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*FLORIDA BAR BOARD CERTIFIED IN CITY, COUNTY AND LOCAL GOVERNMENT LAW

May 22, 2020

BY EMAIL

Vice Mayor Vince Lago
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Coral Gables, Florida 33134
vlago@coralgables.com

Commissioner Jorge L. Fors, Jr.
405 Biltmore Way
Coral Gables, Florida 33134
jfors@coralgables.com

Commissioner Patricia "Pat" Keon
405 Biltmore Way
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Commissioner Michael Mena
405 Biltmore Way
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Re: Appeal of Decision of the City of Coral Gables Historic Preservation Board in Case File No. LHD 2019-008 on the Historic Designation of Property located at 1208 Asturia Avenue (the "Property"); Item F-1; Case 20-1325

Dear Honorable Commissioners,

I am writing on behalf of Maria "Vicki" Cerda, the owner of 1216 Asturia Avenue located adjacent to the Property referred to above, and the aggrieved party and Appellant in the appeal referred to above, to alert you to several procedural, legal and substantive infirmities in the present record of this quasi-judicial case. The well-known standard of review on appeal of the quasi-judicial decisions of local government is: (i) whether the administrative tribunal accorded due process of law; (ii) whether the administrative tribunal applied the correct law, *i.e.*, whether the essential requirements of law were observed in the administrative proceedings; and (iii) whether the decision of the administrative tribunal is supported by competent substantial evidence. *E.g.*, *Florida Power & Light Co. v. City of Dania*, 761 So. 2d 1089, 1092 (Fla. 2000). In my practice, I typically pick one of the foregoing prongs to focus on. In this unusual case, there are departures from all three requirements.

I. Due Process of Law.

First, the hearings before the Historic Preservation Board were duly noticed and convened, with participation by my client. The issue is that the Honorable Mayor signaled his opposition to the Property's historic designation via a memorandum sent by email from the Mayor's Assistant and the Office of the Mayor to the individual Board Members in advance of the January 15, 2020 Historic Preservation Board (HPB) hearing. The HPB members discussed the correspondence and read it into the record. As you know, the Mayor ultimately recused himself from the instant appeal

before the Commission. But at the time of the HPB hearing, the Mayor served as both: an elected Official with appointment authority over Board Members; and one of the “appellate court judges” if you will, who would ultimately rule on any appeal of the HPB’s decision. This dynamic is, at a minimum, “problematic” as was explained by the City Attorney at the May 12, 2020 City Commission meeting on this appeal when the Commission discussed various forms of possible remand back to the HPB. As the City Attorney explained, the City Commission should not craft a remand arrangement whereby there would be possible improper direct communications between the Commission (as the appellate quasi-judicial body) and the HPB (over whose decisions the Commission presides as a body of appellate review). The Mayor’s “thumb on the scale” of the proceedings placed the HPB members in the position of considering their decision with the knowledge that at least one of the “appellate court judges” would view it unfavorably. Moreover, this advocacy by the Mayor no doubt had a chilling effect on the City Manager’s decision whether to prosecute an appeal of the HPB Board to the City Commission in defense of the professional City Staff and City Code, something my client has had to take up at her own expense.

Second, my non-attorney citizen client was incorrectly advised by the Office of the City Attorney that communications with the Commission members in advance of the May 12, 2020 hearing on this matter are to be “avoided” as improper ex parte communications. *See Exhibit A.* That, of course, is not the law, as the famous *Jennings* decision makes clear that such communication, while discouraged, may be duly disclosed at the commencement of the proceeding. This is the same standard featured in the City-issued recitation that is read aloud before every proceeding, and was done in this case. My client was given an admonition contrary to the law, and in stark contrast to the many hearings I have attended where developer’s counsel is permitted to recite, with a straight face: yes, we met and discussed the legislative zoning change for the project, but not the quasi-judicial site plan.

