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DESIGN REVIEW BOARD FILE NO. 2017-001

**LOWER TRIBUNAL FILE NO: DRB FILE NO. 16-0082
2120 LUCERNE AVENUE**

**CITY OF MIAMI BEACH RESPONSE BRIEF TO THE APPEAL
OF DRB FILE 16-0082.**

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Table of Contents

1. Criteria and Scope of the Appeal	1
2. No variances were sought in connection with the DRB Order.	2
3. Relevant Facts	2
4. Is there Competent Substantial Evidence to support the decision of the DRB?	3
a. Compatibility, orientation and massing.	4
b. The "stilt area" complies with the City Code.	10
5. Conclusion	14

1. Criteria and Scope of the Appeal¹

Francesco Senis, Inga Roza Senis, Anne Burdick Berman and Jeffery Brandon (collectively "Petitioners") filed an appeal of a Design Review Board order ("DRB") to the Miami Beach City Commission, pursuant to 118-9(c)(2)(B), of the City's Land Development Regulations (LDRs). The DRB Application was filed by Mr. and Mrs. Dwyer (herein after "Property Owners"), for their single family home. The City Commission is to review the appeal based upon three criteria: (1) whether procedural due process was afforded by the DRB, (2) whether the essential requirements of the law were adhered to, and (3) whether the decision of the DRB to grant design review approval to the property located at 2120 Lucerne Avenue, is supported by competent substantial evidence².

On appeal, the Petitioners raise no issues relating to due process³. Therefore, they have conceded that due process was provided by the DRB. This first appeal standard is not at issue and does not need to be addressed by the City Commission.

Petitioners' argument as to the second standard is very simple – they argue that because the third appellate standard was allegedly not complied with, then, the decision of the DRB did not comply with the essential requirements of the Code [specifically, the design review criteria found at 118-252 through 264, of the LDRs]. What this means is – if the Mayor and City Commission find that there is competent substantial evidence on the record from the DRB hearing to support their decision to grant design review approval for the property – then the decision of the DRB must be upheld as the correct law was applied to the application.

Therefore, the entire focus of the appeal is on whether or not there is competent substantial evidence at the June 6, 2017 and the July 7, 2017 DRB hearings to approve the rendered order allowing the designed home to be constructed.

The above appellate standard mirrors the standard used by the Circuit Court in reviewing other land development decisions – including the City's Planning Board, Board of Adjustment, and Historic Preservation Board decisions. Under case law, the appellate body is to uphold a decision [here, the DRB order] if there is competent substantial evidence in the record to support the decision⁴. The standard is NOT whether there is evidence in the record that would contradict the order, or would support a different decision⁵. The decision of the Mayor and City Commission is not "de novo" [meaning the review is not "new"]. The City Commission is not holding a new evidentiary hearing. No new facts can be presented to the City Commission. Rather, the City Commission is to look at the file, the transcripts, the tape of the hearing, and the exhibits on appeal to see if the record supports the decision of the DRB.

A five-sevenths (5/7th) vote of the City Commission is required to reverse or remand the decision of the DRB on appeal⁶.

2. No variances were obtained in connection with the DRB Order.

In reviewing the evidence the Mayor and City Commission should take notice of the following facts. The original application by the Property Owners of 2120 Lucerne had included a variance to exceed the maximum allowed floor to ceiling clearance for non-air-conditioned space located under a main structure⁷. In short, the Property Owners wanted to make the “stilts” portion of the structure (non-habitable, predominantly open air, portion underneath the home) three (3) feet taller than the maximum allowed height of 7’6”⁸. By the July 7, 2017 hearing, the variance request had been reduced from three (3) to two (2) feet of extra height⁹. A majority of the testimony during the July DRB hearing concentrated on variance request¹⁰. Ultimately, the Property Owners withdrew the variance request¹¹. As such, the decision being reviewed by the City Commission does not include a variance. Please note, that had the variance been approved, the appeal of that variance would have been to Circuit Court, and not to the City Commission¹².

3. Relevant Facts

The Property Owners of 2120 Lucerne Avenue sought design review approval from the DRB of a two story home designed by Arquitectonica¹³. The contemporary home would replace an existing pre-1942 architecturally significant one-story home¹⁴. No design waivers were sought by the Property Owners¹⁵. The DRB had jurisdiction because the applicant sought the demolition of a pre-1942 home, and a variance¹⁶. The home could have been reviewed administratively were it not for these two facts.

