NOT FINAL UNTIL DISPOSITION
OF TIMELY-FILED MOTION FOR
REHEARING OR CLARIFICATION

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

APPELLATE CASE NO.: 2020-157-AP-01

BAYSHORE IN GROVE, INC.,

RACHEL CARDELLO; ISAAC KODSI; and ALEXANDER MOSKOVITZ,

Petitioners,

LOWER TRIBUNAL: Items 6981 and 6982
City Commission of the City of Miami

v.

THE CITY OF MIAMI and THE CONVENT
OF THE SACRED HEART OF MIAMI, INC.,
Respondents.
_____/

Opinion filed: _____, 2020.

On a Petition for Writ of Certiorari Seeking to Quash the City of Miami Commission's Denial of Intervention Status to the Petitioners.

Glen H. Waldman of Waldman Barnett, P.L., for the Petitioners.

Victoria Mendez, City Attorney and John A. Greco, Deputy City Attorney, City of Miami, for the Respondent.

Elliot H. Scherker, Brigid F. Cech Samole, Ryan Bailine and Ethan Wasserman, of Greenberg Traurig, P.A., for The Convent of the Sacred Heart of Miami, Inc., Respondent.

Before: TRAWICK, WALSH, and GUZMAN, JJ.

TRAWICK, J.

The Respondent, the Convent of the Sacred Heart of Miami, Inc. ("Carrollton") filed an application with the City of Miami Historic and Environmental Preservation Board ("HEPB") seeking a Certificate of Approval to develop a boy's school on Carrollton's property ("the Property"). The HEPB denied Carrollton's application, and the matter went before the City Commission (The Commission") for an appeal. Petitioners, Bayshore In Grove, Inc. ("Bayshore"), together with Rachell Cardello, Isaac Kodsi and Alexander Moskovitz (the "Immediate Neighbors"), sought intervenor status before the Commission, which was denied. Petitioners now seek to quash the Commission's decision to deny them intervenor status in this petition for writ of certiorari.

The Property is located on South Bayshore Drive, designated as a scenic transportation corridor.[1] It consists of approximately 3.695 acres and includes the Villa Woodbine, a 5,658 square foot historic mansion, currently housing a campus for an all girl's school. An unimproved section of the property includes part of the Coastal Atlantic Ridge, known as Silver Bluff, a protected element of

[1] A scenic transportation corridor is a roadway identified as having "a unique landscape character and/or an expansive tree canopy that is of substantial environmental importance to the city, as described in subsection 17-31(3)." Code section 23-2 (Definitions).

Environmental Preservation District 6.[2] Carrollton is seeking approval from the City to construct an approximately 9,282 square foot auditorium; 23,730 square foot academic building; 70 by 100 square foot swimming pool; and a new upper and lower deck on the Property. Carrollton is also seeking permission to develop and operate a campus for an all-boys school designed for 336 students plus 50 faculty on the Property (the "Project").

The Project requires multiple approvals, including approvals under Chapters 17 (Environmental Preservation) and 23 (Historic Preservation) of the Miami Code of Ordinances (the "Code"), in addition to zoning approval under the Miami 21 (Zoning Code). The HEPB serves as a quasi-judicial instrument for granting or denying the applications for Special Certificates of Appropriateness and Certificates of Approval. *See* Code section 17-29 (Historic and Environmental Preservation Board) and Code section 23-6.2 (Certificates of Appropriateness). Special Certificates of Approval require the approval of the HEPB for new development that involve removal of existing trees from the site or alteration of other environmentally significant features. *See* Code section 17-33(a)(2) (Removal of trees and development activity within preservation districts). Certificates of Appropriateness are "required for any new construction, alteration, relocation, or

[2] Environmental preservation districts are "[g]eographical areas, parcels or corridors, which have been or may be identified, are established by the city commission as significant natural or manmade attributes in need of preservation and control because of their educational, economic, ecological and environmental importance to the welfare of the general public and the city as a whole." Code section 17-2 (Definitions).

demolition within a designated historic site. . . .” Code section 23-6.2 (Certificates of appropriateness).[3] The Project also requires a Zoning Permit allowing an exception for development of a school in a residential neighborhood, which can only be obtained upon review by the City’s Planning and Zoning Appeals Board (the “PZAB”).