At the same time that the Office of the City Attorney was cutting my client off from communicating with her elected Public Officials, the Mayor on the other hand distributed his emails to the Commissioners with his attached memorandum in advance of the Commission’s meeting on this appeal. These communications are part of the formal record of this Item, and presumably gave rise to the Mayor’s recusal. Like the members of the HPB, this tribunal is now well aware of the Mayor’s position. As for the law on ex parte communication, suffice to say that the sauce being served to the goose is very different than that served to the gander.

Third, this appeal hearing was set to be heard electronically over my client’s vigorous objection. *See Exhibit B.* The City’s own Covid-19 materials recite that the requirements of a quasi-judicial hearing are very difficult to satisfy via electronic hearing. The City coordinated with the *Owner* of the propriety on the subject of an electronic hearing, and the Owner executed an indemnification and waiver document agreeing to the form of the hearing. But as to my client, who is the Appellant who initiated this Case, and the subject of the hearing is *her* appeal, she was *told* that the law necessitated a Zoom hearing, despite the City’s stated public policy of avoiding quasi-judicial hearings via Zoom unless special exigent circumstances are presented. *Id.* For all of the foregoing reasons, we respectfully request that this Item be re-set to allow my client to have a regular, in-person hearing in the Commission Chambers with the benefit of counsel and public

attendance, and all of the other components of due process typically present in a quasi-judicial proceeding.

II. Essential Requirements of the Law and Substantial Competent Evidence.

Failure by a local government to adhere to its own Code constitutes a departure from the essential requirements of the law. *E.g., Rosa Hotel Developers, Inc. v. City of Delray Beach*, 10 Fla. L. Weekly Supp. 600b (Fla. 15th Cir. Ct. 2003). In this case, the City's Code provides that the eligibility of any potential historic landmark "shall" be based on meeting any "one or more" of enumerated Code based criteria. *See* §3-1103, City of Coral Gables, Code of Ordinances. In this case, the professional Staff Analysis found that the Property met not one but *three* of the Code based criteria, as follows:

Exemplifies the historical, cultural, political, economic, or social trends of the community;

Portrays the environment in an era of history characterized by one (1) or more distinctive architectural styles;

Embodies those distinguishing characteristics of an architectural style, or period, or method of construction;

LHD 2019-008 Staff Recommendation at pages 3 and 23; City Code at §3-1103. The Staff Report is of course, substantial competent evidence. The conclusion of the City's professional Staff was supported by the Dade Heritage Trust, The Villagers, Historical Preservation Association of Coral Gables, Miami Design Preservation League, and the Florida Trust for Preservation.

The appeal paper filed by my client recites the following:

The Historical Resources and Cultural Arts Department clearly explained three reasons why this property is considered historic and deserves such status. These are facts. Why did the appointed Board ignore/go against this Report and Recommendation by its expert Staff?

This is a perfect explanation by a non-lawyer of the law requiring substantial competent evidence to support the decision of local quasi-judicial boards. This requirement was noted by Commissioner Mena at the last City Commission meeting on this appeal. Faced with established substantial competent evidence in the form of professional Staff analysis, the Owner was required to provide substantial competent evidence to refute that of the City's professional Staff.

The problem is, however, that out of nearly 100 total pages of transcript pages from the HPB hearing, the Owner only put on one witness, an architect, who provided a mere six pages of testimony. This testimony was limited to the fact that the Owners will be faced with economic difficulty in redeveloping the Property in the manner that they desire, that a young couple who wants a 4,000 square foot home would be unable to develop it if designated, and that the subject Property had a "transformation" so that it was "not the original house." *See Exhibit C* (selected

transcript pages). The Owner's witness testimony simply does not go to the Code based factors listed by Staff. The witness testimony put on by the Owner did not mention *any* of the three Code based criteria that the Staff established. In sum, the record before the HPB contained substantial competent evidence going to the governing Code based factors, which was not refuted or countered by competing substantial competent evidence.

III. Conclusion.

Because of the due process irregularities presented by the Mayor's submissions and the failure of the HPB to base its decision on the substantial competent evidence before it on the Code based criteria, the Commission is respectfully requested to reverse the decision of the HPB with directions to designate the Property Historic in conformity with the professional Staff Report. I will be available at the hearing to respond to any questions of the Commission as contemplated by the Agenda. In the meantime, I am available at the email address above and at 786-280-7814 to discuss this matter, with any communications subject to disclosure at the beginning of the meeting, in conformity with the *Jennings* rule.

