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June 17, 2019

Honorable Miguel M. de La O
Miami-Dade County Courthouse East
22 NW 1st Street
Third Floor
Miami, Florida 33128

RE: ***Miami-Dade County v. City of Miami, Case No. 19-___ AP***

Dear Judge de la O:

I write to you in your capacity as administrative law judge for the circuit court, appellate division, and wish to draw your attention to a few important matters. Contemporaneous with this letter, Miami-Dade County is filing a petition for writ of certiorari seeking review of the City of Miami Mayor's veto of the County's final plans for the rehabilitation of the Coconut Grove Playhouse. This petition involves related events occurring subsequent to the appellate division's decision in *Miami-Dade Cnty. v. City of Miami*, Case No. 18-000032-AP-01, 26 Fla. L. Weekly Supp. 800b (Fla. 11th Cir. Ct. App. Div. Dec. 3, 2018).

Accordingly, we are filing a motion, accompanied by an affidavit, seeking that the petition be assigned to the prior panel from the original case, in furtherance of judicial and litigant economy; and that the petition be placed on a briefing schedule and be heard as expeditiously as possible. Due to the lengthy factual history that must be detailed in the petition, we also are seeking a modest enlargement of the page limitation and have filed a separate motion making that request.

Undersigned counsel has conferred with City counsel regarding the relief requested and was advised that the City consents to the request for an enlargement of the page limitation, but opposes the other above-stated requests.

The County greatly appreciates your prompt attention to these requests given the public interest in, and time-sensitive nature of, this matter.

Sincerely,

James Edwin Kirtley, Jr.
Assistant County Attorney

cc: Victoria Mendez, Esq., City Attorney
John A. Greco, Esq., Deputy City Attorney

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

APPELLATE DIVISION
CASE NO. _____

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
PETITION FOR WRIT OF CERTIORARI

Miami-Dade County, Florida (the "County") hereby requests that this Court issue a writ of certiorari quashing the City of Miami Mayor's veto of City Commission Resolution No. R-19-0169, which had approved the County's application for a final certificate of appropriateness to rehabilitate the Coconut Grove Playhouse. This Court has original jurisdiction pursuant to Florida Rules of Appellate Procedure 9.030(c)(2)-(3) and 9.100(c)(2).

I. Introduction

Dramatic theater rarely benefits from a sequel, and this case proves no exception. In a prior certiorari appeal, a panel of this court quashed a City of Miami

(the "City") decision on the County's application for a certificate of appropriateness to rehabilitate the historic Coconut Grove Playhouse (the "Playhouse"), holding that the City Commission violated the essential requirements of the law and due process. *See Miami-Dade Cnty. v. City of Miami*, 26 Fla. L. Weekly Supp. 800b (Fla. 11th Cir. Ct. App. Div. Dec. 3, 2018) (hereinafter, "*Playhouse I*"). Now, in proceedings involving a subsequent, but related, application, the City has rendered a decision even more infirm than its first.

Part one of this saga began in 2017, when the County applied to alter, and rehabilitate, the Playhouse. Because the Playhouse is a locally-designated historic site within the City, the project required regulatory approval—in the form of a certificate of appropriateness—from the City's Historic and Environmental Preservation Board (the "HEP Board" or "HEPB"). In seeking this and other regulatory approvals, the County has appeared before the City not as a sovereign or other governmental entity, but as any other applicant subject to regulatory review.

In April 2017, the HEPB granted the County a certificate of appropriateness for its conceptual master plan for the project, which would fully restore the architecturally-significant, iconic front building and demolish and replace the existing auditorium building with a new, state-of-the-art theater. The HEPB expressly approved the proposed demolition, on the condition that it review the final, detailed site plans before a demolition permit would issue. Two Coconut Grove

residents appealed that decision to the City Commission, which granted the appeal in part and imposed a series of conditions on the County's project—many of which were untethered to historic preservation. That decision was the subject the County's first certiorari petition, which a panel of this court granted, thereby reinstating the HEP Board's original master plan approval. There ended Part one.

Part two—this proceeding—concerns the County's final plans for the Playhouse, which were designed in detrimental reliance on the HEPB's master plan approval. The County obtained all of the other required regulatory approvals for those plans and then returned to the HEPB, as required. But the HEPB disregarded the only competent evidence in the record, its own prior approval, and the positive recommendation of its own professional staff. Instead, the HEPB denied the application based on an incompetent and inapposite analysis produced by the state's historic preservation office—an office that had no local regulatory jurisdiction here. The HEPB's decision was further tainted by the participation of its biased vice-chair, who had been engaged in an *ex parte* campaign with objectors, other advocates, and the state, in an apparent effort to find ways to defeat the project and force the County to accept their preferred alternative for the Playhouse.

Pursuant to the City's process, the County appealed the HEPB's denial to the City Commission, which conducted a *de novo* public hearing. This time, the Commission approved the County's application. Part two should have ended there,

but didn't. The City Mayor vetoed the City Commission's approval and purported to reinstate the HEPB's tainted denial, and the Commission failed to override the veto. As explained herein, this Court must issue a second writ of certiorari and quash the veto because the City Mayor, like the HEPB, applied the wrong law, violated due process, and rendered a decision unsupported by any competent substantial evidence,.

II. Statement of Facts

A. The History of the Coconut Grove Playhouse

Designed by the important architectural firm of Kiehnel & Elliott, the Coconut Grove Playhouse opened in 1927 as a silent movie house with approximately 1,500 seats. Pet. App. I, Ex. A at 8 (2005 Designation Report).[1] Its dramatic entrance portal and front building exemplify the Mediterranean Revival style of architecture that features so prominently in Florida's architectural history. *Id.* at 10.

In 1955, noted Florida architect Alfred Browning Parker transformed the old silent movie house into a live theater venue. *Id.* at 8. In the process, Parker altered Kiehnel & Elliott's original interior by compressing the auditorium volume, removing seats, and partially burying in concrete the movie house's defining features, to create a steeper floor and improve the sightlines needed for live theater.

[1] Citations herein to "Pet. App. I" refer to the County's appendix to its first petition for writ of certiorari, filed in *Playhouse I*, Case No. 18-000032-AP-01.

Id. at 11; *Id.*, Ex. B at 103-08. Parker's altered interior contained 800 seats. *Id.* at 107. Parker later added a mezzanine, increasing the seats to 1,100, but further altering the original movie house design. *Id.* Additional renovations to the Playhouse in the 1970s and 80s further eroded the original interiors, as well as Parker's alterations. *Id.*, Ex. A at 11, 14; Ex. B at 109-10.

In the forty years that followed Parker's alterations, the Playhouse faced financial trials and tribulations and changed ownership several times. It eventually ended up in the hands of the State of Florida after languishing vacant, shuttered up, and in a state of disrepair for more than a decade. *Id.* at 92, 109-10.

B. The 2005 City of Miami Historic Designation of the Playhouse

In 2005, the City designated the Playhouse as a local historic site. *Id.*, Ex. C. The designation report, which was incorporated into the resolution designating the property, found that "[o]nly the south and east facades [of the original Kiehnel & Elliott design] possess architectural significance." *Id.*, Ex. A at 14. While the designation encompassed the entire site, it did not include the interior. Significantly, Section 23-4(c)(2)(c) of the City Code provides that if the designation report does not precisely describe interior spaces as historically significant and subject to regulation, the interior "shall not be subject to review[.]" *Id.*, Ex. D. The 2005 designation report did not include interior spaces. *Id.*, Ex. A.

C. The County's Plan to Rehabilitate the Playhouse

In 2013, the State of Florida (the "State"), as owner of the Playhouse property, entered into a lease agreement with the County and Florida International University ("FIU") to allow the County to rehabilitate the Playhouse and return theater to Coconut Grove. *Id.*, Ex. B at 92-93. The lease agreement requires the County to develop an approximately 300-seat regional theater at the Playhouse site. *Id.*, Ex. E. Through a public bid process, the County selected Miami-based architectural firm Arquitectonica International Corporation ("Arquitectonica") to plan and design the Playhouse in accordance with the business plan approved by the State. *Id.* The County has committed $20 million of secured bond funding to the project. *Id.*

The County's rehabilitation project fully restores Kiehnel & Elliott's iconic and historically-significant front building, and develops a new, state-of-the-art theater that is sited in the footprint of, and on axis with, the existing auditorium. The new theater also will incorporate the remaining important historic elements of the existing Playhouse, and will be separated from the front building by a lushly landscaped courtyard and breezeway that assumes the position of the original silent movie house lobby. *Id.*, Ex. B at 96-100.

D. The County's 2017 Application for a Special Certificate of Appropriateness for the Conceptual Master Plan

Because the City designated the Playhouse as a historic site, the County sought a certificate of appropriateness from the City for the rehabilitation project.

Id., Ex. D. A certificate of appropriateness is a permit that must be obtained before undertaking "any new construction, alteration, relocation, or demolition within a designated historic site." *Id.* Where, as here, an application contemplates "a major addition, alteration, relocation, or demolition," the project requires a special certificate of appropriateness that the HEPB may only approve after a quasi-judicial public hearing. *Id.*

The City Code further requires "decisions relating to alterations or new construction" to "be guided by the U.S. Secretary of the Interior's 'Standards for Rehabilitation and Guidelines for Rehabilitating Historic Buildings.'" *Id.* Importantly, as this Court recognized in the prior appeal, the parameters of the 2005 City designation constitute the yardstick by which a certificate of appropriateness must be measured. *See Playhouse I.*

E. The HEP Board's Approval of the County's Conceptual Master Plan

Rather than appearing before the HEPB for the first time with a final set of plans, the County applied for a certificate of appropriateness for a conceptual master plan early on in the design process, at the suggestion of City staff, to allow for more public input and transparency in a quasi-judicial setting before producing final designs. Pet. App. I, Ex. F. Therefore, on April 4, 2017, the HEPB conducted a public hearing on the County's application. *Id.*, Ex. G. City staff introduced the application, noting that "the local Historic Designation Report for the Coconut

Grove Playhouse does not reference the interior of the structure as architecturally significant," and "as such, the Historical and Environmental Preservation Board has no purview over what occurs to the interior." *Id.* at 5.

