

**City of Coral Gables City Commission Meeting**  
**Agenda Item E-1**  
**September 14, 2010**  
**City Commission Chambers**  
**405 Biltmore Way, Coral Gables, FL**

**City Commission**

**Mayor Donald D. Slesnick, II**  
**Vice Mayor William H. Kerdyk, Jr.**  
**Commissioner Maria Anderson**  
**Commissioner Rafael "Ralph" Cabrera, Jr.**  
**Commissioner Wayne "Chip" Withers**

**City Staff**

**City Manager, Patrick Salerno**  
**City Attorney, Elizabeth Hernandez**  
**City Clerk, Walter J. Foeman**  
**Deputy City Clerk, Billy Urquia**  
**Assistant City Attorney, Lourdes Alfonsin**

**Public Speaker(s)**

**Jemima Cubas Toyos, Applicant**  
**Lowell Kuvin, Attorney Representing Applicant**

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E-1

Case File LHD 2003-18 REVISED

Lowell J. Kuvin, applicant, has filed an appeal to the Coral Gables City Commission from a decision of the Historic Preservation Board at its regular meeting of May 20, 2010.

**Summary of Appeal:**

The Historic Preservation Board at its regular hearing on May 20, 2010 made a motion to deny the de-designation of the historic designation of the property at 1044 Coral Way, legally described as Lot 1 and the west 32 feet of Lot 2, Block 11, Coral Gables Section "A", PB 5-102. (Passed unanimously 8-0). The applicant is appealing the decision of the Historic Preservation Board to deny the removal of local historic landmark status from the property. (Deferred from the August 24, 2010 City Commission Meeting)

Mayor Slesnick: So what we have now is we have E-1, it is an appeal from the Historic Preservation Board. It's an appeal, I'll give you a summary here it's the Historic Preservation Board at its regular hearing on May 20<sup>th</sup>, made a motion to deny the de-designation of the historic designation of property at 1044 Coral Way, legally described as Lot 1, west 32 feet of Lot 2, Block 11, Coral Gables Section "A" PB 5-102. (Passed

unanimously 8-0). The applicant is appealing the decision of the Historic Preservation Board, to deny the removal of “Local Historic Landmark” status from the property. At our last meeting when this came before us, the City Attorney took the opinion, or gave the opinion to the City Commission, that this was not properly before us. And that because of the concepts of stare decisis, and...

Ms. Alfonsin: Res Judicata.

Mayor Slesnick: Res Judicata, thank you very much, that it was not properly before us. Mr. Kuvin, the attorney for the Toyos, accepted to that and said that he felt that he was not given enough time to respond to that. And so we allowed that we would continue that to this meeting, and have a presentation. Since that time Mr. Kuvin has filed a brief with the City Commission on the issue, as has the City Attorney. So is Mr. Kuvin here today? Yes?

Ms. Toyos: We'd like to postpone it for a little later he hasn't gotten here yet. We spoke to him on Friday, and he said he was coming. However, we haven't heard from him this morning.

Mayor Slesnick: Well we can come back to it, but if it's past 10:30 a.m. it's going to be a long time coming back to it. We have, let me say this, even if he doesn't show, we have the briefs. We have been fully briefed by both sides so we have the legal arguments. Mr. Kuvin presented a cogent argument, as did the City Attorney. We can rule on it today, whether he shows or not OK.

Ms. Toyos: Alright.

Mayor Slesnick: I mean we have the legal argument so... But I'll give the courtesy that before we start the University of Miami hearing, we'll come back to this, and dispose of it then. OK. If he can make it, great.

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Mayor Slesnick: I see that Mr. Kuvin has entered the room so we will go back to E-1. Mr. Kuvin we've already read into the record what E-1 is an appeal of the Historic Preservation board, I have already read it into the record. I have also stated that based on our deferral last time you have submitted a memorandum of law and so has the City Attorney. And you can take a ...Each of us have your memorandum of law, and we have the City Attorney, so I don't think that we need to spend a great deal of time, but certainly if you would like to take a few minutes to explain your memorandum, if you think that we haven't understood it, and we certainly have the right to ask questions.

