


TO: Mayor Dan Gelber and Members of the City Commission

FROM: Raul J. Aguila, City Attorney 

cc: Jimmy L. Morales, City Manager
Rafael E. Granado, City Clerk

DATE: September 4, 2020

SUBJECT: Circuit Court's August 31, 2020 Opinion in *Y-Tech-180 Units Miami Beach Investment, LLC v. City of Miami Beach* (Fla. 11th Cir. Ct. No. 18-184 AP)

The purpose of this memorandum is to advise the City Commission of the Eleventh Judicial Circuit Appellate Division's recent ruling in *Ytech-180 Units Miami Beach Inv. LLC v. City of Miami Beach*, No. 18-184 AP (Fla. 11th Cir. Ct. opinion issued Aug. 31, 2020) (the "Opinion"). A copy of the Opinion, which is not yet final, is attached to this memorandum as Exhibit "A."

The subject of the litigation is a challenge to the adoption of Ordinance No. 2018-4198, which amended and expanded the North Shore Local Historic District to include the Tatum Waterway Neighborhood, which is generally bounded by 77th Street on the south, Hawthorne Avenue and Crespi Boulevard on the west, 87th Street on the north, and Tatum Waterway Drive and Byron Avenue on the east. Specifically, Ytech-180 Units Miami Beach Inv. LLC ("Petitioner"), the owner of several properties within the Tatum Waterway Neighborhood, sought certiorari review, claiming, in pertinent part, that the City failed to conduct and notice the designation of the Tatum Waterway Neighborhood as a quasi-judicial proceeding.

On August 31, 2020, the circuit court quashed Ordinance No. 2018-4198, and remanded for a new hearing on the expansion of the District. A summary of the legislative history of the District, the circuit court's ruling, and the City's next steps to protect its historic resources, is as follows.

1. Designation and Expansion of the North Shore Local Historic District

The designation and expansion of the North Shore Local Historic District culminates efforts over the last few decades to protect North Beach's unique and historic character. The North Shore National Register District—which includes the Tatum Waterway Neighborhood—was officially listed by the federal government in the National Register on November 18, 2009. In April 2015, the City Commission retained Dover Kohl & Partners to draft and establish the North Beach Master Plan to revitalize key North Beach neighborhoods, and encourage the preservation and restoration of contributing buildings in the North Shore National Register District.

The draft Master Plan emphasized historic preservation, including the creation and promotion of local historic districts. Following several public meetings and workshops in 2015 and 2016, the City Commission adopted the final draft Master Plan on October 19, 2016. The Commission contemporaneously authorized the City administration "to pursue and expedite the creation and implementation of the Plan's recommended projects, programs and policies," including the

creation of a North Shore Local Historic District, which included the Tatum Waterway properties. It did so in order to protect historic structures from demolition.

On January 17, 2018, and following a lengthy public process, the City Commission adopted Ordinance No. 2018-4167, designating a portion of the proposed local historic district located along Harding Avenue as the North Shore Local Historic District.

Over the following months, steps were taken to expand the North Shore Local Historic District to include the Tatum Waterway Neighborhood. The Planning Department prepared a formal designation report addressing the proposed expansion of the District, and presented the report to the Historic Preservation Board ("HPB") at a public hearing that was publicly noticed on March 12, 2018. The HPB voted unanimously to transmit a favorable recommendation to the Planning Board. The HPB's favorable recommendation was forwarded to the Planning Board, which processed the designation as an amendment to the City's land development regulations.

The Planning Board voted unanimously on March 27, 2018, to recommend adoption of the proposed amendment adding the Tatum Waterway to the North Shore Local Historic District. Following two readings and public hearings, Ordinance No. 2018-4198 was adopted unanimously by the City Commission on May 16, 2018. Notably, the Petitioner appeared and participated in both public hearings before the City Commission.

2. Circuit Court Opinion

On August 31, 2020, the circuit court issued an opinion quashing Ordinance No. 2018-4198, and remanding for a new hearing. The court recognized that "[i]t appears that the process provided by the Code for the adoption of Historic Designation status is legislative in character and the City substantially complied with this process in designating the Tatum Waterway Neighborhood." The Opinion outlines the City's legislative process in great detail. Nonetheless, the court concluded that the City "has defined the nature of the historic designation process within its Code as quasi-judicial." Accordingly, the City must provide a new designation hearing (the "Hearing") before the HPB and provide mailed notice of the Hearing to property owners within the proposed district boundaries and 375 feet therefrom. "Based on the narrow issue of compliance with the City's own code," the circuit court reasoned that the City should have provided mailed notice and, correspondingly, the City's failure to do so constituted a denial of procedural due process. *Id.*

We do not believe that the decision correctly apprehends the legislative nature of the City's district designation process. Because the City contends the district expansion process at issue here is legislative in nature, the City maintains that the circuit court lacks certiorari jurisdiction to review the City's legislative actions. The City is preparing to seek rehearing of the Opinion and, thereafter, second-tier certiorari review if necessary.