Citing the dual goals of the Secretary of the Interior's Standards for the Treatment of Historic Properties—to preserve historic materials and to preserve a building's distinguishing character—City staff opined that "the defining features of the historic Playhouse built by Kiehnel & Elliott that should be preserved are the south and east facades," as set forth in the designation report. *Id.* at 6. As the plan completely restores the entire historic front building, City staff recommended approval of the County's conceptual master plan, subject to conditions. *Id.* at 6-9.

During the public hearing, Jorge Hernandez, the historic preservation architect and specialist who is part of the architectural and engineering team led by Arquitectonica, provided expert testimony about the Playhouse's history and its changes over time. *Id.* at 22-54. Hernandez opined that the front building is the only architecturally significant structure on the site that retains its historic integrity—a necessary precondition to any preservation requirement. *Id.* at 45-52. As he further explained, the Playhouse interiors and the auditorium itself, by contrast, had long ago lost their historic integrity. *Id.* at 51.

Also testifying at the April 2017 hearing was historic preservation architect Richard Heisenbottle, who opposed—and continues to oppose—the County's plan.

Id. at 81. But Mr. Heisenbottle is not simply a concerned resident; his firm was among the eight that the County rejected in the competitive selection process for the Playhouse project. *Id.*, Ex. M. Notably, although Mr. Heisenbottle gave a conclusory opinion that the historic integrity of the Playhouse interior had not been lost, he conceded that the 2005 designation report governs the application and that it did not designate the interior spaces. *Id.*, Ex. G at 85-89.

At the close of the public hearing, one HEPB member—the current vice-chair— expressed her dissatisfaction with the governing 2005 designation report. She advocated, "I think this Board should be involved with the interiors of the Playhouse," and "should be involved in looking at both the Kiehnel & Elliott and Alfred Browning Parker elements," and "I think the Designation Report from 2004 [sic] should be modified." *Id.* at 202. She thereafter made a motion to deny the County's application, but her motion died for lack of a second. *Id.* at 206-10.

Subsequently, another HEPB member moved to approve the application and grant a certificate of appropriateness for the conceptual master plan, with, among others, the following staff-recommended conditions: "No demolition permit will be issued until the plan comes back to the HEP[Board] and is approved"; and "The concept that is being approved in this plan is in concept only, the HEP [Board] has the purview to require different configurations, heights, setback etc. for the development of each individual building." *Id.* at 220-22; Ex. H. The motion, with

conditions, received a second and was adopted, four-votes-to-one. *Id*., Ex. G at 225.

As is apparent from the title of the HEPB's resolution, the approval expressly included demolition of the existing auditorium:

> A RESOLUTION . . . APPROVING, WITH CONDITIONS . . . AN APPLICATION FOR A SPECIAL CERTIFICATE OF APPROPRIATENESS FOR THE MASTER SITE PLAN ***TO INCLUDE THE PARTIAL DEMOLITION OF AN EXISTING STRUCTURE, THE RECONSTRUCTION OF A THEATER***, . . . AT THE INDIVIDUALLY DESIGNATED HISTORIC SITE AND KNOWN AS THE COCONUT GROVE PLAYHOUSE . . .

Id., Ex. H (emphasis supplied). That demolition was approved is also apparent from the two conditions noted above. Had demolition ***not*** been approved, there would have been no need to specify that a demolition permit may not issue until the County returns with its final plans, and that the HEPB expressly retained the authority to require "different configurations, heights, setback[s] etc. for the development of each individual building," but not to revisit the issue of demolition. *Id.*

F. The City Commission's 2017 Decision on Appeal of the HEP Board's Approval

On December 14, 2017, the City Commission heard an appeal of the HEPB's approval, which was advanced by two Coconut Grove residents who did not like the County's plan. *Id.*, Ex. I; *see also id.*, Ex. B. Upon close of the public hearing, the City Commission first erroneously found that the two Grove residents had standing to advance the appeal. *Id.* at 138. Then turning to the merits, a City Commissioner offered a lengthy motion, which included the following conditions: contingent on an

additional $20 million being pledged within 100 days, the rehabilitated auditorium shall have no less than 600 seats; and the entire Playhouse structure, including the auditorium, shall be preserved with, at a minimum, the Solomonic Columns, Proscenium Arches, and Cherubs contained in the interior protected, restored, and maintained. *Id.* at 139-53; Ex. L. The motion, as presented and explained, was seconded and adopted three-votes-to-two. *Id.*, Ex. B. at 204-05.

G. The Court's Decision Granting a Writ of Certiorari and Quashing the City Commission's 2017 Decision

In response to the City Commission's 2017 decision, the County timely filed a petition for writ of certiorari with this Court. In December 2018, following oral argument, a panel of this Court issued a decision granting the relief requested. Pet. App. II, Ex. A (*Playhouse I*).[2] Agreeing with the County, the Court first held that the two residents who appealed the HEPB decision to the City Commission lacked standing. *Id.* Second, 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." *Id.* Importantly, the Court noted that "[t]he 2005 Designation Report [that governed the certificate of appropriateness proceeding] did not include the interior of the building." *Id.* Accordingly, the Court

[2] Citations herein to "Pet. App. II" refer to the County's appendix filed concurrently with this second petition for writ of certiorari.

reversed and remanded, quashing the City Commission's decision. *Id.*

F. The Playhouse is Listed on the National Register of Historic Places

While the certificate of appropriateness proceedings and related appeal unfolded, an effort to include the Playhouse on the National Register of Historic Places (the "National Register") was also being pursued. The State Division of Historical Resources ("DHR") began the nomination process in 2017. Pet. App. II, Ex B (Playhouse National Register Composite Exhibit).

In contrast to local historic site designation, the National Register is not a regulation: it is solely an honorary listing. It does not impact what can, and cannot, be done with a property, including complete demolition.[3] Nonetheless, National Register listing is, in fact, an honor and does confer various important federal benefits on a property, including eligibility for federal grants and tax exemptions. *See* 36 C.F.R. § 60.2(b)-(c) (2019).

Once listed on the National Register, a property remains there regardless of further alteration, unless affirmative steps are taken to de-list the property for an

[3] *See* 36 C.F.R. § 60.2 (2019) ("Listing of private property on the National Register does not prohibit under Federal law or regulation any actions which may otherwise be taken by the property owner with respect to the property."); DHR's "Results of Listing a Property in the National Register of Historic Places, available at: https://dos.myflorida.com/historical/preservation/national-register/results-of-listing/ ("[l]isting in the National Register . . . does not automatically preserve a building, and does not keep a property from being modified or even destroyed.").

authorized reason. *See* 36 C.F.R. § 60.15. Thus, de-listing is not automatic. Locally, there is at least one example of a property that, despite near total demolition, remains on the National Register to this day: the historic Sears building in downtown Miami.[4] Pet. App. II, Ex. C (Sears Building National Register Listing).

The City Code requires the HEPB to consider National Register nominations, and to obtain the County's written recommendation. Pet. App. I, Ex D. Based on detailed comments and suggested revisions from the County's Historic Preservation Chief (the "County HP Chief") and preservation architect Jorge Hernandez, DHR revised the initial nomination and provided an updated draft in September 2017. Pet. App. II, Ex. B. The County again provided additional comments and suggested revisions to DHR, as well as a recommendation to the HEPB that it approve the nomination, on the condition that certain revisions be made. *Id.*

Disregarding the County's comments, the HEPB approved the nomination as written on February 6, 2018, and it was scheduled for the next available Florida National Register Review Board meeting. *Id.* The state review board postponed the nomination to permit further revisions, and a further revised draft was provided to

[4] According to its National Register document, the Sears, Roebuck and Company Department Store building was the first known example of Art Deco architecture in the County. It was added to the National Register in 1997, but today the only surviving part of the original structure is a seven-story tower, which currently houses a bookstore. The remainder of the original building was demolished to make way for the Adrienne Arsht Center for the Performing Arts. Pet. App. II, Ex. R at 123 (May 2019 City Comm'n Veto Override H'rg Tr.).

all involved agencies in June 2018. *Id.* The County HP Chief again commented that the document "maintained deficiencies that must be resolved prior to proceeding with the nomination," specifically that the descriptive narrative did not support the conclusions about the Playhouse's remaining historic integrity. *Id.* The HP Chief concluded, "[G]iven that the defining elements of Parker's interior design have been eliminated by subsequent architectural interventions, the Playhouse exhibits a low level of integrity to Parker's overall design, and ultimately may not be sufficient for listing." *Id.* Mr. Heisenbottle also provided comments in July 2018, noting issues with accuracy and requesting further revisions.

Despite these concerns about the application's accuracy, a deputy state historic preservation officer opined that it was too late to revise it prior to the scheduled Florida National Register Review Board meeting, and that the accuracy issues could be addressed during the meeting so that the "listing of this property is not further delayed to 2019." *Id.* DHR provided no explanation for the rush but, as explained below, later-discovered documents of behind-the-scenes communications shed light on this unusual turn of events. Despite the inaccuracies, DHR made no additional revisions to the nomination.

On August 9, 2018, the review board heard public comment, including Mr. Heisenbottle's recommended revisions to the physical description. *Id.* Mr. Hernandez noted that the nomination had been vastly improved, but that he doubted

the conclusions regarding the overall integrity of the property. Review board members discussed the level of integrity and the feasibility of successfully restoring the property's interior. Ultimately, a motion was made to forward the nomination to the National Park Service for listing in the National Register, with a recommendation to add the requested edits to the physical description text, but not to edit the conclusions regarding integrity. *Id.* The property was ultimately listed on the National Register on October 19, 2018. *Id.*

G. The County Obtains All Necessary Non-Historic Preservation Regulatory Approvals

Throughout 2018, the County obtained all necessary regulatory approvals from the City's various regulatory review boards for the non-historic preservation aspects of its final plans. This included quasi-judicial planning and zoning review. Pet. App. II, Ex. D (City Regulatory Approvals Composite Exhibit).