Mr. Kuvin: Thank you very much Mayor Slesnick, it's very simple, the city is arguing that collateral estoppel or res judicata applies in this particular instance. However they do

not apply and the reason is because the city if they wanted to object to the application to have the de-designation removed from 1044 Coral Way, had the burden of proving that res judicata or collateral estoppel apply, and to do that they needed to raise the argument in one of two ways: either they'd have an agenda item put on the Historical Preservation Board agenda before it, or to object the Toyos' asking to have the de-designation taken away. They did not do either, and then basically what happened was that the Historical Preservation Board heard the issue and decided not to remove the de-designation. However, during the argument the city did raise the issue of collateral estoppel and res judicata and the arguments were summarily rejected by the Board. I would argue also that today because of collateral estoppel that the city should be precluded from arguing that here because of the fact that (a) they did not make an appeal, and (b) that they needed to have that appeal, but they're arguing something that the board summarily rejected. And so they are estopped from arguing it again which is exactly the same issue that they are trying to argue here. They are getting a "second bite of the apple" today by arguing this. This City Commission should not be hearing an issue for the first time, and I think that's what their argument is going to be in some way so that's my argument.

Mayor Slesnick: Thank you.

Mr. Kuvin: I think that res judicata and collateral estoppel does not apply and that we should go ahead with hearing arguments on whether the Toyos' should be able to de-designate their property basically for you to override the Historical Preservation Board decision.

Mayor Slesnick: Thank you.

Ms. Alfonsin: If I may respond just to the argument.

Mayor Slesnick: Sure why don't you introduce yourself.

Ms. Alfonsin: Lourdes Alfonsin Ruiz, Assistant City Attorney for the City of Coral Gables. Just to respond to whether the Board actually heard the motion to dismiss. No it did not. I argued the motion to dismiss, there was no vote taken, there was a comment made or a couple of comments made by one of the Board members where tried to explain by "taking a bite of a second apple," with the same set of facts, which is the case here. The argument made in 2007 at the June 2007 Board meeting was an argument of economic undue hardship. It was the same argument made in the May 2010 Board meeting. There were no new set of facts. In fact, in the request for de-designation in 2010, Mr. and Mrs. Toyos' wrote a letter, and in that letter specifically said for the last 6 years, we've been in economic undue hardship. So it was the identical argument. I move to dismiss the new argument on economic undue hardship based on the res judicata argument. There was one comment made and the Board never voted on it, and there was never a motion made on it.

Mayor Slesnick: OK. If the Commission would allow me...

Commissioner Withers: Please.

Mayor Slesnick: Can I take a shot at this?

Commissioner Withers: Yes.

Mayor Slesnick: I read and studied the memorandums of law and I thought that Mr. Kuvin made some good points as he argued his case. As did the City Attorney, and I really believe that after reviewing the two that I would agree with Mr. Kuvin that the Historic Preservation Board is the proper place to determine whether or not these are the same material facts and whether or not they had decided this case previously and whether res judicata applied. And I believe, and I listened to the City Attorney and the Assistant City Attorney that the Board did not make that determination, did not consider that specifically. They went on to decide, so I would think my humble suggestion is we send it back to Historic Preservation Board with specific instructions that they are to decide the matter before them which is res judicata. Did they decide this on the same exact facts?-or are there other substantial differences? In this case versus the case they had already decided previously. And that if they decide that they are not barred from hearing this case, they've already made their decision that will come back to us on appeal. If they decide that in fact they are barred from hearing this case, Mr. Kuvin has his right of court.

Commissioner Withers: May I ask a question?

Mayor Slesnick: Yes.

Commissioner Withers: Why wasn't there a decision reached? Why wasn't there a decision made at the board? Is it just they didn't feel they had enough information?

Ms. Alfonsin: I tried to explain that if the argument was the same on undue economic hardship and they didn't understand that you can't come back under the same argument, no vote was taken. The only vote that was taken and the only motion that was made was on de-designation itself.

Commissioner Withers: So you know its pure speculation, but do you think they didn't vote because they didn't think they had to vote?

Ms. Alfonsin: I don't believe they understood the process.

Commissioner Withers: OK.

Mayor Slesnick: The transcript is that Mr. Heisenbottle made a few comments like, "well why don't we consider this again?" "I don't understand why we can't ever come back?" And then, they just went on.

Commissioner Withers: Yes that's what I was... it stopped at that point.