3. City's Next Steps

To safeguard the Tatum Waterway properties from demolition during appellate process, to avoid the possibility of irreparable harm, and, in an abundance of caution, the City Manager has initiated the following process to re-notice the Hearing with mailed notice as described above. The first protective step in this process shall take place before the HPB on September 14, 2020, at 9:00 am.

A. Historic Preservation Board

- i. **Preliminary Evaluation and Recommendation Report.** On September 14, 2020, at 9:00 am, the HPB will meet to consider the Planning Department's Preliminary Evaluation and Recommendation Report and determine if proceeding with a Designation Report is warranted. The Designation Report is an historical and architectural analysis of the proposed district or site.
 - ii. **Notice to City Commission.** The City Commission is notified of the HPB's decision and the boundaries proposed for designation. Within 60 days of the vote of the HPB to direct the Planning Department to prepare a designation report, the City Commission may, by a five-sevenths vote, deny or modify the proposed request for designation.
 - iii. **Designation Report.** The Designation Report is presented to the HPB at a public hearing. If the HPB determines that the proposed district satisfies the requirements for designation in the Land Development Regulations, the HPB transmits a recommendation in favor of designation to the Planning Board and City Commission.
- B. Planning Board.** The Planning Board will hold a public hearing on the proposed designation, consider the proposed historic designation as an amendment to the Land Development Regulations, and, subsequently, transmit its recommendation to the City Commission.
- C. City Commission.** Following two public hearings, the City Commission may adopt an amendment to the Land Development Regulations by a five-sevenths majority vote, which thereby re-adopts the designation of the Tatum Waterway Neighborhood as part of the North Shore Local Historic District.

We will continue to keep the City Commission apprised of the status of the litigation. Because the litigation is on-going, we would request that the Commission refrain from communicating publicly about this matter and refer all inquiries to the City Attorney's Office.

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

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

YTECH-180 UNITS MIAMI BEACH
INVESTMENT, LLC,
Petitioner,

APPELLATE DIVISION
CASE NO. 2018-184-AP-01

v.

CITY OF MIAMI BEACH,
Respondent.

_____ /

OPINION

Opinion filed: August 31, 2020.

On Petition for Writ of Certiorari from City of Miami Beach Ordinance 2018-4198

AKERMAN LLP, Joni Armstrong Coffey, Esq., Nicholas J. Barshel, Esq., Wesley J. Hevia, for Petitioner

SHUBIN & BASS, P.A., Jeffrey S. Bass, Katherine R. Maxwell, for Respondent

Before: TRAWICK, WALSH and BOKOR, JJ.

PER CURIAM.

Ytech-180 Units Miami Beach Investment, LLC (“Ytech”) filed a petition for writ of certiorari seeking to quash City of Miami Beach (“City”) Commission

EXHIBIT A

Ordinance 2018-4198 (the “Ordinance”), which amended and expanded the North Shore Local Historic District in Miami Beach, Florida, to include an area described as the Tatum Waterway Neighborhood (the “Historic Designation”). Based on the narrow issue of compliance with the City’s own code, we agree with Petitioner Ytech, grant the Petition and quash the Ordinance at issue.

FACTS AND PROCEDURAL HISTORY

The Tatum Waterway Neighborhood is located on the west side of the City of Miami Beach (the “City”) and borders the east and west banks of the Tatum Waterway between approximately 77th Street and 87th Street. It consists of various low-rise apartment buildings and single-family homes, constructed mostly during the mid-20th century. City staff found that a significant percentage of the properties had architectural and historic significance. The Petitioner, Ytech, owns and operates the Grand Beach Apartment Complex, consisting of 22 buildings containing a total of 182 apartment units. It is the largest property in the Tatum Waterway Neighborhood.¹

¹ Ytech purchased the property after it was listed on this National Register of Historic Places and after the HPB’s original 2014 vote to recommend designation of the entire National Register Historic District, including the Tatum Waterway Neighborhood.

Development of Master Plan

The City's Response provides a description of the lengthy process that resulted in the adoption of the Ordinance dating back to 1999, when its Planning Department commenced a master planning process which included public workshops, focus group meetings, public hearings, etc. In 2009, the federal government officially listed the North Shore National Register Historic District, including the Tatum Waterway Neighborhood, in the National Register.

In April 2015, the City Commission (the "Commission") retained the firm of Dover Kohl & Partners to draft the North Beach Master Plan (the "NoBe Plan"), which was adopted by the Commission in October 2016. The Commission also authorized the City administration to expedite the creation and implementation of the NoBe Plan's recommended projects, which included the creation of the North Shore Local Historic District. This proposed District was comprised of 175 acres and 473 historically significant or contributing structures. It included the Tatum Waterway Neighborhood. Additionally, the City established a series of moratoria prohibiting demolition of historically significant buildings in this District.

