

**BEFORE THE MIAMI BEACH CITY COMMISSION
DESIGN REVIEW BOARD FILE 16-0082
2120 LUCERNE AVENUE**

IN RE: The Application for Design Review
Approval for the construction of a new
two-story single-family home to replace
an existing pre-1942 architecturally-
significant one-story home, including a
variance to exceed the maximum
allowed floor to ceiling clearance for
non-airconditioned space located under
a main structure.

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PETITION TO REVERSE DESIGN REVIEW BOARD DECISION¹

Francesco Senis, Inga Roza Senis, Anne Burdick Berman and Jeffrey
Brandon (collectively “neighbors”), pursuant to section 118-9, City of Miami
Beach Land Development Regulations, hereby appeal the Order of the City
of Miami Beach Design Review Board (“Order”) approving a proposed
single-family house at 2120 Lucerne Avenue (“proposed house” or
“project”). Exhibit A. Order of Design Review Board, July 7, 2017.

Neighbors request that the City of Miami Beach City Commission
 (“commission”) reverse the decision of the Miami Beach Design Review

¹ All citations to the Exhibits are indicated by: “Exhibit” followed by the
appropriate tab letter and page number.

Board (“DRB”) to grant the application for design review approval for the proposed house (DRB File No. 16-0082), or in the alternative remand the matter back to the DRB with instructions for review consistent with the requests herein.

INTRODUCTION

Patrick and Marisa Dwyer (“Dwyers” or “applicants”) applied for DRB approval for construction of a new three-level, single-family house to replace an existing pre-1942 architecturally-significant, one-story house at 2120 Lucerne Avenue on Sunset Island No. 4.² It is undisputed that the proposed building at issue in this appeal will be one of the first “stilt houses” approved in Miami Beach.

The demolition of the existing 2,024 square-foot one-story house and its replacement with a three level, 3,326.80 square-foot building (Exhibit G A-01. Revised Plans Presented at July 7, 2017 Hearing) 37 feet in height (Id.) as measured from base flood elevation would alter and negatively impact this well-established single-family residential neighborhood. The DRB-approved

² The application for DRB approval included a variance to allow the new building to exceed the maximum allowed floor-to-ceiling clearance for non-air conditioned space under the main structure. The DRB denied the variance at its July 7 meeting. Because the variance addressed the internal heights of the levels/floors of the house and not the proposed height of the building itself, and because the variance was denied, the variance is not at issue here.

massive, out-of-scale structure that would loom over and dominate the surrounding properties is not only out of character with the predominately single-story houses on the island but is also an invitation to build more such behemoths in this neighborhood. Given the virtually unanimous objection to the project by its residential neighbors, no one was surprised that this application consumed several hours of contentious public hearings at two meetings of the DRB. During the DRB review process only one neighbor spoke in favor of this out-of-scale project. Furthermore, the flawed DRB decision-making process included a failure to base its decision on competent substantial evidence on several key issues and a failure to observe the essential requirements of law.

At the hearing the applicant failed to address the proposal's compliance with specific design review criteria. And the DRB Order failed to show compliance with those criteria.³ This, coupled with the staff report's determination that the application failed to comply with four of the design review criteria, shows that the DRB did not observe the essential

³ While Paragraph I.C. of the order states that "the project would remain consistent with the criteria and requirements of Section 118-251 if the following conditions are met," the conditions do not address the issue of massing and scale in addressing compatibility with the surrounding neighborhood and other requirements addressed in section 118-251.a(3), (5), (6) and (12). See pages 19-20.

requirements of law when it approved the application. These failures warrant reversal of the DRB decision.

The Order's conclusory statements on compliance with required review standards are contrary to the factual basis for the staff recommendation. Therefore, the DRB decision and order regarding the project's compliance with all the review criteria is not based on competent substantial evidence.

These fundamental failures on the part of the DRB warrant the reversal of that board's approval of the Dwyer application.

