



CITY OF NEWARK PLANNING COMMISSION

37101 Newark Boulevard, Newark, California 94560-3796 □ 510/578-4330 □ FAX 510/578-4265

City Administration Building
7:30 p.m.
City Council Chambers

AGENDA Tuesday, January 28, 2020

A. ROLL CALL

B. MINUTES

B.1 Approval of Minutes of the regular Planning Commission meeting of Tuesday, January 14, 2019. (MOTION)

C. WRITTEN COMMUNICATIONS

D. ORAL COMMUNICATIONS (Anyone wishing to address the Commission on any planning item not on the Agenda may take the podium and state his/her name and address clearly for the recorder.)

E. PUBLIC HEARINGS

E.1 Consideration of a motion to continue the hearing to the Planning Commission meeting of February 11, 2020 to consider U-20-1, a Conditional Use Permit to allow Fitness 19, a physical fitness center located at 6203 Jarvis Avenue (APN: 537-521-37)– from Deputy Community Development Director Interiano . Staff is recommending continuation of this item to the February 11, 2020 meeting.

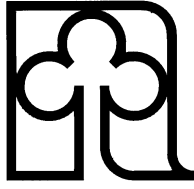
F. STAFF REPORTS

G. COMMISSION MATTERS

G.1 Report on City Council actions.

H. ADJOURNMENT

Pursuant to Government Code 54957.5: Supplemental materials distributed less than 72 hours before this meeting, to a majority of the Planning Commission, will be made available for public inspection at this meeting and at the Planning Division Counter located at 37101 Newark Boulevard, 1st Floor, during normal business hours. Materials prepared by City staff and distributed during the meeting are available for public inspection at the meeting or after the meeting if prepared by some other person. Documents related to closed session items or are exempt from disclosure will not be made available for public inspection.



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City Administration Building
7:30 p.m.
City Council Chambers

MINUTES

Tuesday, January 14, 2020

A. ROLL CALL

Community Development Director (CDD) Turner, introduced the new Administrative Support Specialist, Lina Tran, to the Planning Commission.

Chairperson Fitts called the meeting to order at 7:30pm. Present were Vice Chairperson Aguilar, Commissioner Otterstetter and Becker. Commissioner Bridges was absent.

B. MINUTES

B.1 Approval of Minutes of the Planning Commission meeting of November 12, 2019.

MOTION APPROVED

Commissioner Becker moved, Vice Chairperson Aguilar seconded, to approve the Minutes of the regular Planning Commission meeting on November 12, 2019. The motion passed 3 AYES, 1 ABSTENTION, 1 ABSENT.

G. COMMISSION MATTERS

G.1 Election of Officers

Chairperson Fitts moved item G.1 Election of Officers up on the agenda. Chairperson Fitts moved to nominate Vice Chairperson Aguilar to Chairperson, Commissioner Otterstetter seconded, 4 AYES, 1 ABSENT.

Commissioner Becker moved to nominate Commissioner Bridges to Vice Chairperson, Chairperson Fitts seconded, 4 AYES, 1 ABSENT.

C. WRITTEN COMMUNICATIONS

None.

D. ORAL COMMUNICATIONS

None.

E. PUBLIC HEARINGS**E.1 Hearing to consider U-19-9, a Conditional Use Permit to allow Fitness 19, a physical fitness center located at 6203 Jarvis Avenue (APN: 537-521-37).**

Commissioner Becker recused himself due to his involvement in discussion, evaluation, and preparing recommendations with the applicant associated with this project in his previous role as City Manager.

Deputy Community Development Director (DCDD) Interiano presented staff's report on the Conditional Use Permit (CUP), U-19-9. DCDD Interiano stated the neighboring property owner, VN Investment Group LLC, submitted late today a letter in opposition to the application. Staff recommends approval of the CUP.

Commissioner Otterstetter asked staff what percentage of retail Fitness 19 will have. DCDD Interiano advised that the applicant would be better suited to respond.

Chairperson Aguilar raised concerns regarding the CEQA exemption, parking analysis, and CC&R addressed in the letter submitted by VN Investment Group LLC.

CCD Turner confirmed the CEQA exemption is correct. CDD Turner agreed with the parking analysis that there is adequate parking in the center to accommodate the parking needs of Fitness 19. CDD Turner stated the CC&R is not an item that the City will address as it is a private matter between property owners.

Mitch Gardner, President/Owner of G2 Design Building, representing Fitness 19 asked that the Planning Commission approve the CUP.

Chairperson Aguilar asked how Fitness 19's customer base differs from that of Anytime Fitness and if Fitness 19 offers anything different.

Mr. Gardner explained Fitness 19 offer group classes, personal training, larger area with a larger variety of equipment, and senior discount which he doesn't believe Anytime Fitness offers. Fitness 19 offers membership at a base price with options for add on services.

John Cumbelich described the extensive research conducted in an attempt to find another tenant for the vacant space. In response to Chairperson Aguilar's question regarding the response of a Fitness 19 in another similar shopping center, Mr. Cumbelich stated that a Fitness 19 opened up in a Dublin shopping center similar to the Newark location. John stated the City officials in Dublin and the property owner were delighted with the positive impact that Fitness 19 has had on their shopping center.

Richard Bowles stated in response to the petition by Anytime Fitness, there is another petition that was signed by 28 of the tenants to support the CUP

application. In response to Commission's concern regarding the CC&R, Mr. Bowles confirmed that it is a private matter between the property owners.

Chairperson Aguilar asked staff if Sprouts representatives were made aware of the application and whether Sprouts had provided comments. DCDD Interiano stated staff has not heard from Sprouts representatives.

Property owner, Steven Mavromihalis, stated Sprouts has been made aware of the application. Mitch Gardner stated Sprouts provided a letter that they have no objections to the use of the space for a fitness center.

Matt Morales, owner of Anytime Fitness, shared that he opened the gym back in 2013 that offers classes and personal training. His family lives a mile from the gym and participant in the community. Mr. Morales asked the Commission to deny the CUP as a larger fitness center will most likely put them out of business.

Commissioner Fitts asked if there was another location that could accommodate their business. Mr. Morales stated he has not found another location that would fit their budget.

Long Nguyen, owner of the adjacent property under VN Investment Group LLC, gave a statement on behalf of his attorney. VN Investment Group LLC believes the CUP application is not CEQA exempt and the parking analysis does not accurately take into account the length of time a vehicle occupies a parking space. Mr. Nguyen stated the CC&R requires VN Investment Group LLC to provide written consent to allow Fitness 19 in the center which they have not provided.

Chairperson Aguilar closed the public hearing.