The proposed new home was elevated and basically looks like a modern “stilt” home, with only the parking structure, and associated storage, and the entry way to the home on the ground [this ground level area shall be referenced hereinafter as the “stilt area”]¹⁷. The entirety of the remainder of the two story structure is above the stilts¹⁸. The Property Owners utilized a Miami Beach Freeboard of five (5) feet, above Base Flood Elevation (BFE). At this site, BFE is eight (8) feet¹⁹. Under the City Code the Property Owners are provided the discretion to utilize between 1 and 5 feet for Freeboard²⁰.

The LDRs allow a clearance of 7’6” for the “stilt area”²¹. Originally, the Property Owners requested a three (3) foot variance to allow the ceiling height for the “stilt area” to be 10’6”²². The first fully-enclosed, habitable floor of the home was designed at an elevation of 15’10” NGVD, approximately 6’10” above the minimum building standard requirement of nine (9) feet [BFE of 8’, plus a 1’ Freeboard]²³. In the final order being

appealed all the heights would be reduced by the variance amount, as the Property Owners withdrew the variance request²⁴. So, the home would be approximately 4'10" above the minimum building standard requirement.

The planning staff report and testimony delineated that the structure, despite the "stilt" style, and "stilt area" was considered a two story, single-family home²⁵. Planning staff raised a concern that the home was "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 character²⁶." The planning report utilizes this same statement for the four (4) subsections of the design review criteria being challenged by the Petitioners [Subsections 118-251(a) (3), (5), (6), and (12)]²⁷. In fact, these are the only four (4) of the 18 criteria of the design review process that are being challenged, and that were of concern to the Planning Department. All of the remaining 18 criteria were found to be: not applicable; satisfied; satisfied by the withdrawal of the variance; or satisfied once final plans are submitted.

4. Is there Competent Substantial Evidence to support the decision of the DRB?

Based upon the foregoing, the only real question before the City Commission is whether there is competent substantial evidence to support the decision of the DRB to grant design review approval to the Property Owners of 2120 Lucerne Avenue. Petitioners attempt to make four arguments for what boils down to one simple argument – is the orientation and massing of the design compatible with the neighborhood? The four (4) arguments will be addressed together – as each argument derives from the same premise and same concern of the neighbors – they do not believe the height and design are compatible with the neighborhood. By not arguing the other 14 of 18 criteria for design review, the Petitioners have waived any arguments that those criteria have not been met. The fifth argument incorrectly argues noncompliance with Section 142-105, of the LDRs, which section relates to the garage and entryway area underneath the elevated home. This argument will be addressed separately.

Courts have interpreted what is substantial competent evidence, and have determined that such a finding requires two separate inquiries: (1) whether the evidence "will establish a substantial basis of fact from which one fact can be reasonably inferred;" and (2) whether the evidence is "sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached²⁸." In reviewing the transcripts, exhibits, videos of the public hearings, and arguments of counsel, the City Commission should take into consideration this standard in determining whether the DRB approval of the design was substantiated by competent substantial evidence in the record.

a. Compatibility, orientation and massing.

Petitioners painstakingly argue about four sections of the design review criteria, found at 118-251(a), at subsections (3), (5), (6), and (12)²⁹. As you will see, below, the criteria in question, all relate to compatibility, orientation of the structure, and massing of the structure. The City Code provisions in question are:

Sec. 118-251. - Design review criteria.

(a) 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. The board and the planning department shall review plans based upon the below stated criteria, criteria listed in neighborhood plans, if applicable, and design guidelines adopted and amended periodically by the design review board and/or historic preservation board. Recommendations of the planning department may include, but not be limited to, comments from the building department and the public works department. If the board determines that an application is not consistent with the criteria, it shall set forth in writing the reasons substantiating its finding. The criteria referenced above are as follows:

(3) 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.

(5) The proposed site plan, and the location, appearance and design of new and existing buildings and structures are in conformity with the standards of this article and other applicable ordinances, architectural and design guidelines as adopted and amended periodically by the design review board and historic preservation board and all pertinent master plans.

(6) The proposed structure, and/or additions or modifications to an existing structure, indicates a sensitivity to and is compatible with the environment and adjacent structures, and enhances the appearance of the surrounding properties.

(12) The proposed structure has 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).

