

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-air conditioned space located under a main structure.

**RESPONSE TO PETITION
TO REVERSE DESIGN REVIEW BOARD DECISION**

Respondents, Patrick and Marisa Dwyer (hereinafter, Dwyer or the Dwyers), submit this response to Petitioners, Francesco Senis, Inga Roza Senis, Anne Burdick Berman and Jeffery Brandon (collectively, Petitioners), Petition to Reverse Design Review Board Decision (hereinafter, Petition).

EXECUTIVE SUMMARY

- The Dwyers, who recently become empty nesters, seek to replace a pre-1942 house with a code-compliant, contemporary family home that utilizes 5 feet of freeboard to ensure resilience as to rising sea levels (the Project). By utilizing freeboard, the Project is required to be built on stilts or on a mound—Dwyer chose to use stilts in an effort to minimizing massing.



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Supplemental Appendix B at 59.

- After extensive evidence, presentations, and public comment over two hearing dates, the City of Miami Beach (the City) Design Review Board (DRB) unanimously approved the Project pursuant to the City's Land Development Regulations Section 118-251, titled Design Review Criteria.
- Three property owners—whose properties do not abut the property at issue—have filed a petition requesting that the City Commission (Commission) reverse the DRB order (Order).
- The Commission's review is limited to whether the DRB: (i) provided due process of law; (ii) observed the essential requirements of law; and (iii) based its decision on competent, substantial evidence. City of Miami Beach,

Code of Ordinances § 118-9.c.

- The Petitioners only raise issues with whether the DRB (ii) observed the essential requirements of law; and (iii) based its decision on competent, substantial evidence. Due process has been met and is not before the Commission.
- First, Petitioners argue that there was not competent substantial evidence to support the DRB Order as to its determination that the Project is compatible with the zoning district's "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."
- Petitioners are wrong. Petitioners only raise issue with 4 of the 18 criteria required pursuant to Section 118-251. The remaining 14 criteria have not been challenged and, therefore, are conceded as met.
- The evidence, testimony, plans and presentations provided to the DRB address *each and every criterion* set forth in Section 118-251, including the 4 criteria at issue in the Petition. See *infra* at 18-24.
- Second, Petitioners argue that the DRB failed to apply the essential requirements of the law.
- Again, Petitioners are wrong, and as they concede that the DRB did apply the correct code provision—Section 118-251—Petitioners demonstrate that they simply do not like the DRB's approval. But that is not a basis for reversal, especially where, as here, there is competent substantial evidence to support the approval. Petitioners have not pointed to any other code

provision that was required to be applied and that was not.

- The DRB Order is supported by competent substantial evidence, testimony, plans and presentations that were before the DRB and the City's Staff. The correct law was applied.
- Accordingly, the Petition should be denied in all respects.