Chairperson Aguilar motioned to continue the hearing to the Planning Commission meeting of January 28, 2020 to consider U-19-9, a Conditional Use Permit to allow Fitness 19, a physical fitness center located at 6203 Jarvis Ave (APN: 537-521-37), seconded by Commissioner Fitts, 3 AYES, 1 ABSENT, 1 ABSTENTION.

F. STAFF REPORTS

CDD Turner stated there is an upcoming League of California Cities planning commissioner training. Staff encourages Planning Commissioners attend the event. The event is from March 4-5.

G. COMMISSION MATTERS

G.2 Report on City Council actions.

CDD Turner reported that City Council voted to uphold the Planning Commission's denial of the Conditional Use Permit for Electric Guard Dog Fence.

H. ADJOURNMENT

Commissioner Fitts adjourned the regular Planning Commission meeting at 8:46 p.m. in memory of retired Recreation Director Mel Nunes.

Respectfully submitted,

STEVEN TURNER
Secretary

DRAFT



E. 1 Hearing to consider U-19-9, a Conditional Use Permit to allow Fitness 19, a physical fitness center located at 6203 Jarvis Avenue (APN: 537-521-37). The property is zoned Community Commercial – from Deputy Community Development Director Interiano. *A.I.* (RESOLUTION)

Background/Discussion – The City has received an application for a Conditional Use Permit (CUP) to allow a physical fitness center located at 6203 Jarvis Avenue (the “Project”), a vacant suite located adjacent to Sprouts market. The property is zoned Community Commercial (CC) and according to the Zoning Ordinance, a physical fitness center falls under the use category of “Indoor sports and recreation” which requires approval of a CUP in order to operate at this location.

Fitness 19 is a physical fitness center/health club, which offers free-weights and cardio and strength equipment. In addition, they offer classes such as aerobics, Zumba, yoga, and mat pilates. Fitness 19 has over 100 locations nationally. The proposed location in Newark is would employ approximately 35-40 employees, most being part-time with 5-6 full-time staff.

Fitness 19 would be located in the Sprouts shopping center, which was formerly the Raley’s shopping center. The proposed physical fitness center would use all (27,508 sq.ft.) of the remaining vacant space (adjacent to Sprouts) used by the former Raley’s store which vacated the building in August of 2015. The vacant space is roughly half of the main anchor building in the shopping center, which is located in a prominent shopping area of the City known as “Four Corners”.

In regards to the specific zoning standards, the proposed use is consistent with the site development regulations of the CC zone district. The proposed use would not result in any exterior building modifications, with the exception of a future sign, which has not been determined at this time. In general, interior modifications as shown on the floor plans include the main gym area, exercise rooms, small retail area and reception area. be required to accommodate the proposed use. Staff originally had concerns regarding the parking demands of the proposed use in conjunction with all other uses within the shopping center which led to a parking analysis being required. The applicant provided a parking analysis prepared by Abrams Associates on June 21, 2019, which evaluated all existing businesses in conjunction with the proposed fitness center use. Abrams Associates opinion, based on the analysis, is that there is sufficient parking to support the addition of the proposed use. It should be noted that the parking demands for a physical fitness center are much higher than the Sprouts retail center and that although staff would concur that there appears to be sufficient parking, some parking areas located on the north-west and south of the subject building are often available but are not convenient, readily visible, or quick to access. Based on the results of the study, staff would suggest a condition be required for Fitness 19 employees to park on those least-accessible parking spaces.

The property owners attorney, Bowles & Verna, have submitted two letters in support and justification for approving the Fitness 19 application. Also, the neighboring business owner, Matt

Morales of Anytime Fitness, has submitted a petition that recommends denial of the Fitness 19 application. Staff has reviewed both letters and taken them into consideration in making our recommendations and has attached copies of these letters for the Planning Commission's consideration as well.

Ultimately, staff believes the proposed business is complimentary to the shopping center and complies with the CUP findings described below and therefore recommends approval.

Required Findings

- A. The proposed use is allowed within the applicable zoning district and complies with all other applicable provisions of this Ordinance and all other titles of the Municipal Code;
Response: The proposed use is allowed through the issuance of a CUP to be consistent with the existing zoning. The application for a fitness center has been evaluated and found to be consistent with the type of uses found in the Community Commercial zoning district and be compatible with the surrounding commercial uses in the shopping center. This finding can be made in the affirmative.
- B. The proposed use is consistent with the General Plan and any applicable specific plan;
Response: The proposed use is consistent with the GP Policy LU-1.1 Balance of Uses. Maintain a reasonable balance of land uses in the city so that residents can live close to where they work and satisfy their shopping, educational, personal, health, entertainment, and recreational needs close to home. Also consistent with GP Policy LU-1.6 Strengthening the Retail Base. Diversify the retail base of the city to create jobs, generate tax revenue to support City services, and enable residents and workers to find the goods and services they need without leaving Newark. This finding can be made in the affirmative.
- C. The proposed use will not be adverse to the public health, safety, or general welfare of the community, nor detrimental to surrounding properties or improvements;
Response: The proposed business would not have an adverse effect to public health, safety, or general welfare of the community or surrounding properties. Automobile parking, provided in the existing parking area at the shopping center, is sufficient for the proposed use and the other nearby uses. The use would occupy a vacant commercial space in an existing shopping center that has complementary uses. Therefore, this finding can be made in the affirmative.
- D. Tax revenue generated by the development will exceed the City's cost of the service demand as a result of the development or a compelling community benefit will be provided;
Response: The proposed use will occupy an existing commercial storefront that has been vacant for approximately four years within an existing shopping center and is not expected to result in a substantial change in the shopping center's cost of service to the City. A portion of the Indoor sports and recreation use will contain a retail area, which is expected to generate sales-tax revenue. This finding can be made in the affirmative.
- E. The proposed use complies with any design or development standards applicable to the zoning district or the use in question unless waived or modified pursuant to the provisions of this Ordinance;
Response: There are no planned improvements to the exterior of the building, therefore no design or development standards apply to this application. This

finding can be made in the affirmative.

- F. The design, location, size, and operating characteristics of the proposed activity are compatible with the existing and reasonably foreseeable future land uses in the vicinity;

Response: The operating characteristics of the proposed use are expected to be compatible with the existing commercial tenants and would provide additional services for the shopping center customers. This finding can be made in the affirmative.

- G. The site is physically suitable for the type, density and intensity of use being proposed, including access, utilities, and the absence of physical constraints.

Response: The proposed is physically suitable for the type, density, and intensity of use being proposed, in that it would occupy an existing vacant space in the existing Sprouts center that is accessible, is served by utilities, and is without physical constraints. This finding can be made in the affirmative.

