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 DIVISION
CASE NO.: 2023-13 AP 01

SETAI RESORT & RESIDENCES
CONDOMINIUM ASSOCIATION, INC.,
a Florida Not for Profit Corporation;
and DR. STEPHEN SOLOWAY,
an individual.

Petitioners,

v.

SHORE CLUB PROPERTY OWNER,
LLC., a Foreign Limited Liability Company;
and THE CITY OF MIAMI BEACH, a
Florida municipal corporation.

Respondents.
_____/

**OPINION**

Opinion filed: April 11, 2024

On Petition for Writ of Certiorari from the Special Magistrate of the Historic Preservation Board's affirmance of an order from the City of

Miami Beach Historic Preservation Board.

Kent Harrison Robbins, the Law Offices of Kent Harrison Robbins, P.A., for Setai Resort & Residences Condominium Association, Inc., and Dr. Stephen Soloway, Petitioners.

Rafael A. Paz, City Attorney, Nicholas E. Kallergis, Deputy City Attorney, and Freddi R. Mack, Senior Assistant City Attorney, City Attorney's Office, for City of Miami Beach, Respondent.

Michael W. Larkin and Nicholas J. Rodriguez, Bercow Radell Fernandez Larkin & Tapanes, PLLC, for Shore Club Property Owner, LLC, Respondent.

Neisen O. Kasdin, Joni Armstrong Coffey, and Kristofer D. Machado, Akerman LLP, for Shore Club Property Owner, LLC, Respondent.

Before: TRAWICK, SANTOVENIA, and ARECES, R., JJ.

SANTOVENIA, J.

**Factual Background**

Petitioner Setai Resort & Residences Condominium Association, Inc., ("Association" or "Setai") is the owner of the Setai Condominium property located at 2001 Collins Avenue, Miami Beach. Petitioner Dr. Stephen Soloway ("Dr. Soloway") owns residential unit 3701 at the Setai (collectively, the Association and Dr. Soloway are known as the "Petitioners").

Respondent, the City of Miami Beach's ("City") Historic Preservation Board reviews, *inter alia,* certificates of appropriateness

in the City's designated historic districts. Respondent Shore Club Property Owner, LLC, ("Applicant" or "Shore Club") is the owner of property located at 1901 Collins Avenue in the City ("Property"). The Setai and Shore Club are located across the street from each other.

The Shore Club filed a Board Hearing Application ("Application") requesting a certificate of appropriateness ("COA") for the Property with the City of Miami Beach Historic Preservation Board ("HPB"), and the HPB held a hearing to consider the Application. The project for the Property envisions the demolition of, renovation of and new additions to the Shore Club ("Project").[1] The February 8, 2022, hearing was deferred at the request of the Applicant to March 8, 2022 in order to submit revised plans in response to HPB comment. On March 8, 2022, a second hearing was held by the HPB. The HPB discussed the Application, accepted testimony, denied the Application, by a 3-3 vote, and then continued the hearing to May 10, 2022, to revise plans pursuant to staff and HPB's comments.

[1] The Application requested a Certificate of Appropriateness for the partial demolition and renovation of two buildings on the site: the total demolition of the two buildings, the construction of two new additions, and landscape and hardscape modifications.

The Shore Club revised its plans on April 18, 2022, and presented a second submittal of those revised plans ("Second Amended Proposal" or "Proffered Plans") before the May 10, 2022 HPB hearing. At that hearing, the HPB approved the Shore Club's Application for a COA.[2] Petitioners' rehearing request was denied. Petitioners then filed a petition for writ of certiorari to the HPB Special Magistrate requesting to quash the HPB's decision. The Special Magistrate affirmed the HPB decision, and Petitioner filed a Petition for Writ of Certiorari to this Court.

**Standard of Review**

On a petition for writ of certiorari, this Court reviews a local government's quasi-judicial orders under a three-part review that asks whether: (a) the procedural due process requirements were met; (b) the essential requirements of law have been observed; and (c) the findings and judgment are supported by competent substantial evidence. *City of Deerfield Beach v. Vaillant*, 419 So. 2d 624, 626 (Fla. 1982).