PARTIES

Francesco and Inga Roza Senis own the property at 1621 W. 21 Street at the south west corner of the property and within 375-feet of the proposed project. Exhibit B. Miami-Dade County Property Records.

Anne Burdick Berman owns the property at 1541 W. 22nd Street across the street from the property and within 375-feet of the proposed project. Exhibit C. Miami-Dade County Property Records.

Jeffrey Brandon owns the property at 2130 Bay Avenue which is west of the property and within 375-feet of the proposed project. Exhibit D. Miami-Dade County Property Records.

The Dwyers own the property at 2120 Lucerne Avenue, Miami Beach, Florida. They applied for and received DRB approval for the demolition and redevelopment on that site.

On June 6, and July 7, 2017, the DRB held a publicly-noticed, quasi-judicial hearing and reviewed the application for compliance with design review and variance approval criteria. At that hearing the neighbors individually appeared before the Design Review Board and spoke regarding the application's consistency with the design reviews criteria focusing on the project's compliance with the neighborhood compatibility criteria.

FACTUAL BACKGROUND

In early 2017, the Dwyers applied to the city for permission to demolish an architecturally-significant, one-story, single-family house at 2120 Lucerne Drive, a corner lot at Lucerne Avenue and West 22nd Street on Sunset Island 4. Exhibit E. Aerial map of area. The applicant proposed a bulky, out-of-scale, three-level building in a neighborhood with many single-story houses. Exhibit F. 4, 8-9. July 7. 2017 Staff Report. This 3,326.80 square-foot house would have three levels (the first level with a parking garage, foyer/vestibule and storage area and two floors of living area). Exhibit F 8. July 7, 2017 Staff Report. Exhibit G. EX-06. Revised Plans Presented at July 7, 2017 DRB Meeting.

The property is included in the RS-4-zoned single family residential neighborhood covering the interior lots and the lots on the south side of the island. Across West 22nd Street from the property is RS-3-zoned waterfront property to the north. Exhibit G 17. Revised Plans Presented at July 7, 2017 DRB Meeting.

Starting in October 2016, the applicant met with staff on numerous occasions regarding the project's design. Staff clearly and "continually stated to the [applicant's] team that the proposed design may not be the most appropriate form for an interior dry lot on a corner parcel, which exposes two elevations to the street." Exhibit F 7. Staff Report, July 7, 2017. The result of these meetings was a plan that remained consistent in its design.⁴

Prior to the June 6, 2017 DRB hearing, the planning department issued its staff report. The planning department staff explained in the report that a corner lot is an inappropriate location for a building that is perceived or "reads" as three stories in height even though it may be two stories. Exhibit H 7. June 6, 2017 Staff Report. Staff recommended that the design of the building be changed so it would be seen as a two-story building. Id. "Staff

⁴ The applicants requested Design Review Board approval for the construction of a single-family house to replace an existing pre-1942 architecturally significant one-story home, including a variance to exceed the maximum allowed floor to ceiling clearance for non-airconditioned space located under a main structure.

would recommend that the uppermost level containing the four bedrooms be removed in its entirety and that the spaces be reconfigured into one main living floorplan.” Exhibit H 7. June 6, 2017 Staff Report. According to the staff report the proposed building “is out of scale with the surrounding context and is developed with a massing that breaks the existing streetscape and dominates the corner parcel, and looms over the front and sides of the property when compared to the existing neighborhood character.” Exhibit H 4-6. June 6, 2017 Staff Report. That is the basis for the staff determination that the application failed to comport the design review criteria in section 118-251 (a) (3), (5), (6), and (12). Id. The planning department recommended that the variance request be denied and that the rest of the application be continued to the September 5, 2017 meeting to resolve 29 concerns. Exhibit H 9. June 6, 2017 Staff Report.