CEQA- This project is exempt from CEQA per 15301 Existing Facilities in that the proposed use is would be located in an existing building where only minor alterations are proposed.

Action – It is recommended that the Planning Commission approve the Condition Use Permit (U-19-9) as requested by the project applicant, based upon the findings in the draft resolution in Attachment 1, subject to conditions of approval.

Attachment

1. Draft Resolution
2. Fitness 19 Site Plan
3. Abrams Associates Parking Analysis
4. Correspondence from Applicant Attorney, Bowles & Verna
 - December 5, 2019
 - January 3, 2020
5. Letter in Opposition from Matt Morales, October 5, 2019



Parking Review
6203 Jarvis Avenue
City of Newark

Prepared by:
Abrams Associates
1875 Olympic Boulevard, Suite 210
Walnut Creek CA 94596

 **Abrams Associates**
TRAFFIC ENGINEERING, INC.

June 21, 2019

6203 Jarvis Avenue

City of Newark

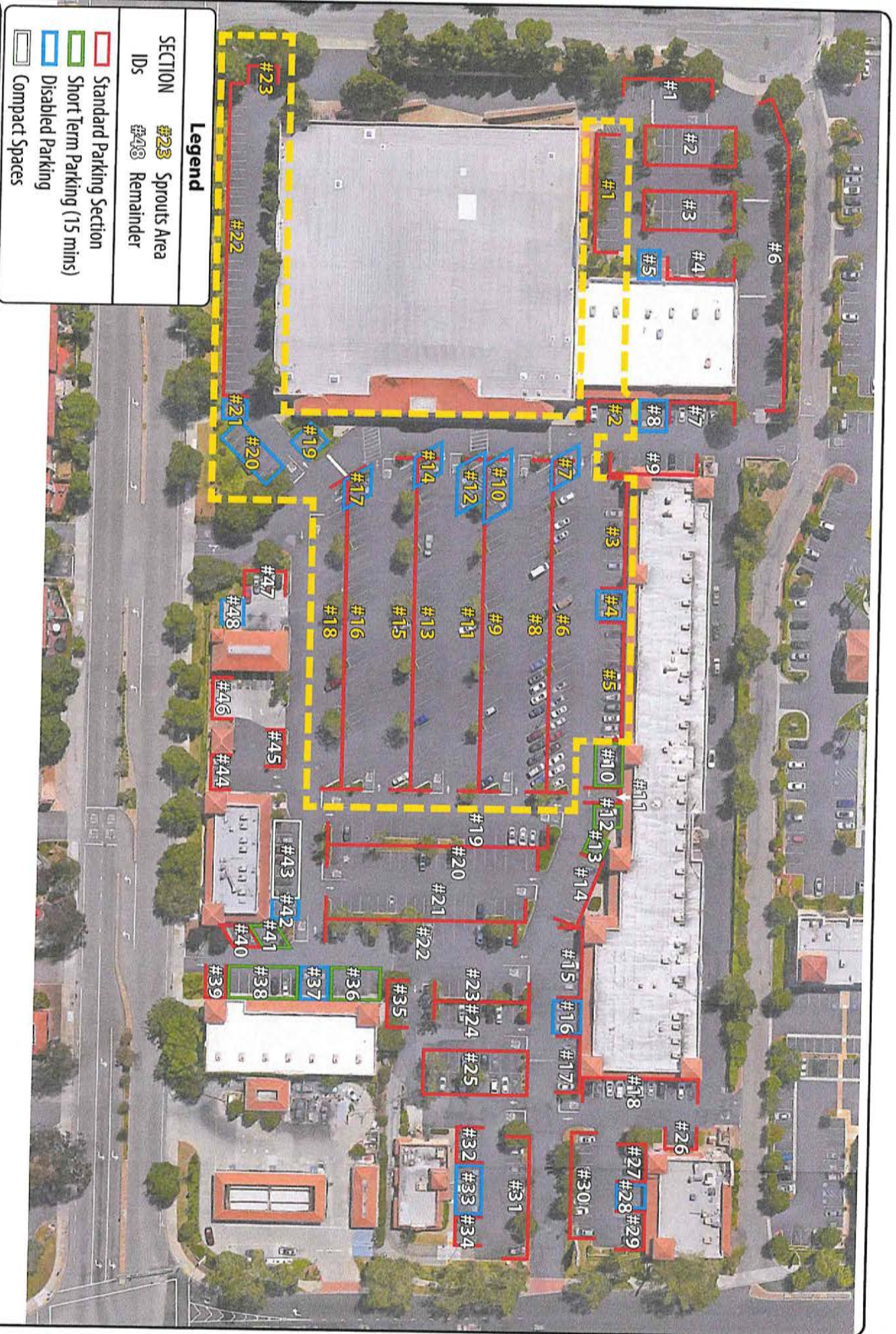
PARKING STUDY

1) INTRODUCTION

The purpose of this report is to analyze the parking conditions and the current parking regulations for the shopping center at 6203 Jarvis Avenue that was formerly known as the Raleys Shopping Center. The building that includes Sprouts Market has an adjacent 28,242 square foot attached building that is currently occupied by Anytime Fitness, The Genius Kids Club, and some small offices. The entire 28,242 square foot space is proposed to be leased to Fitness 19 who would run a fitness center with a variety of exercise equipment, cardio machines, free weights. The study is intended to analyze the parking shared by the various users of the shopping center and provide a review of the potential effects on parking that might result from Fitness 19 being added to the center. **Figure 1** shows the parking survey areas and the subareas that were designated to present the parking supply and demand for various areas.

2) PARKING ANALYSIS

The City strives to provide adequate parking for all shopping center patrons while also still encouraging the use of alternative modes of transportation. Most Cities try to maintain a balance between providing all of the parking necessary to meet the needs of various land uses while also promoting alternatives to automobiles that reduce parking demand (e.g., increased use of transit, ridesharing, cycling, and walking). For this study the first step was to analyze the current parking demand generated by the shopping center the area and document the existing supply.



Legend	
SECTION #23	Sprouts Area
IDS #48	Remainder
[Red outline]	Standard Parking Section
[Green outline]	Short Term Parking (15 mins)
[Blue outline]	Disabled Parking
[White outline]	Compact Spaces

FIGURE 1 | PARKING SURVEY AREA INDEX

PARKING REVIEW
6203 Jarvis Avenue
 City of Newark

2.1 Existing Parking Supply

For the purposes of this study the parking in the shopping center was divided into four separate areas: 1) Sprouts front parking area which is the portion of the parking lot in front of Sprouts that is included in the “*maintenance area*” for that building, 2) Sprouts side parking area which is southeast of the building and is also part of the “*maintenance area*” for that building, 3) the southwest back corner of the parking lot which includes about 11 spaces that are part of the Sprout’s building parking “*maintenance area*” and 4) the remainder of the parking lot, outside the Sprouts Parking Area. The number of parking spaces in each area is shown in **Table 1**. There may be some minor discrepancies with the plans but based on our field review the survey area currently has a total of 631 parking spaces.

