

CITY OF JERSEY CITY

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

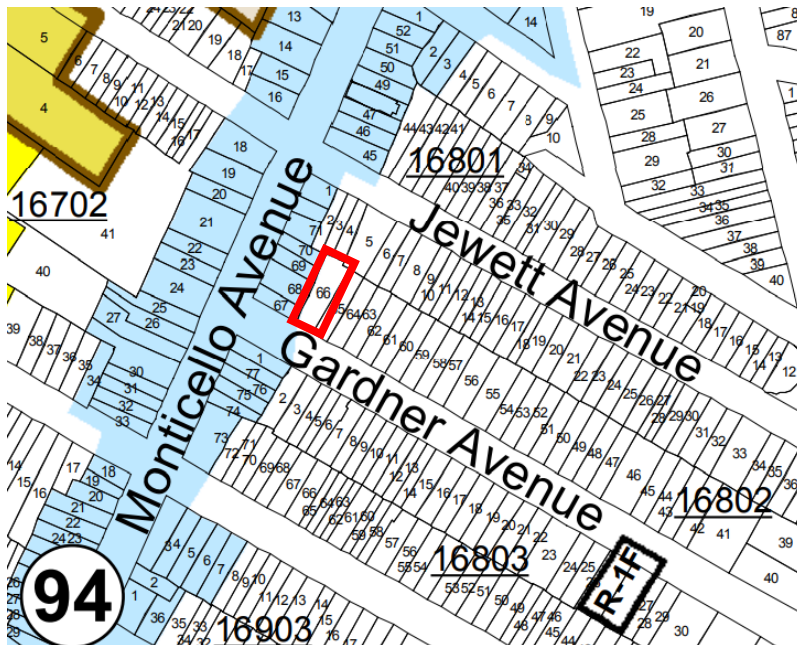


DATE: 6/7/22
TO: Zoning Board Commissioners
FROM: Cameron Chester Black, PP, AICP
RE: 70 Gardner Avenue
Case #Z21-095 Block 16802, Lot 66
"d2" variance application

BACKGROUND

The site consists of an existing three family building located in an R-1 Zone and the applicant is proposing to rehabilitate and expand the existing non-conforming use (d2). The lot is oversized with a width of 30' and a lot length of 109/113'. FIX & FLIP NEWARK-IL 2, LLC. (the Applicant) is proposing a one (1) story addition with a three (3) story extension in the rear and rehabilitation of the existing 2.5 story three (3) family dwelling structure, roof deck area, landscaping and other streetscape improvements are included. The maximum height permitted for a structure with ten foot (10') ceiling heights and a flat roof is thirty-three feet (33') and the Applicant is proposing an addition of the existing structure with ten foot (10') ceiling heights and a total building height of forty feet (40'). The adjacent property to the North East is 42' height (68 Gardner). The existing driveway with two surface parking spaces in the rear is to remain. The new expansion will result in 3 larger units (3 bedrooms each) with the following breakdown in square footage:

- Unit 1 – 2,828 square feet (354 sq. ft. of roof deck) with 2 baths
- Unit 2 – 1,429 square feet (+284 sq. ft. of roof deck) with 2.5 baths
- Unit 3 – 1,429 square feet (+356 sq. ft. of roof deck) with 2.5 baths



Applicant's Site is outlined in Red



Picture of 70 Gardner taken on June 7th, 2022

REQUIRED “c” VARIANCES/DEVIATIONS

#	REQUIREMENT	PROPOSED
1	Maximum Building Height: Three stories with a 10' floor to ceiling height is 33'	10' floor to ceiling with 40' height

REQUIREMENTS AND STANDARDS FOR CONSIDERATION

“8. Maximum Building Height: Three stories with a minimum floor to ceiling height of nine feet, a maximum floor to ceiling height of twelve (12) feet, and a maximum of five additional feet between the top of the third floor and the topmost point of any peaked roof (where a peaked roof is deemed appropriate under the design standards), provided that a minimum of two adjacent floors must be connected solely by means of a staircase internal to the unit, and provided that only one of the two internally connected floors may have a kitchen and/or a full bath.

For the purposes of calculating the maximum allowable building height an additional twelve (12) inches is assumed between the ceiling of each story and the floor above in accordance with the chart below:

Fl. to Ceiling ht	Fl. to fl. ht	Total bldg ht with flat roof	Total ht with peaked roof
9 ft	10 ft	30 ft	35 ft
10 ft	11 ft	33 ft	38 ft
11 ft	12 ft	36 ft	41 ft
12 ft	13 ft	39 ft	44 ft

In the case of varied floor to ceiling heights, the total permitted building height with a flat roof shall be the sum of the floor to ceiling heights of each floor plus twelve (12) inches per floor. The total permitted building height with a peaked roof is five (5) feet higher than with a flat roof.”

FINDINGS NEEDED FOR “c” VARIANCE RELIEF

See Appendix A on Page 4

REQUIRED “d2” VARIANCE

#	REQUIRED PRINCIPAL USES	PROPOSED
1	1 or 2 Family Home	Existing 3 Family Home (Expanded)

Required Proofs for D2 Expansion of a Nonconforming Use:

See Appendix B Page 5

Staff Comments Regarding Variance:

Staff Comments:

1. Applicant’s expert shall provide testimony showing that the expansion of the non-conforming use variance (d2) can meet the positive and negative criteria. This should include, but not in any way be limited to testimony addressing that the site is uniquely and particularly suitable for the proposed use expansion, testimony reconciling the master plan and zone plan and testimony confirming that there will not be any detriment to the zone or public good.
2. Staff recommends to the board that the applicant provide testimony for addressing the proofs necessary to meet the negative criteria for a floor to ceiling height variance and height. Specifically, that the addition of the third story is an appropriate use of the land and an appropriate build out of the land, and the proposed project will not substantially affect any neighbors, nor will the variances cause any substantial detriments to the public good, nor impairment to the intent and purpose of the Jersey City Zone Plan and Zoning Ordinance.

Staff opinion:

The proposed improvements appear not to negatively influence the air, light, and/or space or the quality of life and general welfare/wellbeing of the public. The height deviation subsumed by the d variance is 2’ less than the adjacent property and the improvements in greenery and the street tree will upgrade the 100 percent impervious lot coverage of the front yard. The larger unit sizes will diversify the housing stock in this part of the City.

Staff recommends approval with the following conditions:

1. 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.
2. 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.
3. All testimony given by the applicant and their expert witnesses in accordance with this application shall be binding.
4. All street 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.
5. Privacy fence around the property must be installed in conformance with the City’s fencing design standards.

Appendix A:

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:

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

- 3) without substantial detriment to the public good, and**
- 4) 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.

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