H. The HEP Board Vice-Chair's *Ex Parte* Communications Regarding the County's Application

Throughout these regulatory processes, the County has proceeded as any other applicant seeking quasi-judicial regulatory review. The County was thus entitled to all of the protections that govern quasi-judicial matters, including certificates of appropriateness before the HEPB. Yet, despite sitting as a judge on the County's applications, the HEPB's current vice-chair demonstrated an extraordinary interest in, and involvement with, the Playhouse and efforts to derail the County's plan, both

in and out of the public hearing process. For more than a year, the vice-chair engaged in a campaign of *ex parte* communications principally, if not exclusively, with known objectors to the County's plan and also with DHR. Pet. App. II, Ex E (Vice-Chair Ex Parte Communications). Because the City Mayor expressly used his veto to reinstate the HEPB's 2019 decision to deny the County's application, it is important to detail the vice-chair's extraordinary due process failures, which infected that HEPB decision.

The vice-chair had been the lone dissenting vote during the April 2017 hearing on the County's conceptual master plan application. Pet. App. I, Ex. G at 206-10, 225. She also, at that same meeting, was the lone proponent of attempting to modify the governing 2005 designation report to include the Playhouse interiors. *Id.* at 202.

Despite sitting as a judge on the County's application, which required impartiality, she worked to undermine the County's project. First, at the HEPB's May 2017 meeting, while the master plan approval was pending appeal to the City Commission, the vice-chair made another motion to direct City staff to examine the interior of the Playhouse for possible designation. That motion also died for lack of a second. Pet. App. II, Ex. F (HEPB Meeting Minutes Composite Exhibit).

Then, at the November 2017 HEPB meeting, the Playhouse was placed on the agenda as a discussion item, and the vice-chair requested that the County periodically provide status updates and outreach to the public, so that the HEPB

could be involved during the County's preparations of its final plans. Pet. App. II, Ex. G (11/2017 HEPB Meeting Tr.). County counsel explained that the matter was on appeal to the City Commission, that the County would be back before the HEPB to present the final plans at the appropriate time, and that because the matter is quasi-judicial, the County would be reluctant to come back to the HEPB "out of sequence." *Id.* Rather than accepting the County's due process concerns, the vice-chair responded, "[W]e are stewards of old buildings" and "this property belongs to all of us," and she expressed offense that the County was engaging in public outreach for the project but had not opted to "engage with this Board, which is the arbiter of a Certificate of Appropriateness for demolition." *Id.* That exchange made clear that the vice-chair did not consider her role as a judge of a quasi-judicial application to constrain her in any way. Rather, she believed her role as a quasi-judicial decision-maker allowed her to act as an advocate whose position gave her the right to wield power over, and micromanage, the County's business and architectural plans.

In January 2018, the vice-chair sent an *ex parte* communication to DHR regarding the Playhouse. Pet. App. II, Ex. E (Tab 1). Curiously, although she identified herself as a HEPB member, she expressed that she was writing in her "capacity of a citizen only." *Id.* at 3. And in that capacity, she asked "whether or not the current plans [submitted by the County] comply with the Secretary of the Interior's applicable standards for a locally designated Historic [sic] site." *Id.* She

did this even though City historic preservation staff had previously found the County's plans consistent with the Secretary of the Interior's standards, and even though her own board had accepted that recommendation in the quasi-judicial hearing on the earlier master plan application. Pet. App. I, Ex. G.

In February 2018, the state historic preservation officer replied and offered his conclusory view that the County's project did not comply with the Secretary of the Interior's standards. The vice-chair forwarded the email thread to the City's historic preservation officer, asking that he provide it to the entire HEPB. Pet. App. II, Ex. E (Tab 1 at 2). That correspondence was untethered from any pending, quasi-judicial hearing process or proceeding.

In the same email to the City preservation officer, referencing the City Commission's decision to impose the conditions that this Court later found to be unlawful, the vice-chair inquired whether there was now an opportunity to attempt to designate the interior, as she had many times before unsuccessfully pursued:

> When the City Commission directs that the Solomonic columns, Proscenium arches and cherubs are to be protected, restored and maintained, ***it could be an invitation for the HEPB to consider de novo whether or not to designate the interior***. Maybe the HEPB should kick around that potential course, for which there are differing opinions.

Id. (emphasis supplied).

At its February 2018 meeting, while this was going on, the HEPB considered the National Register nomination for the Playhouse. Pet. App. II, Ex. F. When the

County's HP Chief appeared to explain the County's concerns with the draft narrative, the vice-chair questioned the County's ability to impose conditions, expressed her view that the County's assessment of the analysis of integrity was inaccurate, and read into the record DHR's conclusions (but not the actual narrative) about the level of integrity. *Id.* She then made a motion, which the HEPB adopted, to approve the nomination as written. *Id.*

The Florida National Register Review Board was more receptive to the County's concerns and postponed the nomination to allow time for revisions. Pet. App. II, Ex. B. Notably, the lone dissenter to postponement was Rick Gonzalez—the HEPB vice-chair's longtime friend and an objector to the County's plan. *Id.*

At its March 2018 meeting, the HEPB was informed that DHR decided to postpone review of the National Register nomination, to allow time to consider the County's comments on the narrative. Pet. App. II, Ex. F. In response, the vice-chair made a motion, which the HEPB adopted, to communicate to the state historic preservation office that "it is quite important that attention be very promptly paid to the Coconut Grove Playhouse because it is a vacant building and the Board has heard a lot of rumors about its imminent demise as well as the Board's continued desire that the property be placed on the National Register." *Id.* In the months that followed, the vice-chair continued to request regular updates from City historic preservation staff regarding the status of the Playhouse project. *Id.*

In December 2018, when this Court quashed the City Commission's decision, reinstating the HEP Board's approval of the conceptual master plan, the vice-chair emailed Mr. Gonzalez with the remark, "Bad Day for Preservation." Pet. App. II, Ex. E (Tab 2 at 1). When later asked to explain this comment, the vice-chair stated that she begins with "a predicate that it is better to preserve than it is to demolish," and that when the circuit court appellate division ruled, "it seemed to me . . . that you all [the County] would have a good argument that you could proceed to demolish, and in that sense, because I start out honing toward preservation rather demolition, it's a bad -- it was a bad day for preservation." Pet. App. II, Ex. H at 33-34 (3/2019 HEPB Meeting Tr.).

Mr. Gonzalez forwarded the email thread to DHR, which responded to him and the vice-chair, "I'm curious why the city or some local supporter has not updated the local designation report? It seems like that was the downfall in the case. They [sic] could update the local designation using the NR [National Register] information." Pet. App II, Ex. E (Tab 2 at 1). DHR continued to ignore the errors in the National Register application that Jorge Hernandez and the County's HP Chief had identified.

In January 2019, while the County's final plans were pending before the HEPB, the vice-chair wrote to the City Commissioner whose district includes the Playhouse, confirming that she would attend a meeting with him to discuss the

Playhouse. She also confirmed that she would be bringing with her a Coconut Grove resident who had spoken against the County's project at prior meetings—an individual whom the vice-chair described as "a long time supporter of the Commissioner" who is "involved with the efforts regarding the Playhouse." Pet. App II, Ex. E (Tab 3).

When asked to explain why she arranged and attended this meeting, the vice-chair said, "I think it is both appropriate and respectful that when an item of importance in an individual commissioner's district is about to come before this board, it's appropriate to talk to the commissioner about it." She also recalled asking the Commissioner, "what do you think about this[?] . . . What do the constituents, what's their interest? I was soliciting his views." Pet. App. II, Ex. H at 35-36. Yet, having said that it was both "appropriate and respectful" to schedule and attend a meeting with the Commissioner to solicit his views, the vice-chair could not recall what his views were or what he said in response to her questions, other than to "vote your conscience." *Id* at 35-37. It apparently did not occur to her that this was essentially the equivalent of a trial court judge meeting with an appellate judge to ask what legal outcome the higher court might prefer in the case.

When questioned about her *ex parte* communications, the vice-chair explained that "[w]hen I receive an e-mail, okay, I do not consider that an *ex parte* communication." *Id.* at 38. Yet, her treatment of at least one email from the County

suggests otherwise. In January 2019, the City historic preservation officer forwarded to the entire HEPB an email from the County providing a link to a public website with Playhouse project updates and supporting documents, and offering access to the Playhouse for HEPB members to tour the facility and assess existing site conditions. Pet. App. II, Ex. E (Tab 4). This lone email—but no others—the vice-chair forwarded to City counsel with the proviso that "[i]n an abundance of legal caution, we are advising that we received these below materials [from the County] which were remitted by an applicant for an upcoming HEP Board quasi-judicial review. We have deleted the materials, unread." *Id.* (Tab 4 at 1).

Curiously, the vice-chair did not see fit to similarly treat any emails she received from, or sent to, objectors to the County's plan. For example, in February 2019, the vice-chair received an email (also directed to objectors Mr. Gonzalez and Bert Bender) from Mr. Heisenbottle, the rival architect and frustrated bidder who regularly spoke against the County's plan and advanced his own "alternative" plan for a larger Playhouse. *Id.* (Tab 5). The vice-chair later professed her "huge respect" for Mr. Heisenbottle, explaining that "[h]e is the reason I am involved with preservation[.]" Pet. App. II, Ex. H at 27.