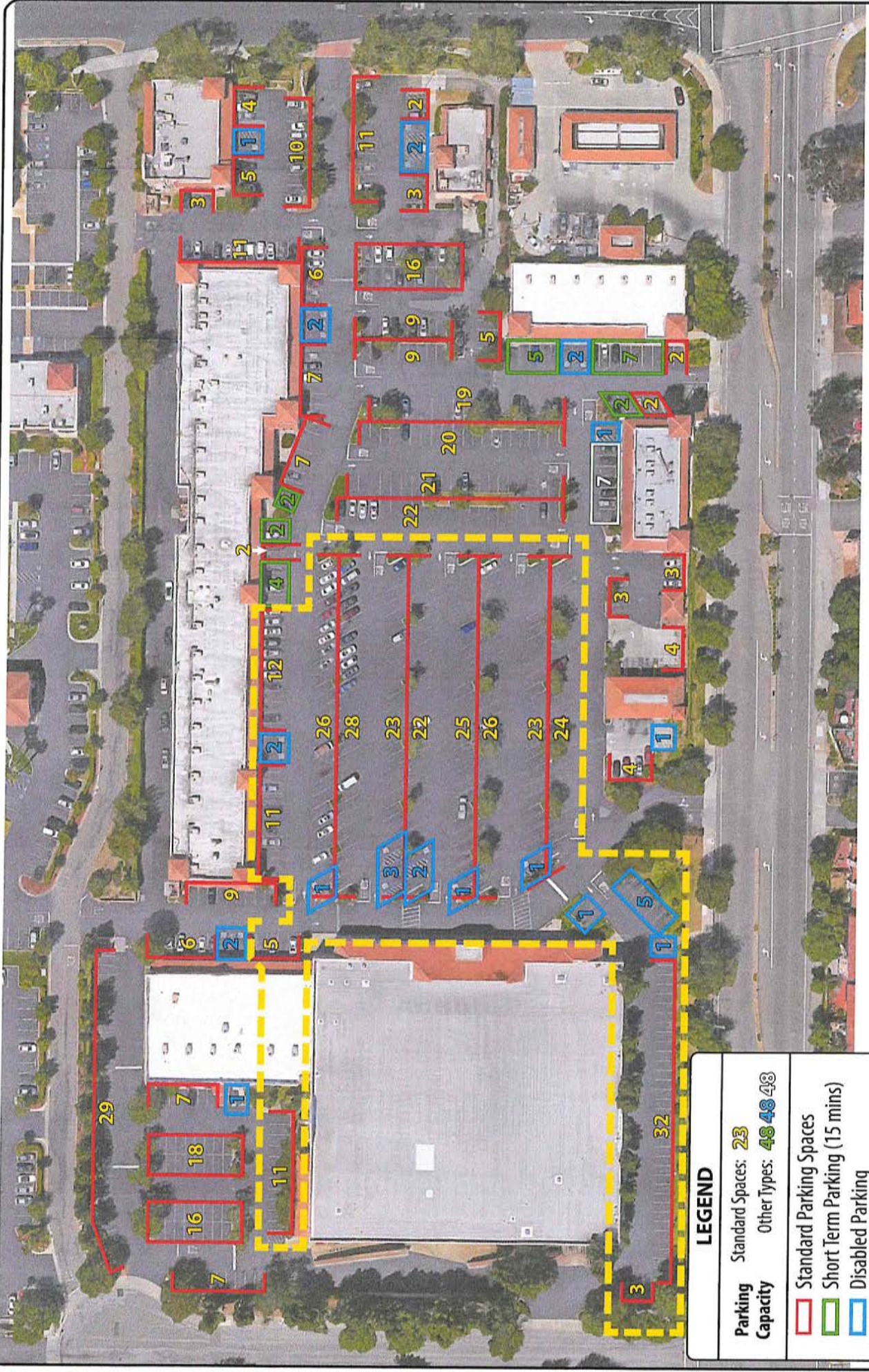
Table 1
6203 Jarvis Avenue Shopping Center
Number of Parking Spaces

<u>Location</u>	<u>Totals</u>
Sprouts Front Area	235
Sprouts SE Side Lot	42
SW Back Corner Lot	106
Remainder of Lot	248
Total	631

2.2 Parking Occupancy Surveys

The parking survey involved a survey of the number and types of spaces, and counts of the parking occupancy on both weekdays and weekends. In addition to extensive field observations, parking surveys were conducted on three different days, two weekdays and one Saturday. The parking occupancy surveys were conducted on Friday May 18, 2018, Saturday May 19, 2018, and Friday June 14, 2019. The surveys of parking occupancy were conducted at one-hour intervals for the time periods of 2-3 PM, 2-4 PM 4-5 PM, 5-6 PM, and 6-7 PM. The data sheets showing the complete survey results for the survey day with the highest occupancy (Friday May 18, 2018) are attached to this report. These data sheets show the number of vehicles parked in each part of the study area during each time period.

The study area and an index of the parking areas that are used to identify each area in the data tables are shown on **Figure 1**. **Figure 2** shows an inventory of the parking in the area with the



LEGEND	
Parking Capacity	Standard Spaces: 23 Other Types: 48 48 48
	Standard Parking Spaces
	Short Term Parking (15 mins)
	Disabled Parking
	Compact Spaces

FIGURE 2 | PARKING CAPACITY BY SECTION AND DESIGNATION
 PARKING REVIEW
6203 Jarvis Avenue
 City of Newark

number of spaces in each row of parking. **Figure 3** presents the peak capacity recorded in the four different study areas of the parking lot during the worst case conditions recorded during any of the surveys (from 6:00 to 7:00 PM on Friday May 18, 2018). As seen in **Figure 3**, the overall parking lot was never more than 50% occupied during any of the surveys although the northern portion of the lot near the restaurants was recorded to be 68% occupied during the peak period. However, during the same peak period the parking area in front of Sprouts was only 55% occupied and the parking lot on the southeast side of the Sprout's building was only 33% occupied.