The HEPB considered but denied Carrollton’s applications for the Special Certificate of Approval and Certificate of Appropriateness,[4] after which Carrollton appealed the HEPB’s denial of its applications to the Commission. The Petitioners then sought to intervene in Carrollton’s appeal to the Commission to oppose Carrollton’s appeal of its applications.[5] The Petitioners are the Immediate Neighbors who own abutting residences that are within 500 feet of the Project, as well as the Association which was formed to advocate on behalf of its members, which includes the Immediate Neighbors. Carrollton’s appeal was heard by the Commission on June 25, 2020, and July 23, 2020. The Petitioners and their attorneys participated in these hearings, but their request to intervene was denied by a 3-1 vote of the Commission. The Commission deferred action on Carrollton’s appeal first to the September 2020 Commission hearing. The Petitioners filed their

[3] Further, alterations or new construction “shall not adversely affect the historic, architectural, or aesthetic character of the subject structure or the relationship and congruity between the subject structure and its neighboring structures and surroundings . . .” Code section 23-6.2(h).

[4] The Petitioners sought to intervene in the HEPB proceedings, but the Board denied intervention.

[5] At the time of the filing of the Petition, the Project had not yet been reviewed by the PZAB.

Petition for Writ of Certiorari seeking to quash the Commission's denial of their right to intervene. At their September 10, 2020 meeting, the Commission indefinitely deferred action on Carrollton's appeal.

Certiorari review by the circuit court requires a determination as to whether: (1) procedural due process was accorded, (2) the essential requirements of the law were observed; and, (3) the administrative findings and judgment were supported by competent substantial evidence. *City of Deerfield Beach v. Vaillant*, 419 So. 2d 624, 626 (Fla. 1982).

As an initial procedural matter, we note that, "[a] party cannot appeal a wholly favorable order." *Bank of New York Mellon v. Pearson*, 212 So. 3d 1071, 1073 (Fla. 3d DCA 2017). Ordinarily, a party may only appeal from a judgment that is adverse to him in some respect. *See Credit Indus. Co. v. Remark Chem. Co.*, 67 So. 2d 540, 541 (Fla. 1953); *see also Van Tran v. Deutsche Bank National Trust Company*, 302 So. 3d 990 fn 1 (Fla. 3d DCA 2020). The HEPB issued adverse decisions against Carrollton when denying its applications for a Special Certificate of Approval and Certificate of Appropriateness. The HEPB's decisions are in line with and not adverse to the Petitioners' position. However, the Commission has deferred a decision on Carrollton's appeal. It is quite possible that the Commission might at some point in the future affirm rather than reverse the HEPB's decisions, which could result in no adverse ruling to the Petitioners. The Petitioners have thus

not suffered injury based on an adverse decision. Accordingly, Petitioners' challenge is premature. *See Estate of Tippett,* at 533.

Procedural Due Process

"Generally, due process requirements are met in a quasi-judicial proceeding 'if the parties are provided notice of the hearing and an opportunity to be heard.'" *A & S Entertainment, LLC v. Florida Department of Revenue*, 282 So. 3d 905, 909 (Fla. 3d DCA 2019) (citations omitted). "[T]he opportunity to be heard must be meaningful, full and fair, and not merely colorable or illusive." *Rucker v. City of Ocala,* 684 So. 2d 836, 841 (Fla. 1st DCA 1996). "The 'core' of due process is the right to notice and an opportunity to be heard." *Carillon v. Seminole County,* 45 So. 3d 7, 9 (Fla. 5th DCA 2010). Further, "[t]he extent of procedural due process protection varies with the character of the interest and the nature of the proceeding involved." *Id.* at 9-10.

The Petitioners received notice, they were represented by counsel and they participated in the proceedings just like any other interested citizens. They provided testimony concerning their interests as well as their objections to the proposed Project. Consideration of the fiscal and administrative burdens attendant to quasi-judicial proceedings militate against additional procedural requirements. A determination that the Commission should afford further procedural rights, such as granting all neighboring landowners the right to cross examine witnesses, "would

create a cumbersome, unwieldy procedural nightmare for local government bodies. *See Carillon,* 45 So. 3d at 11(citation omitted). Accordingly, there was no violation of due process by the Commission in denying the Petitioners the opportunity to intervene.

