

DEVELOPMENT APPLICATION REVIEW | STAFF REPORT

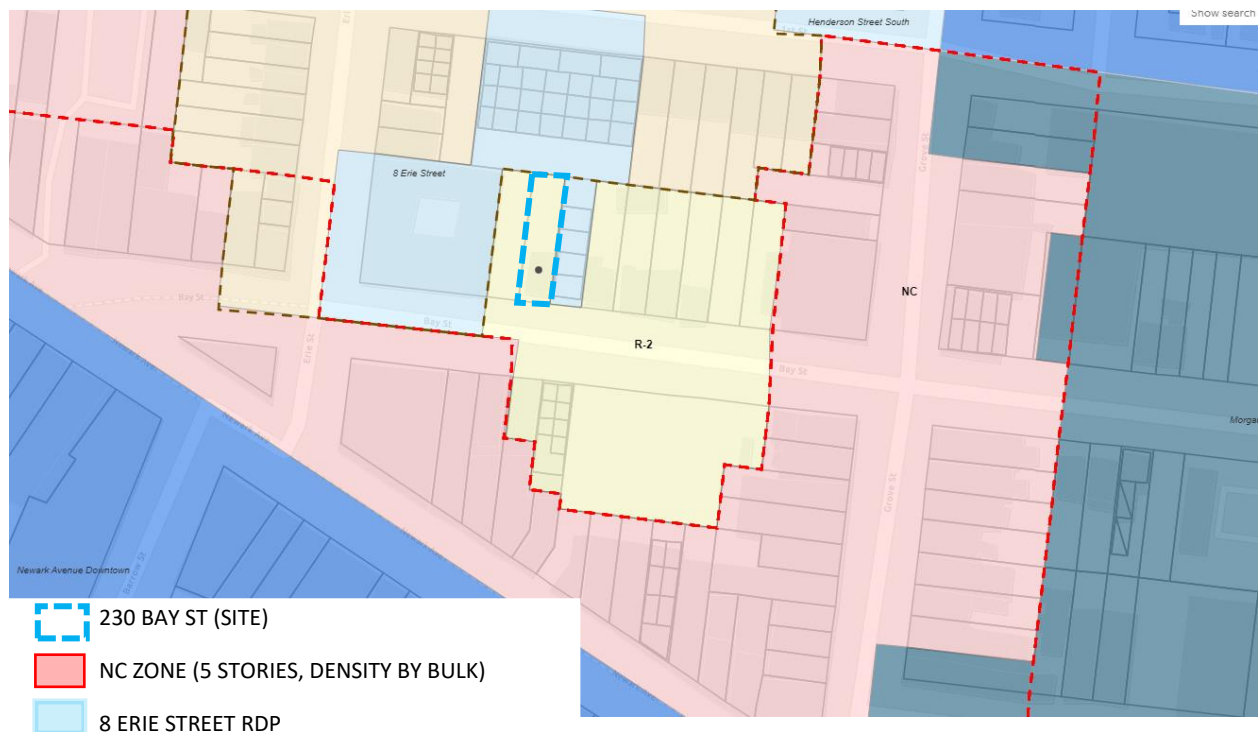
DATE : 02.15.2022
TO : Zoning Board Commissioners
FROM : Mallory Clark-Sokolov, PP, AICP, Senior Planner
Tanya Marione, PP, AICP, Division Director
CASE : Z21-056
PROJECT : 230 Bay Street
'c' and 'd' Variances

I. DOCUMENTS REVIEWED

- General Development Application Form dated 06.25.2021
- Survey by Schmidt Surveying dated 01.25.2018
- Architectural Plan Set by Mukti Architecture dated 10.15.2021
- Principle Points Statement

II. APPLICATION BACKGROUND + PROPOSAL

- **Existing Conditions:** The site is currently a pre-existing three (3) story + basement, two (2) unit structure in the R-2 district. The property is adjacent to the 8 Erie St RDP and across the street from the NC district, and is located within a 1.5 block walk from the Grove St Path station.