STATEMENT OF FACTS AND CASE

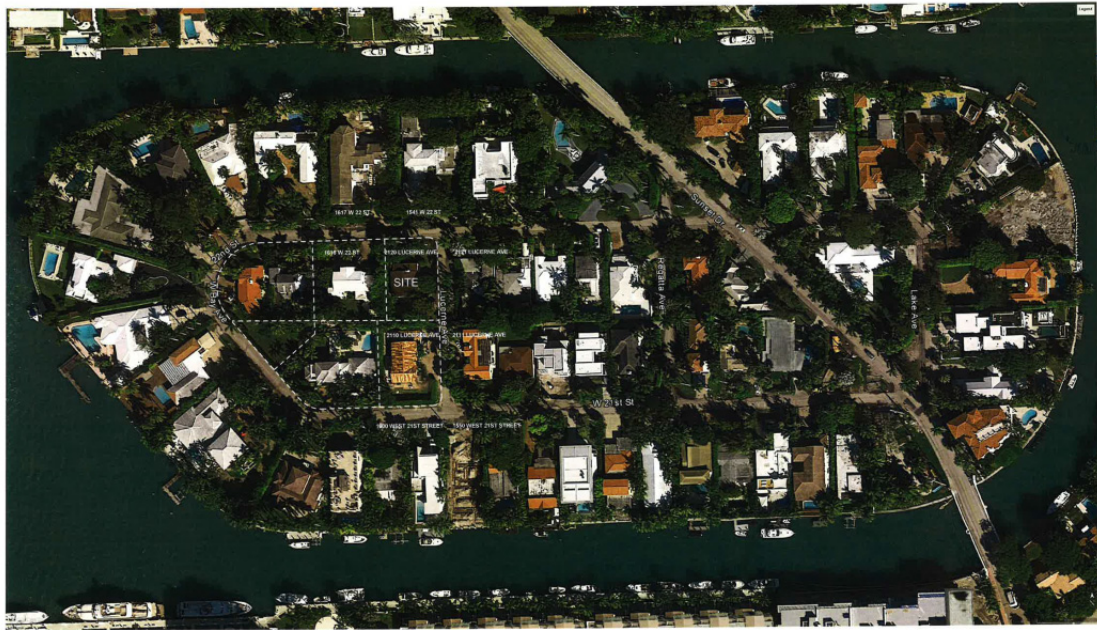
I. The Application.

The Dwyers, as recent empty nesters, purchased a corner lot at 2120 Lucerne Avenue on Sunset Island No. IV (the Property) in Miami Beach, Florida. Appendix N at 1. Dwyer seeks to replace the house currently located on the Property, a pre-1942 house, with a newly constructed, contemporary two-story house that is designed to address sea-level rise issues while meeting all code requirements of the City's Land Development Regulations. *Id.*¹ In order to replace the pre-1942 structure and build the new home, Dwyer was required to go before the DRB. City Land Development Regulations, Section 118-252(a).² The Property is zoned RS-4, single-family residential, which zoning includes the interior lots and lots on the south side of the island. Appendix F at 1.³

¹ Contrary to Petitioners' portrayal before the Commission, the City's Staff has stated unequivocally that this is a two-story house. Appendix A at 1; Appendix F at 1. Petitioners' attempts throughout their Petition to characterize the Project as three-stories simply is inaccurate and misleading.

² The DRB held hearings on the Project on June 6, 2017 and July 7, 2017. City of Miami Beach Design Review Board Hearing, <http://miamibeachfl.swagit.com/play/06062017-863> (last visited August 22, 2017); City of Miami Beach Design Review Board Hearing, <http://miamibeachfl.swagit.com/play/07072017-588> (last visited August 22, 2017). Transcribed copies of the June 6, 2017 and July 7, 2017 DRB hearings have not been prepared at the time of this filing, therefore, links to the hearings are cited with the minute mark indicated for reference.

³ Dwyer also sought a clearance variance for under the first habitable floor of the house, but withdrew that request prior to the DRB's voting on the project, so the variance is not at issue before this Commission. Appendix A at 4 ("variance was withdrawn by [Dwyer]"). Petitioners inaccurately characterize the variance as having been denied, but this simply is wrong.



DWYER RE I E N E

Supplemental Appendix B at 6.

The Project consists of an elevated, two-story home built on stilts with a parking garage area and entry vestibule located below on the first habitable floor. Appendix G at 1. Utilizing the allowable freeboard of 5 feet, which was approved in May 2016, above the Base Floor Elevation of 8 feet, the Project would consist of 23 vertical feet of habitable space, over the two floors. Supplemental Appendix A at 1; Miami Beach, Fla., Ordinance 2016-4009 (May 11, 2016).⁴ This Project originally was 24 feet in height, but to address the City Staff's concerns of compatibility with surrounding houses, it was reduced by a foot in height prior to the Project's approval. *Id.*