Respectfully Submitted,



Paul C. Savage

cc: Maria V. Cerda
CityClerk@coralgables.com
City Attorney Miriam Ramos, Esq.
Andres Viglucci

EXHIBIT A

(Email from Office of the City Attorney Re: Ex Parte Communication)

From: Ceballos, Gustavo
Sent: Friday, May 1, 2020 1:02 PM
To: vicki cerda
Cc: Kautz, Kara; Ramos, Miriam
Subject: RE: 1208 Asturia Appeal/Initial questions

Good afternoon Vicki,

Just wanted to clarify the email below. Given the quasi-judicial nature of this item all communications to the commissioners about the appeal should take place during the public meeting. If you are concerned about individuals that may not be able to participate during the meeting then emails should be sent to the City Clerk for them to be made part of the record during the meeting. As we discussed on the call, because this is a quasi-judicial item any communications outside of the public meeting or without the opposing counsel/parties being present is an ex-parte communication and needs to be avoided. If you have any other questions or wish to discuss further please feel free to give me a call.

Respectfully,

Gus

Gustavo J. Ceballos, Esq., B.C.S.

Assistant City Attorney

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City, County, and Local Government Law*

City of Coral Gables

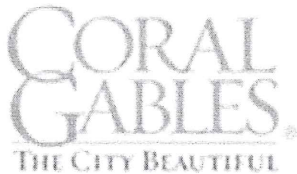
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EXHIBIT B

(Email from Office of the City Attorney Re: Electronic Hearing)

From: Ceballos, Gustavo

Sent: Monday, May 4, 2020 1:23 PM

To: vicki cerda; Ramos, Miriam; City Clerk

Cc: Kautz, Kara

Subject: RE: In Person vs Virtual for 1208 Asturia --- Precedent for Deferred Appeals Already Set by the City of Miami

Good afternoon Vicki,

In regards to the discussion about deferring this item we must take note that this property originally came for designation back in January 15, 2020 where the Board was unable to take an action. It was then scheduled for February and then could not be heard in the February meeting and had to be continued to a special meeting on March 4. The appeal was then filed and pursuant to Section 3-606 of the City of Coral Gables Zoning Code, the meeting should have taken place at the next Commission meeting but due to the evolving situation with Covid-19 it was deferred. Given that the Zoning Code requires it to be heard at the next meeting any further delay would only further increase the City's exposure for possible liability. There are general property rights that we have to keep in mind when further delaying any hearings. In regards to the Miami case, there is one significant distinguishing fact in that case, and that is that the Appellant is the Property owner. In the Miami case, further delays do not injure the Property Owner as they have no current property rights which they have been prohibited from using. In this case, the Property Owner is being prevented from moving forward with their intended scope of work until this appeal is finalized. Given the posture of this case, not allowing it go to forward could subject the City to liability. In addition, the Governor has expressly permitted the use of virtual meetings, given the global pandemic we are all facing, and the City has carefully-drafted rules of procedure to ensure due process for all involved.

Respectfully,

Gus

Gustavo J. Ceballos, Esq., B.C.S.

Assistant City Attorney

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From: vicki cerda <vicki_cerda@hotmail.com>
Sent: Monday, May 4, 2020 10:06 AM
To: Ceballos, Gustavo <gceballos@coralgables.com>; Ramos, Miriam <mramos@coralgables.com>; City Clerk <CityClerk@coralgables.com>
Cc: Kautz, Kara <KKautz@coralgables.com>
Subject: In Person vs Virtual for 1208 Asturia --- Precedent for Deferred Appeals Already Set by the City of Miami

CAUTION: External email. Do not click links or open attachments unless you recognize the sender and know the content is safe.