[2] At that hearing, the Shore Club submitted a revised proposal which reduced the floor area of the proposed addition by 48,500 feet and preserved and restored an adjacent building, the historic Grossman annex.

**Standing**

Respondents argue that Petitioners were obligated to demonstrate the factual basis for their special injury conferring standing at the Special Magistrate hearing. *Renard v. Dade Cnty.,* 261 So. 2d 832, 837 (Fla. 1972) (holding that to maintain a judicial challenge to a zoning action, a party must demonstrate that the action will cause him or her to suffer a "special injury", i.e., an adverse impact upon a protected and legally sufficient interest.)

The Association is a condominium association regulated by Fla. Stat. Section 718.111(3)(b), which provides that such an association may "[i]nstitute, maintain, settle, or appeal actions or hearings in its name on behalf of all unit owners concerning matters of common interest to most or all unit owners.." Further, Rule 1.221, Fla. R. Civ. P. similarly provides that a condominium association "…may institute, maintain, settle, or appeal actions or hearings in its name on behalf of all association members concerning matters of common interest to the members."

Dr. Soloway is the Association President and a unit owner at the Setai. He appeared through counsel and made an extensive record through testimony of the condominium manager and the

introduction of evidence. Moreover, written objections were submitted by the Setai and Dr. Soloway prior to the hearing.

In support of their "special injury", Petitioners argue that they have a common ownership interest in the Setai property that is the immediate neighbor to the Shore Club. They further contend that the HPB review process requires consideration of the adverse impact of new construction on neighboring properties. Thus, the Setai property and Petitioners as its owners would suffer a "special injury" should the HPB review process and review criteria not be considered.

Section 118-9(c)(3)(B)(iii), Rehearing and appeal procedures of the City of Miami Beach Code ("Code") states:

> (3) Eligible appeals of the design review board or historic preservation board shall be filed in accordance with the process as outlined in subsections A through D below:
>
> …
>
> B. Eligible parties to file an application for an appeal are limited to the following:
> …
>
> (iii) An affected person, which for purposes of this section shall mean either a person owning property within 375 feet of the applicant's project reviewed by the board, or a person that appeared before the board (directly or

> represented by counsel) and whose appearance is confirmed in the record of the board's public hearing(s) for such project;

We find that Petitioners are authorized by §118-9(c)(3)(B)(iii) of the Code to file an appeal of the decision of the HPB to the Special Magistrate as an "affected person" who owns property within 375 feet of the Applicants' Property and who "appeared at the board" through counsel and representatives at the hearing before the HPB. Thus, Petitioners have standing due to their special injury.

Similarly, applicable case law requires that in evaluating standing, "…a court must consider 'the proximity of [the party's] property to the property to be zoned or rezoned, the character of the neighborhood, … and the type of change proposed.'" *Renard, supra.,* 261 So. 2d at 837. Ordinarily, abutting homeowners have standing by virtue of their proximity to the proposed area of rezoning. *Save Calusa, Inc., v. Miami-Dade Cnty.,* 355 So. 3d 534, 540 (Fla. 3d DCA 2023); *see Paragon Grp., Inc. v. Hoeksema*, 475 So. 2d 244, 246 (Fla. 2d DCA 1985), review denied, 486 So. 2d 597 (Fla. 1986) (holding owner of single-family home directly across from rezoned property had standing to challenge proposed rezoning); see also *Elwyn v. City of Miami*, 113 So. 2d 849, 851 (Fla. 3d DCA 1959) ("Plaintiffs as

abutting home owners [sic] were entitled to maintain the suit challenging the propriety, authority for and validity of the ordinance granting the variance."). Such proximity generally establishes that the homeowners have an interest greater than "the general interest in community good share[d] in common with all citizens." *Save Calusa*, *supra.*, 355 So. 3d at 540 (citing *Renard*, 261 So. 2d at 837); *Solares v. City of Miami*, 166 So. 3d 887, 889 (Fla. 3d DCA 2015) ("cases recognizing the standing of property owners and residents to challenge zoning decisions do not create an exception to the special injury requirement, they simply identify a type of special injury").