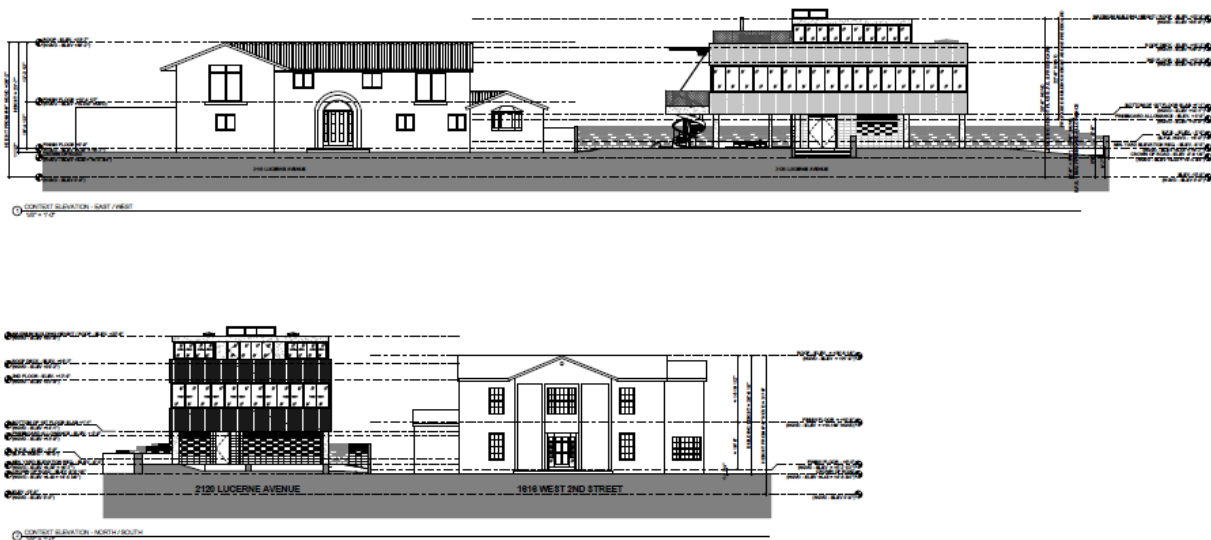
⁴ By utilizing freeboard, the Project is required to build on stilts or on a mound.

The Project includes two habitable floors of living space and covers 29.82% of the Property, leaving a substantial portion for green space, including 60 feet of separation with the house to the south and 40 feet of separation with the house to the west. Appendix F at 1; July Hearing at 8-10. The Project proposes 3,289 square feet of living space, with 2,107 square feet for the first floor, including the main living areas, the master bedroom and master bathroom, and the second floor containing 951 square feet divided between four guest bedrooms. Appendix G. The remaining 231 square feet is contained in the entry vestibule and spiral stairs below the first habitable floor. Supplemental Appendix B at 20. To minimize privacy concerns, the Project includes an outdoor terrace on the first floor—not on the second habitable floor or rooftop; although both are features that the Code allows, Dwyer chose not to include both in the interest of further maximizing compatibility with the neighboring properties. June Hearing at 60-63.



Supplemental Appendix B at 55; July Hearing at 43.

The Project is compatible with its two abutting neighbors' homes. Both abutting houses are two stories and each over 30 feet N.G.V.D. Supplemental Appendix at B, 54-56; June Hearing at 18-19; July Hearing at 8-15. The two-story house to the south of the Property is at least 4,500 square feet of habitable space with six bedrooms and seven bathrooms. June Hearing at 18-19. The two-story house to the west of the Property is at least 2,900 square feet of habitable space with five bedrooms and four bathrooms. *Id.* Thus, the scale and height of the abutting properties are similar to that of the Project.



Supplemental Appendix D at 14.

II. The City's Staff Reports.

A. The pertinent Code provision.

The City's Staff Report reviewed the Project pursuant to Section 118-251 of

the City's Code, titled "Design Review Criteria," which states:

(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:

(1) The existing and proposed conditions of the lot, including but not necessarily limited to topography, vegetation, trees, drainage, and waterways.

(2) 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.

(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.

(4) The color, design, selection of landscape materials and architectural elements of exterior building surfaces and primary public interior areas for developments requiring a building permit in areas of the city identified in section 118-252.

