IN THE DISTRICT COURT OF APPEAL
OF FLORIDA, THIRD DISTRICT

CASE NO. 3D20-1195

CIRCUIT COURT APPELLATE
DIVISION CASE NO. 2019-167-AP-01

MIAMI-DADE COUNTY,

Petitioner,

v.

CITY OF MIAMI,

Respondent.
_____/

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

In attempting to defend an absurd result, the City employs an exceedingly cramped textualism that examines only its own code and charter and excludes the fundamental constitutional requirements that undergird all quasi-judicial proceedings. Ironically, the City also in essence asks the Court to add words to its code and charter, while also ignoring all context and binding precedent. And nowhere does the City provide any legal support for its—and the Circuit Court's—most radical proposition: that a veto that comes at the end of an admittedly quasi-judicial proceeding, and that alters the outcome of that adjudicative proceeding by turning a "yes" into a "no," is wholly separate from, and not subject to the same review standards as, the original quasi-judicial proceeding, such that, at the very end of the proceeding, parties can be stripped of the due process protections that they

were entitled to at the earlier stages. Making matters worse, the Circuit Court's decision condones what actually happened here: after the hearings, an objector not only communicated privately with a decision-maker to encourage rejection of the absent party's application, but also privately ghostwrote a proposed basis for rejection and sent it to the decision-maker—and that decision-maker's rejection became the final decision.[1]

In response to the County's petition, the City doubles down on its misguided argument and, compounding its error, assails an argument that the County did not even make. Contrary to the City's contention, the County does not challenge the constitutionality of the mayoral veto over a quasi-judicial proceeding, but rather argues that the veto must be exercised in accordance with the constitutional requirements applicable to all quasi-judicial proceedings. Thus, the County maintains that the lower court violated the essential requirements of the law by: ignoring the due process implications of its reading of the City charter and code; and wrongly analogizing to gubernatorial vetoes of purely legislative actions at the State

[1] As noted in the Petition, the City has consistently regarded the un-overriden veto as the final decision on the County's application and has never contended that the mayoral veto was anything other than a final and reviewable decision. Rather, the dispute is in which court, and under which standard of review, should such review occur? *See* Pet. App. Ex. S at MDC1425 n.4 (stating that "[a]lthough this Court does not have jurisdiction to review the County's petition for writ of certiorari, ***the mayoral veto is not insulated from challenge***" because it is an executive act that may be reviewed by action for declaratory or injunctive relief) (emphasis supplied).

level to conclude that a mayoral veto of a quasi-judicial application at the local government level is separate from the quasi-judicial process that it overturned. Challenging the application of fundamentally incorrect law is appropriate on second-tier review.

Lastly, the City defends the lower court's improper, and incorrect, factual findings as mere dicta and thus not a proper basis for second-tier certiorari relief. But the County's whole point is that those findings have no place in the opinion below: whether characterized as dicta or judicial overreach, making those findings while also rejecting jurisdiction violated the essential requirements of law. For each of these reasons, and as explained in the County's Petition and below, this Court should see past the City's misguided arguments and instead grant certiorari.

ARGUMENT

A. The City Charter and Code Do Not Exclude the Mayoral Veto from the Quasi-Judicial Process

As it did below, the City here contends that the plain text of the City's code and charter compels a determination that the mayoral veto of a quasi-judicial decision is separate from the quasi-judicial process. But the text compels no such conclusion, and the Circuit Court erred in determining that it did, as that finding required adding words, ignoring established law, and embracing an absurd result.

The City's argument has some surface appeal: the City code provides notice and hearing procedures for certificate of appropriateness applications before the

historic board and the City Commission, but doesn't include those requirements for the City Mayor's veto. Instead, the charter merely says that the City Mayor has veto authority over, among others, quasi-judicial decisions of the City Commission, period. *See* § 4(g)(5), City of Miami Charter (providing that the City Mayor may veto "any legislative, ***quasi-judicial***, zoning, master plan or land use decision of the city commission") (emphasis supplied). And the City code adds only that the charter's veto provisions "shall be exercised exclusively in accordance with the terms and conditions" specified in the code, none of which require notice and a hearing. § 2-36, City of Miami Code. Ergo, according to the City and the Circuit Court, because the City charter and code do not provide for an additional hearing during the veto period, the mayoral veto ***cannot*** be quasi-judicial.