Dear all. As you know, from the very start I have voiced my concern about the 1208 Asturia appeal being heard virtually. This is not a hearing, but an appeal which is a very different matter. And one that does not happen very often in the city -- the last one being about 3-4 years ago. Many properties do not qualify for historic designation and are torn down. This one met 3 criteria to be a landmark – it is not just another house – and has gotten to this point for some very “unusual” reasons. The Miami Herald has also followed this matter very closely and will continue to be involved. Two more points to consider are:

1. There has been a lot of support for the historic designation of the property as you know from the unprecedented large number of letters to the city (55 letters to the Historical Resources & Cultural Arts staff & about 35 to the City Manager). Public input is important and needs to be guaranteed which is never the case when any sort of technology is involved. An appeal needs to be done in a proper setting to avoid any possible legal challenges.
2. The Miami City Commission recently set a precedent with an appeal that was deferred until it can be done in person to ensure it is being handled fairly and all voices are heard. If you are not aware of this, please see: <https://www.miamiherald.com/news/business/real-estate-news/article242203416.html> We are following the City Of Miami on our county wide emergency order for COVID-19, so why wouldn't we also follow it for this?

I received a lot of feedback last week and I respectfully request that you defer this matter until we can all safely participate in person and neighbors and interested parties have a fair and equal chance to get their views heard. Also not during a time when we are all addressing the ongoing catastrophic Covid-19 crisis that has crippled the economy and our City Beautiful. Virtual meetings are great to get the urgent business of the city. Not for this. Please do the right thing for all residents. I encourage you to consider all of the above in making the final determination.

Vicki

City of Coral Gables City Commission

May 22, 2020

Page 7

EXHIBIT C

(Historic Preservation Board Transcript Pages of Owner's Witness)

1 in home runs, he also led the league in strike-outs.

2 Not every project of a great architect rises
3 to the level of a historic landmark. Great architects
4 sometimes do just average buildings. Great architects
5 sometimes do what their clients are obligating them to do,
6 what the economic circumstances are obligating them to do,
7 what other limitations might be obligating them to do.

8 With that said, let's go and get deeper into
9 the merits with Mr. Pacheco's help and talk about
10 historical and architectural significance. If we could
11 bring up the Power Point presentation, yes.

12 Mr. Pacheco, were you sworn earlier as a
13 witness?

14 MR. PACHECO: Yes, I did.

15 MR. GARCIA-SERRA: Okay. Ramon, here, we've
16 got a street view of the property indicating the
17 properties to its immediate left and right which were both
18 constructed in the 1920s, one of which is already
19 designated historic.

20 MR. PACHECO: Thank you.

21 MR. GARCIA-SERRA: An observation of the
22 block that I have made is that it is predominantly
23 Mediterranean style in architect, in architecture. This
24 home is a bit of an anomaly here and an anomaly which I
25 think is a significant, historically architecturally

1 significant anomaly.

2 Ramon, if you could just elaborate further
3 and advise what your opinion is.

4 MR. PACHECO: Okay. Good afternoon to
5 everybody. As a graduate architect of the University of
6 Florida in 1968, the first office that I have to work for
7 was from Pancoast, Ferendino and Grafton. I worked there
8 and with a great honor to Russell, which I admire
9 tremendously.

10 I feel that this house had compromises that I
11 don't think Russell had intended to do it, and I analyze
12 to save the property first. I analyze it, how can we grow
13 into this property, how can we make it work?

14 I have done two houses in Asturia. One was
15 historical, and we're very close to, with the historical
16 preservation board. I respect them tremendously and I
17 respect what they're doing for the city, but in this case,
18 honestly, I don't agree.

19 If you see the survey that I handed to all of
20 you, I don't think was the intention of Russell to have
21 this house two feet, eight inches from the next-door
22 property that was existing there already.

23 Things happen in the construction a lot of
24 time. There are compromises, and a lot of the times we
25 have to have, we have to have compromises, and I think

1 Russell was forced to compromise. I don't know what was
2 the code at that time, but you don't do a house two feet,
3 eight inches away from a property and seven inches on the
4 other side -- seven feet on the other side.