In the February 2019 email, Mr. Heisenbottle apologized that he had "missed the call yesterday," presumably a call about the Playhouse. Pet. App. II, Ex. E (Tab 5). He also provided a link to the County's final architectural plans. *Id.* The vice-

chair did not forward this exchange to City counsel with the proviso that she had deleted the materials unread, as she had done with the County's email. When later questioned about this communication, the vice-chair stated:

> The answer to your second question is, yes [I did participate], it was a call among Rick Gonzalez and Bert Bender . . . who are fellow directors of the Florida Trust for Historic Preservation . . . [, which is] a historic preservation body in the State of Florida that's been around for a long time. And on an annual basis, it publishes a list called the 11 Most Endangered, and it identifies properties that it considers to be at risk of either affirmative overt demolition or demolition by neglect and it reaches out to its members and to its constituents to say, hey, we ought to rally around Building A and try to save it, okay, and I knew that this building, the Coconut Grove Playhouse, had been on the Florida Trust 11 Most Endangered list multiple times over multiple years. . . . Mr. Gonzalez and Mr. Bender are architects, preservation architects whom I respect. Mr. Heisenbottle is a well-known local preservation architect also whom I respect. There's [sic] a lot of preservation architects that [sic] I respect. ***And I felt it incumbent upon myself as a member of the Board of the Florida Trust to reach out to my colleagues and say, hey, the county's application is coming forward. We have previously considered this building to be -- to merit being one of the 11 most endangered, what's your input?***

Pet. App. II, Ex. H at 39-41 (emphasis supplied).[5]

Also in February 2019, the vice-chair and Mr. Gonzalez received an email from the Florida Trust for Historic Preservation thanking them "for [their] continued ***advocacy***" and providing a press release regarding the Playhouse's inclusion on the

[5] The one architect the vice-chair expressed a lack of admiration for is Bernardo Fort-Brescia, of Arquitectonica, who heads the County's design team. Pet. App. II, Ex. H at 27. She was also curiously silent about Jorge Hernandez, despite his impressive credentials in the field of historic preservation.

organization's "Florida 11 to Save, the most endangered historic places in the state[.]" Pet. App. II, Ex. E (Tab 6 at 5) (emphasis supplied). When asked to explain whether she had "advocated in regards to the Playhouse, . . . to saving it," the vice-chair replied, "Yeah, it's a National Register structure. It's important." Pet. App. II, Ex. H at 42. Again, the vice-chair did not seem to appreciate that her role as a quasi-judicial decision-maker might constrain her ability to be an advocate.

The vice-chair responded to the email, inquiring about the prospects of a DHR representative's possible appearance when the HEPB would be considering the County's final application. Pet. App. II, Ex. E (Tab 6 at 4). She was advised that DHR did not have funding to send a representative, and that only "mission critical" travel was authorized, such as to hurricane-impacted regions. *Id.* (Tab 6 at 3-4). In response, the vice-chair remarked, "Since the Playhouse isn't 'mission critical,' one wonders what it is," to which the State replied, "'mission critical' basically means directly related to statute. A HEPB meeting ***related to local compliance*** is not part of our statutory mandate. Hopefully in the future the limitations will be lifted and we'll have discretion to be more participatory when appropriate." *Id.* (Tab 6 at 3) (emphasis supplied).

On the same email thread, Mr. Gonzalez replied, copying the vice-chair, stating, "Wow this is sad. They are about to DEMOLISH a state owned historic property that was listed 10 times on the [Florida Trust's] most endangered list!" *Id.*

(Tab 6 at 3). He later added, "Isn't [the State] worried That [sic] they are going to demolish their building under a lease??!!" *Id.* (Tab 6 at 2). One representative from DHR replied that "I feel that it is clear from [DHR's rejection of the County's] grant application that we did not favor this plan." *Id.* But the representative also noted that the State Department of Environmental Protection (DEP) had not asked DHR to conduct a formal review of the plans, and "I doubt that until we receive the request from DEP, we would have a basis to officially respond." *Id.* Another DHR representative further explained to the vice-chair and other recipients of the email exchange that "we've not completed what we would consider a 'formal' review of the [County's] plans, ***but no 'formal' review process is established by the statute***." *Id.* (Tab 6 at 1) (emphasis supplied).

Having been informed that DHR had not been asked to review the County's project, that such review was not legally required, and that DHR otherwise lacked any regulatory authority over the project, the vice-chair took it upon herself to request such a review anyway—a review that her *ex parte* communications with DHR had informed her would not be favorable to the County. Thus, at the February 2019 HEPB meeting, after the County's application was deferred because of technical issues in viewing the plans, the vice-chair made a motion, which the HEPB adopted and the County did not oppose, directing City staff to request that DHR provide immediate guidance with regards to the County's plans, with specific

emphasis to the demolition of a National Register structure. Pet. App. II, Ex. I at 52, 54 (2/2019 HEPB Meeting Tr.). After the meeting concluded, the vice-chair ghost-wrote questions for the City historic preservation officer and emailed them to him with the suggestion that he submit them to DHR—despite the HEPB not having approved those questions and the County having no knowledge of, or opportunity to comment on, them after the conclusion of the HEPB meeting. Pet. App. II, Ex. E (Tab 9). DHR ultimately received and responded to those very questions.

In February 2019, the day prior to the initial hearing on the County's final plans, Mr. Gonzalez emailed the vice-chair (with copies to Messrs. Heisenbottle and Bender) to ask for transportation to the public hearing. Pet. App. II, Ex. E (Tab 7). The vice-chair offered to have an employee of her private law practice "pick you up and take you to the HEP Meeting [sic] tomorrow." *Id.* When the County inquired why the vice-chair, as a judge on the County's quasi-judicial application, was arranging transportation to the hearing for an objector, the vice-chair explained that "he is an expert, he is a friend, he is a fellow board member of the Florida Trust for Historic Preservation," and "I thought it was only courteous to offer him an opportunity for a ride." Pet. App. II, Ex. H at 45. Longstanding friendships and common courtesies aside, it apparently did not occur to the vice-chair that a judge should not be arranging transportation to a hearing for someone who would be offering testimony against the party whose application she would be considering.

The day after the County's application was deferred at the February 2019 HEPB meeting, Mr. Heisenbottle emailed the vice-chair and Arva Moore Parks, a historian and preservationist, attaching a WORD document and design renderings with remarks he had planned to deliver in opposition to the County's application at the hearing, and explaining: "This is what I had planned to say and show at last night's meeting. I will need a new strategy for next months [sic] meeting, unless I can convince staff to bring forth a revision and correction to the Designation Report on their own. (Fat chance of that.)" Pet. App. II, Ex. E (Tab 8). The vice-chair said she did not read the materials sent by Mr. Heisenbottle, but there is no record of her sending the email to City counsel with that proviso, unlike the manner in which she handled the County's email. Pet. App. II, Ex. H at 46.

On March 5, 2019, the HEPB at last considered the County's final plans. At the outset of that meeting, the County questioned the vice-chair about her numerous *ex parte* communications and ultimately requested that she recuse herself, arguing that the content and tenor of her extensive *ex parte* communications—principally, if not exclusively, with objectors—demonstrated that she was biased against the County's plan and that her continued involvement in the quasi-judicial proceeding would violate the County's due process right to an impartial decision-maker. *Id.* at 49. The vice-chair declined to recuse, explaining:

> I frequently ask hard questions. . . . I start out with the goal of preserving as opposed to demolishing, demolition. . . . [D]emolition is

> allowed under the Secretary of the Interior's Standards, under certain conditions. . . . 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.

Id. at 51-52. Pursuant to the City Code, her colleagues on the HEPB could have voted to recuse the vice-chair, but declined to do so—although one Board member did say he was concerned by the vice-chair's conduct. *Id.* at 55-56.

I. The HEP Board's Rejection of the County's Final Plans

The net effect of this Court's prior decision was to reinstate the HEPB's April 2017 approval of the County's conceptual master plan, which expressly, albeit conditionally, authorized demolition of the auditorium building. And, having obtained the necessary non-historic preservation approvals from the City, all that remained was for the HEPB to consider and approve the County's final plans.

In December 2018, the County submitted its letter of intent and application for a final certificate of appropriateness. Pet. App. II, Ex. J. Consistent with the HEPB's prior approval, including demolition, the County's letter of intent focused on the final plans for rehabilitation of the historic front building and construction of the new theater and parking garage. *Id.* But in an abundance of caution, although demolition had already been approved, the County not only checked the boxes on the application form labeled "NEW CONSTRUCTION" and "ALTERATION," but

also the box labeled "DEMOLITION."[6] *Id.*

City preservation staff again recommended approval, finding the final plans consistent with the City Code, including the Secretary of the Interior's standards:

> The application has demonstrated compliance with Chapter 23 entitled "Historic Preservation" of the City of Miami Code of Ordinances and the Secretary of the Interior's Standards. Staff finds the request complies with all applicable criteria and finds that the request for a Special Certificate of Appropriateness for restoration and new construction **does not** adversely affect the historic, architectural, or aesthetic character of the subject structure subject to [certain] conditions[.]

Pet. App. II, Ex. K at 7-8 (1/22/19 City HP Staff Report) (emphasis original).

At the March 5, 2019 HEP Board meeting, Mr. Hernandez presented the County's final plans to the HEPB. Pet. App. II, Ex. H at 70-102. Mr. Hernandez detailed the year-long historic preservation study he performed at the property, and explained how the County's project was appropriate from a historic preservation perspective and satisfied the applicable standards. The County's HP Chief also testified, explaining that she conducted an independent analysis finding the plans consistent with the Secretary of the Interior's standards. *Id.* at 118-28.

The HEP Board then heard several hours of public testimony, both for and against the County's application. *Id.* at 128-244. Notably, no fact-based testimony,

[6] At the March 5, 2019 HEP Board meeting, County counsel noted this fact on the record in response to concerns as to whether the County had omitted the request to demolish from the County's final application. Pet. App. II, Ex. H at 59.

expert or otherwise, was presented to show that the County's project fails to satisfy the City Code, including the Secretary of the Interior's standards.

