

Ytech wins court challenge of city of Miami Beach historic designation of Tatum Waterway

By Susan Askew



ytech wins court challenge of city of miami beach historic designation of tatum waterway: [company owns 22 buildings in the affected area; city expected to seek rehearing](#)

Ytech, the largest property owner on the Tatum Waterway, won the first round in its challenge of Miami Beach’s historic designation process when an appellate court ruled the City violated property owners’ due process rights when considering whether to add the area to the North Shore Local Historic District. While not final until “disposition of timely-filed motion for rehearing or clarification,” the opinion quashes the City ordinance that designated the Tatum Waterway neighborhood historic and orders a new hearing for designation. The City is expected to seek a rehearing on the ruling.

[Ytech](#) owns and operates [Ocean House Apartments](#), 23 two-story Art Deco buildings with 186 units on four-acres and three city blocks along the waterway. The company, headquartered in Miami, is a real estate investment, development, redevelopment and asset management firm.

Ytech argued the City’s land use boards and Commission ignored the impact of sea level rise on the Tatum Waterway neighborhood and, instead, relied on a [“compromise” crafted between preservationists and developers](#) to historically designate the North Shore area in exchange for development rights in a new Town Center. Ytech, which was not a party to the agreement, argued the “political compromise [was] extraneous to the public hearing processes” thus violating its right to due process by not giving property owners the opportunity to present their case based on evidence in a public hearing.

In its motion to quash the designation, Ytech said the properties are prone to flooding by “a tidal waterway that regularly overflows its banks. The neighborhood’s small apartment buildings sit barely above average high tide... Pre-dating today’s construction standards, their foundations often sit in salty tidal waters. The inexorable march of sea level rise will only exacerbate this flooding.”

Ytech argued the City Code requires the Historic Preservation Board to consider the consequences of sea



level rise and resiliency, evidence that should be presented as part of a “quasi-judicial” process which requires individualized notice to affected property owners and the right to testify and cross-examine witnesses. Decisions must be based “exclusively on the record” presented at public hearings not on a “handshake deal,” that the company said was “made between City elected officials, the historic preservation community and the development community” outside of the quasi-judicial process.

“Indeed, property owners did not even get a fair chance to explain why their individual buildings lacked historic merit,” the motion stated. “Instead, they faced decision-makers who, although well intentioned, had pre-committed to designation in exchange for unrelated zoning relaxations elsewhere in the City; who personally campaigned for designation inside and outside the public processes; and who were advised of sea level rise concerns but disregarded those factors to meet publicly admitted political obligations.”

The opinion is narrowly focused on whether the process is quasi-judicial or legislative which determines the rules that apply to hearings and decision-making. Ytech argued that property owners did not receive appropriate notice to appear before the Historic Preservation Board when it discussed the designation as required for quasi-judicial review and that the designation process is quasi-judicial all the way through – from the Historic Preservation Board to the Planning Board and then, finally at the City Commission level – and that all decisions must be based on the record presented at the hearings. The City argued the City Commission process is legislative and thus, the Court does not have jurisdiction. A legislative process also does not have the same requirements with regard to the decision-making process and evidence submitted into the public record.

The 11th U.S. Circuit Court of Appeals agreed with Ytech. “[O]nce 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,” the ruling states. “Accordingly, the hearing at the City Commission adopting the ordinance failed to comply with due process as required by the City’s own code.”

“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... the City code. Accordingly, we grant the writ, quash the City’s Ordinance and remand for a new hearing,” the judges concluded.

Ytech attorney Joni Armstrong Coffey of Akerman, said of the ruling, “One of the facts that was critically important is that, at the Historic Preservation Board itself, there was no individualized mailed notice” and that neither Ytech nor neighboring property owners received notice that the designation process was starting.

With regard to the distinction between a legislative and quasi-judicial process, she said, decisions in a quasi-judicial setting “must be made on the record, not on extraneous influences. That doesn’t mean people knowledgeable about historic preservation can’t come and testify... it means the decision cannot be made on grounds extraneous to the hearing that the property owner doesn’t know about,” such as the compromise made between preservationists and developers.

Armstrong Coffey said, for now, the ruling means the Tatum Waterway is not included within the North Shore Local Historic District. Any effort to include it has to go back through the designation process which includes hearings before the Historic Preservation Board, Planning Board, and City Commission.

“Historic designations, particularly of entire districts, have increasingly become a back-door method for preventing new development and is a clear distortion of the intention of preservation,” Yamal Yidios, Ytech CEO, is quoted in a press release following the ruling. “Such methods can have devastating economic, social

and environmental impacts because of the degree to which they prevent necessary adaptation to changing conditions, the rebirth of neighborhoods, and the vitality of urban economies.”

Yidios added, “Preservation of truly historic urban areas and structures is essential to the culture, life and economy of any great city. However, preservation as an antidevelopment weapon suffocates the necessary growth of cities and dilutes the status of true landmarks.”

Ytech noted in its statement that the ruling benefits “all property owners in the designated area – many of whom lacked the resources to appeal government actions in court.” The area comprises approximately 105 buildings in the Tatum Waterway Neighborhood, according to Ytech.

Jeffrey Bass of Shubin & Bass, Special Counsel for the City, said in an email to RE:MIAMI BEACH, “The City does not litigate via press release. Nor does it litigate in the media. Historic Preservation is vitally important to the City – it defines us – it is the lifeblood of our urban fabric. The City is at present studying a wide variety of responsive and protective actions to ensure the preservation of its precious historical resources.”