(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.

(7) The design and layout of the proposed site plan, as well as all new and existing buildings 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 contiguous and adjacent buildings and lands, pedestrian sight lines and view corridors.

(8) 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 all parking spaces are usable and are safety and conveniently arranged; pedestrian furniture and bike racks shall be considered. Access to the site from adjacent roads shall be designed so as to interfere as little as possible with traffic flow on these roads and to permit vehicles a rapid and safe ingress and egress to the site.

(9) 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. Lighting shall be reviewed to assure that it enhances the appearance of structures at night.

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

(11) 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.

(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).

(13) The building has, where feasible, space in that part of the ground floor fronting a 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 street, or streets shall have residential or commercial spaces, shall have the appearance of being a residential or commercial space or shall have an architectural treatment which shall buffer the appearance of the parking structure from the surrounding area and is integrated with the overall appearance of the project.

(14) The building shall have an appropriate and fully integrated rooftop architectural treatment which substantially screens all mechanical equipment, stairs and elevator towers.

(15) An 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).

(16) All portions of a project fronting a street or sidewalk shall incorporate an architecturally appropriate amount of transparency at the first level in order to achieve pedestrian compatibility and adequate visual interest.

(17) 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.

(18) In addition to the foregoing criteria, subsection [118-]104(6)(t) of the city Code shall apply to the design review 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.

Section 118-251.

B. The Staff Report’s analysis of the Project.

In reviewing the Project, the Staff Report stated it “has been generally supportive of the overall design concept and direction of the architecture” and the Project “appears to be consistent” with the City Code. Appendix F at 1. The Staff Report found the vast majority of the criteria to be satisfied or not applicable. Appendix F at 4-9. Specifically, the Staff Report found the Project “largely follows the minimum setback requirements,” is “[e]levated well-above Base Floor Elevation plus freeboard,” with a “design [that] attempts to restrain the impact of the enclosed 2nd floor on the overall elevation by minimizing its square footage, which at 951 [square feet] is only 44.9% of the first floor volume.” *Id.*⁵

The Staff Report raised concerns as to whether “the proposed design may not be the most appropriate form for an interior dry lot on a corner parcel,” but notes that the Project does “comply with both the City’s zoning regulations for single family homes and [Dwyer’s] desire to build a home that responds to the pending threat of sea level rise.” Appendix F at 7. Pertinent here, the Staff requested that Dwyer “lower[] the overall height,” which Dwyer did prior to the July 7, 2017 hearing, though Staff still noted “concerns with the proposed home in terms of its sensitivity to and compatibility with the immediate area.” Appendix F at 8. Specifically, Staff recommended that the second floor, which contains four guest bedrooms, “be removed in its entirety and that the spaces be reconfigured

⁵ The Code allows the second habitable floor to be up to 70% of the footprint of the first habitable floor—and greater than 70% with DRB approval—but in the interest of compatibility, the Project minimized the second habitable floor.

onto one main living floorplan.” Appendix F at 8. The Staff “commend[ed] [Dwyer] on a generally forward thinking design concept” but “given the specific forms and spatial relationships chosen by the architect and the established context of the immediate area, staff believes that further design refinements are in order . . . and recommends the application be continued” Appendix F at 9.

Notwithstanding its concerns, the Staff Report recognized that the Board would possibly approve the Project and stated that, if approval were to occur, it should be “subject to the conditions enumerated” in the “Draft Order,” which, per the Staff Report, address any inconsistencies with the applicable criteria. Appendix F at 10.

III. The DRB Hearings.

The DRB first heard the Project at the June 6, 2017 hearing. During that hearing, Dwyer presented extensive information regarding the Project, including testimony from the architect and evidence regarding the Project’s compliance with Section 118-251, including compatibility with the abutting properties and the surrounding neighborhood.⁶ The City’s Chief of Urban Design, James Murphy, recognized the “need to design for the future,” as the Project is “ahead of its time,” and stated that the Project is permitted under the Code, but noted that there is “tension” between new homes that address sea-level rise (such that the homes are built on stilts and utilize freeboard) and the existing pre-1942 homes. June

⁶ Contrary to Petitioners’ unsupported statements (e.g., Petition at 8, 9), Dwyer extensively addressed the criteria set forth in Section 118-251. See June Hearing at 10-32, 62-75; see July Hearing at 8-20, 46-48.