The best way for the City Commission to determine whether the structure is compatible is to review the following documents submitted into the record. The staff report filed by the Planning Department recommended that the design not be approved, as presented. Staff recommended modifications to the design. Please note, that the staff report and recommendation of the City's Planner (and his planning staff) are considered "competent substantial evidence"³⁰. At the time the reports were drafted, the design did include the variance request for first three (3) feet, and, later, reduced the request to two (2) additional feet of height at the surface level³¹. The variance request was withdrawn during the July 7, 2017 hearing. The best evidence relating to compatibility, orientation and massing of the single family home is demonstrated through the following aerials, drawings, and neighborhood comparisons.

The City relies on the entirety of the record below as to competent substantial evidence. However, to support the DRB's decision, the City Attorney's Office believes that the exhibits below appear to be the best representation as to the compatibility, scale, design, and massing of the home. These documents were part of the record at the hearing, and several were used as enlarged poster boards during the hearing. It is up to the City Commission to decide whether all the evidence, including the exhibits listed below, constitute competent substantial evidence to support the DRB's decision that the design is compatible with the neighborhood, the massing, and the orientation of the structure.

The first exhibit shows an aerial of the neighborhood, and includes the superimposed image of the proposed single family home. The aerial shows the size or massing and orientation within the neighborhood.



Petitioners' Exhibit G, page EX-15.

The second exhibit shows another aerial rendering of the massing and orientation of the Property Owners' design in context of the neighborhood.



Petitioners' Exhibit G, page EX-16.

The third exhibit provides a rendering of the structure, from “stilts” to roof.

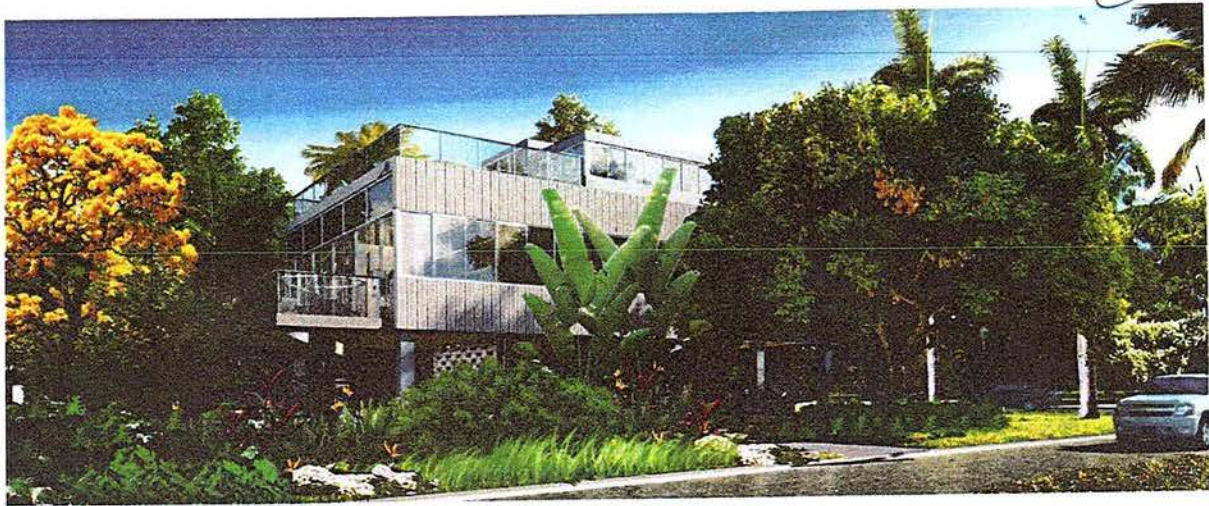


Petitioners' Exhibit G, page A0-11.

The next few exhibits are renderings of the proposed structure, “in context” of the neighborhood.



Petitioners' Exhibit G, page A2-10.



Petitioners' Exhibit G, page A2-15.



Petitioners' Exhibit G, page A2-14.



[illegible]

9



Petitioners' Exhibit G, page A2-09.

Based upon the City's, the Property Owners, or, alternatively, the Petitioners' arguments on appeal, as supported by the evidence, the City Commission is to decide whether the decision of the DRB should be upheld, modified, or upheld.

b. The "stilt area" complies with the City Code.

Petitioner's final (fifth) argument incorrectly argues noncompliance with Section 142-105, of the LDRs, which section relates to the "stilt area," garage and entryway area underneath the elevated home. As will be seen below, the enclosed area of the garage meets the requirements of the LDRs. And, the enclosed "air-conditioned entryway" on the ground floor has been calculated in unit size, consistent with the LDRs requirements. Therefore, it appears Petitioner has misunderstood the plans for this structure. The applicable LDR provides:

Sec. 142-105. - Development regulations and area requirements.