We thus hold that the Petitioners have standing to challenge the order of the Special Magistrate.

We note that we similarly found that the Setai had standing in Eleventh Judicial Circuit Court Appellate Division Case Nos. 2021-36-AP-01 and 2022-36-AP-01, two consolidated cases wherein the Setai filed a lawsuit against its other neighbor, BHI Miami Limited Corp., and the City of Miami Beach.

**Procedural Due Process**

Generally, "due process requires fair notice and a real opportunity to be heard and defend in an orderly procedure *before*

judgment is rendered." *Richard v. Bank of America, N.A.*, 258 So. 3d 485, 489 (Fla. 4th DCA 2018)(citation omitted).

Petitioners argue that they were not afforded procedural due process because the HPB approved a redesign of the Project without Code-required plans and elevations of the redesign. Petitioners further contend that the Project was approved without a Code required staff review, analysis and recommendation, and that the HPB impermissibly delegated its duty to evaluate and determine compliance with the COA criteria to staff.

Section 118-561(b) of the Code states:

> Certificate of appropriateness conditions and safeguards. In granting a certificate of appropriateness, the historic preservation board and the planning department may prescribe appropriate conditions and safeguards, either as part of a written order or on approved plans. Violation of such conditions and safeguards, when made a part of the terms under which the certificate of appropriateness is granted, shall be deemed a violation of these land development regulations.

Section 118-564(d) of the Code states:

> An approved certificate of appropriateness, together with any conditions or limitations imposed by the board, shall be in written form and attached to the site plan and/or the schematics submitted as part of the

> applications. Copies of the certificate shall be kept on file with the board and shall be transmitted to the building official. The applicant shall receive a copy of the certificate of appropriateness.

The Special Magistrate agreed with the Respondents that there was no due process violation and stated in her Order: "Code Section 118-561(b) empowers the HPB to attach conditions at the same time it grants the COA." The Special Magistrate Order also explained that "Code Section 118-564(d) also empowers the HPB to attach written conditions to the COA without the need for another hearing." The Special Magistrate further held that the Petitioners have "no due process right to review revised plans at still another hearing when the Proffered Conditions reduced the size and length, and thus the intensity, of the Project, increasing its compatibility with the neighborhood." The Court finds that § 118-564(d) of the Code does not require HPB-imposed conditions to be included with the written application materials prior to receiving HPB approval.

Section 118-564(a)(3) of the Code states that "[t]he historic preservation board and planning department shall review plans based upon the below stated criteria and recommendations of the

planning department may include, but not be limited to, comments from the building department".[3] Respondents also correctly cite §§

[3] The criteria referenced above are as follows:

a.The location of all existing and proposed buildings, drives, parking spaces, walkways, means of ingress and egress, drainage facilities, utility services, landscaping structures, signs, and lighting and screening devices.

b.The dimensions of all buildings, structures, setbacks, parking spaces, floor area ratio, height, lot coverage and any other information that may be reasonably necessary to determine compliance with the requirements of the underlying zoning district, and any applicable overlays, for a particular application or project.

c.The color, design, surface finishes and selection of landscape materials and architectural elements of the exterior of all buildings and structures and primary public interior areas for developments requiring a building permit in areas of the city identified in section 118-503.

d.The proposed structure, and/or additions to an existing structure are appropriate to and compatible with the environment and adjacent structures, and enhance the appearance of the surrounding properties, or the purposes for which the district was created.

e.The design and layout of the proposed site plan, as well as all new and existing buildings and public interior spaces shall be reviewed so as to provide an efficient arrangement of land uses. Particular attention shall be given to safety, crime prevention and fire protection, relationship to the surrounding neighborhood, impact on preserving historic character of the neighborhood and district, contiguous and adjacent buildings and lands, pedestrian sight lines and view corridors.