Local Designation Process

On July 13, 2016, the Commission directed the Planning Department to commence the local designation process for the North Shore Historic District as defined in the NoBe Plan. On October 11, 2016, the HPB reviewed the Preliminary

Evaluation Recommendation Report and directed staff to prepare a Formal Designation Report. (Pet. App. B. 86). On December 9, 2016, the City Commission modified the HPB's recommendation by excluding the Tatum Waterfront Neighborhood from the proposed Designation. On September 25, 2017, the Commission resolved to again include the Tatum Waterway Neighborhood. On October 10, 2017, the HPB transmitted the designation report to the Planning Board and City Commission with a favorable recommendation to include the Tatum Waterfront Neighborhood. The Planning Board unanimously approved a motion to recommend approval of the designation of the proposed North Shore Historic District. On December 18, 2017, the Mayor and Commission unanimously approved the designation of the North Shore Historic District.

Expansion of the North Shore Historic District

On December 18, 2017, the HPB reviewed the Preliminary Evaluation and Recommendation Report regarding the expansion of the North Shore Historic District and directed staff to prepare a Formal Designation Report. On January 17, 2018, the Mayor and Commission adopted the designation. The City held four public hearings as part of this historic designation process:

March 12, 2018 HPB Designation Hearing – Notice to the Public was advertised in the January 28, 2018 Edition of the Miami Herald.² (Resp. App. 499). After input from the public and discussion of the Board, the HPB voted unanimously (7-0) to transmit a favorable recommendation for Historic Designation to the Planning Board and City Commission.

March 27, 2018 – Planning Board Hearing

The Planning Board processed the designation as an amendment to the City's land development regulations. The amendment added the legal description of the Tatum Waterway boundaries to section 118-593(e)(2)(1) of the Code. After a brief staff presentation and public comment, the Planning Board voted unanimously to recommend adoption of the Tatum Waterway Neighborhood to the North Shore Local Historic District.

April 11, 2018 First Commission Hearing

Members of the public spoke for and against the designation amendment. Ytech was represented by two attorneys at this hearing, Neisden Kasdin, Esq. and Wayne Pathman, Esq. Mr. Kasdin stated that the properties in the Tatum Waterway Neighborhood were prone to flooding and argued that the Commission was

² Notice was pursuant to Code of the City of Miami Beach, Florida, (the "Code") section 118-164(b)(3)), which applies in part to a designation of a parcel or parcels of land involving ten contiguous acres or more. The Notice stated in part that "[a]ll persons are invited to appear at this meeting or be represented by an agent. . ." It also indicates that admissible relevant evidence may be submitted and that a verbatim record should be made for purposes of appeal.

compelled to consider sea level rise and resiliency. He stated that the Historic Designation would cause a “high probability that there will be no new development orders, there will be no demolition.” (Pet. App. C. 4-5). He further stated that “I’m not asking you today not to vote for this, but before you vote for this on second reading [consider] how can it be mitigated.” (Pet. App. C. 6). Mr. Pathman implored the Commission to consider “the economic impact of what will happen with flood insurance” and “look to mitigate that possibility.” (Pet. App. C. 17-18). Neither attorney presented any evidence at this hearing, nor did they complain of lack of notice. (Nor could they since they both appeared and represented their client.) The Commission voted to approve the First Reading of the Historic Designation.

May 16, 2018 Final Hearing

Mr. John Breistol, the President of Ytech, related that his tenants “contend with flood conditions on a regular basis” and stated that the Commission did “not properly study the impacts this legislation may have.” (Pet. App. B. 5). As pointed out by the City, neither Mr. Breistol, nor Ytech’s attorneys challenged compliance with the criteria set forth in Miami Beach Code section 118-592(a), other than Mr. Breistol’s comments regarding flood conditions. The Commission voted unanimously to approve the adoption of the Ordinance.

Ytech filed this Petition for Writ of Certiorari challenging the City’s Historic Designation. The City filed a Response which included therein a Motion to Dismiss

the Petition. The Motion to Dismiss claims that this Court does not have certiorari jurisdiction because the Historic Designation was the result of a legislative act and not the result of a quasi-judicial hearing.

STANDARD OF REVIEW

“Whether a lower tribunal has subject matter jurisdiction is a question of law that is reviewable de novo.” *Department of Revenue v. Vanamburg*, 174 So. 3d 640, 642 (Fla. 1st DCA 2015) (citation omitted).

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).