At the DRB review on June 6, 2017, the board heard a presentation from the planning staff that echoed the staff report. The attorney for the applicant presented argument regarding the project and variance. The architect for the project described the project and explained that the first level would include an enclosed storage area, parking and a “vestibule” accessing a circular stairway to the second floor. The second level would include the master bedroom and bath, a home office, and dining, kitchen and lounge

areas. Four bedrooms, two baths and a den with a deck would be on the third level. He also confirmed that granting the first level clearance variance would not increase the overall height of the proposed house.

Neither the architect nor the attorney for the applicants addressed the application of the design review criteria set forth in section 118-251(a) to the requests for DRB approval.

Sunset Island 3 and 4 residents appeared and spoke at the hearing. They focused their remarks on the relationship of the proposed building and the rest of their one-to-two story single-family residential neighborhood. Neighbors agreed with the city's professional planners that the project would be out of scale with the neighborhood and with its three-level height and associated mass would loom over its neighbors. This building would be two stories on stilts and would be as bulky as a three-story building. As one neighbor said, even a child would perceive this proposed building as three-stories. These neighbors spoke to the height and the massing of the building, echoing the city's staff report in several cases.

The board discussed the matter and decided to continue the application to its July 7, 2017 meeting.

On June 12, the applicant filed with the city revised plans that reduced the variance but did not change the design of the second or third levels,

height, or massing of the project. Exhibit G. Revised Plans Presented at July 7, 2017 DRB Meeting.

Planning staff issued a new report with minor changes but with the same determination of non-compliance with design review criteria 3, 5, 6 and 12 in section 118-251(a), and virtually the same analysis, and the same recommendation as the June 6, 2017 staff report (denial of the variance and continuance to the September 5, 2017 hearing). Exhibit F. 1-18, July 7, 2017 Staff Report.

At the DRB hearing on July 7, 2017, the attorney for the applicants discussed the development posture of two adjoining lots and claimed that this proposed house was appropriate on a corner lot. He then discussed the design of the house in the context of the now-reduced first level clearance variance. The applicant's architect then described the unchanged design of the house.

As they did at the June 6 DRB hearing, the applicants' representatives failed to discuss the design review criteria set forth in section 118-251 and how the proposed project would meet those requirements.

The opposing neighbors focused on the requirement that the DRB examine development plans for consistency with the criteria in section 118-251(a) regarding aesthetics and the physical attributes of the project in relation to the site, adjacent structures and the surrounding community.

According to the DRB review criteria, the development must not have a negative impact on adjacent neighborhoods. According to these standards, the applicant must eliminate or mitigate aspects of the proposed project that adversely affect the surrounding area.

Several neighbors testified about the compatibility of the proposed house with the Sunset 4 Island neighborhood as well as its compliance with the code. Area resident, Terry Bienstock explained that utilization of all of the available five-foot freeboard⁵ height is a design choice and subject to design criteria in section 118-251(a). He noted that over the last five years on an island with approximately 20 houses 18 new houses have been built. And none of the houses, old and new, have been stilt houses as

⁵ Section 54-75 of the Miami Beach Code defines freeboard as follows: Freeboard means the additional height, usually expressed as a factor of safety in feet, above a flood level for purposes of floodplain management. Freeboard tends to compensate for many unknown factors, such as wave action, blockage of bridge or culvert openings, and hydrological effect of urbanization of the watershed, which could contribute to flood heights greater than the heights calculated for a selected frequency flood and floodway conditions. All new construction and substantial improvements to existing construction shall meet the minimum freeboard requirement, and may exceed the minimum freeboard requirement up to the maximum freeboard without such height counting against the maximum height for construction in the applicable zoning district.

Freeboard, minimum equals one (1) foot.

Freeboard, maximum equals five (5) feet.

requested here.⁶ Mr. Bienstock also noted that part of the first level of the proposed house would include an air-conditioned area contrary to the Land Development Regulations.

Dr. Ann Burdick Berman lives across the street from the property at 1541 West 22d Street. She stated that an example of the character of the area is its pre-1942 homes and that the proposed three-story-looking house is out of character with the neighborhood.