f.Pedestrian and vehicular traffic movement within and adjacent to the site shall be reviewed to ensure that clearly defined, segregated pedestrian access to the site and all buildings is provided for and that any driveways and parking spaces are usable, safely and conveniently arranged and have a minimal impact on pedestrian circulation throughout the site. Access to the site from adjacent roads shall be designed so as to interfere as little as possible with vehicular traffic flow on these roads and pedestrian movement onto and within the site, as well as permit both pedestrians and vehicles a safe ingress and egress to the site.

g.Lighting shall be reviewed to ensure safe movement of persons and vehicles and reflection on public property for security purposes and to minimize glare

and reflection on adjacent properties and consistent with a city master plan, where applicable.

h.Landscape and paving materials shall be reviewed to ensure an adequate relationship with and enhancement of the overall site plan design.

i.Buffering materials shall be reviewed to ensure that headlights of vehicles, noise, and light from structures are adequately shielded from public view, adjacent properties and pedestrian areas.

j.Any proposed new structure shall have an orientation and massing which is sensitive to and compatible with the building site and surrounding area and which creates or maintains important view corridor(s).

k.All buildings shall have, to the greatest extent possible, space in that part of the ground floor fronting a sidewalk, street or streets which is to be occupied for residential or commercial uses; likewise, the upper floors of the pedestal portion of the proposed building fronting a sidewalk street, or streets shall have residential or commercial spaces, or shall have the appearance of being a residential or commercial space or shall have an architectural treatment which shall buffer the appearance of a parking structure from the surrounding area and is integrated with the overall appearance of the project.

l.All buildings shall have an appropriate and fully integrated rooftop architectural treatment which substantially screens all mechanical equipment, stairs and elevator towers.

m.Any addition on a building site shall be designed, sited and massed in a manner which is sensitive to and compatible with the existing improvement(s).

n.All portions of a project fronting a street or sidewalk shall incorporate an amount of transparency at the first level necessary to achieve pedestrian compatibility.

o.The location, design, screening and buffering of all required service bays, delivery bays, trash and refuse receptacles, as well as trash rooms shall be arranged so as to have a minimal impact on adjacent properties.

p.In addition to the foregoing criteria, subsection [118-]104(6)(t), and the requirements of chapter 104, of the City Code shall apply to the historic preservation board's review of any proposal to place, construct, modify or maintain a wireless communications facility or other over the air radio transmission or radio reception facility in the public rights-of-way.

q.The granting of the variance will result in a structure and site that complies with the sea level rise and resiliency review criteria in chapter 133, article II, as applicable.

118-562(b), 118-561(b) and 118-564(d) of the Code (*see supra*) for their argument that the Second Revised Plans did not need to go back to the staff for review. We find Respondents' argument compelling.

Petitioners next argue that the public was not provided notice and opportunity to submit objections, and that there was no evidentiary hearing. Petitioners proffer no legal authority to support their contention that the public need be given notice and an opportunity to submit objections to new plans. We find that Petitioners had ample notice of the hearings and the nature of the Application, were given multiple opportunities to be heard about the proposals (which reduced the intensity and massing of the project beyond what was noticed and supported by City staff). We believe that the Special Magistrate was correct to reject the Petitioners' argument.

The approval of the Second Amended Proposal with conditions did not deprive Petitioners of procedural due process. Thus, procedural due process requirements were met.

**Essential Requirements of Law**

Having found that Petitioners were accorded procedural due process, the second prong of the test to be considered is whether the essential requirements of law were followed. In *Haines City Cmty Dev. v. Heggs*, 658 So. 2d 523, 530 (Fla. 1995), the Supreme Court held that "applied the correct law" is synonymous with "observing the essential requirements of law." Further, 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." *Id.* at 527 (citation omitted).