Hearing at 9, 78. After hearing extensive comments from the public, almost all of which were focused on whether the Project is compatible with the other houses on Sunset Island, the DRB continued the application in order for Dwyer “to further refine the design and less the impact on the surrounding area.” Appendix F at 1.⁷

On July 7, 2017, the DRB continued to hear from Dwyer regarding the Project and its compatibility with the neighborhood. During the hearing, Dwyer illustrated the Project’s compatibility with the abutting properties, including how the two abutting properties each were similar in height and size. The public also was permitted to comment, including the most affected neighbor, Kenneth Naylor, who shares 120 feet of property line with Dwyer. Mr. Naylor spoke enthusiastically in favor of the project referring to the Project as a “design for the future” and noting that the Project was designed with freeboard and resiliency in mind, which are good things for the future of Miami Beach. Supplemental Appendix B at 8; July Hearing at 42.⁸ Mr. Naylor also spoke against the idea of changing the Project to a one-story house, as that would include increase the mass and be intrusive upon neighboring properties. Supplemental Appendix B at 8.

⁷ Contrary to Petitioners’ representation, numerous neighbors spoke in favor of and/or wrote letters supporting this project. Supplemental Appendix C; July Hearing at 43-46.

⁸ Although each of the Petitioners are residents of Sunset Island IV, none are abutting property owners. July Hearing at 61-62. Also, Petitioners extensively rely on statements by Terry Bienstock for support of their Petition, although he is neither a Petitioner nor an abutting property owner. Petition at 10-11. Mr. Bienstock’s comments at the June hearing included a personal attack on Dwyer stating that he did “not know why they were moving from Key Biscayne” and “they can live someplace else.” June Hearing at 47-53.

Following the presentation, the DRB members spoke extensively regarding the compatibility of the Project, prior to voting to approve the Project. July Hearing at 88-109.

IV. The DRB Order Approving the Project.

The DRB Order made numerous findings of fact “based upon the evidence, information, testimony and materials presented” at the June 6, 2017 and July 7, 2017 hearings. Appendix A at 1. The DRB Order approves the Project with certain conditions to be met as to Section 118-251(3), (5), (6), and (12) (*id.* at 1-2), all which were discussed with and agreed to by Dwyer at the July 7, 2017 hearing. Appendix A at 1-10. Specifically, the DRB Order states:

The City of Miami Beach Design Review Board makes the following FINDINGS OF FACT, based upon the evidence, information, testimony and materials presented at the public hearing and which are part of the record for this matter:

I. Design Review

* * *

C. The project would remain consistent with the criteria and requirements of Section 118-251 if the following conditions are met:

1. Revised elevation, site plan, and floor plan drawings for the proposed new home at 2120 Lucerne Avenue shall be submitted, at a minimum, such drawings shall incorporate the following:

- a. The maximum floor to ceiling clearance under the main structure shall not exceed 7’-6” from the lowest level slab provided.
- b. The height of the main structure shall not exceed 23’-0” when measured from BFE + 5’-0” (maximum freeboard).

c. The proposed entrance walkway width perpendicular to Lucerne Avenue shall be not permitted as proposed. The walkway shall be reduced to a maximum of five feet.