As expected, Mr. Heisenbottle again testified against the County's plans. At the outset of his testimony, Mr. Heisenbottle stated that he is "an expert on historic preservation matters" and that along with Arva Moore Parks and Bert Bender, "we present ourselves to you as experts[.]" *Id.* at 219. In the course of his testimony, Mr. Heisenbottle never directly opined that the County's plan fails to meet the Secretary of the Interior's standards, much less did he provide any kind of expert analysis to that effect. Rather, the bulk of his testimony concerned his view that the interior of the Playhouse retains sufficient historic integrity and should be considered for designation. *Id.* at 222-26. But as he had previously conceded, the interior was not included in the governing designation report.

Ms. Parks testified that after recently touring the theater, she was "shocked at how much of the soul of the original interior was intact," and so she became "a zealot for saving the interior," noting that the Playhouse is "on the National Register, and even the interior now, and that is very special for us." *Id.* at 229. She did not acknowledge that the interior was beyond the scope of regulation in this proceeding or testify that the County's plan fails to meet the Secretary of the Interior's standards.

Mr. Bender did render the conclusory opinion that "[t]he proposal before you does not meet the Secretary of the Interior's Standards," but he merely read from

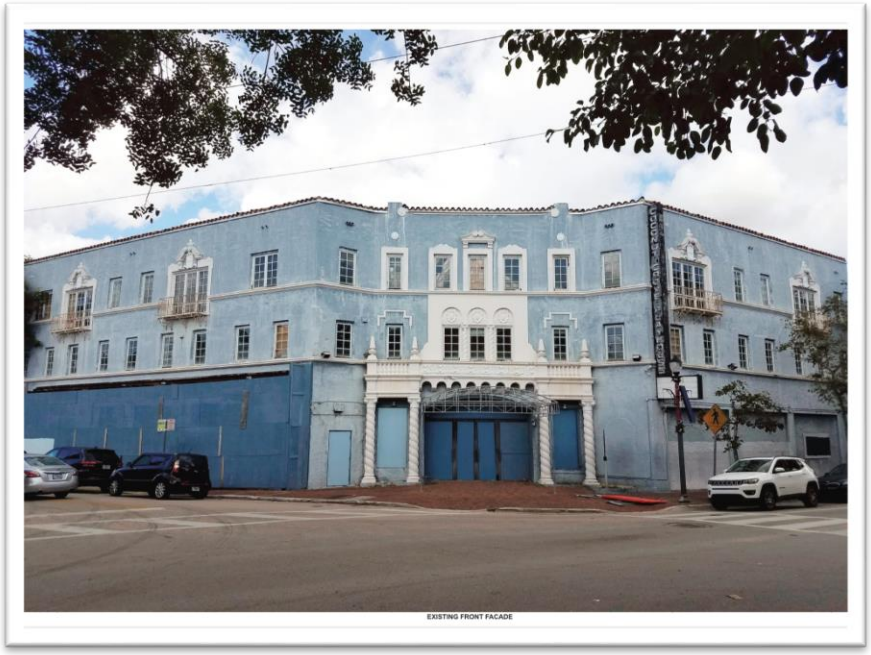
DHR's responses to the vice-chair's questions. *Id.* at 238-41. Mr. Bender did not provide any independent explanation or analysis beyond that conclusory recitation.

DHR's letter, which was made part of the record, explains that "our office has reviewed Miami-Dade's plans and we are responding to the HEPB's questions based on the historic and architectural characteristics of the property described in the National Register nomination," not the governing local designation report. Pet. App. II, Ex. L (DHR Letter & 11/2017 DHR Email). In response to the question of whether "demolition of the Playhouse structure (except solely its Southerly and Easterly facades which the County plans to preserve in its new proposed program) [is] consistent with the Secretary of the Interior's Standards," DHR opined that "[t]he demolition of the Playhouse structure as outlined in the provided plans is not consistent with [those] Standards (Standards 1, 2, 4, 5, 6, 9, and 10)." *Id.* Beyond this conclusory statement, however, DHR provided no analysis of why, or how, the County's project fails to meet those standards. Instead, DHR cites a November 2017 email from Dr. Timothy Parsons to Michael Spring, finding that the County's project was not eligible for a state grant. According to that email, the County's project did not satisfy the Secretary of the Interior's standards, and thus was not eligible for the grant, because "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." *Id.* (emphasis supplied).

DHR's analysis was based on the Playhouse interior and the non-regulatory National Register document, and DHR opined only about the County project's purported impact on the National Register status. Nowhere did DHR analyze the County's plans under the governing 2005 designation report or the regulatory standards set forth in the City Code. The record thus contained no evidence that the County's plan failed to meet the Secretary of the Interior standards when measured in reference to the governing local designation report, as opposed to the non-regulatory National Register narrative premised on the interior.

Nonetheless, following the close of the public hearing and board discussion, the vice-chair moved to deny the County's application "based on the expert testimony that the plans do not satisfy the standards of the Secretary of the Interior." Pet. App. II, Ex. H at 318. She also noted in her motion that the 2017 HEP Board resolution should remain in place and that the County should be allowed to come back with a different application addressing the HEPB's concerns with the project. *Id.* The motion received a second and was adopted six-votes-to-four. *Id.* at 321. Essentially, the HEPB reconsidered its prior approval to demolish the auditorium building, despite an absolute lack of evidence in the record showing that the exterior structure contained any architectural significance or historic integrity.

To put the matter in perspective, here is the view that both supporters and objectors alike use when they advocate "saving" the Coconut Grove Playhouse:



EXISTING FRONT FACADE

The County's final plans would restore this iconic front building to its 1927 glory. By contrast, here is the portion of the building that the HEPB belatedly decided to require the County to preserve, despite the HEPB's prior decision to the contrary:

EXISTING SOUTHWEST SIDE ELEVATION

EXISTING NORTHEAST SIDE ELEVATION

The 2005 designation report did not find that this rear structure possesses any architectural significance or historic integrity. Rather, its significance derives from what occurred on the inside, and as this Court previously determined, the interior is beyond the scope of this proceeding because it was not part of the 2005 designation.

J. The City Commission Grants the County's Appeal and Approves the Final Plans

The County timely appealed the HEPB denial to the City Commission, arguing that the denial was an improper reconsideration of the 2017 approval of demolition, that the decision was tainted by the participation of the biased vice-chair, and that the denial resulted from a misapplication of the law and was not based on competent substantial evidence. Pet. App. II, Ex. L (County Appeal Letter).

On May 8, 2019, the City Commission took up the appeal. Pet. App. II. Ex. N (5/8/19 City Comm'n Tr.). Public testimony was taken at the outset of the hearing. *Id.* at 5-149. Many of the same individuals who had testified before the HEPB did so again at the appeal hearing. Once again, no one offered fact-based testimony that the County's project fails to meet the Secretary of the Interior's standards. Aside from lay opinion testimony, the only record material contrary to the County's plan remained the incompetent DHR letter.

Following public testimony, the County Mayor described the merits of the County's plan and explained the importance of the project moving forward. *Id.* at 175-85. Historic preservation expert Jorge Hernandez again presented the final

plans and fielded historic-preservation-related questions from City Commissioners. *Id.* at 232-65. The County's counsel also outlined the legal grounds for the appeal. *Id.* at 185-97.

Following the close of the public hearing, the City Commissioners discussed the application. Then, Commissioner Russell, in whose district the Playhouse is located, made the following motion: "[M]y motion is to approve the appeal in part with regard to the plan that has to do with the preservation of the front structure . . . but to deny in part the appeal with regard to demolition of the auditorium structure." *Id.* at 280. The motion received a second, but failed two-votes-to-three. *Id.* at 302

Thereafter, Commissioner Carollo moved to grant the appeal in full and approve the County's final plans, subject to several conditions, to which the County agreed. *Id.* at 302-07. The motion was seconded and adopted three-votes-to-two. *Id.* at 307.

K. The City Mayor's Veto of the City Commission's Decision

The resolution embodying the City Commission's approval provided that it would take effect within 10 days, unless vetoed by the City Mayor. Pet. App. II, Ex. O (City Res. No. R-19-0169). On May 17, 2019, nine days after the City Commission voted to approve the County's plan, City Mayor Francis Suarez issued the veto along with a statement explaining his reasons for the veto. Pet. App. II, Ex. P (City Mayor's Veto Message).

First, the City Mayor found that the County's appeal was premature because "[t]he HEP Board's decision invited the County to come back to the Board 'to address some, or all of the concerns, heard from various members of the Board." *Id.* at 1. According to the City Mayor, this meant that "further hearings could have taken place based on the HEP Board's decision" and thus "the appeal should have been denied as an unperfected appeal." *Id.*

Second, "[t]o the extent that the merits of the appeal could have been reached," the City Mayor explained that his veto "seeks to affirm the HEP Board's decision is [sic] supported by competent and substantial evidence." *Id.* According to the City Mayor, "the County's proposal would jeopardize the National Register [ ] 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," citing DHR's letter to the HEPB. *Id.* at 1-2. He also noted that "acceptance of the County's proposal could effectively remove the Coconut Grove Playhouse from the National Register," which would be "a troublesome outcome for the residents of Miami." *Id.* at 2.

Third, the City Mayor found that the County failed to show that demolition was strictly necessary, citing section 267.061(2)(b), Florida Statutes, and that "the County's assertions that no other funds are available to the Playhouse renovation are unsupported by competent and substantial evidence[.]" *Id.*

Finally, the City Mayor found that "the County's application is fatally flawed because no request for demolition is included in the application or request," even though the County had checked the box labeled "DEMOLITION" on its final application in an abundance of caution, and had noted this fact on the record at the HEPB and City Commission hearings. *Id.*

As explained below, none of those reasons were based on a correct application of the law or were supported by substantial competent evidence.