Essential Requirements of the Law

Code section 17.40(b) (Appeals) provides in part that, "[a]ny citizen may appeal any decision of the historic and environmental preservation board as it relates to this article, to the city commission….The city commission shall hear and consider all facts material to the appeal . . . ." Furthermore, Code section 23-6.2(e) (Certificates of appropriateness) provides in part that, "[t]he applicant, the planning department, or any aggrieved party may appeal to the city commission any decision of the board on matters relating to . . . certificates of appropriateness . . . . The appeal shall be by de novo hearing and the city commission may consider new evidence or materials." However, neither Chapter 17 (Environmental Preservation) nor Chapter 23 (Historic Preservation) contains a provision providing for the right to intervene. The Commission is obviously aware of their ability to allow intervention, as it specifically provides for intervention in Miami 21 (the City's Zoning Code). Miami 21 section 7.1.4.3.d. (Definitions) defines an Intervenor as "a person whose interests in the proceeding are adversely affected in a manner greater than those of the general public." Section 7.1.4.3.g states that a "[p]arty

shall mean the Applicant, the city staff, and any person recognized by the Decision-making body as a qualified Intervenor." As a Party, each intervener has "the right to call and examine witnesses, to introduce exhibits, to cross-examine opposing witnesses on any relevant matter . . . and to rebut evidence." Section 7.1.4.4.a provides that "[a] qualified Intervenor may make a presentation, conduct cross-examination and make final arguments in the order as decided by the chair." Miami 21 Zoning Code 7.1.4.5.b.

Petitioners argue that section 7.1.4.3.d of Miami 21 affords intervention rights in their appeal to the Commission of the HEBP denial. Under the cannon of *expressio unius est exclusio alterius,* the notable absence of any provision for intervention in Chapter 17 and 23 must be construed to mean that the City did not intend to extend such a right in proceedings under those Code Chapters. [6] "Municipal ordinances are subject to the same rules of construction as are state statutes." *Rinker Materials Corp. v. City of North Miami,* 268 So. 2d 552, 553 (Fla. 1973). "When interpreting a statute and attempting to discern legislative intent, courts must first look at the actual language used in the statute." *Joshua v. City of Gainesville*, 786 So. 2d 432, 435 (Fla. 2000). "It is a general canon of statutory construction that when the legislature includes particular language in one section of a statute but not in another section of the same statute, the omitted language is

[6] "Under the canon of statutory construction *expressio unius est exclusio alterius,* the mention of one thing implies the exclusion of another." *State v. Hearns,* 961 So. 2d 211, 219 (Fla. 2007).

presumed to have been excluded intentionally." *L.K. v. Department of Juvenile Justice*, 917 So. 2d 919, 921 (Fla. 1st DCA 2005). Where the Legislature includes in one section of a chapter a certain right and excludes it in another, the courts ordinarily construe this to be a deliberate omission. *National Rental Car v. Sanchez,* 349 So. 2d 829, 830 (Fla. 3d DCA 1997).

As is evident from our review of Chapter 17, Chapter 23 and Miami 21, the City intended to allow intervention in zoning proceedings while not allowing intervention in historic and environmental preservation proceedings. As the Third District Court of Appeal noted in considering different procedures in HEPB and zoning matters

> [T]he Historic Preservation Board has procedures and standards distinct from the board, procedures and standards governing general zoning decisions. Whereas historic preservation is concerned with protecting historic structures and significant existing architecture, zoning concerns the use of land, as well as the density and the location of buildings on the land. [citation omitted] Therefore, a rational basis exists to separate historic preservation from zoning decisions, because historic preservation decisions involve a special expertise and require considerations of criteria and purpose that differ from those of zoning.

Estate of Tippett v. City of Miami, 645 So. 2d 533, 537-8 (Fla. 3d DCA 1994) (Gersten, J.,concurring).

Accordingly, we find that there was no violation of the essential requirements of law in denying intervention under Chapters 17 and 23.

Competent Substantial Evidence

Competent substantial evidence has been defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Williams v. Crist*, 831 So. 2d 818, 819 (Fla. 3d DCA 2002) (citing *Duval Utility Co. v. Florida Public Service Commission*, 380 So. 2d 1028, 1031 (Fla. 1980)). The evidence presented to the Commission included the testimony of the Petitioners and City Attorney, correspondence between the City and Petitioners' counsels, and the language of Resolutions 6981 and 6982. It appears that there was sufficient competent substantial evidence to support the denial the Petitioner's request for intervention.

Based upon the above analysis, the Petition for Writ of Certiorari is hereby DENIED. It should be noted that this opinion in no way addresses the actual merits of the underlying issues presented in the appeal submitted to the Commission for resolution.

WALSH and GUZMAN, JJ., concur.

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