* * *

2. A revised landscape plan, and corresponding site plan, shall be submitted to and approved by staff. The species, type, quantity, dimensions, spacing, location and overall height of all plant material shall be clearly delineated and subject to the review and approval of staff. At a minimum, such plan shall incorporate the following:

a. The subject property is located within the Sunset Island #3 & 4 CIP ROW Streetscape Neighborhood Project, which is currently underway and installation of any required street trees shall not be permitted until after the completion of the City project. Shortly after the completion of the City's ROW project, the property owner shall be responsible for obtaining a separate Public Works ROW permit for the installation of the required street trees, which may occur after the issuance of a FINAL CO.

b. The installation of sod and street trees in the public ROW is subject to the review and approval of the Public Work Greenspace Division. All understory landscape material in the public ROW should be removed and replaced with sod.

c. In order to protect the root system of existing trees #5 and 6, as identified on sheet L1-20, the architect shall remove the section of the coral rock wall proposed at the property line, and low walls outlining the driveway/parking edge located within the dripline of the trees. A less intrusive fence, such as picket / wire mesh shall be provided in these sections in order to secure the property. Also, the hardscape area in the public ROW and within the dripline of tree #6 shall be removed. A 3' wide walkway may be provided for pedestrian access subject to the review and approval of the Public Works Department and CMB Urban Forester.

d. The proposed landscape buffer within the west interior side yard shall be further enhanced in order to provide a continuous landscape buffer and specified to be 25'-0" minimum in height at the time of installation and subject to the review and approval of staff. The finish material of the walkways shall consist of an ornamental landscape gravel in order to enhance rooting space for trees/ palms and/or bamboo specified to provide screening.

* * *

IT IS HEREBY ORDERED, based upon the foregoing findings of fact, the evidence, information, testimony and materials presented at the public hearing, which are part of the record for this matter, and the staff report and analysis, which are adopted herein, including the staff recommendations which were adopted by the Board, that the Application for Design Review approval is GRANTED for the above-referenced project subject to those certain conditions specified in Paragraph I, II, III of the Findings of Fact, to which the applicant has agreed.

Appendix A at 1-3, 5.

ARGUMENT

I. STANDARD OF REVIEW.

On appellate review of the Board's decision, the Commission is required by the Code to apply a three-part review standard, inquiring whether the Board: (i) provided due process of law; (ii) observed the essential requirements of law; and (iii) based its decision on competent, substantial evidence. City of Miami Beach, Code of Ordinances § 118-9.c.⁹ This standard of review is identical to, and should be construed the same as, the standard that governs a circuit court's review of a

⁹ Petitioners have not raised any issue that due process was not afforded to them by the DRB, such that, that criteria is conceded as met.

local governmental board's quasi-judicial decision on certiorari. *E.g.*, *Miami-Dade County v. Omnipoint Holdings, Inc.*, 863 So. 2d 195, 198-99 (Fla. 2003); *Dusseau v. Metro. Dade Cty. Bd. of Cty. Comm'rs*, 794 So. 2d 1270, 1274 (Fla. 2001). The Commission accordingly cannot re-weigh the evidence or substitute its judgment for that of the Board, *e.g.*, *Dusseau*, 794 So. 2d at 1275-96; *Fla. Power & Light Co. v. City of Dania*, 761 So. 2d 1089, 1093 (Fla. 1993), and is prohibited from undertaking a de novo review. *Battaglia Fruit Co. v. City of Maitland*, 530 So. 2d 940, 943 (Fla. 5th DCA 1988).

II. The DRB Order is Supported by Competent Substantial Evidence.

Petitioners argue that Dwyer failed to meet its initial burden as to Section 118-251(a)(3), (5) and (6) as to compatibility and Section 118-251(12) as to orientation and massing, such that the DRB Order is not supported by competent substantial evidence. Petition at 14-22. Based on the record before the DRB, this argument fails.

A. The governing standard.

The governing standard of review on certiorari is both well established and exacting:

. . . [T]he “competent substantial evidence” standard cannot be used by a reviewing court as a mechanism for exerting covert control over the policy determinations and factual findings of the local agency. Rather, this standard requires the reviewing court to defer to the agency's superior technical expertise and special vantage point in such matters. The issue before the court is not whether the agency's decision is the “best” decision or the “right” decision or even a “wise” decision, for these are technical and policy-based determinations properly within the purview of the agency. The circuit court has no

training or experience—and is inherently unsuited—to sit as a roving “super agency” with plenary oversight in such matters.