* * *

(b) The development regulations for the ... RS-4 single-family residential districts are as follows:

* * *

(4) Unit size requirements.

d. Non-air-conditioned space located below minimum flood elevation, plus freeboard. Notwithstanding the above, for those properties located in the ... RS-4 single-family residential districts, where the first habitable floor is located six feet or more above existing grade in order to meet minimum flood elevation requirements, including freeboard, the following shall apply:

1. The height of the area under the main structure may have a maximum floor to ceiling clearance of

seven feet six inches [7'6"] from the lowest level slab provided.

2. Up to, but not exceeding, 600 square feet of segregated parking garage area may be permitted under the main structure.

[the total segregated area, enclosed and unenclosed is 590 square feet: 288 square feet for the parking area + 302 square feet for the storage, enclosed area = 590 square feet. This can be clearly delineated in the third exhibit/legend found below].

3. The area under the first habitable floor of the main structure shall consist of non-air conditioned space. Such area shall not be subdivided into different rooms, with the exception of the parking garage area, and required stairs and/or elevators.

[The stairs, elevator, entry way, consistent with the provision above are enclosed and counted towards unit size. See exhibits below].

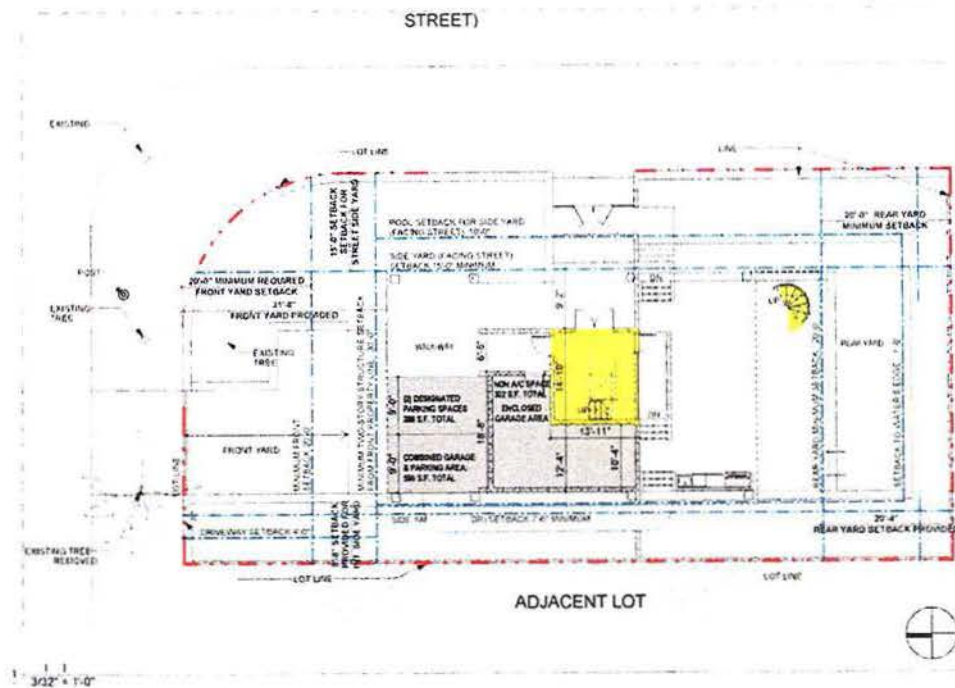
4. The parking garage area and the non-air-conditioned floor space located directly below the first habitable floor, shall not count in the unit size calculations.

[The parking garage, which by definition includes storage areas is exempted from unit size and meets the requirements of subsection 2, above, as to square footage. The parking area is not enclosed, but, the storage area of the garage is and consists of 302 square feet.].

