

CITY OF JERSEY CITY

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

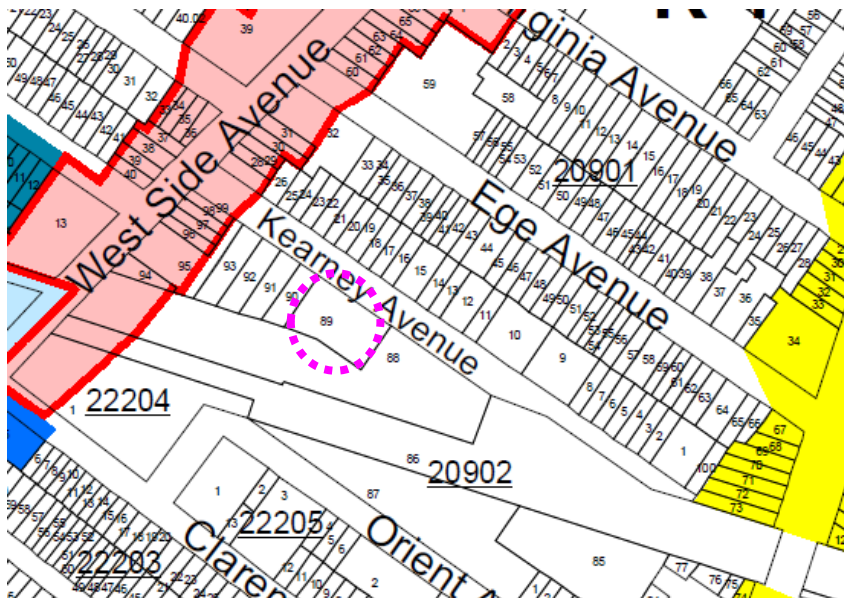


DATE: 10/27/21
TO: Zoning Board Commissioners
FROM: Cameron Black, AICP, PP, Senior Planner
RE: 245-253 Kearney Avenue
Case #Z21-065 and Z21-066 Block 20902, Lot 89
1 year extension and Administrative Amendment with "d" Use Variance and "c" variances

BACKGROUND

In November of 2019 the applicant received approval under Case Z19-067 to repurpose an existing warehouse structures for a physical therapy facility. The applicant now requests approval to amend the approval to remove the interior office. The applicant is also requesting a one (1) year extension.

The site is in an R-1 zone and the applicant is proposing to renovate an existing 5,918 square foot industrial warehouse into a physical therapy fitness center. The proposed use of a commercial gym/physical therapy center in an R-1 zone triggers a "d-1" variance for use. There are multiple existing "c" variances associated with the property for rear yard setback, maximum building coverage, maximum lot coverage, and side yard setbacks. Additionally, the applicant is proposing 5 parking spaces for the customers of the gym/physical therapy center, which triggers a parking variance. Lastly, a signage variance is necessary for the painted mural on the East façade (191 sq. ft.), the gooseneck illuminated "Body Mechanix" sign (50 sq. ft.) on the Front façade, and the "Rehabilitation" sign (7 sq. ft.).



Applicant's site circled with pink dotted line



Picture A - Site photographs taken on 10.22.21

Previously Approved “c” VARIANCES/DEVIATIONS

#	REQUIREMENT	PROPOSED
1	1 space per dwelling unit or no parking	5 spaces
2	Rear Yard Setback of 20’	0’
3	Combined Front and Rear yard of 35’	0’
3	Side Yard Combined 5’ setback	0’ to the West & 29.6’ to the East
4	Max. Building Coverage 60%	98.62%
5	Max Lot Coverage 85%	98.62%
6	No Signage Permitted for Commercial Uses	Gooseneck illuminated signs and wall mural

FINDINGS NEEDED FOR “c” VARIANCE RELIEF

See Appendix A PAGE 4

Previously Approved “d” VARIANCE

#	R-1 REQUIRED PRINCIPAL USES	PROPOSED
1	One or two family home	Commercial Fitness Center/Physical Therapy

See Appendix B for Findings needed for D variance relief (PAGE 5)

Staff Opinion

When considering a “d(1)” variance and referencing *Medici v. BPR Co.*, 107 N.J. 1 (1987) one may argue that the site is particularly suited for the proposed use given the light industrial nature of the block and the ample space to house workout equipment. The physical therapy center/gym does not qualify as an inherently beneficial use (i.e. childcare center, hospital, school, etc.), but it may promote the general welfare of the public by increasing access to improve one’s health. It is the opinion of staff that this preliminary and final major site plan with “d (1)” variance and “c” variances is an improvement to the site and does not adversely influence the zone plan.

Staff Comments Regarding Use Variance:

Staff Comments:

1. Applicant’s expert shall provide testimony explaining the change in layout and why it is proposed.

Staff recommends approval with the following conditions in the event the application is approved:

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 green roof and 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 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.

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

- 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