Petitioners argue that the HPB failed to follow the essential requirements of law when it approved an incomplete application for a COA, and the Special Magistrate affirmed the decision. Respondents correctly contend that the HPB's decision to approve the COA is entitled to great deference. "It is axiomatic that 'zoning or rezoning is the function of the appropriate zoning authority and not the courts'" and that reviewing authorities on appeal "are not empowered to act as super zoning boards, substituting their

judgment for that of the legislative and administrative bodies exercising legitimate objectives." *Norwood-Norland Homeowners' Ass'n, Inc. v. Dade Cnty.*, 511 So. 2d 1009, 1012 (Fla. 3d DCA 1987) (citation omitted).

The HPB Order dated May 10, 2022, stated, in part:

**1. Certificate of Appropriateness**

> C. The project would be consistent with the criteria and requirements of section 118-564 and 113-50(a) if the following conditions are met:
>
> 1g. The first eight (8) levels of the new tower addition shall be reduced in length by 30'-0" from the east, in a manner to be reviewed and approved by staff consistent with the Certificate of Appropriateness Criteria and/or the directions from the Board.
>
> h. The maximum floor plate size for the portion of the new tower addition that exceeds 50'-0" in height shall be 15,000 square feet per floor in accordance with Section 142-246(e)(2) of the City Code.

Petitioners request this Court to reweigh the determination of the HPB that there was enough information to evaluate the Second Amended Proposal as modified by the conditions of approval. We decline to do so and will not substitute our judgment for that of the

HBP in its effort to achieve a legitimate objective. *See Norwood-Norland Homeowners' Ass'n, Inc.*, *supra.*, 511 So. 2d at 1012.

Petitioners next argue that the Shore Club's proposed modification, later identified as conditions (g) and (h) in the May 10, 2022 HPB Order, was a substantial redesign that changed the site plan and architectural elevations. Petitioners assert that the proffered "modifications" to the project were renamed by Staff as "conditions." Petitioners maintain that these conditions which modified the plans specified new dimensions for the floor plates; substantially modified the elevations of the building, laterally shifting the building and footprint 30 feet to the west; substantially modified the rear setback; and modified the site plan. Petitioners contend that by deeming those "modifications" as "conditions," and considering those modifications as "concessions," the Special Magistrate erred in approving an HPB Order that did not comply with the City of Miami Beach COA review procedures and the City's ordinance requiring a quasi-judicial process as to those modifications.

Respondents correctly argue that the COA requires them to reduce the length of the first (8) levels of the proposed addition by 30

feet from the east, and floors numbered 5 and up do not exceed 15,000 sq. feet. We find that the conditions of approval in the COA Order are definite technical specifications clearly intended to effectuate the COA criteria as interpreted by the HPB members. The Special Magistrate correctly concluded that there is no discretion involved in carrying out these conditions, only non-discretionary ministerial adjustments to specific technical elements.

Petitioners submitted a chart (Petition, p. 20) that purports to be a compilation of "data from the Second Resubmittal Plans (A. 000733) and the addition of the dimensions of the floor plate specified in the 'conditions' that are part of the HPB Order." Petitioners argue that over 23,000 square feet were being added to the upper floors of the new building addition, and on the higher floors the square footage of the floor plates increased by as much as 29%. In fact, this chart assumes that every floor above 50 feet would be built to 15,000 square feet. There is no record evidence of this. The chart is not only directly refuted by the testimony of Respondents' architect, but also by the testimony of the City and staff.

The City's professional staff prepared a detailed report and recommendation ("Staff Report"). The Staff Report noted: "[t]he

applicant was previously requesting approval for floor plate sizes that range between 16,280 sq. ft. and 19,177 sq. ft. for levels 5 through 12. The applicant has submitted revised plans with all floor plates except for two levels within the 15,000 sq. ft and is currently requesting a floor plate size of 15,918 sq. ft. for levels 6 and 7 only." Moreover, the second revised plans (A. 733) state that the square foot area will decrease. Even assuming *arguendo* that the square foot area of floors above 50 feet would increase to 20,000 square feet, Respondents would still be compliant with the code.