The veto was also marred by violations of due process, and not only because the City Mayor embraced the tainted HEPB proceedings in his veto message. In the nine days between the City Commission's approval and the veto, the City Mayor received numerous *ex parte* emails from members of the public, some in support of the County's plan and others imploring him to issue the veto. Pet. App. II, Ex. Q (City Mayor *Ex Parte* Communication Excerpts). The City Mayor responded to some of these emails, in some cases thanking the sender and in other cases asking to speak to the sender by phone. The day before the veto was issued, Mr. Heisenbottle emailed the City Mayor, noting that "the deadline is fast approaching" and attaching a draft veto message for his consideration. *Id.* That same day, the City Mayor forwarded Mr. Heisenbottle's email to the mayoral staff member who had been working on the veto message. *Id.* Some emails also involved scheduling meetings between the City Mayor and members of the public about the Playhouse, but it is

unclear whether those meetings took place and, if so, what was discussed. *Id.*

The City Mayor's veto message did not disclose the *ex parte* communications. And because those *ex parte* communications occurred after the record was closed, the City Mayor had no other opportunity to disclose them at a public meeting prior to issuing the veto. The communications thus retain the presumption of prejudice.

As required by the City Code, the City Commission considered the City Mayor's veto at its next regular meeting. At that meeting, a motion to override the veto was made but only received three of the necessary four votes to override. Pet. App. II, Ex. R at 123 (May 2019 City Comm'n Veto Override H'rg Tr.). Accordingly, the veto stood as issued. The County thereafter instituted this appeal.

II. Legal Standard

In a challenge to a quasi-judicial decision, this court conducts a "first-tier review" and considers: (1) whether the decision-maker observed the essential requirements of the law; (2) whether the decision is supported by competent substantial evidence; and (3) whether the parties were accorded procedural due process. *See, e.g.*, *Miami-Dade Cnty. v. Omnipoint Holdings, Inc.*, 863 So. 2d 195, 198-99 (Fla. 2003).

A. Essential Requirements of the Law Standard

Observing the essential requirements of law means applying the correct law in proper fashion. *See Haines City Cmty. Dev. v. Heggs*, 658 So. 2d 523, 530 (Fla.

1995). The court must ascertain whether the decision-maker overlooked sources of established law, or applied an incorrect analysis to those sources considered. *City of Tampa v. City Nat'l Bank of Fla.*, 974 So. 2d 408, 411 (Fla. 2d DCA 2007). To warrant relief, there must be "an inherent illegality or irregularity, an abuse of judicial power, an act of judicial tyranny perpetrated with disregard of procedural requirements, resulting in a gross miscarriage of justice," *see Sucart v. Office of Comm'r*, 129 So. 3d 1112, 1115 (Fla. 3d DCA 2013), or "a serious error of fundamental dimensions," *see City Nat'l Bank of Fla.*, 974 So. 2d at 410-11.

B. Competent Substantial Evidence Standard

Competent substantial evidence has been defined as 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). Although a local government's quasi-judicial decision must generally be upheld if any substantial competent evidence supports it, the court is required to examine whether such evidence in fact exists and is empowered to quash the decision where "the record is devoid of substantial competent evidence to support the [ ] decision." *City of W. Palm Beach Zoning Bd. of Appeals v. Educ. Dev. Ctr.*, 504 So. 2d 1385, 1386 (Fla. 4th DCA 1987); *see also Jesus Fellowship, Inc. v. Miami-Dade County*, 752 So. 2d 708, 711 (Fla. 3d DCA 2000).

C. Procedural Due Process Standard

In a quasi-judicial proceeding, "certain standards of basic fairness must be adhered to in order to afford due process." *See Jennings v. Dade Cty.*, 589 So. 2d 1337, 1340 (Fla. 3d DCA 1991). First, due process requires that the parties are provided notice of the relevant hearing. *Sem. Entm't. v. City of Casselberry*, 811 So. 2d 693, 696 (Fla. 5th DCA 2001). Adequate notice means that the correct scope of the hearing has been provided: "The granting of relief, which is not sought by the notice of hearing or which expands the scope of a hearing and decides matters not noticed for hearing, violates due process." *Connell v. Capital City Partners, LLC*, 932 So. 2d 442, 444 (Fla. 3d DCA 2006).

Second, the parties must be given an opportunity to be heard and "be informed of all the facts upon which the [quasi-judicial decision-maker] acts." *Jennings*, 589 So. 2d at 1340. Essential to this component of due process is that the quasi-judicial decision is based solely on the record presented at the public hearing. *See, e.g., Thorn v. Fla. Real Estate Comm'n*, 146 So. 2d 907, 910 (Fla. 2d DCA 1962).

For this reason, "[e]x parte communications are inherently improper and are anathema to quasi-judicial proceedings." *Jennings*, 589 So. 2d at 1341. Thus, generally, where an ex parte communication occurs, "its effect is presumed to be prejudicial unless the [decision-maker] proves to the contrary by competent evidence." *Id.* Section 286.0015, Florida Statutes, purports to remove the

presumption of prejudice if a local government has adopted a procedure for disclosure of ex parte communications and "the subject of the communication and the identity of the person, group, or entity with whom the communication took place is disclosed and made a part of the record before final action on the matter." Fla. Stat. § 286.0115. The City has adopted such a procedure.

Finally, an "impartial decision-maker is a basic constituent of minimum due process" in quasi-judicial proceedings. *Cherry Comm'n, Inc. v. Deason*, 652 So. 2d 803, 804 (Fla. 1995) (citation omitted). A decision-maker who cannot be fair and impartial may not participate in the proceeding. *Ridgewood Properties, Inc. v. Dep't of Cmty. Affairs*, 562 So. 2d 322, 324 (Fla. 1990); *Verizon Bus. Network Servs., Inc. ex rel. MCI Commc'ns, Inc. v. Dep't of Corr.*, 988 So. 2d 1148, 1151 (Fla. 1st DCA 2008). In such matters, "the appearance of neutrality can be as important as neutrality itself because of the former's impact upon confidence in the proceedings." *Int'l Ins. Co. v. Schrager*, 593 So. 2d 1196, 1197 (Fla. 4th DCA 1992).

III. Argument

The City Mayor's veto—like the HEPB decision he purports to reinstate—departs from the essential requirements of the law, is not supported by competent substantial evidence, and violates due process. Each argument is addressed below.

A. The City Mayor's Veto Violates the Essential Requirements of the Law

In vetoing the City Commission's approval, the City Mayor applied the wrong law. First, the City Mayor committed clear legal error in concluding that the appeal was premature. The City Code provides that "[t]he applicant," among other aggrieved parties, "may appeal to the city commission any ***decision*** of the [HEP] board on matters relating to designations and certificates of appropriateness[.]" Pet. App. I, Ex. D (Sec. 23-6.2(e), City Code) (emphasis supplied).

Here, the HEPB clearly issued a decision from which the County, as the applicant, had a right to appeal. The vice-chair's prevailing motion was that the County's application "be denied," *see* Pet. App. II, Ex. H at 318, and the HEPB resolution indicates on its face that the application was in fact denied, *see id.* (HEP Board Res. No. HEPB-R-19-010). Moreover, the HEPB's written resolution makes plain that the decision may be appealed: "**THIS DECISION IS FINAL UNLESS APPEALED IN THE HEARING BOARDS DIVISION WITHIN FIFTEEN (15) DAYS.**" *Id.* (emphasis original).

While it is true that the HEPB's vice-chair also invited the County, "***if it wants***, to come back to the Board to address some, or all of the concerns, heard from various members of the Board," nothing about that invitation makes the HEPB's action anything other than a final decision subject to appeal. Pet. App. II, Ex. H at 318 (emphasis supplied). Put another way, an order is no less final merely because

the HEPB has invited an applicant to return with a different plan than the one the applicant wanted. In believing otherwise and finding that the County had filed an "unperfected appeal," the City Mayor misapplied the law.

The City Mayor—for two reasons—also applied the wrong law in justifying his veto on the basis that the County's plan would "jeopardize" the Playhouse's National Register status, citing the incompetent DHR opinion that the plan is "not consistent" with the Secretary of the Interior's standards.

First, in looking to the National Register rather than the City's governing designation report, the City Mayor in effect improperly amended the City's governing regulatory standards to turn a non-regulatory, honorary designation into a new, additional, uncodified layer of local regulatory control. Under federal law, National Register listing in no way restricts a property owner's ability to alter, or even demolish, a historic resource. Thus, a local government may not use National Register status, in and of itself, to deny an applicant permission to make alterations to a historic site. Rather, the local government's regulatory decision must be governed by the criteria set forth in that local government's code—namely, here, whether the application satisfies the Secretary of the Interior's standards.[7]

[7] Moreover, as explained above, even taken on its own terms, there is no fact-based evidence in the record that the County's plan would result in delisting. Indeed, the local experience of the Arsht Center and the Sears Tower suggests the opposite. *See supra* n.4.

Second, in relying on the incompetent DHR analysis, the City Mayor disregarded the local historic site designation, the scope of which is described in the governing 2005 designation report. Instead, DHR expressly premised its analysis on the National Register application. Pet. App. II, Ex. L at 1 ("we are responding to the HEPB's questions based on the historic and architectural characteristics of the property ***described in the National Register nomination*** and following the guidance provided by the Secretary of the Interior's Standards") (emphasis supplied).

The National Register application includes the Playhouse's interior spaces, and DHR's analysis expressly considers the effects of the County's plan on the interior. Indeed, DHR cites a November 2017 email from a state historic preservation official, concluding that the County's "project will result in the loss of integrity of the building," because "[t]he ***entire interior of the building*** would be replaced as part of the proposed structural work." *Id.* (emphasis supplied).