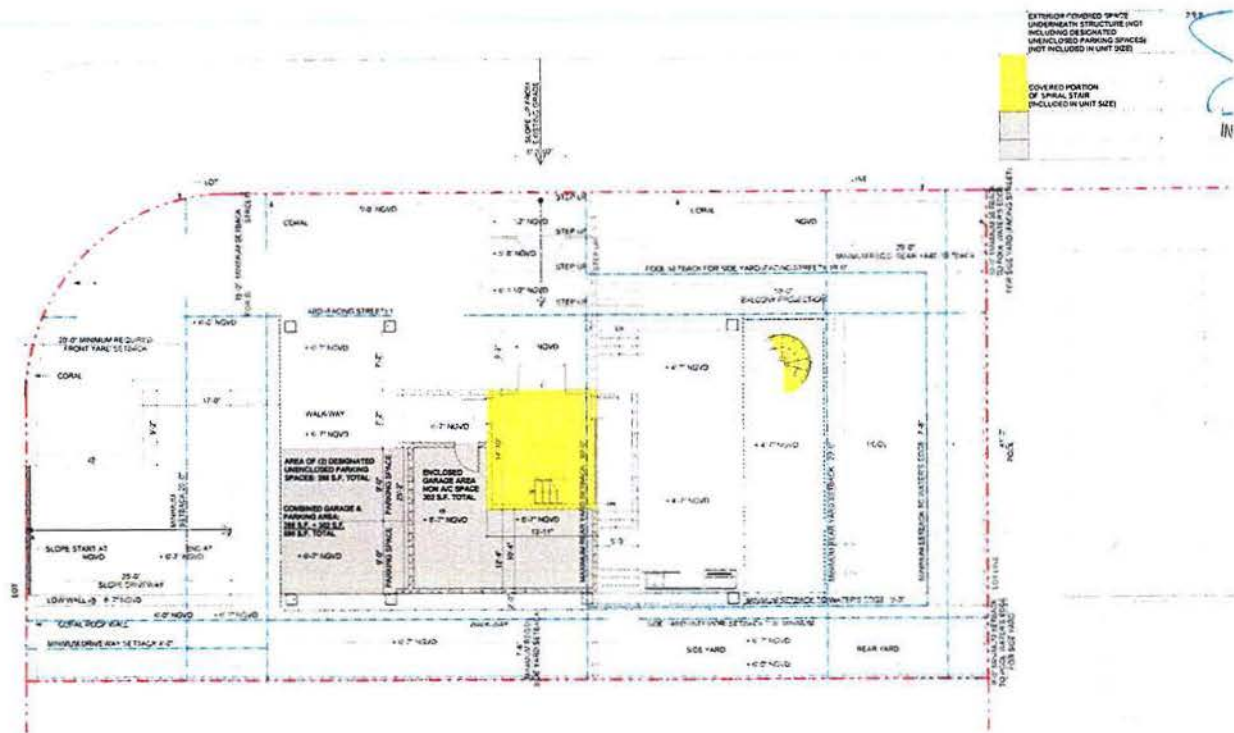
The City's Planning staff found no violation of the provisions of this LDR section – other than to object to the Property Owners request for a variance to increase the maximum ceiling height from 7'6" to 10'6" (which variance was reduced to two (2) feet by the July 7, 2017 DRB hearing, for a total height of 9'6"³². Once the variance was withdrawn, there was no relaxation of the requirements in Section 142-105(b)(4)d. Its staff report and staff analysis is considered competent substantial evidence³³, and there was compliance with the code requirements, this portion of the DRB order should be upheld.

Moreover, pursuant to Section 142-105(5)(d), in single family homes, garages can be "[a] maximum of 500 square feet of garage space shall not be counted in lot coverage if the area is limited to garage, storage and other non-habitable uses."

According to the plans documented below, the Property Owners plans meet the square footage requirements of the LDRs.



Petitioners' Exhibit G, page A0-05 (top left of page). These two plans show the small area that is the air-conditioned entryway on ground floor, in the stilt area of the structure, which is counted towards unit size; as well as the open garage and enclosed closet space, which is not counted towards unit size.



Petitioners' Exhibit G, page A0-08.

DESIGNATED SPACE	TOTAL AREA
COVERED SPACE UNDERNEATH STRUCTURE	2,433.63 S.F.
EXTERIOR COVERED SPACE UNDERNEATH STRUCTURE (NOT INCLUDING DESIGNATED UNENCLOSED PARKING SPACES) (NOT INCLUDED IN UNIT SIZE)	1,612.82 S.F.
ENTRY AREA (INCLUDED IN UNIT SIZE)	206.43 S.F.
COVERED PORTION OF SPIRAL STAIR (INCLUDED IN UNIT SIZE)	24.28 S.F.
(2) DESIGNATED UNENCLOSED PARKING SPACES (NOT INCLUDED IN UNIT SIZE)	288 S.F.
ENCLOSED GARAGE AREA (NOT INCLUDED IN UNIT SIZE)	302 S.F.