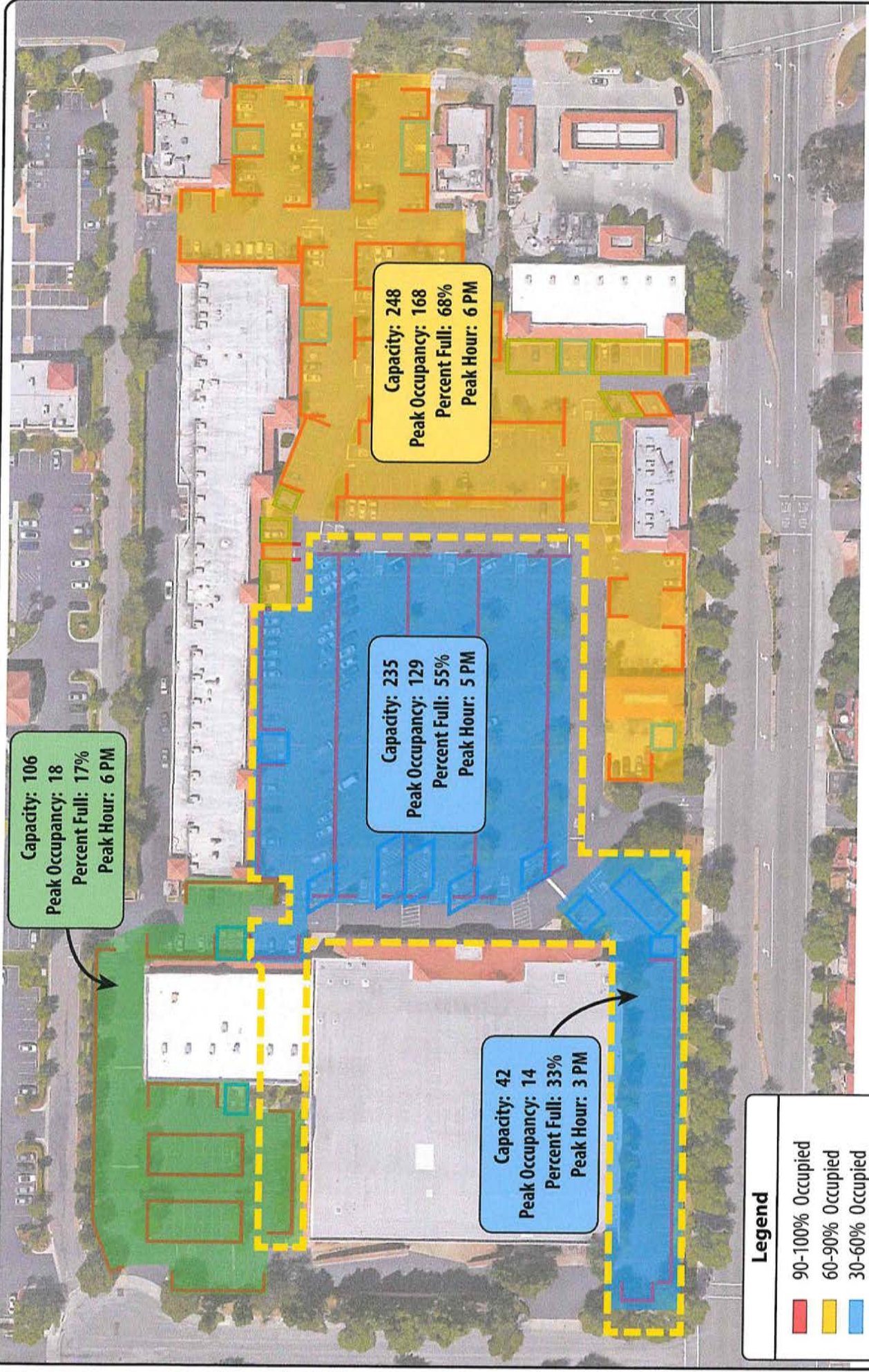
Parking Survey Summary

The results from the highest period of occupancy recorded the day with the highest occupancy levels are presented in **Tables 1 through 4**. As noted on these tables, there are 631 parking spaces in the shopping center. Of these, 343 are located within the Sprout's building parking maintenance area.

The highest occupancy levels recorded during the surveys on the peak Friday are presented in **Table 1**. The survey results indicated that for the overall shopping center a maximum of 315 of the 631 existing parking spaces were occupied at 6:00 PM. This equates to an occupancy rate of 50%. The highest occupancy recorded for the Sprouts Parking Maintenance Area was 49%. Please note the parking area in the back corner of was never observed to be more than about 20% occupied, with a minimum of about 90 parking spaces available in this area during each of the parking surveys.

2.3 Parking Demand

This section discusses the City of Newark's zoning and estimated parking demand for the project. Section 17.13.0505 of the Newark Municipal Code specifies that for all uses in the commercial use classification parking shall be at three spaces per 1,000 square feet. For the overall shopping center (129,764 square feet) the 631 spaces provided equates to a ratio of 4.86 spaces per 1,000 square feet. Please note there is an area associated with the Sprouts Building identified as the parking "maintenance" area in the CCR's for the shopping center. For the Sprout's building (60,862 square feet) the 288 spaces provided within the parking "maintenance" area for this building equates to a ratio of 4.73 spaces per 1,000 square feet. The following is a summary of the potential parking demand from the project.



Legend

- 90-100% Occupied
- 60-90% Occupied
- 30-60% Occupied
- 0-30% Occupied

FIGURE 3 | PARKING SURVEY SUMMARY
 PARKING REVIEW
6203 Jarvis Avenue
 City of Newark

Parking Demand Based on ITE Parking Generation Rates - To provide additional information on parking demand, **Table 2** provides a summary of the parking demand results using the average ITE parking generation rates for the shopping center taken from the 5th Edition of the ITE Parking Generation Manual. As shown in **Table 2**, the unadjusted average peak parking demand that would be generated by the entire shopping center would be forecast to be for approximately 358 parking spaces based on the ITE data. As shown in **Table 3**, the unadjusted average peak parking demand that would be generated by the Sprouts portion of the shopping center would be forecast to be for approximately 168 parking spaces based on the ITE data. With the addition of Fitness 19 the peak parking demand of the shopping center is forecast to increase by about 58 spaces.