We find that the Special Magistrate observed the essential requirements of the law.

**Competent substantial evidence**

"Substantial evidence has been described as such evidence as will establish a substantial basis of fact from which the fact at issue can be reasonably inferred." *De Groot v. Sheffield*, 95 So. 2d 912, 916 (Fla. 1957). "Competent, substantial evidence must be reasonable and logical." *Wiggins v. Florida Dep't of Highway Safety and Motor Vehicles*, 209 So. 3d 1165, 1173 (Fla. 2017).

Petitioners argue that there was a lack of competent substantial evidence. Specifically, at the May 10, 2022 hearing, Petitioners

contend that no competent substantial evidence was introduced after the redesign was first presented; accordingly, the May HPB Order that included that redesign is unsupported by competent substantial evidence.

Staff Reports alone constitute competent substantial evidence. *City of Hialeah Gardens v. Miami-Dade Charter Found. Inc.,* 857 So. 2d 202, 205 (Fla. 3d DCA 2003). *See also Village of Palmetto Bay v. Palmer Trinity Private Sch., Inc.*, 128 So. 3d 19, 26-27 (Fla. 3d DCA 2012). In *Euroamerican Grp. Inc. v. City of Miami Beach,* 19 Fla. L. Weekly Supp. 310b (Fla. 11th Cir. Ct. Jan. 25, 2012), this Court held that oral testimony as well as staff reports and review constitute competent substantial evidence.

Competent substantial evidence supports the HPB's approval of the Second Amended Proposal with the conditions proffered at the May 10th hearing. Staff's recommendation of approval and analysis, both in writing and through testimony at the March 8th and May 10th HPB hearings, serves as competent substantial evidence to support the HPB's decision. Moreover, the testimony of Applicant's expert consultants, letters of intent, submitted plans and presentations constitute competent substantial evidence. Finally,

testimony by members of the public, including the former Chairman of the HPB and two former members of the HPB, constitutes competent substantial evidence and confirms that the Project satisfies the COA criteria. Other testimony at the hearing by representatives from the nearby Nautilus Hotel, the Lincoln Road Business Improvement District, and the Betsy Hotel constitutes evidence that likewise supports the decision of the HBP.

Petitioners next assert that there was no competent substantial evidence to support the Special Magistrate's conclusion that the modifications' "proffered conditions" reduced the size and intensity of the Project and, therefore, there is no competent substantial evidence to support the Special Magistrate's conclusion that the modifications increased the compatibility of the Project.

The Special Magistrate found, and we agree, that the "HPB's expert Staff had advised it the design changes were specific and measurable, minor in nature and were in sufficient detail for staff to implement and enforce." Furthermore, the City's Historic Preservation and Architecture Officer Deborah Tackett testified that the Proffered Conditions were "crystal clear." Ms. Tackett further

testified that the Proffered Conditions met the HPB criteria and the concerns expressed at the March 8, 2022, HPB meeting.

Thus, we find that the Special Magistrate correctly determined that substantial competent evidence supported the HPB's Order.

Finally, we note that at the appellate oral argument, Petitioners stated that they were abandoning their argument pertaining to off-street loading space requirements near the Setai. Thus, we need not address that issue as it is no longer before us.

Accordingly, for the foregoing reasons, the Petition for Writ of Certiorari is **DENIED.**

TRAWICK and ARECES, R., JJ., concur.

ARECES, R., J., concurring

I join the Court's Opinion in all respects except its discussion of section 118-9(c)(3)(B)(iii) of the City of Miami Beach Code. It is not necessary to reach the issue of whether a municipality can, by ordinance, dictate to a court of competent jurisdiction which persons or entities do, or do not, have standing to bring an action before a circuit court. For the other reasons mentioned in the Court's Opinion, the Petitioners in this case have standing.

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