(T)

The above exhibit magnifies the legend to A0-08. The total enclosed garage space 302 square feet. The unenclosed parking area under the home is 288 square feet.

5. Conclusion

The Petitioners appeal should be denied as (1) Petitioners never raised a concern over procedural due process; (2) competent substantial evidence supports the decision of the DRB; and (3) if the City Commission agrees that there is competent substantial evidence to support the design, then, the argument relating to the failure of the DRB to apply the correct law (adhere to the essential requirements of law) is moot. If the Mayor and City Commission support the DRB's decision, and that there was competent substantial evidence at the June 6, 2017 and the July 7, 2017 DRB hearings to approve the rendered order allowing the designed home to be constructed, then the Petition should be denied.

¹ All citations to authority shall be placed in endnotes so as not interfere with or distract from the review of factual arguments.

² LDRs Section 118-9(c)(4).

³ Pursuant to LDRs Section 118-9(c)(4)C.(i), the appeal shall be in writing, and include all record evidence, facts, law and arguments necessary for the appeal (this appellate document shall be called the "brief").

⁴ *Metropolitan Dade County v. Blumenthal*, 675 So.2d 598, 605 (Fla. 3d DCA 1996)(*en banc*)("The legal issue for the circuit court to consider was whether or not there was substantial competent evidence to support [the Board's] resolution.")

⁵ It is not the role of the [City Commission on appeal] to reweigh the evidence before the board, but instead to determine whether the evidence: (1) "will establish a substantial basis of fact from which one fact can be reasonably inferred;" and (2) 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). It cannot be gainsaid that the evidence before the board met that standard. See *City of Fort Lauderdale v. Multidyne Med. Waste Management*, 567 So. 2d 955 (Fla. 4th DCA 1990) (court may not re-weigh evidence presented by competing expert witnesses). When the facts in the record give the board a "choice between alternatives," it is up to the board to make that decision, not the appellate panel. *Metro. Dade County v. Blumenthal*, 675 So. 2d 598, 606 (Fla. 3d DCA 1995).

⁶ LDRs Section 118-9(c)(4).

⁷ Petitioners' Exhibit F.

⁸ *Id.*

⁹ Petitioners' Exhibit H.

¹⁰ Video and transcript of July 7, 2017 hearing.

¹¹ Petitioners' Exhibit A at page 4 of 7.

¹² LDRs Section 118-9(c)(1)C; and LDRs Section 118-353.

- ¹³ Petitioners' Exhibit F at page 1; Petitioners' Exhibit H at page 1.
¹⁴ Petitioners' Exhibit H, page 1.
¹⁵ Petitioners' Exhibit E, July 7, 2017 staff report pages 1, 7-9.
¹⁶ LDRs Section 142-105(a)(1)d.
¹⁷ See Property Owners' plans, Petitioners' Exhibit G and testimony/transcript from July 7, 2017 hearing.
¹⁸ *Id.*
¹⁹ Petitioners' Exhibit H, at page 2; and Petitioners' Exhibit E, page 1.
²⁰ City Code Section 54-75.
²¹ LDRs Section 142-105; Petitioners' Exhibit H, pages 2-3; and Petitioners' Exhibit F, pages. 2-3.
²² Petitioners' Exhibit H, pages 2-3.
²³ Petitioners' Exhibit H, page 2.
²⁴ Petitioners' Exhibit A, page 4.
²⁵ Petitioners' Exhibit H, page 5; Petitioners' Exhibit F, page 2, and 7.
²⁶ Petitioners' Exhibit F, at pages 4-6; Petitioners' Exhibit H, pages 4-5.
²⁷ *Id.*
²⁸ *De Groot v. Sheffield*, 95 So.2d 912, 916 (Fla. 1957).
²⁹ See Petitioner's Brief.
³⁰ Under Florida law, the opinion of professional staff generally is deemed to constitute substantial competent evidence. See, e.g. *Hillsborough County Bd. Of County Comm'rs v. Longo*, 505 So.2d 470 (Fla. 2d DCA 1987).
³¹ Petitioners' Exhibits F and H.
³² Petitioners Exhibits F and H, at pages 2-3; and see criteria of LDRs Section 142-105(d)(4)d.1.
³³ See Endnote 30.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the forgoing was emailed this 22nd day of August, 2017 to:

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