Neighbor and Architect Bill Taylor presented a drawing that depicts the height issues when taking advantage of the city's freeboard regulations and requested that the board approve a building that respects the neighborhood. Exhibit I. Height Sketch.

Inga Senis, the abutting property owner caddy-corner to the south west of corner of the property, spoke to the proposed house's negative impacts on her property. She also presented photographs of nearby houses to show this project's incompatibility with the neighborhood. Exhibit J. Neighborhood Pictures Presented at July 7 Hearing.

⁶ In discussion on the issue of freeboard and the necessity for increased elevation due to sea-level rise, the planning director noted the origin of the freeboard concept. He spoke of the low-lying areas on Hibiscus Island as the area that necessitated the use of the freeboard concept. Neighbors testified to the lack of flooding on Sunset 4.

The applicant's attorney in rebuttal discussed the unchanged proposed design and how the second floor (the third level) is "stepped back" and the north side of that level would not include a terrace. He then discussed the variance.

After a lengthy discussion regarding the city's freeboard provisions, James Murphy, chief of urban design stated that the board has two fundamental tasks: 1) Approve or deny the variance and 2) Approve or deny the design pursuant to the criteria. He explained that freeboard is not the issue here. The applicants' attorney stated that his client would reduce the height by one foot.

The board then voted to deny the variance and approve the plans without the variance. In doing the latter the board deleted Condition 1.b. which stated that "The uppermost level [the third level] containing four bedrooms be removed in its entirety and that the spaces be reconfigured into one main living floorplan." Exhibit F 11. July 7, 2017 Staff Report. This modification of the draft order specifically removed the one condition that would have reduced the massing of the project and made the project more compatible with the neighborhood as stated in the staff report. Exhibit F 8. July 7, 2017 Staff Report.

The result is a project that remained consistent in its design (including its massing and scale) while reducing the height by one foot.

On July 13, 2012, the board rendered its order granting design review approval to the project.

STANDARD OF REVIEW

This city commission's standard of review requires a determination of whether (1) the proceedings before the DRB afforded procedural due process; (2) the DRB observed the essential requirements of the law; and (3) the DRB's decision was supported by competent substantial evidence. Sec. 118-9.c(4), Miami Beach Land Development Regulations.

ARGUMENT

1. The Applicant Failed to Meet Its Initial Burden to Show That It Met DRB Review Criteria

In the DRB review of the development proposal, the applicant has the initial burden to show that it has met the DRB approval requirements. *Irvine v. Duval County Planning Commission*, 495 So.2d 167 (Fla.1986). These requirements are set out in sections 118-251 through 264 of the Miami Beach Land Development Regulations. However, the applicant failed to meet that burden by its failure to address the DRB review criteria and how the proposed building met each of those standards.

A. Design Review Criteria 3
Compatibility

The applicant did not present any evidence that it complied with Section 118-251(a)(3). That criteria requires a showing that the applicant's plans must show all information reasonably necessary to determine compliance with the requirements of the underlying zoning district. According to Section 118-251(a), the application's consistency with each criterion encompasses "aesthetics, appearances, safety, and function of any new or existing structure and physical attributes of the project in relation to the site, adjacent structures and surrounding community." Section 118-251(a). Land Development Regulations.

In its presentation to the DRB, the applicant failed to demonstrate that it had complied with this requirement. There is nothing in the record to show that the applicant presented any evidence that its application met all applicable land development regulation provisions applicable to this zoning district in the context of the aesthetics, appearances, safety, and function of the proposed building in relation to the site, adjacent structures and surrounding community. The applicant failed to show how the large three level building being proposed for DRB approval would be similar in scale with the one and two-story houses in the surrounding neighborhood. Nor did the applicant present facts showing that the massing of this large house

would fit in with the appearance of the existing neighborhood streetscape.

Without this required evidence, the applicant did not meet its burden to show compliance with design review Criteria 3.

That failure warrants reversal of the DRB's approval of the application.