Dusseau, 794 So. 2d at 1275-76 (original emphasis); *Miami-Dade County v. Torbert*, 69 So. 3d 970, 974 (Fla. 3d DCA 2011). This Commission should faithfully—and strictly—follow the *Dusseau* formulation. *E.g.*, *Euroamerican Grp., Inc. v. City of Miami Beach*, 19 Fla. L. Weekly Supp. 310b (Fla. 11th Jud. Cir. Ct. Jan. 25, 2012); *Town of Golden Beach v. City of Sunny Isles Beach*, 11 Fla. L. Weekly Supp. 786c (Fla. 11th Jud. Cir. Ct. June 15, 2004).

B. There is competent substantial evidence to support the DRB Order.

During the hearings, there was no issue, besides the withdrawn variance, that was more intensely argued than the compatibility of the Project under Section 118-251. Dwyer presented extensive testimony from its architect and photographs/renderings of the Project in comparison with the entire Sunset Island IV, the immediate neighborhood, and the abutting properties, to support the DRB Order that the Project complied with Section 118-251. Contrary to Petitioners’ argument, this evidence and testimony established the Project is compatible with the zoning district as 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.”

First, as to Section 118-251(a)(3), which concerns “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,” the evidence establishes:

- The Project is similar to height and mass to the two abutting properties, each of which are over thirty feet in height;
- The second habitable floor is only 951 square feet and centrally located on top of the first floor;
- Covering only 29.82% of the lot, the Project provides extensive green space and appropriate setbacks;
- 71% of the houses on the island with the same zoning and on interior lots are equal to or greater in square footage to the Project;
- The Property is a corner lot, which provides more buffering as it is bordered by the street on two sides, between the Project and other houses; and
- The Project, as approved, is more compact, covers less of the Property and provides more greenspace than is required under the Code and that of many of the neighboring properties.

Appendix F at 1, 4-9; Supplemental Appendix A; June Hearing at 10-25; July Hearing at 8-20, 88.

Second, as to Section 118-251(a)(5), which concerns “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,” the evidence establishes:

- The Staff Report generally is supportive of the overall design concept and direction of the architecture” and the Project “appears to be consistent” with the City Code;
- The Staff Report further notes that the Project “largely follows the minimum setback requirements,” is “[e]levated well-above Base Floor Elevation plus freeboard,” with a “design [that] attempts to restrain the impact of the enclosed 2nd floor on the overall elevation by minimizing its square footage, which at 951 [square feet] is only 44.9% of the first floor volume”;
- The Staff Report noted that the Project does “comply with both the City’s zoning regulations for single family homes and [Dwyer’s] desire to build a home that responds to the pending threat of sea level rise” and “commend[ed] [Dwyer] on a generally forward thinking design concept”;
- At the hearings on the Project, Mr. Murphy stated that the Project is “ahead of its time,” is permitted under the Code, and addresses sea-level rise (such that the homes are built on stilts and utilize freeboard); and
- The Project, while forward-thinking, does embrace the Commission’s commitment to resilience and the use of freeboard to combat rising sea levels.

Appendix F; June Hearing at 9-11, 74-77; July Hearing at 8-20, 43-46, 88.¹⁰

¹⁰ Petitioners assert that “over the last five years” “none of the houses, old and new, have been stilt houses as requested here”—meaning utilizing the “five-foot freeboard height.” Petition at 10. But this argument is misplaced as the Code only added the 1-5 foot freeboard height allowance in 2016. Miami Beach, Fla., Ordinance 2016-4009 (May 11, 2016).

Third, as to Section 118-251(a)(6), which addresses whether “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,” the evidence establishes:

- Many of the neighbors, staff and the DRB members commented on the appearance of the Project enhancing the neighborhood;
- Mr. Murphy noted that the City’s staff admires the design and style and that the Project may be the adaption (or evolution) of homes going forward; and
- The Project was referred to as “beautiful,” “the future,” and “responsible” by numerous persons during the hearings.