- **Proposed Conditions:** The site proposes to renovate the existing structure and add a rear and vertical addition for a four (4) story + basement, four (4) unit structure at 45.83ft tall. The proposal includes several green components including a Stormwater detention system, solar panels, and green roof adjacent to the roofdeck.
- **Variances**
 - **D(5) Density**
Required/Permitted: 1-2 Family
Proposed: 3 units
 - **D(6) Height**
Required/Permitted: 40ft
Proposed: 45.83ft
 - **'c' Variance: Rear Yard Setback**
Required/Permitted: 30ft
Proposed: 20.33ft

III. STAFF COMMENTS

- **D(5) Variance**
 - The MLUL acknowledges that “special reasons” advancing the purpose of general zoning are sufficient for Density variances provided the Applicant proves the site is suitable for the intensity of the development as proposed.
 - The R-2 Zone permits a density of 55 units/acre, which would permit three (3) units on the site. The proposal is for a density of 70 units/acre for a total of four (4) units.
 - In terms of the positive criteria, the application advances the purposes of zoning by promoting MLUL purpose e and n :
 - e. To promote the establishment of appropriate population densities and concentrations that will contribute to the well-being of persons, neighborhoods, communities and regions and preservation of the environment*
 - n. To promote utilization of renewable energy resources; and*
 - The application proposes a reasonable density suitable for the site as it is matching the bulk and density of the adjacent lot which is identical in size. The proposed 70 units/acre and is well within the 104 unit/acre average density of the block. Additionally, the higher density is suitable in this location given the proximity to the Grove St Path Station and the commercial retail district found on the adjacent street at Newark Ave.

BLOCK	LOT	ADDRESS	UNITS	DENSITY
11403	20	353 Grove St	16	86 u/ac
11403	22	218 Bay St	4	70 u/ac
11403	23	220 Bay St	4	70 u/ac
11403	24	224 Bay St	3	52 u/ac
11403	26	228 Bay St	4	70 u/ac
11403	29	8 Erie St	16	70 u/ac
11404	1	154-158 Newark Ave	18	91 u/ac
11404	3	150 Newark Ave	16	222 u/ac

11404	4	229 Bay St	4	153 u/ac
11404	5	227 Bay St	8	161 u/ac
11404	6	225 Bay St	34	107 u/ac
11404	7	351 Grove St	4	100 u/ac

- Similarly, the recently adopted Land Use Element recommended this specific property be studied for a potential rezoning of R2 to R5 zone, which would permit 4 units on the site.

▪ **D(6) Variance**

- Grasso v. Spring Lake, 375 NJ Super 41 (App. Div 2004) requires that the Applicant demonstrate that the proposed height will not offend the purpose of the height limitation, and in turn that granting the deviation will not disrupt the purposes of zoning. Height restrictions are established with the intent of:
 1. Limiting intensity in order to preserve light and air of the adjacent structures
 2. Maintaining a contextual density within the zone.
 3. Advance the purposes of zoning

The proposed additional height matches that of the adjacent property and falls well under the permitted height of the zone across the street where the NC district permits five (5) stories, 55ft. The majority of the corridor exceeds the proposed height of this structure and therefore the light and air of the block will not be compromised through the granting of the variance. The 4th story addition is set back as to not be visible from the ROW. The proposed condition is consistent with the character of the overall neighborhood and responds to the contextual condition of the existing block corridor.

- **Rear Yard Setback**

Required: 30ft

Proposed: 20.33ft

- The applicant is proposing to meet the rear building line of the adjacent property and maintain a 20ft rear yard. The light and air at the back property line will be consistent with what exists today in terms of shadow as the adjacent properties are equal to or taller than the proposed structure, with the exception of a 1 story garage next door that provides no rear yard. The large multifamily property sharing the rear property line has a 25ft rear yard and therefore sufficient light and air will be maintained for both parcels. Staff sees no detriment to the granting of the variance.

IV. STAFF RECOMMENDED CONDITIONS

All testimony given by the applicant and their expert witnesses in accordance with this application shall be binding. The staff recommends the following conditions to mitigate the negative criteria:

1. 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 planning staff or approval by Board.
2. Applicant shall provide an affidavit from the architect of record representing that the constructed project is consistent with final approved plans.
3. All street trees and landscaping shall be installed in accordance with the Jersey City Forestry Standards prior to the issuance of a Certificate of Occupancy (CO) or Temporary Certificate of Occupancy (TCO).