But this argument does not survive even cursory scrutiny, as the text does not compel the conclusion the City urges. And the City's interpretation violates at least two canons of statutory construction: (1) "where a statute is fairly susceptible of two interpretations, one of which would render the statute unconstitutional, the courts should avoid the unconstitutional interpretation," *Durring v. Reynolds, Smith & Hills*, 471 So. 2d 603, 606 (Fla. 1st DCA 1985); and (2) "[a] statutory interpretation that achieves an absurd or illogical result will not be adopted," *Ryder Truck Rental, Inc. v. SE First Nat'l Bank of Miami,* 427 So. 2d 302, 303 (Fla. 3d DCA 1983).

1. The City's Charter and Code Do Not Compel the Result that the City Mayor's Veto Exists Separate and Apart from the Quasi-Judicial Proceeding from Which it Emanates

Nothing about the City's charter or code compels a conclusion that the veto of a quasi-judicial decision is not also quasi-judicial. Nor does the lack of additional hearing procedures during the veto period sever the veto from the quasi-judicial process from which it emanates.

The City essentially advances a perverse *expressio unius* argument: while the code provides that certificate of appropriateness applications are decided by the historic board and City Commission after notice and a hearing, the charter and code do not specify any such requirement for the mayoral veto and, thus, the mayoral veto cannot be quasi-judicial. But the correct application of "[t]his maxim, meaning 'the expression of one thing implies the exclusion of the other' . . . [is] 'depend[ent] entirely on context,' including the history and structure of the legislation being examined." *Crews v. Florida Pub. Employers Council 79, AFSCME*, 113 So. 3d 1063, 1071-72 (Fla. 1st DCA 2013) (citations omitted). Moreover, it "properly applies only when the court can determine that the matters expressly mentioned are intended to be exclusive." *Id.*

The City simply has not shown that the express provision of notice and hearing procedures in its historic preservation code, but not in the charter veto provisions, excises the veto from the adjudicative proceeding and decision that the

veto would reverse. This is particularly true because the historic preservation code and the City charter were not adopted together and are thus not even a singular body of law to which *expressio unius* concepts would apply. *See Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003) ("*expressio unius est exclusio alterius* does not apply to every statutory listing or grouping; it has force only when the items expressed are members of an 'associated group or series,' justifying the inference that items not mentioned were excluded by deliberate choice, not inadvertence.").

Indeed, contrary to the City's suggestion, the silence of the City's laws alone does not settle the matter. The charter language recognizes that the City Commission engages in different types of decision-making: "legislative, quasi-judicial, zoning, master plan or land use decision[s]," and the City Mayor may veto any of them. § 4(g)(5), City of Miami Charter. Consistent with that recognition, the charter text can just as easily be read to say that, because the City Mayor may veto different types of decisions, his veto is a part of each of the respective types of proceedings and subject to the standards applicable to each. Accordingly, the very same language that the City relies upon for its cramped textual argument supports a conclusion that the veto of a decision rendered upon a showing made at a properly-noticed hearing is a part of that same quasi-judicial process and thus subject to its unique requirements.

In fact, accepting the City's (and the Circuit Court's) interpretation—that the

mayoral veto of a quasi-judicial decision ***cannot*** be a quasi-judicial act (or, perhaps more broadly, that the mayoral veto of any of the types of decisions listed in the charter exists apart from the applicable type of proceeding)—would require ***adding*** words to the charter or code to specify that the veto is an entirely different type of proceeding. But those words aren't there, and the lower court was not at liberty to add them. *See Bay Holdings, Inc. v. 2000 Island Blvd. Condo. Ass'n*, 895 So. 2d 1197, 1197 (Fla. 3d DCA 2005) (courts "are not at liberty to add words to statutes that were not placed there").