5 What happened is, if we see the value of this
6 property, which probably it's between 800 and a million
7 dollar, and you know that you have to do new electrical,
8 new plumbing, new air-conditioning, new repairs -- they
9 did a report -- new roofing, new windows, it's going to go
10 over the 50 percent rule. When you go over the 50 percent
11 rule, you have to bring the house to code, or not. That's
12 something that probably they can tell me.

13 He pushed the house back ten feet than what
14 is required. The set-back in the front is 25. He push it
15 35 feet, why it's limiting to me to add toward the back
16 ten feet, which I thought is help -- is not helping the
17 situation.

18 By the way, I don't have any economical issue
19 on this, being here. I'm here because of a principle. I
20 think the case has to be studied extremely well, and I
21 don't think it has been, and I admire the report for
22 ranch-house houses.

23 I feel that if you see that survey, there's
24 no way you can add to the back to have a house for a young
25 couple that wants to grow a family there, that wants to

1 have at least 4,000-square-foot home. The house right now
2 is 2,300.

3 How can you grow toward the back? Two story?
4 I don't recommend it. You're going to eat the lot
5 coverage of the house, you're not going to have lot
6 coverage, and that is not going to be approved. If we
7 have to follow the rule of the 50 percent, this house is
8 not going to be possible to expand it.

9 This is my way to see this property. I
10 think, honestly, it's not a Russell Pancoast.

11 I remodel in Star Island a Russell Pancoast
12 house that was magnificent. My principle was bring
13 everything to what Russell Pancoast wanted to have.

14 We found the microfilms, and we did not only
15 exteriorly, we did interiorly everything the way Russell
16 had it, because all these houses have transformation.

17 This one had had already transformation.
18 This is not the original house that Russell did. It has
19 transformation.

20 So I think you need to look at all those
21 issues. This is not the original house, and that's what
22 I'm here.

23 MR. GARCIA-SERRA: Thank you, Ramon.

24 MR. PACHECO: Okay? Thank you.

25 MR. GARCIA-SERRA: Sort of synopsis of what

1 MR. PACHECO: Yes. Something else that I
2 forgot to tell you is that you see this house is in
3 between two Mediterranean homes that were built in 1920 --
4 when this house was built, there were only two houses that
5 were built already.

6 I find very strange that Russell didn't pay
7 attention to what he had next door which are two -- one
8 historical, the other one I don't know, but I think
9 probably is going to be historical. They were built much
10 before, before that.

11 Didn't pay attention, and that's strange
12 because this guy was very talented. He -- that's what I
13 -- I don't want to give him the full credit because I see
14 so many issues here that I don't think he was able to do.

15 He loved, he loved, he loved Art Deco
16 tremendously, and I see very little Art Deco here.

17 I knows it's ranch, I'm sure it's ranch, but
18 this is not the best ranch in Coral Gables.

19 Coral Gables also is the the best investment
20 for any person that wants to invest in South Florida.
21 When you buy a lot for 800 to a million dollars in
22 Asturia, you need to, you need to know that your
23 investments are secure.

24 This investment is not secure. It's very
25 difficult for my client to collect this money, and you can

1 -- and they can tell you how much they pay. I'm not sure,
2 but I think it -- I know from my own clients how much they
3 paid, so you need to put in balance that also.

4 I don't want a house that because it become
5 historic, I depreciate the value. It should increase the
6 value, and that to me is extremely important for Coral
7 Gables.

8 You cannot make any house historical. The
9 value has to go up, not go down. Today, in economic
10 reasons that we have today, we have to make the houses to
11 improve the price, and I know it's not this case at this
12 time. So thank you for listening to me.

13 MR. GARCIA-SERRA: Thank you, Ramon. Ninety
14 percent of our presentation has -- was this discussion of
15 whether we think it reaches to the level of being
16 recognized as a historic landmark, but I would be remiss
17 if I didn't talk about process and I didn't talk about
18 policy, because that's important here also, and it
19 dovetails quite well with what Mr. Pacheco was saying
20 right now.

21 When you're talking about historic
22 preservation, it's one thing when you're talking about
23 historic preservation with the public sector being
24 involved. Sometimes there are buildings of such importance
25 that government needs to come in and acquire those to make