Table 2
Off-Street Parking Calculations For The Entire Shopping Center Using Parking Data from the Institute of Transportation Engineers

Component	Data Source	Land Use	Size		Parking Rate	Peak Demand
Overall Shopping Center	ITE Parking Demand Rates	Shopping Center	129,764	sq. ft.	2.76	358

Table 3
Off-Street Parking Calculations for The Sprouts Parking Maintenance Area Using Parking Data from the Institute of Transportation Engineers

Component	Data Source	Land Use	Size		Parking Rate	Peak Demand
<i>Sprout's Maintenance Area</i>	<i>ITE Parking Demand Rates</i>	<i>Shopping Center</i>	<i>60,862</i>	<i>sq. ft.</i>	<i>2.76</i>	<i>168</i>
Sprout's Farmer's Market	ITE Parking Demand Rates	Shopping Center	32,620	sq. ft.	2.76	90
Fitness 19	ITE Parking Demand Rates	Health/Fitness Club	28,242	sq. ft.	4.73	134
<i>Sprout's Maintenance Area With Fitness 19</i>			<i>60,862</i>	<i>sq. ft.</i>		<i>224</i>
Net Increase in Forecast Demand with Fitness 19						56 vehicles

3) CONCLUSIONS

The 631 parking spaces in the survey area are generally no more than about 50% occupied at any time. Based on the parking occupancy surveys and the review of parking demand associated with the proposed Fitness 19 facility, it is our conclusion that there is more than sufficient parking in the overall shopping center to accommodate the potential for an increase parking demand from Fitness 19. The increase in parking demand from Fitness 19 is forecast to be for approximately 56 vehicles and our surveys indicated that there are always a minimum of about 300 parking spaces available in the center, even during the highest periods of parking occupancy in the evening. However, it must be acknowledged that a lot of this available parking is not necessarily located the most convenient areas of the parking lot.

The parking in the northern part of the shopping center can sometimes be frustrating for customers as the available parking referred to above is usually found farther away from the restaurants. It is important to note that parking in an area is generally perceived to be full at somewhat less than its capacity. As a result, it is likely the public's perception that the parking closest to the restaurants is often relatively full in the evening. The surveys show that even when this part of the lot is relatively full, the overall shopping center still has more than adequate parking. However, it must be acknowledged that some of parts of shopping center parking lot are not necessarily conveniently located for the restaurants.

TABLE 1
Summary of (5/18/2018) Survey

Sprouts' Parking Maintenance Area						
	Capacity	3:00 PM	4:00 PM	5:00 PM	6:00 PM	7:00 PM
Total	288	129	129	141	129	134
Disabled	17	10	7	3	5	1
Standard	271	119	122	138	124	133
Standard Only %		44%	45%	51%	46%	49%
Total %		45%	45%	49%	45%	47%

Remainder of Parking Lot						
	Capacity	3:00 PM	4:00 PM	5:00 PM	6:00 PM	7:00 PM
Total	343	152	143	172	186	166
Disabled	12	1	2	5	3	3
Short Term(G)	22	11	8	19	19	11
Standard(S) + Compact (C)	302	138	129	142	160	146
G + S + C	331	151	141	167	183	163
Standard Only %		46%	43%	47%	53%	48%
G + S + C %		46%	43%	50%	55%	49%
Total %		44%	42%	50%	54%	48%

Total Area						
	Capacity	3:00 PM	4:00 PM	5:00 PM	6:00 PM	7:00 PM
Total	631	281	272	313	315	300
Total %		45%	43%	50%	50%	48%
Standard Spaces	573	257	251	280	284	279
Standard Spaces %		45%	44%	49%	50%	49%

Table 2
Sprouts' Parking Maintenance Area

ID	Capacity Type	3:00 PM	4:00 PM	5:00 PM	6:00 PM	7:00 PM
1	11	0	1	0	0	0
2	5	5	1	5	4	5
3	11	3	5	9	8	11
4	2 H	0	1	0	0	0
5	12	12	10	12	11	12
6	26	18	21	26	26	26
7	1 H	0	0	0	0	0
8	28	8	12	13	9	14
9	23	5	6	8	8	9
10	3 H	1	0	0	1	0
11	22	9	5	7	4	7
12	2 H	2	0	1	0	0
13	25	5	9	9	12	12
14	1 H	1	1	0	1	0
15	26	18	18	13	14	9
16	23	13	12	13	13	7
17	1 H	1	0	1	1	0
18	24	14	14	12	10	10
19	1 H	1	1	0	0	0
20	5 H	3	3	0	1	1
21	1 H	1	1	1	1	0
22	32	8	8	10	5	10
23	3	1	0	1	0	1
Total	288	129	129	141	129	134
Disabled	17	10	7	3	5	1
Standard	271	119	122	138	124	133
Total % Occupancy		45%	45%	49%	45%	47%

TABLE 3
Remainder of Parking Lot

ID	Capacity	Type	3:00 PM	4:00 PM	5:00 PM	6:00 PM	7:00 PM
1	7		0	0	0	0	0
2	16		0	0	0	0	0
3	18		0	0	0	2	1
4	7		2	2	1	2	0
5	1	H	1	0	1	0	0
6	29		4	5	0	0	0
7	6		2	2	2	5	2
8	2	H	0	1	0	0	0
9	9		1	1	2	9	6
10	4	G	1	3	3	4	4
11	2		1	2	1	2	2
12	2	G	2	2	2	2	2
13	2	G	1	1	1	2	1
14	7		6	5	7	7	7
15	7		2	7	7	7	7
16	2	H	0	1	2	1	1
17	6		4	6	6	5	5
18	11		11	10	11	11	11
19	22		11	11	13	8	9
20	21		11	12	11	16	12
21	20		12	12	14	9	9
22	19		15	12	12	16	13
23	9		1	0	5	2	7
24	9		6	1	5	6	6
25	16		8	7	14	12	16
26	3		3	2	1	1	1
27	5		5	5	4	4	4
28	1	H	0	0	0	0	1
29	4		4	4	4	4	4
30	10		9	9	10	10	9
31	11		8	5	2	8	8
32	3		2	1	1	0	1
33	2	H	0	0	0	0	0
34	2		1	1	1	1	1
35	5		2	1	1	5	0
36	5	G	3	0	4	3	0
37	2	H	0	0	1	0	0
38	7	G	3	2	7	6	3
39	2		1	1	1	1	1
40	2		2	1	2	2	1
41	2	G	1	0	2	2	1
42	1	H	0	0	1	1	1
43	7	C	2	4	6	4	6
44	3		1	1	1	2	2
45	3		1	1	1	1	1
46	4		0	0	0	1	0
47	4		2	2	2	1	0
48	1	H	0	0	0	1	0
Total	343		152	143	172	186	166
Disabled	12		1	2	5	3	3
Short Term(G)	22		11	8	19	19	11
Compact (C)	7		2	4	6	4	6
Standard (S)	302		138	129	142	160	146
G + C + S	331		151	141	167	183	163
Total % Occupancy			44%	42%	50%	54%	48%

TABLE 4
Summary by Parking Area

Section	Capacity	3:00 PM	4:00 PM	5:00 PM	6:00 PM	7:00 PM
Sprouts Front Area	235	115	115	129	122	122
Sprouts SE Side Lot	42	14	13	12	7	12
SW Back Corner	106	10	12	6	18	9
Remainder of Lot	248	142	132	166	168	157