Ms. Alfonsin: It stopped at that point. And I don't believe that they understood what the process was and what res judicata was.

Mayor Slesnick: OK.

Ms. Alfonsin: I think the motion now...

Mayor Slesnick: But this would go back with specific instructions to Board: number one, you need to determine and decide whether you have determined this case on substantially the same facts or not. If you have then you are barred from hearing the case and you should dismiss it. Mr. Kuvin has a right to appeal. If you determine that there are substantially new facts that you did not decide before you, you have already made your decision and then it would come to us automatically on appeal because they've already determined that so.

Commissioner Anderson: I agree Mr. Mayor. I think that's it for me that will work as well.

Mr. Kuvin: If I may just say one thing, I object to the characterization that this was about economic hardship. It was not about economic hardship in front of the Historical Preservation Board. It was about that the property had lost its characteristic, its house and that was the basis of our asking to have the de-designation. It was under the Title 36 of the Code of Federal Regulations, which state that the National Historic Landmark will be considered for withdrawal, with designation only at the request of the owner or upon the initiative of the secretary. And that there are four justifications for doing this and the one that we had applied for the one that we had asked for was that the property seized to meet the criteria for designation because the qualities which caused it to be originally designated had been lost or destroyed. That was the basis of our

Mayor Slesnick: That is the federal law for National Historic Landmarks.

Mr. Kuvin: It's a federal law...Mayor.

Mayor Slesnick: Yes, but this is not a National Historic Landmark.

Mr. Kuvin: But the problem was is that the city does not have a method in which to de-designate a property on the books. So we went to the...

Mayor Slesnick: Well I appreciate you coming here...

Ms. Alfonsin: However Mr. Mayor, the request that was made by Mr. and Mrs. Toyos in April of 2007 was facing economic hardship, which has been accumulating for over a four year period. Again April 30<sup>th</sup> of 2007, the economic hardship that we are enduring each additional month, and then in 2010 they say the economic hardship that we've been enduring for six years.

Mayor Slesnick: OK. I appreciate that. That argument can be made to the Preservation Board.

Commissioner Anderson: That's fine.

**Mayor Slesnick: Do I have a motion?**

**Commissioner Anderson: I'll move that.**

**Mayor Slesnick: Is there a second?**

**Commissioner Withers: Second.**

Mayor Slesnick: OK. It has been moved and seconded that this Commission is sending back this case to the Historic Preservation Board for the determination by them whether or not there are substantial differences or basis for the appeal of the Toyos of which they decided the case or whether or not this is not substantially different and therefore it has been predetermined already by the prior..

Commissioner Cabrera: And then the applicant, if they do not get a favorable outcome to this has the right to appeal again.

Mayor Slesnick: If the Board determines that they are prohibited from hearing the case again cause of the theory of res judicata and collateral estoppel whatever, then his appeal is to the courts. He's made the argument that the Board is the proper decider of this determination.

Commissioner Cabrera: So that's what I wanted to clarify.

Mayor Slesnick: I don't know if the City Attorney says they can come here, they could come here.

Ms. Alfonsin: They would come here.

Mayor Slesnick: OK. They can come here.

Ms. Alfonsin: They would come here and that's why you could make the determination today.

Mayor Slesnick: OK.

Ms. Alfonsin: On the dismissal.

Mayor Slesnick: I don't think we can make the determination today unless we have our Board determine whether the facts are substantially different or not.

Ms. Alfonsin: And I would suggest at this point to remand it to the Historic Preservation Board, but what would occur then at that point is if the Historic Preservation Board agrees with the city's argument on res judicata and would come back to the City Commission on appeal by Mr. Kuvin and vice versa, if the board disagrees with the city's argument on res judicata the city has an opportunity to appeal to the Commission.

Commissioner Cabrera: The citizen?

Ms. Alfonsin: The city, the city staff.

Mayor Slesnick: If they do not agree with res judicata as a principle that prohibits them, then there is already an appeal before us on the merits of the case. You can add to that on appeal of their decision on res judicata. But if they say we are not prohibited from hearing this case, we think there are substantial differences, but we've heard it and we've decided it, then it's already back here. And we'll hear the case on merits. And if you want to add appeal on their decision on res judicata you may.