B. Design Review Criteria 5
Compatibility

The applicant did not present any evidence that it had complied with Section 118-251(a)(5). That criteria requires the location, appearance and design of the proposed building to be in conformity with all design review and related land development regulation provisions. The application's consistency with each criterion encompasses "aesthetics, appearances, safety, and function of any new or existing structure and physical attributes of the project in relation to the site, adjacent structures and surrounding community." Section 118-251(a). Land Development Regulations.

Yet the applicant failed to present any evidence showing that the scale and massing of the proposed building is consistent or comparable to the surrounding neighborhood predominately made up of one and two story single-family houses. The evidentiary presentation by the applicant's architect focused on the relationship between the location, appearance and design of the proposed building and its immediate neighbors. This is contrary

to the directive in section 118-251(a). that requires the analysis to include the building's relationship with the surrounding community. Without this required evidence, the applicant did not meet its burden to show compliance with design review Criteria 5.

That failure warrants reversal of the DRB's approval of the application.

Non-Air-Conditioned Space on First Level

Criteria 3 requires compliance with applicable code provisions. The applicant did not show that it complied with section 142-105(b)(4)d. regarding non-airconditioned space below minimum flood elevation plus freeboard. That section states that "the area under the first habitable floor of the main structure [the first level of the proposed building] shall consist of non-air-conditioned space where that area is between six and seven and a half feet above existing grade (including freeboard). Such area shall not be subdivided into different rooms, with the exception of the parking garage area, and required stairs and/or elevators." Section 142-105(b)(4)d.3. Miami Beach Land Development Regulations.

According to the plans, part of the first level of the proposed building is air-conditioned, contrary to that provision. Therefore, the project is

contrary to 118-251(a)(5) because its design is contrary to an applicable land development regulations provision.

C. Design Review Criteria 6
Compatibility

The applicant did not present any evidence that it complied with Section 118-251(a)(6). That provision requires that a DRB application must show sensitivity to and compatibility with the environment and adjacent structures and that the proposed building enhances the appearance of the surrounding properties. The applicant needs to present evidence that the “aesthetics, appearances, safety, and function of the proposed new building and physical attributes of the project are consistent with Criteria 6 relation to the surrounding community as well. Section 118-251(a). Land Development Regulations.

The applicant failed to present any evidence that this three-level out-of-scale, insensitive and incompatible building showed any sensitivity to and compatibility with the surrounding one and two-story area. Nor did the applicant present any facts that showed that this “out of scale” and massive three-level residence enhances the appearance of the surrounding properties, as required by Criteria 6 and section 118-251(a). Exhibit F 7. July 7, 2017 Staff Report.

That failure warrants reversal of the DRB's approval of the application.

D. Design Review Criteria 12
Orientation and Massing

The applicant did not present any evidence that it complied with Section 118-251(a)(12). The applicant presented no evidence that the orientation and massing of the proposed building is sensitive with the building site and area and creates or maintains important view corridors as required by that provision. The application's consistency with each criterion includes the proposed building's aesthetics, appearances, safety, and function and physical attributes of the project in relation to the site, adjacent structures and surrounding community. Section 118-251(a). In fact, the professional planning staff states that the 27'2" x 36'4" area of this building "contributes to the awkward massing of the home and its inconsistent relationship to existing homes." Exhibit F 8. July 7, 2017 Staff Report. Staff also notes the negative impact of the proposed building on the West 22nd Avenue and on Lucerne Avenue view corridors, stating "the residence is out of scale...and developed with a massing that breaks the existing streetscape, dominates the corner parcel and looms over the front and sides of the property." Exhibit F 6. July 7, 2017 Staff Report. But the applicant never

addressed design review criteria 12 and, thereby, failed to carry its burden to show that it met that criteria.

That failure warrants reversal of the DRB's approval of the application.

2. The Design Review Board Decision as Set Forth in the Order Failed to Follow the Essential Requirements of Law When It Did Not Apply the Design Review Standards in Section 118-251(a).