Section	Capacity	3:00 PM	4:00 PM	5:00 PM	6:00 PM	7:00 PM
Sprouts Front Area	235	49%	49%	55%	52%	52%
Sprouts SE Side Lot	42	33%	31%	29%	17%	29%
SW Back Corner	106	9%	11%	6%	17%	8%
Remainder of Lot	248	57%	53%	67%	68%	63%

RESOLUTION 1985

RESOLUTION OF THE PLANNING COMMISSION OF THE CITY OF NEWARK APPROVING U-20-1, A CONDITIONAL USE PERMIT TO A FITNESS GYM IN THE COMMUNITY COMMERCIAL ZONING DISTRICT AT 6203 JARVIS AVENUE. (APN: 537-521-37)

WHEREAS, Mr. Mitchell Gardner, has filed with the Planning Commission of the City of Newark an application for U-20-1, a conditional use permit, to allow for a indoor sports and recreation use, Fitness 19; and

PURSUANT to the Municipal Code Section 17.31.060, a public hearing notice was published in The Tri City Voice on December 31, 2019 and mailed as required, and the Planning Commission held a public hearing on said application at 7:30 p.m. on January 14, 2020 at the City Administration Building, 37101 Newark Boulevard, Newark, California; and

WHEREAS, pursuant to Chapter 17.35 (Use Permits), Section 17.35.060 (Required Findings), the Planning Commission hereby makes the following findings:

- A. The proposed use is allowed within the applicable zoning district and complies with all other applicable zoning district and complies with all other applicable provisions of this Ordinance and all other titles of the Municipal Code;

Response: The proposed use is allowed through the issuance of a CUP to be consistent with the existing zoning. The application for a fitness center has been evaluated and found to be consistent with the type of uses found in the Community Commercial zoning district and be compatible with the surrounding commercial uses in the shopping center. This finding can be made in the affirmative.

- B. The proposed use is consistent with the General Plan and any applicable specific plan;

Response: The proposed use is consistent with the GP Policy LU-1.1 Balance of Uses. Maintain a reasonable balance of land uses in the city so that residents can live close to where they work and satisfy their shopping, educational, personal, health, entertainment, and recreational needs close to home. Also consistent with GP Policy LU-1.6 Strengthening the Retail Base. Diversify the retail base of the city to create jobs, generate tax revenue to support City services, and enable residents and workers to find the goods and services they need without leaving Newark. This finding can be made in the affirmative

- C. The proposed use will not be adverse to the public health, safety, or general welfare of the community, nor detrimental to surrounding properties or improvements;

Response: The proposed business would not have an adverse effect to public health, safety, or general welfare of the community or surrounding properties. Automobile parking, provided in the existing parking area at the shopping center, is sufficient for the proposed use and the other nearby uses. The use would occupy a vacant commercial space in an existing shopping center that has complementary uses. Therefore, this finding can be made in the affirmative.

- D. Tax revenue generated by the development will exceed the City's cost of the service demand as a result of the development or a compelling community benefit will be provided.

Response: The proposed use will occupy an existing commercial storefront that has been vacant for approximately four years within an existing shopping center and is not expected to result in a substantial change in the shopping center's cost of service to the City. A portion of the Indoor sports and recreation use will contain a retail area, which is expected to generate sales-tax revenue. This finding can be made in the affirmative.

- E. The proposed use complies with any design or development standards applicable to the zoning district or the use in question unless waived or modified pursuant to the provisions of this Ordinance;

Response: There are no planned improvements to the exterior of the building, therefore no design or development standards apply to this application. This finding can be made in the affirmative.

- F. The design, location, size, and operating characteristics of the proposed activity are compatible with the existing and reasonably foreseeable future land uses in the vicinity; and

Response: The operating characteristics of the proposed use are expected to be compatible with the existing commercial tenants and would provide additional services for the shopping center customers. This finding can be made in the affirmative.

- G. The site is physically suitable for the type, density, and intensity of use being proposed, including access, utilities, and the absence of physical constraints.

Response: The proposed business is physically suitable for the type, density, and intensity of use being proposed, in that it would occupy an existing vacant space in the Sprouts center that is accessible, is served by utilities and without physical constraints. This finding can be made in the affirmative.

NOW, THEREFORE, BE IT RESOLVED that the Planning Commission hereby approves

this application with the following conditions:

1. Fitness 19 shall require its employees to park in the rear sides (area #1, 22 & 23) as shown in Abrams Associates parking analysis) of the building.
2. A Sign Permit will be required for any future sign on the exterior of the building.
3. The site and its improvements shall be maintained in a neat and presentable condition, to the satisfaction of the Community Development Director. This shall include, but not be limited to, repainting surfaces damaged by graffiti and site clean-up. Graffiti removal/repainting and site clean-up shall occur on a continuing, as needed basis. Any vehicle or portable building brought on the site shall remain graffiti free.
4. Construction equipment, including compressors, generators and mobile equipment shall be fitted with heavy-duty mufflers designed to reduce noise impacts.
5. Planning inspection is required prior to occupancy.
6. All proposed changes from approved exhibits shall be submitted to the Community Development Director who shall decide if they warrant Planning Commission and City Council review and, if so decided, said changes shall be submitted for the Commission's and Council's review and decision. The applicant shall pay the prevailing fee for each additional separate submittal of project exhibits requiring Planning Commission and/or City Council review and approval.
7. If any condition of this conditional use permit be declared invalid or unenforceable by a court of competent jurisdiction, this conditional use permit shall terminate and be of no force and effect, at the election of the City Council on motion.
8. The applicant hereby agrees to defend, indemnify, and save harmless the City of Newark, its Council, boards, commissions, officers, employees and agents, from and against any and all claims, suits, actions, liability, loss, damage, expense, cost (including, without limitation, attorneys' fees, costs and fees of litigation) of every nature, kind or description, which may be brought by a third party against, or suffered or sustained by, the City of Newark, its Council, boards, commissions, officers, employees or agents to challenge or void the permit granted herein or any California Environmental Quality Act determinations related thereto.
9. In the event that any person should bring an action to attack, set aside, void or annul the City's approval of this project, the applicant shall defend, indemnify and hold harmless the City and/or its agents, officers and employees from any claim, action, or proceeding against the City and/or its agents, officers and employees with counsel selected by the applicant (which shall be the same counsel used by applicant) and reasonably approved by the City. Applicant's obligation to defend, indemnify and hold harmless the City and/or its agents, officers and employees shall be subject to the City's compliance with Government Code Section 66474.9.
10. The Conditions of Project Approval set forth herein may include certain fees, dedication requirements, reservation requirements and other exactions. Pursuant to Government Code Section 66020(d)(1), these Conditions constitute written notice of a statement of the amount of such fees, and a description of the dedications, reservations and other exactions. The applicant is hereby further notified that the 90-day approval period in which the applicant may protest these fees, dedications, reservations and other exactions, pursuant to Government Code Section 66020(a), has begun. If the applicant fails to file a protest within

this 90-day period complying with all of the requirements of Section 66020, the applicant will be legally barred from later challenging such exactions.

