

CITY OF JERSEY CITY

Department of Housing, Economic Development & Commerce
Division of City Planning
Interdepartmental Memorandum



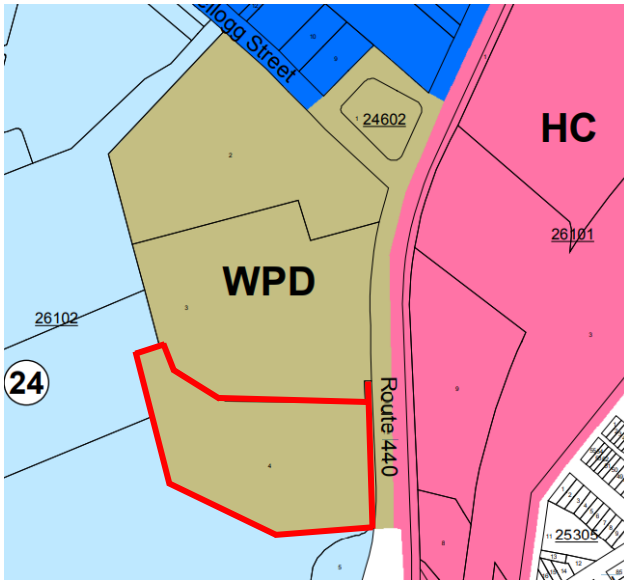
DATE: 8/2/2021
TO: Planning Board Commissioners
FROM: Cameron Black, AICP, PP, Senior Planner
RE: 321 NJ State Highway Route 440
Case # Z21-011
Block 26102, Lot 4
Preliminary and Final Major Site Plan with "c" variances

BACKGROUND

The 8.2 acre site is located in the WPD zone and currently consists of multiple retail and commercial structures. The applicant is proposing to renovate an existing retail space to convert into a Health Club (Planet Fitness). The Planet Fitness will have 168 parking spaces, 12 bike spaces, and 4 loading spaces. The Planet Fitness proposal incurs a use variance because it is not listed among the primary uses in the WPD Zone. There is a "c" variance for the use of free standing sign where only façade signs are permitted. The 4 tree pits will be expanded to the 5'x10' tree pit dimensions required in the City Forestry Standards.



Site is outlined in Red and the Applicant's area of improvements is outlined in a Red Dotted Line



Applicant's Site Outlined in Red in the WPD Zone

Staff Comments Regarding Use Variance:

Staff acknowledges that a use variance subsumes bulk standards. Case law, however, has determined that the bulk standards should still be used for reference in deciding the positive and negative criteria.

“c” VARIANCES/DEVIATIONS

#	REQUIREMENT	PROPOSED
1	1 primary and secondary Façade Sign	2 Façade Signs and 1 Free Standing Sign

SEE APPENDIX A FOR FINDINGS NEEDED FOR “c” VARIANCE RELIEF

REQUIRED “d” VARIANCES

#	PERMITTED	PROPOSED
1	B. Permitted principal uses are as follows: 1.Marinas. 2.Offices. 3.Townhouses. 4.Multi-family dwellings. 5.Retail sales of goods and services. 6.Theaters. 7.Restaurants, All Categories.	- Health Cub

SEE APPENDIX B FOR REQUIRED PROOFS FOR USE

Staff Comments Regarding Use Variance:**Site Suitability:**

The applicant's site is a standard strip mall design and a Planet Fitness type health club would likely operate normally along an arterial road such as Rt. 440.

Positive Criteria:

- The applicant is proposing that the health club is a benefit to the community because of the absence of any facility like this in the area and that it meets 40:55D-2 "G":
 - "To provide sufficient space in appropriate locations for a variety of agricultural, residential, recreational, commercial and industrial uses and open space, both public and private, according to their respective environmental requirements in order to meet the needs of all New Jersey citizens;"

Master Plan Reconciliation:

The Goals and Objectives of the Jersey City Master Plan identify a "lack of open space and recreation uses".

Negative Criteria:

Staff believes that the applicant would have to address the following to address the negative criteria:

- Traffic created from health clubs are difficult to foresee and there is no way of confidently knowing how this may influence the quality of life for the community.

Staff Comments Regarding Bulk Variances:

- The existing bulk of the structure is to remain.

Staff Comments:

1. Applicant's experts shall provide testimony justifying the d(1) variance for use.
2. Is the Health Club use an appropriate buildout of this space?
3. Will this use negatively impact any of the adjacent uses or properties?
4. Staff reserves the ability to supplement this report through testimony before the Board.

Staff recommends approval with the following recommended conditions:

In the event a motion is made to approve this application, staff recommends the following conditions:

1. Revised plans shall be submitted showing incorporation of the Jersey City's Municipal Utilities Authorities' Comments, and Division of Engineering's Comments.
2. Architect of record shall submit a signed and sealed affidavit confirming that the final building was constructed as approved, prior to issuance of the Certificate of Occupancy.
3. All materials and color selections shall be shown on Final Plans. No change to the facade and site design, including materials as well as any changes that may be required by the Office of Construction Code, shall be permitted without consultation with and approval by planning staff.
4. Engineer of record shall submit a signed and sealed affidavit confirming that the final building's storm water detention was constructed as approved, prior to issuance of the Certificate of Occupancy.
5. All testimony given by the applicant and their expert witnesses in accordance with this application shall be binding.
6. All trees and landscaping shall be installed in accordance with 345-66 and the City's Forestry Standards, prior to an issuance of a Certificate of Occupancy.