When the DRB gave design approval for the project, it failed to follow the essential requirements of law because the approval did not meet each of the required design review criteria necessary for approval.

The Order memorializing the decision to approve the project makes a determination that "the project as submitted is inconsistent with Design Review Criteria 3, 5, 6 and 12 in Section 118-251 of the Miami Beach Code." Exhibit A 1, Final Order. That document then states "[t]he project would remain consistent with the criteria and requirements of Section 118-251 if the following conditions are met..." and then lists the conditions.

In the original draft order attached to the July 7, 2014 Staff Report, one of the conditions addressed the scale, massing and compatibility issues that caused the professional planning staff to determine that the project was inconsistent with the four design review criteria. That condition stated "[t]he

uppermost level containing four bedrooms be removed in its entirety and that the spaces be reconfigured onto one main living floorplan.” The DRB at its July 7, 2017 meeting removed that condition. Without that condition, there is nothing in the order that addresses the requirements of Criteria 3, 5, 6 and 12.

Therefore, the Order is invalid because it contradicts itself. It says on the one hand the project does not comply with the four criteria. But on the other hand, it will comply if it meets conditions that do not address compliance with those criteria. This Order takes the applicable law – Criteria 3, 5, 6, and 12 – and authorizes it to be ignored. This is a failure to follow the essential requirements of the law.

3. The Design Review Board Approved the Application Without any Competent Substantial Evidence to Support That Decision.

Competent substantial evidence is defined as that evidence relied upon to sustain the ultimate finding that is “sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached.” *De Groot v. Sheffield*, 95 So.2d 912, 916 (Fla. 1957). Competent substantial evidence is not opinion unsubstantiated by facts. *City of Apopka v. Orange County*, 299 So.2d 657, 660 (Fla. 4th DCA 1974).

“Design review encompasses the examination of architectural drawings for consistency with the criteria stated below, with regard to the aesthetics, appearances, safety, and function of any new or existing structure and physical attributes of the project in relation to the site, adjacent structures and surrounding community.” Therefore, the plain language of this provision requires that each criterion must be applied in that context.

As stated in section 1 above, the applicant failed to carry its burden to show that it had met the design review criteria in section 118-251(a) because it did not present fact-based evidence showing that it complied with design review criteria 3, 5, 6, and 12.

This failure is in the face of two staff reports and two hearings at which city planning staff determined that four of these criteria were not satisfied. Staff presented its analysis and found that the applicant’s proposed building:

1. Would be out of scale with the surrounding area,
2. Has a massing that breaks up the existing streetscape,
3. Dominates the corner parcel where it is to be located, and
4. Looms over the front and sides of the property.

Staff identified the deficiencies in the proposed design of the project, and the applicant failed to present fact-based evidence that it complied with

the four design criteria. These four design review criteria address the relationship between the proposed building and the surrounding area (context), its compatibility with its neighborhood, its relationship to the streetscape and view corridors and its impact on neighborhood character. The applicant presented no evidence regarding whether or how this plan met each of these criteria. In his testimony, the applicant's architect emphasized the building design and said very little if anything about the impacts of this design on the surrounding area.

The applicant presented no analysis or facts that addressed each of the design review criteria and how they were met by this design. This is the fatal flaw. The design review provisions at issue all relate to the application's relationships with immediate neighbors and the surrounding neighborhood. Because the applicant presented no fact-based evidence to the board that the application meets the specific requirements of sections 118-251(a)(3),(5),(6), and (12), there is no competent substantial evidence that supports the DRB decision to approve the proposed building as consistent with those standards. Therefore, the DRB Order is not based on competent substantial evidence and should be reversed and the application denied.

CONCLUSION

The neighbors request that the city commission review the decision of the DRB and deny the application or in the alternative, remand this matter to the DRB with instructions that the DRB require that the "uppermost level [the third level] containing four bedrooms be removed in its entirety and that the spaces be reconfigured into one main living floorplan," as stated in the original proposed order.

Respectfully Submitted,

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