In short, simply granting the City Mayor veto authority over quasi-judicial decisions without more, as the charter and code provisions do here, does not sever the veto from the nature of the adjudicative decision that the veto would reverse. Because the text itself does not compel the Circuit Court's radical interpretation, the decision below should be quashed.

2. The City's Analysis Ignores Constitutional Due Process Requirements that Undergird Quasi-Judicial Proceedings

Nowhere does the City acknowledge that its textual analysis must also consider the text of superior law, such as the U.S. and Florida Constitutions, as well as binding precedent from this and other Florida courts that interpret those constitutional requirements. The City only focuses upon cases holding that a quasi-judicial proceeding is one where notice and a hearing are required. City Resp. 20-21. But none of those cases stand for the proposition that every decision-maker

involved in the process must hold its own hearing for the final decision to be considered quasi-judicial and thus subject to certiorari review.[2]

Moreover, the City ignores decisions from Florida courts on the due process rights attendant to quasi-judicial proceedings. As addressed in detail in the County's Petition, when the City Commission considers a quasi-judicial application, it is obligated to observe certain basic components of due process. *See, e.g., Jennings v. Dade Cnty.*, 589 So. 2d 1337, 1340 (Fla. 3d DCA 1991); *Cherry Comm'n, Inc. v. Deason*, 652 So. 2d 803, 804 (Fla. 1995); *Thorn v. Fla. Real Estate Comm'n*, 146 So. 2d 907, 910 (Fla. 2d DCA 1962). The view advanced by the City, and embraced by the Circuit Court, cannot be squared with these constitutional requirements.

Nowhere does the City's exceedingly narrow analysis address the central

[2] Indeed, at least one of the City's cases suggests the opposite—that requiring a hearing at any stage of the process may entitle an aggrieved party to certiorari review. *See Bloomfield v. Mayo*, 119 So. 2d 417, 421 (Fla. 1st DCA 1960) (decision that is "purely administrative or quasi-legislative or quasi-executive in character and quality" may nevertheless be "reached or affected by the writ of certiorari" if "as an incident to the arriving at or making of such order by the promulgating authority, a notice and hearing, judicial in nature, is required by law to be observed as a condition precedent" to the decision). And in the state administrative context, it is clear that an agency head who relies on the record from a previously-held hearing, rather than personally holding a hearing, is nevertheless acting in a quasi-judicial capacity. *GTECH Corp. v. State Dep't of Lottery*, 737 So. 2d 615, 621 (Fla. 1st DCA 1999) ("The Secretary of the Lottery did not make a final decision on the selection of a provider until after it had afforded [the applicant] notice and an opportunity to be heard in two bid protest hearings. . . . When the Secretary of the Lottery approved the recommendation by the administrative law judge, she was acting in a quasi-judicial capacity.").

question in this case: how can a singular application process that starts off as a quasi-judicial proceeding suddenly turn into a less rigorous proceeding at the end, simply because the final decision-maker changed? And relatedly, how can an applicant's constitutional right to due process—particularly the right to an impartial decision-maker who renders a decision based solely on the record evidence—evaporate merely because the City charter imbues its Mayor with veto authority over a decision that up to that point had been subject to those due process requirements?

Because the City's overly-constricted focus on its charter and code nowhere addresses these foundational issues, its arguments fail. There is simply no legal support for atomizing what is otherwise a singular process into discrete components—with each component analyzed separately in a way that results in the final decision being subject to less constitutionally-mandated protection than an earlier component of the same proceeding.

The City, through its code, specified that certificates of appropriateness must be obtained through a quasi-judicial process. It follows that when the City Mayor injects himself into that process and exercises his veto authority, he is part of the same quasi-judicial proceeding and must act accordingly. Indeed, as noted in the Petition, that is how the City Mayor actually viewed the matter. While the City now disavows the quasi-judicial nature of the veto, the City Mayor conceded that those standards applied to him when he acted here. This concession is all the more

damaging given the numerous breaches of the fundamental quasi-judicial protections that he had acknowledged applied. Because the Circuit Court's interpretation would allow the City Mayor to escape the consequences of those violations, the decision below must be quashed rather than condoned.