E.g., June Hearing at 1, 9, 54; July Hearing 43-46.

Finally, as to Section 118-251(a)(12), which addresses whether “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 evidence establishes:

- As stated above, the orientation and mass of the Project is similar to a majority of the houses in this neighborhood; and
- The Project maximizes setbacks and minimizes its footprint (only covering 29.82% of the lot) in order to exercise sensitivity to the surrounding area.

June Hearing at 10-25; July Hearing at 8-20, 88.

Petitioners also argue that Dwyer “did not show that it complied with section 142-105(b)(4)d regarding non-air conditioned space” because part of the area below the first floor, includes an air conditioned entry vestibule. Petition at 16-17.

This is because compliance with Section 142-105(b)(4)d allows for an exemption towards which areas are counted in the calculation for reaching total unit area. The entry vestibule is air-conditioned, and therefore it is not part of the Section 142-105(b)(4)d exemption and is counted in the total unit area calculation. The Staff Report reviewed this portion of the Project and raised no issue with this area as planned. Appendix F.¹¹

The Staff Report's finding of compliance with the applicable code provisions is, in and of itself, competent substantial evidence. *Bergfors v. Village of Key Biscayne*, 7 Fla. L. Weekly Supp. 17a (Fla. 11th Jud. Cir. Ct. Sept. 28, 1999) (“[t]he recommendation of [the City’s] professional planning staff [in the Staff Report] constitutes substantial competent evidence” to support the Order”); accord *Village of Palmetto Bay v. Palmer Trinity Private Sch., Inc.*, 128 So. 3d 19, 26-27 (Fla. 3d DCA 2012) (staff report recommendation, in which “all applicable criteria” were reviewed, “constitutes competent substantial evidence”); *City of Hialeah Gardens v. Miami-Dade Charter Found., Inc.*, 857 So. 2d 202, 205 (Fla. 3d DCA 2003) (testimony of professional staff, when based on “professional experiences and personal observations, as well as [information contained in an] application, site plan, and traffic study,” constitutes competent, substantial evidence); *Palm Beach County v. Allen Morris Co.*, 547 So. 2d 690, 694 (Fla. 4th DCA 1989) (confirming that professional staff reports analyzing a proposed use constitutes competent, substantial evidence). That this is so defeats Petitioner’s

¹¹ The sole issue raised by the Staff Report on this point related to the now-withdrawn variance, and is of no issue here.

evidentiary challenge.

The evidence before the DRB was more than sufficient to support its determination. *E.g., Village of Palmetto Bay v. Palmer Trinity Private Sch., Inc.*, 128 So. 3d 19, 26-27 (Fla. 3d DCA 2012). The DRB Order was thus based on competent substantial evidence.

III. The DRB Order Follows the Essential Requirements of Law.

Petitioners also argue that the DRB “failed to follow the essential requirements of law because the approval did not meet each of the required design review criteria necessary for approval.” Petition at 19-20. Essentially, Petitioners’ real argument is that they disagree with the DRB Order approving the project. But that is an issue of whether there is competent substantial evidence to support the order—not an issue with following the essential requirements of the law.¹² Instead, the question here is whether the DRB applied the correct law. *E.g., Dusseau*, 794 So. 2d at 1273-74; *Jesus Fellowship, Inc. v. Miami-Dade County*, 752 So. 2d 708, 709 (Fla. 3d DCA 2000); *Remseaoliv, LLC v. City of South Miami*, 19 Fla. L. Weekly Supp. 237b (Fla. 11th Jud. Cir. Ct. Dec. 16, 2011). The DRB indisputably did so. Petitioners do not cite to any additional Code provisions or law that the DRB failed to follow, as there is none and this argument fails.

CONCLUSION

Based on the foregoing, Dwyer requests the Court to deny the Petition in all respects.

¹² See Argument II, *infra*, and incorporated here.

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was sent via Registered e-mail on August 22, 2017, to:

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