APPENDIX : REQUIRED PROOFS FOR VARIANCES

- D(1) USE VARIANCE (NJSA 40:55D-70D):

▫ **Hardship**

Prior to the 1948 Land Use Law amendments, a use variance could only be granted if an undue hardship was proven. NJSA 40:55D-70d states that “in particular cases for special reasons.” certain variances may be granted by the Board of Adjustment. These “special reasons” are also often referred to as positive criteria.

- In 1952, Ward v. Scott NJ 117 clarified that “special reasons” was bound by the purposes of general zoning.

▫ **Positive Criteria**

Medici v BPR, 107 NJ 1 (1987) sets forth the standard for reviewing a use variance, with the positive criteria requiring that the application shows;

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 – the Applicant must reconcile why the use is not listed in the permitted or conditional uses for this zone.

▫ **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

- D(2) EXPANSION OF A NON-CONFORMING USE VARIANCE

▫ **Positive Criteria**

NJSA 40:55D-70d states that “in particular cases and for special reasons....” the types of variances already identified may be granted by the Board of Adjustment. These “special reasons” also are referred to as the positive criteria. The Applicant must demonstrate that a project advances the purposes of zoning listed in the MLUL.

1. **Special Reasons/Positive Criteria for D(2)**

All legal non-conforming uses and structures are protected under N.J.S.A 40:55D-68. However, in no instance is an owner allowed to enlarge or modify a non-conforming use without seeking a D(2) variance for the expansion of a non-conforming use. The first burden of proof is to determine that the non-conforming use was legal at the time it was created.

▫ **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

D(5) DENSITY VARIANCE (NJSA 40:55D-70d):

▫ **Positive Criteria**

NJSA 40:55D-70d states that “in particular cases and for special reasons...” the types of variances already identified may be granted by the Board of Adjustment. These “special reasons” also are referred to as the positive criteria. The Applicant must demonstrate that a project advances the purposes of zoning listed in the MLUL.

A. Special Reasons/Positive Criteria for D(5) Density Variance

Density Variances should be evaluated in terms of intensity of use. Mainly, site suitability of the proposed density should be considered. Findings must show that the site can accommodate issues that may be associated with the increased density.

- **D(6) HEIGHT VARIANCE (NJSA 40:55D-70D):**

▫ **Hardship**

Variance on grounds of hardship must show that the height restriction in effect prohibits utilization of the property for a conforming structure. Grasso v. Borough of Spring Lake Heights, 866 A. 2d, 988 (2004). Height standards and variances are bulk and dimensional in their nature. Therefore, it is appropriate to consider the C(1) factors for undue hardship;

1. By reason of exceptional narrowness, shallowness or shape of a specific piece of property, or
2. By reason of exceptional topographic conditions or physical features uniquely affecting a specific piece of property, or
3. By reason of an extraordinary and exceptional situation uniquely affecting a specific piece of property or the structures lawfully existing thereon...

▫ **Positive Criteria**

In the case of a d(6) height variance, Courts have held through Coventry Square v. Westwood Zoning Board of Adjustment 138 NJ 285(1994) and later Grasso v. Spring Lake, 375 NJ Super 41 (App. Div 2004) that the special reasons for height variances vary from that of use differences in that the Applicant needs to prove that the site can accommodate the intensity of the proposal.

- Height restrictions are established with the intent of

1. Limiting intensity in order to preserve light and air of the adjacent structures

- 2. Maintaining a contextual density within the zone.
 - 3. Advance the purposes of zoning
- The Applicant must demonstrate that the proposed height will not offend the purpose of the height limitation, and in turn that granting the deviation will not disrupt the purposes of zoning.
- **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
- **'C' VARIANCE**
Required Findings for 'C' Variance Standard/Deviations under N.J.S.A. 40:55D-70(c)(2):
 - 1. The justifications must relate to a specific piece of property;
 - 2. The purposes of the Municipal Land Use Law would be advanced by the deviation from the zoning ordinance requirement;
 - 3. The deviation can be granted without substantial detriment to the public good;
 - 4. The community benefits of the deviation would substantially outweigh any detriment and;
 - 5. The deviation 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