3. The City's Interpretation Leads to Absurd Results.

As explained in the Petition, the lower court's decision—which adopts the City's construction of the code and charter regarding the veto—renders absurd results. *First*, it makes the level of due process afforded to quasi-judicial parties capriciously dependent on the identity of the decision-maker: if a quasi-judicial application is decided by one decision-maker (*i.e.*, the City Commission), the decision is subject to certiorari review, but if it is decided by another decision-maker (*i.e.*, the City Mayor), it is subject to a much less stringent review in an entirely different type of judicial proceeding. *Second*, contrary to binding precedent interpreting constitutional provisions, it invites rank political influence into the process at the eleventh hour: while applicants before the City Commission would be insulated from the pernicious influences of ex parte communications, such communications would be fair game once the decision lands on the City Mayor's desk during the veto period. In short, the logical consequence of the Circuit Court's decision is that the due process rights that quasi-judicial parties are entitled to will evaporate during every veto period, and that is absurd.

But the City nowhere addresses the absurdities that would result from its interpretation. This Court should reject the City's and the Circuit Court's narrow focus on the City code and charter to the exclusion of constitutional requirements. Because reading the City charter and code to include the veto within the quasi-judicial proceeding is more faithful to the text and the law—including constitutional due process requirements—and does not lead to absurd results, certiorari relief is warranted.

B. The County Does Not Challenge the Constitutionality of the Veto over Quasi-Judicial Decisions, but rather the Circuit Court's Interpretation as Contrary to Constitutional Due Process Principles.

The City is correct that "a petition seeking certiorari review is not the proper procedural vehicle to challenge the constitutionality of a statute or ordinance." *Miami-Dade Cnty. v. Omnipoint Holdings, Inc.*, 863 So. 2d 195, 199 (Fla. 2003); *see also First Baptist Church of Perrine v. Miami-Dade Cnty.*, 768 So. 2d 1114, 1115 (Fla. 3d DCA 2000). But the City wrongly argues that the County attempts to raise a constitutional challenge to the veto provision in this proceeding.

The County has never argued that the City charter or code provisions governing the mayoral veto are in any way unconstitutional. And there was no reason to do so, because those provisions are susceptible to a constitutional construction. As the County has argued throughout these proceedings, a constitutional interpretation of the veto authority is readily available: the City Mayor could (as he

in fact purported to do here, albeit unsuccessfully) confine himself to the record adduced at the quasi-judicial hearings that preceded him, avoid ex parte communications, and make his decision based only on the evidence presented in the duly-noticed hearings.

In seeking first-tier certiorari review before the lower court, the County argued not that the City's charter and code provisions were unconstitutional, but that the City Mayor applied the wrong law, violated due process, and failed to base his decision on substantial competent evidence. Only after the County filed its petition below did the City advance its post-hoc argument that the mayoral veto somehow exists outside of the quasi-judicial process from which it emanates. The lower court accepted that argument and, in doing so, departed from the essential requirements of the law. That decision—and not the constitutionality of the City's charter and code—is the subject of the County's petition. Indeed, the County argued to the Circuit Court that the County has interpreted the exercise of the very similar veto provisions of its own Home Rule Charter in the same manner it advances here.

It is true, as the Petition explains, that the Circuit Court's decision does have constitutional implications. By interpreting the mayoral veto as existing apart from the quasi-judicial proceeding it intended to decide, the Circuit Court stripped away all of the procedural protections to which the County was entitled as a quasi-judicial applicant seeking a historic preservation permit from the City. Indeed, the Circuit

Court's decision effectively denied the County—and future, similarly-situated quasi-judicial applicants—all meaningful review, thereby resulting in a miscarriage of justice. The decision subverts not only the entire purpose of the historic preservation process at issue—which requires a decision based on the application of code-prescribed standards to evidence in a public hearing record—but also all other quasi-judicial proceedings that the City Mayor has the authority to veto.