But as this Court previously recognized, "[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." *Playhouse I*, 26 Fla. L. Weekly Supp. at 800b. Certificate of appropriateness proceedings are governed by the local designation, and it is against that designation that consistency with the Secretary of the Interior's standards must be analyzed. *Id.* The City Mayor failed to analyze the County's project in reference to the governing designation

report. Instead—and contrary to this Court's prior ruling—he, like DHR before him, inserted the Playhouse interior into these proceedings. Just as in *Playhouse I*, considering the interior violated the essential requirements of the law.

The City Mayor further departed from the essential requirements of the law when he based his veto on his assertion that the County failed to properly apply for demolition in its final application. That is incorrect, as the County made plain at both the hearing before the HEPB and on appeal to the City Commission. Pet. App. II, Ex. H at 58-59; Ex. N at 271. But even if the County had not so applied, that would still not furnish a basis to deny the application here, because the HEPB's 2017 master plan decision had previously approved 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 was, in fact, granting permission to demolish; otherwise, why provide a limitation on when such permission may be exercised? Moreover, the resolution also included an express reservation of authority to the HEPB to later require different configurations of heights, setbacks, and the like as to new construction, but did not reserve any authority to revisit the demolition approval. *Id.*

Consistent with the *expressio unius* canon of construction, the HEPB's

mention of one thing in the resolution—the right to later require different configurations and setbacks—excluded something else—the ability to later revisit the demolition approval. *See, e.g.*, *City of Miami v. Valdez*, 847 So. 2d 1005, 1008 (Fla. 3d DCA 2003) ("when a law expressly describes a particular situation where something should apply, an inference must be drawn that what is not included by specific reference was intended to be omitted or excluded"). Thus, the County received prior approval to demolish and did not need to reapply for it when submitting its final application. Because the City Mayor apparently thought otherwise, he applied the wrong law in issuing the veto.

The City Mayor also applied the wrong law in relying on section 267.061(2)(b), Florida Statutes. That statute applies only to state agencies and makes no mention of local governments administering municipal historic preservation regulations. *Id.* Moreover, as even DHR admits, the statute does not empower the state, much less a local government, "to 'force' an agency, or an agency's lessee, to preserve a building." Pet. App. II, Ex. E (Tab 6).

Finally, the City Mayor departed from the essential requirements of the law in basing the veto on the grounds that "the County's assertions that no other funds are available to the Playhouse renovation" were "unsupported by competent and substantial evidence." Pet. App. II, Ex. P at 2. Although the issue of funding was discussed at the HEP Board and City Commission hearings, the source and amount

of funding simply has no bearing on whether the County's application for a certificate of appropriateness should issue. As demonstrated above, that decision may only be based upon the criteria in the City Code. This regulatory proceeding was not an opportunity for the City Mayor to challenge the applicant's business model or its lease terms. Thus, to the extent that the City Mayor considered the applicant's financial arrangements, the City Mayor misapplied the law. For each of these reasons, the City Mayor's veto must be quashed.

B. The City Mayor's Veto is Unsupported by Competent Substantial Evidence

As evidentiary support for his veto, the City Mayor cites to DHR's March 1, 2019 letter. *Id.* at 1-2. But, as explained above, that letter is incompetent, inapposite, and irrelevant in the context of this proceeding.

DHR's letter is incompetent because it is conclusory. DHR simply states, without analysis, that certain of the Secretary of the Interior's standards are not satisfied. DHR does not explain why. Instead, DHR cross-references a November 2017 email finding the project to be ineligible for a state grant, which, by the way, was also not a regulatory matter. But that email, too, simply parrots the standards that the state contends the project fails to satisfy and, as such, does not constitute competent substantial evidence upon which the City Mayor could rely. *See In re N.F.*, 82 So. 3d 1188, 1195 (Fla. 2d DCA 2012) ("[T]he Department's position amounted to nothing more than parroted statutory phrases and bald incantations of

buzz words. Such conclusory assertions, devoid of factual support, were not competent substantial evidence[.]"); *Fla. Dep't of Transp. v. Samter*, 393 So. 2d 1142, 1145 (Fla. 3d DCA 1981) ("no weight may be accorded an expert opinion which is totally conclusory in nature and is unsupported by any discernible, factually-based chain of underlying reasoning"); *Payne v. City of Miami*, 52 So. 3d 707, 732 (Fla. 3d DCA 2010) (department's one-page document that "performs no analysis" was not competent substantial evidence).

The evidence is also inapposite and irrelevant, first, because DHR's analysis is based on the National Register application and purported effects on the Playhouse's National Register status—which are non-regulatory and do not govern here; and, second, because it considers the Playhouse's interior—which this Court has previously determined to be beyond the scope of this proceeding.

Aside from DHR's letter, the City Mayor identifies no other competent substantial evidence that would support a finding that the County's application does not satisfy the Secretary of the Interior's standards. And, in fact, there is none.

When the County sought approval of the master plan in 2017, City historic preservation staff found that the application—including the request to demolish the auditorium building—satisfied the Code-prescribed criteria and, thus, recommended approval. Similarly, City staff reviewed and recommended approval of the County's final plans, finding them consistent with the Secretary of the Interior's standards per

the Code. The County's historic preservation officer also independently reviewed the application and found it consistent with the City Code criteria, including, specifically, the Secretary of the Interior's standards.

During the HEPB public hearing below, Messrs. Heisenbottle and Bender and Ms. Parks did not offer any fact-based testimony, expert or otherwise, showing that the County's project fails to satisfy the governing standards. Mr. Heisenbottle's testimony centered upon his conclusory view that the Playhouse interior retains historic integrity for the 1927 silent movie house configuration and should have been included in the designation; but of course, that is beyond the scope of this proceeding. In any event, he never directly opined that the County's plan fails to meet the Secretary of the Interior's standards, much less provide any kind of expert analysis to that effect. Nor did Ms. Parks. Instead, she explained that touring the theater made her "a zealot for saving the interior." Pet. App. II, Ex. H at 229. And Mr. Bender merely read from, and cited to, DHR's incompetent opinion.

Aside from the above, the only other testimony in opposition to the County's plan came from members of the public who nostalgically prefer that the Playhouse be restored in its entirety. But such testimony is neither fact-based nor relevant to the governing Code-prescribed criteria. *Cf. City of Apopka v. Orange Cty.*, 299 So. 2d 657, 659 (Fla. 4th DCA 1974) ("laymen's opinions unsubstantiated by any competent facts" and "objections of a large number of residents of the affected

neighborhood are not a sound basis for the denial of a permit") (citation omitted).

In short, none of this amounts to competent substantial evidence supporting denial of the County's application. And because no such evidence exists, the City Mayor's veto must be quashed.

C. The City Mayor's Veto Violates Due Process

First, in relying on DHR's flawed analysis, the City Mayor—like the HEPB—effectively expanded the scope of the hearing in violation of the applicant's right to due process. Due process in a quasi-judicial proceeding is generally satisfied if the parties are provided notice of the relevant hearing and what will occur there, and an opportunity to be heard in the proper forum. *See Jennings*, 589 So. 2d at 1340; *Seminole Entm't, Inc.*, 811 So. 2d at 696. But a forum is not proper if the matters decided exceed the parameters of the noticed hearing, beyond the scope of what the City Code allows. *Connell*, 932 So. 2d at 444.

This was a certificate of appropriateness proceeding governed by the existing 2005 designation resolution, as this Court determined in the prior appeal. *See Playhouse I*, 26 Fla. L. Weekly Supp. at 800b. That designation did not include the Playhouse interior, and it has not been amended through the City's Code-prescribed process. Yet, as noted above, DHR relied on the non-regulatory National Register application, which includes the interior. Indeed, DHR found the County's application inconsistent with the Secretary of the Interior's standards precisely

because of impacts to the interior spaces. As such, DHR's analysis exceeded the scope of this proceeding, and therefore did not form a permissible basis to deny the County's application. In relying on it anyway, the City Mayor violated due process by exceeding the parameters of the noticed hearing.

Second, the City Mayor violated due process because it is apparent that he decided to veto without reviewing or considering the entire public hearing record on the County's application. Due process requires that a quasi-judicial decision-maker be apprised of the entire record and base his decision solely upon the evidence presented in the public hearing. *See, e.g.*, *Metro. Dade Cty. v. Fla. Processing Co.*, 229 So. 2d 254, 256 (Fla. 1969) ("due process requires that Board members must base their judgment upon the evidence and testimony adduced at the hearings"); *Sheffey v. Futch*, 250 So. 2d 907, 910 (Fla. 4th DCA 1971) (due process requires "[r]easonable familiarity and study of the transcript before making an independent decision in vote form"). Here, the City Mayor was not present for the entirety of the public hearings before the HEP Board and City Commission, and he does not indicate in his veto message that he independently reviewed, and became familiar with, the entirety of the closed record in reaching his decision.

What he does say in his veto message suggests just the opposite: that he was not appropriately familiar with the record. His veto message contends that the County failed to apply for demolition. Pet. App. II, Ex. P at 2. But that is plainly

false, as the record demonstrates. *See supra* note 6 and accompanying text.

The City Mayor's apparent lack of familiarity with that important aspect of the record is troubling and implicates the due process right to a fully informed decision-maker. Just as due process would not permit a juror who heard only part of the evidence to deliberate and render a verdict in a trial, it similarly does not permit the City Mayor to be only partially informed when exercising the power to veto. *See Fla. Processing Co.*, 229 So. 2d at 256; *Sheffey*, 250 So. 2d at 910.

Third, the City Mayor's veto violates 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. Pet. App. II, Ex. Q. As a consequence, the County was deprived of an opportunity to be informed of, and respond to, such communications. *Jennings*, 589 So. 2d at 1340 (parties must be given an opportunity to be heard and "be informed of all the facts upon which the [quasi-judicial decision-maker] acts").