In a memo to the City Administration immediately after the decision, however, he wrote, “We do not believe that the decision correctly apprehends the legislative nature of the City’s district designation process.” Because the Court does not have jurisdiction to review legislative actions – which the City maintains this was – the City will seek a rehearing, Bass noted in the memo.

In addition, he wrote, “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 will begin the designation process again, starting with a discussion at a meeting of the Historic Preservation Board on September 14 at 9:00 am.

The Tatum Waterway neighborhood is located on the east and west banks of the Tatum Waterway between approximately 77th and 87th Streets on the west side of Miami Beach. Following recommendations in the North Beach Master Plan, the City began the process of creating a local historic district for the North Shore in 2016. The area, including the Tatum Waterway neighborhood, was already part of the North Shore National Register Historic District created by the Federal government in 2009.



The City Commission removed the Tatum Waterway from the local historic designation process in December 2016 but, in September 2017, added it back in before formal designation for the Tatum Waterway neighborhood was approved in December 2017. In between, Miami Beach [voters approved the new development rights for the area](#) now known as the Town Center located between 69th and 72nd Streets from the West side of Collins Avenue to Bonita Drive. The upzoning was supported by preservationists in exchange for developer support of the designations which included putting the Tatum Waterway back into the historic district.

In its motion to quash filed in June 2018, Ytech argued the designation process was “tainted” throughout

with mentions of the “compromise” during discussions at the Historic Preservation Board, Planning Board, and City Commission.

“Ultimately, as the final decision-maker on historic designation, the City Commission was performing the final adjudicatory act, and was obligated to apply the historic preservation and Sea Level Rise Criteria to the record facts, namely, the staff Designation Report, the testimony of witnesses, and other evidence presented at the two hearings. Ytech and its neighbors were entitled to know the facts, confront and cross-examine witnesses, and have the City Commission vote only on that record.”

“Even if the Historic Preservation Board [HPB] conducted a fair quasi-judicial proceeding (and it did not), a fair recommendation would have been meaningless when City Commission reached its final decision based on the extraneous ‘compromise’ pre-hearing discussions and commitments to which individual Commissioners admitted,” the filing stated. The compromise referenced was reached in September 2017.

In their response, the City argued the “compromise” referred to “was that born from the North Beach community’s participation in the master planning process” which resulted in a “consensus document” reconciling the differences of opinion between the community and developers. The City noted in court documents that a “compromise” was referenced when the Master Plan was presented to the City Commission in October 2016. *“The most important of these compromises is the granting of additional development rights in the Town Center Area which the public was only accepting of if it was coupled with the creation of local historic districts,”* according to the court filing. [Emphasis in document.]

The City also argued the land use boards apply criteria for sea level rise when considering both quasi-judicial development orders and legislative ordinances. In this case, the City argued, the land use boards were acting on criteria as it applied to legislation. The City Commission “*does not* possess final quasi-judicial authority over matters relating to historic preservation,” the City argued. [Emphasis in document.] It does, however, have the “legislative authority to amend the City’s land development regulations to include a historic district upon the favorable recommendation of the HPB and the recommendation of the Planning Board” which it did, according to the City’s response. The Court disagreed, saying the process was quasi-judicial at the start and should be quasi-judicial at the end.



“Historic designation has enormous consequence for a property owner in Miami Beach,” Ytech stated in its motion. “[A]fter designation, property owners, including those in flood-prone areas, face a complex and time-consuming permitting process... [that] utilizes strict controls over subsequent repairs, modification, renovation, and potentially demolition of the now-designated property...”

“The immediate practical effect,” of the Tatum Waterway designation, “was to reduce the ability to get property insurance, reduce the ability to sell, and ultimately reduce property values,” Ytech claimed.

The City, however, contended that “Designation neither adds nor subtracts development rights, it simply requires review by the HPB *instead of the DRB* [Design Review Board] for applications seeking development order approval.” [Emphasis in document.]

wider impact?

While specific to the Tatum Waterway, if the ruling stands, it would have an impact on all future historic designation processes, Armstrong Coffey said. “What this opinion rules is that under the City’s own Code, all the protections of due process have to be afforded in the designation process – not just in the permitting process for already designated properties – but in the designation process itself and, to date, that has not

been the process the City has employed. It’s been more like a regular ordinance, regular regulation, and it is the due process components that are essential to fairness... It is necessarily a more deliberate process and it has to be grounded in established facts and evidence.”

“The interesting thing about the quasi-judicial process, when the property owner gets ample notice and the opportunity to participate, there can be some give and take in that process,” Armstrong Coffey added. “The early staff reports from the City itself indicate that the Tatum Waterway area is of mixed historical significance. That doesn’t mean that there might not be some properties worth designating, but what it means is that where Ytech had already gone in and invested millions of dollars which it was able to do prior to designation, at that point it wasn’t able to negotiate a tailored approach to designation because the entire Tatum Waterway area was a foregone conclusion for designation.”

The Tatum Waterway “is not susceptible to development at an extremely intense rate but it has been and certainly even can be further enhanced,” she said. “To do that with a tailored approach is better because it allows the property owner to work with the City to choose the best properties and develop the others in a way that makes preservation affordable.”

Upon purchasing the buildings in the neighborhood, Ytech says it preserved original structures, “maintained the scale and character of the district” while renovating the apartment units and creating public space improvements.

[Ytech reportedly put its Tatum Waterway property on the market](#) a couple of weeks ago for \$50 million. Ytech CEO Yidios told RE: MiamiBeach the ruling has no impact on the sale plans.



Photos of Ocean House NoBe courtesy of Ytech