But, to be clear—and contrary to the City's contention—the argument that the Circuit Court wrongly embraced an unconstitutional interpretation when a constitutional one was available, *see Durring*, 471 So. 2d at 606, in no way equates to a constitutional challenge on the mayoral veto power itself. The Court should disregard the City's meritless argument and grant certiorari.

C. The Circuit Court's Improper and Incorrect "Factual" Findings Violate the Essential Requirements of the Law, Warranting Certiorari Relief

The City brushes aside the lower court's improper and incorrect "factual" findings, arguing that those findings amount to mere dicta and are thus not subject to review. The County does not disagree with the City's characterization that "judicial comment in an opinion that is 'unnecessary to the decision in the case and therefore not precedential'" constitutes dicta. *BellSouth Telecom., Inc. v. Church & Tower of Fla., Inc.*, 930 So. 2d 668, 673 (Fla. 3d DCA 2006). But that does not insulate such comments from review. Indeed, that is precisely the point here: the lower court's frolic into the merit facts—including reversals of facts that had

heretofore been uncontested—when the court was only deciding its jurisdiction was not only unnecessary, but also wholly improper. Once the court found that it lacked jurisdiction, it lost authority to address the merits of the case, much less make findings contrary to the record and the parties' agreements. *Capricorn Marble Co. v. George Hyman Const. Co.*, 462 So. 2d 1208, 1208 (Fla. 4th DCA 1985) (when "a court is without jurisdiction, it has no power to adjudicate or determine any issue or cause submitted to it").

Tellingly, the City does not contest the County's assessment that: (1) the record belies the Circuit Court's purported factual findings as to the scope of the 2005 designation regarding the Playhouse interior and other factual matters; and (2) the parties regard *Playhouse I* as the law of the case in the proceedings below. The Circuit Court's effort to tell a different narrative was error.

Regardless of the label, the Circuit Court reached into the record and made its own findings relating to, among other things, the scope of the 2005 designation. The court thus did exactly what the Florida Supreme Court forbade in *Broward Cnty. v. G.B.V. Int'l, Ltd.*, 787 So. 2d 838, 844-45 (Fla. 2001), wherein it held that second-tier certiorari relief was appropriate because "the circuit court made its own factual finding based on the cold record." Compounding the impropriety is that the Circuit Court's findings were not essential or even relevant to its jurisdictional determination. Certiorari relief to quash the decision below is therefore warranted.

In addition to quashing the Circuit Court's improper findings, this Court should also make clear that, on remand, the lower court is not at liberty to make such findings. Such guidance would further the important interest in judicial and litigant economy and the public interest. This matter has been ongoing for more than three years and has already endured multiple hearings and appeals before the City and one prior certiorari proceeding before a different Circuit Court panel. It is of utmost importance to the County and the public that these proceedings be resolved as expeditiously as possible, so that the County and its co-lessee, Florida International University, may continue their joint efforts to restore the Playhouse and return great theater and vitality to this important historic site. Providing guidance that may avoid the need for yet more judicial review is therefore appropriate, and consistent with this Court's practice in prior cases where it has, on second-tier review, remanded with instructions to the lower court. *See, e.g.*, *City of Miami v. Hervis*, 65 So. 3d 1110, 1122 (Fla. 3d DCA 2011) (granting petition, quashing lower court's decision, and remanding with directions).

CONCLUSION

For the reasons set forth in the Petition and herein, this Court should quash the Circuit Court's decision below and remand with instructions to decide the County's petition on the merits and in accordance with the facts in the record.

Dated: November 10, 2020

Respectfully Submitted,

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Certificate of Service

I HEREBY CERTIFY that this ***Reply in Support of Petition for Writ of Certiorari*** is being served on November 10, 2020, via e-mail generated by the Florida Courts E-Filing Portal to: John A. Greco, Esq., Deputy City Attorney, City of Miami jagreco@miamigov.com, kjones@miamigov.com; and Kerri L. McNulty, Esq., Senior Appellate Counsel, City of Miami, klmcnulty@miamigov.com, csantos@miamigov.com, MRedruello@miamigov.com.

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