In that regard, this case is similar to *The Vizcayans v. City of Miami*, 15 Fla. L. Weekly Supp. 657a (Fla. 11th Cir. Ct. App. Div. July 3, 2014). *See* Pet. App. II, Ex. S. There, a panel of this Court found that the then-City Mayor's *ex parte* communications regarding a quasi-judicial land use matter, which took place during the veto period after the City Commission's public hearing, violated due process:

> [T]he Mayor engaged in *ex parte* communications with Respondent during the ten day veto period following the Commission's adoption of

> the Orders. . . . We find that the Mayor's communications all took place after the hearings had concluded, away from public earshot, and therefore violated Petitioner's due process rights under the *Jennings* criteria.

Id.

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 that procedure was not, and could not have been, used by the City Mayor here. Indeed, because the *ex parte* communications occurred during the veto period ***after*** the City Commission's appeal hearing, the City Mayor had no public hearing setting in which he could have made the necessary disclosure prior to issuing his veto.[8] Accordingly, the City Mayor's ex parte communications are presumed prejudicial under *Jennings*, and amount to a violation of the County's right of due process. Thus, the City Mayor's veto must be quashed for these reasons, too.

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

Because the City Mayor's veto statement indicates that he seeks to affirm and reinstate the HEPB's decision, the Court must also consider the legal deficiencies

[8] Theoretically, the City Mayor could have made a disclosure in his veto statement, but he did not do so. It would not have solved this due process problem in any event, because the County still would not have had an opportunity to be heard and respond to the ex parte disclosure ***before*** his decision. *See* § 286.0115, Fla. Stat. (requiring disclosure "***before*** final action on the matter") (emphasis supplied).

inherent in that Board's decision.

1. Essential Requirements of the Law Violation

Like the Mayor's veto that endorses it, the HEPB's decision amounts to a departure from the essential requirements of law. The vice-chair's prevailing motion denied the County's application "based on the expert testimony that the plans do not satisfy the standard of the Secretary of the Interior." Pet. App. II, Ex. H at 318. But the only "expert testimony" in the record to that effect was DHR's incompetent opinion. *See supra* pp. 31-32, 44-45, 47-48. Because DHR exceeded the scope of the applicable law, the HEPB could not rely on DHR's analysis to deny the County's application.

The HEPB also misapplied the law when it improperly reconsidered the 2017 master plan and demolition approval, in derogation of its own rules of procedure governing reconsideration. The HEPB's rules provide that an application for certificate of appropriateness may not be reconsidered or reheard "if the applicant/owner can demonstrate to the [HEP] Board that he or she has expended substantial monies in detrimental reliance of the Board's prior decision or if it would violate due process rights of any participant at the prior hearing resulting in the decision." Pet. App. II, Ex. M at Attchmt. 3 (HEPB Rules).

It is undisputed that the County obtained the April 2017 master plan approval so that it could develop final plans and take other necessary measures to advance the

project, and the County has in fact done so since that time. The County thus expended substantial public dollars in reliance on the HEPB's prior demolition and master plan approval. In fact, the record below reflects that the County expended $1.1 million to develop and finalize the project plans premised on the 2017 approval, which included demolition of the auditorium building. Pet. App. II, Ex. N at 191-92. As the County relied on that approval to its detriment, the HEPB was barred from reconsidering its prior decision under its rules.

2. No Competent Substantial Evidence

The HEPB's decision, like the Mayor's veto, is unsupported by any competent substantial evidence. The HEPB adopted the vice-chair's motion to deny the County's application "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 evidence in the record—"expert" or otherwise—against the County's plan is DHR's incompetent opinion, which, as discussed above, does not constitute competent substantial evidence. No other record evidence exists to overcome the City's own professional analysis, the County HP Chief's expert opinion, and the expert testimony of Jorge Hernandez that the County's project satisfies the applicable standards.

3. Due Process Violation

Like the City Mayor's veto, the HEPB's decision violates due process because

it considered the Playhouse's interior, which is beyond the scope of this certificate of appropriateness proceeding. *See, e.g.*, *supra* pp. 44-45. Due process does not allow a quasi-judicial board to exceed the scope of what is properly noticed and within the board's purview for decision. *Playhouse I*, 26 Fla. L. Weekly Supp. at 800b.

Finally, one additional due process issue unique to the HEPB proceeding requires elaboration here. Because the City Mayor's veto message purported to reinstate the HEPB's decision, the court must consider the egregious due process violation created by the vice-chair's participation in the HEPB hearing.

Due process requires that a quasi-judicial decision-maker be impartial and free from bias, and to make a decision based solely on the public hearing record. *Cherry Comm'n, Inc.*, 652 So. 2d at 804; *Thorn*, 146 So. 2d at 910. Unfortunately, the vice-chair was anything but impartial, as evidenced by her actions and her extensive *ex parte* communications, as detailed above. *See supra* pp. 15-28.

To summarize, over a two-year period, in public meetings outside of any quasi-judicial hearing process on the County's applications, the vice-chair demonstrated an extraordinary interest in the Playhouse, requesting periodic updates even when the matter was not otherwise slated for an agenda, and advocating against the County's proposals at every opportunity. She tried unsuccessfully on multiple occasions to have the HEPB amend the 2005 designation to include the interior—an

effort that she surely knew would pose roadblocks to the County's plan. She also championed efforts to have the Playhouse added to the National Register—an otherwise laudable endeavor—but then used its National Register status as a sword to solicit from DHR a negative opinion on the County's proposal, which she in turn used to support her motion to deny the County's application.

Out of public view, the vice-chair did even more. She corresponded with DHR extensively in the "capacity of a citizen only," in an apparent effort to explore ways to defeat the County's applications. *Id.* (Tab 1). She also engaged in a campaign of *ex parte* email communications and phone calls, possibly in-person meetings too, with objectors to the County's project—most notably, Messrs. Heisenbottle, Gonzalez, and Bender. In one particular exchange with Mr. Gonzalez, she characterized this Court's prior decision as a "Bad Day for Preservation." *Id.* (Tab 2). In explaining this comment, the vice-chair stated that when this Court ruled, "it seemed to me . . . that [the County] would have a good argument that [it] could proceed to demolish, and in that sense, because I start out honing toward preservation rather demolition, it's a bad -- it was a bad day for preservation." Pet. App. II, Ex. H at 34.

Along the same lines, the vice-chair candidly admitted that she begins with "an initial inclination to preserve rather than to demolish" when considering applications that come before the HEP Board. *Id.* at 52. But of course, due process

will not condone any quasi-judicial decision-maker approaching any matter with a predisposition one way or another. It requires the decision-maker to come to each matter free from predisposition, ready to judge based solely upon the evidence presented. Granted, the vice-chair added that her initial predisposition "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," *see id.*, but her conduct in this case belied her pronouncement.

On multiple occasions, the County explained to the HEP Board that the decision to demolish the existing auditorium building was not arrived at blithely, but, rather, after a careful year-long study of the building's historic integrity and a thorough analysis of its ability to effectively function as a sustainable theater in the years to come. Mr. Hernandez, the County's historic preservation architect and expert, offered thoughtful, thorough testimony in this regard—testimony that no one, not even the County's most vocal objectors, has dared to assail. In addition, and most importantly here, City historic preservation and planning staff recommended approval of the County's application, including the request to demolish, finding the proposal consistent with the City Code requirements and the Secretary of the Interior's standards. The County's HP Chief likewise independently concluded that the project met those standards.

Faced with this evidence, did the vice-chair accept demolition as appropriate

in this case? No. Instead, she did what she said she could not do: she "ignore[d] evidence, testimony that establishes that demolition is appropriate," *see id.*, and instead went about soliciting a contrary opinion from DHR that she could use to justify denial of the County's application. This is the very antithesis of an impartial decision-maker: one who has an "agenda" and searches for evidence to support a particular outcome, rather than the other way around.

She showed her bias in other ways as well. The only *ex parte* communication she refused to engage in was the County's invitation to visit the Playhouse building and to view the County's publicly-available website with information about the project, which was distributed to all HEPB members. That communication, she forwarded to City counsel with the proviso that, "[i]n an abundance of legal caution," she had "deleted the materials, unread," because they were "remitted by an applicant for an upcoming HEP Board quasi-judicial review." Pet. App. II, Ex. E (Tab 4). Objectors, by contrast, she felt free to correspond with regularly and to assist them in attending the hearings on the application. There is simply no concept of due process that authorizes the judge in a quasi-judicial matter to engage in an *ex parte* campaign with an applicant's opponents but prohibits that judge from communicating with the applicant, solely.

The vice-chair also admitted that she had advocated in favor of "saving" the Playhouse. Pet. App. II, Ex. H at 42. But one cannot be both an impartial quasi-

judicial decision-maker and an advocate, no more than a jurist can be both a judge and an attorney who argues cases. *Cf. Junior v. LaCroix*, 263 So. 3d 159, 168 (Fla. 3d DCA 2018) (Rothenberg, C.J., specially concurring) ("[T]he trial court impermissibly crossed the line between neutral arbiter of the facts to that of an advocate[.]"). Due process simply does not permit one to wear such antithetical hats simultaneously.

Collectively, the conduct summarized above and more thoroughly detailed in the statement of facts, paints a picture of a very biased decision-maker. Because a decision-maker who cannot be fair and impartial may not participate in the proceeding as a judge, the vice-chair should have recused herself from hearing the County's final application. *Ridgewood Properties, Inc.*, 562 So. 2d at 324; *Verizon Bus. Network Servs., Inc.*, 988 So. 2d at 1151. And because instead of recusing, she worked to introduce into the proceeding the opposing, albeit incompetent, evidence that she herself had procured and later moved to deny the County's application based on that incompetent evidence, she tainted the entire proceeding and led the HEPB into violating due process.

IV. Conclusion

For each of the reasons above, this 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: June 17, 2019

Respectfully Submitted,

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Certificate of Service

I certify that a true and correct copy of this ***Petition for Writ of Certiorari*** was served upon the counsel listed below via electronic mail and regular mail, on June 17, 2019:

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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.

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