Mr. Kuvin: I would object to that, and the reason being is just that because now they're getting "a second bite at the apple." They are collaterally estopped from arguing collateral estoppel because...

Mayor Slesnick: OK. Mr. Kuvin I appreciate that and I think I have shown subdued respect for your brief and a lot of my thinking is based on your argument. And the fact is I do not believe the Board did consider in any formal manner that issue

Commissioner Withers. They didn't.

Mayor Slesnick: Mr. Clerk.

**Commissioner Anderson: Yes**

**Commissioner Cabrera: Yes**

**Vice Mayor Kerdyk: Yes**

**Commissioner Withers: Yes**

**Mayor Slesnick: Yes**

**(Vote: 5-0)**

Commissioner Withers: Don, may I ask Lowell a question?- and you could answer this, you could dance around it, you can you know and maybe if it's totally inappropriate stop me or stop them, but I want to ask this question. Do you feel that this whole process and the denial is based on some kind of retaliatory position that the city's taking for letting the property deteriorate, degrade and all that?

Mr. Kuvin: No I don't Mr. Withers. I believe that this whole process is because there is a subjective idea of what the Historical Preservation Board wants on that property and I think if you read through the record very carefully, that you'll see several instances where people say, Board members say, I don't want to see another Mac Mansion there. I don't want to see a contemporary house there. I believe that what fell through the cracks was that Building and Zoning didn't go and cite the building and have it shored up to keep it from collapsing, and that was not only their fault, but maybe even my clients fault a little bit. But nobody knew it was going to collapse because I believe that they would have done so if they had known it was in danger of collapsing, but that's what I believe it is.

Vice Mayor Kerdyk: You know there's one other argument that's totally outside this, and when staff comes back and presents I would like them to also talk a little bit about the designation of the Coral Way corridor because I know that is on the books to designate that corridor and this would be a nonconforming use in that; and I'd like to know how that really stacks up and maybe you can brief the Commission on what the intentions of this are for the city, thank you.

Commissioner Withers: Have there been any plans submitted? Site plans, or architectural renderings?

Mr. Kuvin: The Toyos have spent tens of thousands of dollars, Commissioner, on plans.

Commissioner Withers: Right.

Mr. Kuvin: Plans that incorporated the house as it stood there.

Commissioner Withers: I remember that.

Mr. Kuvin: And plans that have not incorporated the house after it collapsed. So they've spent tens of thousands of dollars in many years trying to get this done. I believe what's holding this up and what has caused them a lot of issues is that there's a subjective idea of Historical Preservation Board members, or maybe even people in the city that want a specific type of house there. And I believe that the property is being encumbered by those subjective ideas. I believe that the Board of Architects should be able to just say, "this is what kind of house you want built? That's fine, meet the City Code, meet the zoning ordinances not a problem." That's why we're asking for de-designation.

Ms. Alfonsin: If I may Commissioner, there were plans that were approved. Both sides were happy with the plans and they even received a variance from the Historic Preservation Board on the square footage and on moving the house a little further to the east. So there were plans that were approved.

Commissioner Anderson: But there were some delays on both sides.

Commissioner Withers: So what happened to that?

Unknown: The house collapsed.

[Inaudible]

Commissioner Withers: But I'm talking about a new... It's raised now has there been anything submitted on a new design, without the house?

Ms. Alfonsin: Yes.

Commissioner Withers: OK.

Ms. Alfonsin: And they were approved and nothing happened with those plans the year of the variance elapsed, and then the next thing we knew, there was a request for designation again.

Mr. Kuvin: Actually to be honest, to be more accurate is that the plans were approved to a certain extent. It went to the Historic Preservation Board, but then at that particular meeting said, well the windows should be a little smaller, maybe the walls shouldn't be like this and that's the point where my clients were a little bit upset by going through seven years of this subjective intent.

Mayor Slesnick: OK. Thank you very much and by the way, Kara please you need to, we've got all kinds of copies of all this material that can be held on to and utilized again, and then, if you'll check with other Commissioners for their material.

Commissioner Withers: Thank you.

Mayor Slesnick: We had a card to speak from Dolly McIntyre, but Dolly we do not allow members of the Board to speak, but we noticed your presence. We thank you for your service on the Board. Thank you.