DISCUSSION

“It is the character of the hearing that determines whether or not board action is legislative or quasi-judicial. Generally speaking, legislative action results in the formulation of a general rule of policy, whereas judicial action results in the application of a general rule of policy.” *Board of County Commissioners of Brevard County v. Snyder*, 627 So. 2d 469, 474 (Fla.1993) (citations omitted). Ytech claims that the adoption of the Ordinance approving the Historic Designation was judicial in character; whereas, the City claims that it was legislative in character. We decline

to make such a determination, as we find that the City made the determination through its own Code. The Historic Designation Procedure is set forth in the Code sections 118-591 through 118-593. An outline of this procedure is provided in the May 16, 2018 Commission Memorandum for the Second Reading Public Hearing:

Step One: A request for designation is made either by the City Commission, the Historic Preservation Board, other agencies and organizations as listed in the Land Development Regulations of the City Code, or property owners involved. Proposals for designation shall include a completed form available from the Planning Department.

Step Two: The Planning Department prepares a preliminary evaluation report with recommendations for consideration by the Board.

Step Three: The Historic Preservation Board considers the preliminary evaluation to determine if proceeding with a designation report is warranted.

The designation report is an historical and architectural analysis of the proposed district or site. The report:

- 1) describes the historic, architectural and/or archeological significance of the property or subject area proposed for historical Site or District designation;
- 2) recommends Evaluation Guidelines to be used by the Board to evaluate the appropriateness and compatibility of proposed Developments affecting the designated Site or District; and
- 3) will serve as an attachment to the Land Development Regulations of the City Code.

Step Four: The City Commission is notified of the Board's decision and the initial boundaries proposed for designation. Within 60 days of the vote of the Historic Designation Board to direct the Planning Department to prepare a designation report, the City Commission may, by a five seventh's vote, deny or modify the proposed request for designation.

Step Five: The designation report is presented to the Historic Preservation Board at a public hearing. If the Board determines that the

proposed site or district satisfies the requirements for designation as set forth in the Land Development Regulations of the City Code, the Board transmits a recommendation in favor of designation to the Planning Board and City Commission.

Step Six: The Planning Board will hold a public hearing on the proposed designation, and shall consider the proposed historic designation as an amendment to the Land Development Regulations of the City Code and, subsequently, transmit its recommendation to the City Commission.

Step Seven: The City Commission may adopt an amendment to the Land Development Regulations of the City Code by a five-sevenths majority vote, which thereby designates Historic Preservation Site or Historic District after two (2) public hearings for a parcel of land that is more than ten (10) contiguous acres.

(R. 86). It appears that the process provided by the Code for the adoption of Historic Designation status is legislative in character and the City substantially complied with this process in designating the Tatum Waterway Neighborhood.

The City contends that the HPB has two separate essential functions: one being legislative, i.e., to recommend to the planning board, and city commission, the designation of historic buildings, structures, improvements, landscape features, public interiors, and historic sites or districts (See Code §118-102(1)); and, the other being quasi-judicial, i.e., review and approval of applications for “certificates of appropriateness.” (See Code §118-102(3)). However, Ytech claims that the process is quasi-judicial relying on Code section 118-591(f) which provides:

Public hearing. A quasi-judicial public hearing on a proposed historic preservation designation shall be conducted by the historic preservation

board after the date a designation report has been filed, and shall comply with the notice requirements in accordance with section 118-8.

Section 118-8 provides notice procedures for quasi-judicial, public hearings and quasi-judicial land use board actions by advertisement, mail and posting.³ In regard to notice by mail, Code section 118-8 states in part that:

“At least 30 days prior to the quasi-judicial, public hearing date, a description of the request, and the date, start time of the meeting, and location of the hearing shall be given by mail to the owners of record of land lying within 375 feet of the property subject to the application.”

While this Court need not decide whether a historic designation process for an area is necessarily quasi-judicial, it is impossible to rectify Code section 118-591(f) with the City’s argument that this specific process was legislative in nature. And once the Code requires a quasi-judicial public hearing at the historic preservation board level, any further reviews by the Commission that flow from such hearing must also be quasi-judicial in nature. Accordingly, the hearing at the City Commission adopting the ordinance failed to comply with due process as required by the City’s own code.

³ Code section 2-511 defines quasi-judicial as referring to;

an action or proceeding by the city commission or a city board on an application for a site-specific rezoning, variance, conditional use permit, design review approval or other request, other than a comprehensive plan amendment, which has an impact *on a limited number of persons or property owners*, on identifiable parties and interests, where the decision is contingent on a fact or facts arrived at from distinct alternatives presented at a hearing, and where the decision *can be functionally viewed as policy application*, rather than policy setting, or as may otherwise be defined by case law. (emphasis added).

As the City has defined the nature of the historic designation process within its Code as quasi-judicial, the City failed to comply with the due process requirements set forth in section 118-8 of the City Code. Accordingly, we grant the writ, quash the City's Ordinance and remand for a new hearing.

TRAWICK, WALSH, and BOKOR, JJ., concur.

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