APPENDIX A

FINDINGS NEEDED FOR “c” VARIANCE RELIEF

The following findings are required for “c” Variance Relief:

- 1) Hardship “C1” Variance Standard under N.J.S.A. 40:55(D)-70(c)(1):
 - a. Pertinent information: Exceptional narrowness, shallowness, or shape of the property, exceptional topographical conditions, and/or other exceptional situations.
 - b. Based on this information, the strict application of the Ordinance would result in exceptional difficulties to, and undue hardships upon, the developer of such property.
 - c. The conditions causing hardship are peculiar to the subject property, and do not apply generally to other properties in the same district.
 - d. Other means to cure the deficiency (such as purchase or sale of property) do not exist, or are unreasonable or impracticable.
 - e. The variance requested is the reasonable minimum needed.
- 2) Flexible “C2” Variance Standard under N.J.S.A. 40:55D-70(c)(2):
 - a. The justifications must relate to a specific piece of property;
 - b. The purposes of the Municipal Land Use Law would be advanced by a deviation from the zoning ordinance requirement;
 - c. The variance can be granted without substantial detriment to the public good;
 - d. The community benefits of the deviation would substantially outweigh any detriment and;
 - e. The variance will not substantially impair the intent and purpose of the zone plan and zoning ordinance.

NEGATIVE CRITERIA

No relief may ever be granted unless it can be done

- 1) **without substantial detriment to the public good, and**
- 2) **without substantially impairing the intent and purpose of the zone plan and zoning ordinance**

1) Substantial detriment to the public good – Balancing Requirement.

The focus of this first prong of the negative criteria is on the variance’s effect on the surrounding properties. The board must weigh the zoning benefits from the variance against the zoning harms. In many instances, conditions of approval address the negative criteria standard and help to mitigate the impact of the variance.

2) Substantial impairment to the intent and purpose of the zone plan and ordinance.

The focus of this second prong of the negative criteria is on the power to zone based on ordinance and not variance

APPENDIX B

Required Proofs for Use Variances:

Positive Criteria:

The accepted standard for reviewing a use variance application is set forth in Medici v. BPR, 107 NJ 1 (1987) .

The application must show:

- 1) That the purposes of zoning are advanced, and
- 2) That the use is particularly suited to the property, and
- 3) Must also meet the enhanced burden of proof.

Sica v. Board of Adjustment of Tp. Of Wall, 127 N.J. 152 (1992) states:

The statute requires proof of **both positive and negative criteria**. Under the **positive criteria**, the **applicant must establish "special reasons"** for the grant of the variance. The **negative criteria** require proof that the variance "can be granted without substantial detriment to the public good" and that it "will not substantially impair the intent and the purpose of the zone plan and zoning ordinance. (This is called the enhanced standard of proof established in *Medici v. BPR Co. 107 N.J.1 (1987)*"

(Emphasis and parenthesis added by staff)

OR

- 4) The application must show and prove that an extreme or undue hardship exists, still meeting the enhanced burden of proof.

Negative Criteria

The language for negative criteria is first introduced in 1948 through a legislative amendment to the state land use laws. "provided such relief may be granted without substantial detriment to the public good and without substantially impairing the intent and purpose of the zone plan and zoning ordinance"

No relief may ever be granted unless it can be done

- 1 **without substantial detriment to the public good, and**
- 2 **without substantially impairing the intent and purpose of the zone plan and zoning ordinance**

1) Substantial detriment to the public good – Balancing Requirement.

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many instances, conditions of approval address the negative criteria standard and help to mitigate the impact of the variance.

In *North Bergen*, the Court further noted that,

"the greater the disparity between the variance granted and the ordinance's restriction, the more compelling and specific the proofs must be that the grant of the variance"

"Because zoning restrictions are enacted to further municipal planning and zoning objectives, it is fundamental that resolutions granting variances undertake to reconcile the deviation authorized by the Board with the municipality's objectives in establishing the restriction."

2) Substantial impairment to the intent and purpose of the zone plan and ordinance.

The focus of this second prong of the negative criteria is on the power to zone based on ordinance and not variance. The MLUL requires an annual zoning board report and a re-examination of the Master Plan every 6 years to address zoning decisions. NJSA 40:55 D-89 and 40:55D-89.1

"The added requirement that boards of adjustment must reconcile a proposed use variance (in this case any d or c variance) with the provisions of the master plan and zoning ordinance will reinforce the conviction...that the negative criteria constitute a 'safeguard' to prevent the improper exercise of the variance power." *Medici v. BPR Co.*, 107 NJ 1,5 (1987) (parenthesis added by staff)

Finally, Cox adds:

"It should be noted that, with particular regard to concern about preserving the zone plan, the negative criteria have been likened to the standards applied by courts in determining that the grant of a variance amounted to an arrogation of the governing body's power to zone."

"Judge Wolfson in a carefully argued opinion found that it was a zoning board's obligation to hear all variance applications but to refuse the grant of a variance on negative criteria grounds where it believes the variance request would amount to an arrogation of authority"
Cox 8-2.3