The Commission thereby makes the findings prescribed in Newark Municipal Code Section 17.35.060, and directs the Resolution be mailed to the applicant and filed with the City Clerk.

This Resolution was introduced at the Planning Commission's January 14, 2020 meeting by _____, seconded by _____, and passed as follows:

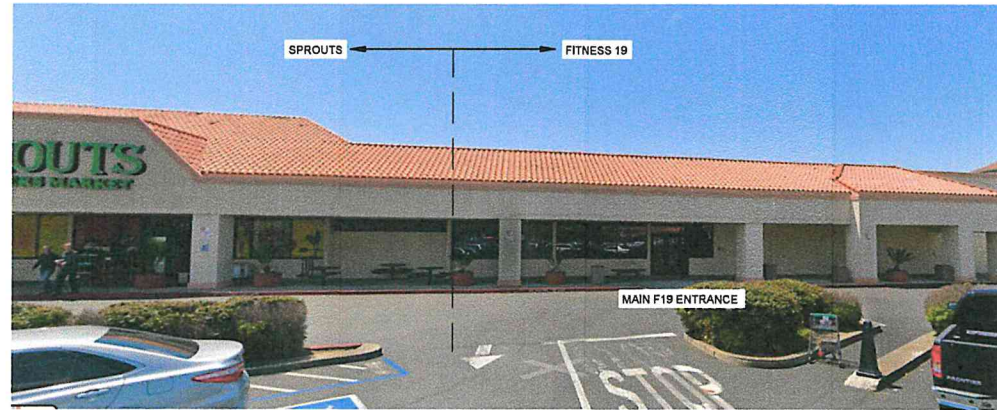
AYES:

NOES:

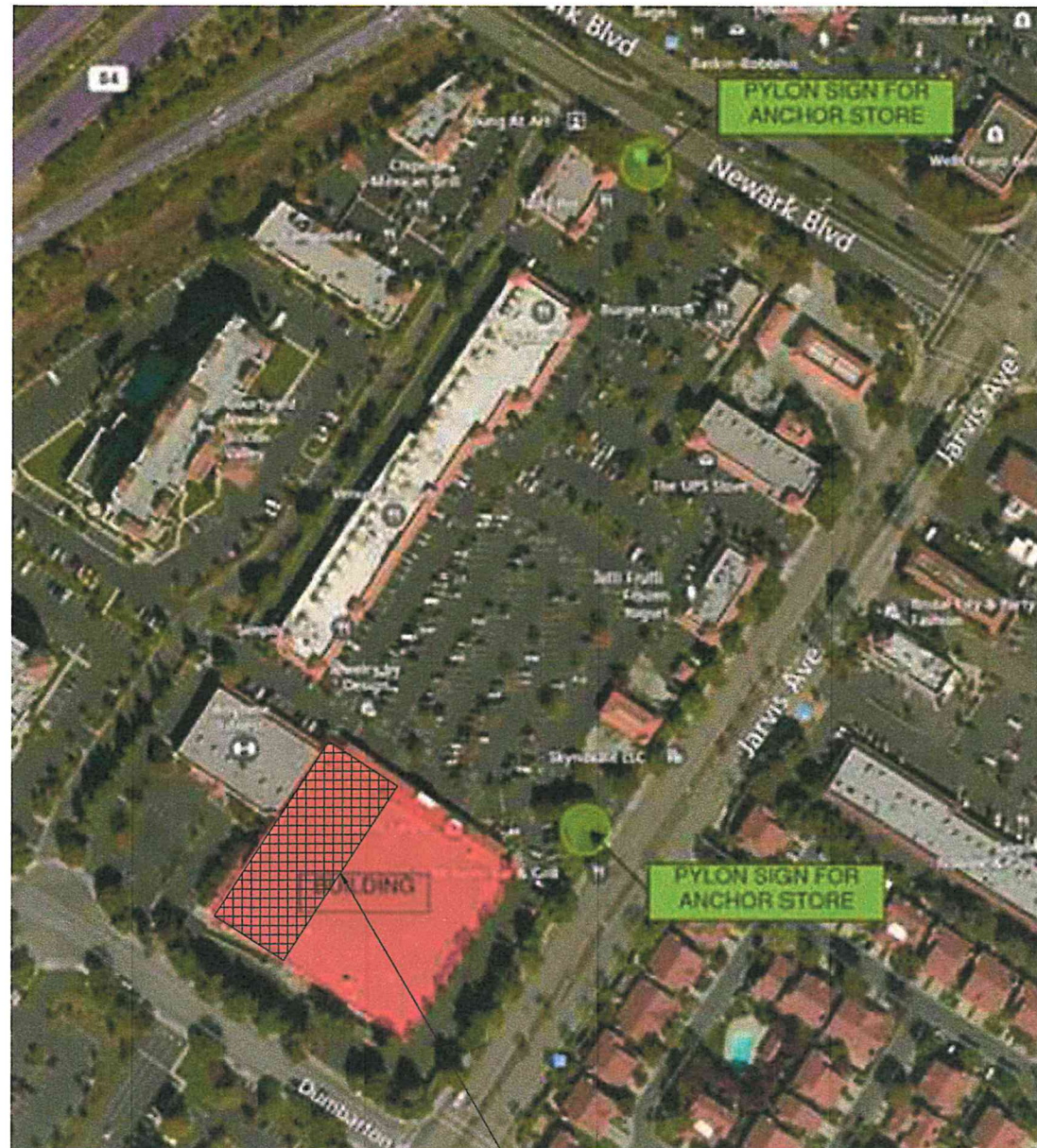
ABSENT:

STEVEN TURNER, Secretary

WILLIAM FITTS, Chairperson



1 Front Elevation



2 Site Plan

PROPOSED FITNESS 19 LOCATION



SHEET INDEX

- A-100 COVER SHEET
- A-101 PROPOSED FLOOR PLAN
- A-102 SITE PLAN

APPLICANT/OWNER:

6203 JARVIS, LLC
 DELAWARE CORPORATION
 6203 JARVIS AVE
 NEWARK, CA 94560

TENANT:

BOB RODGER
 MITCHELL GARDNER (AGENT)
 FITNESS 19
 2700 COLORADO BLVD #254
 LOS ANGELES, CA 90041
 231.507.2529

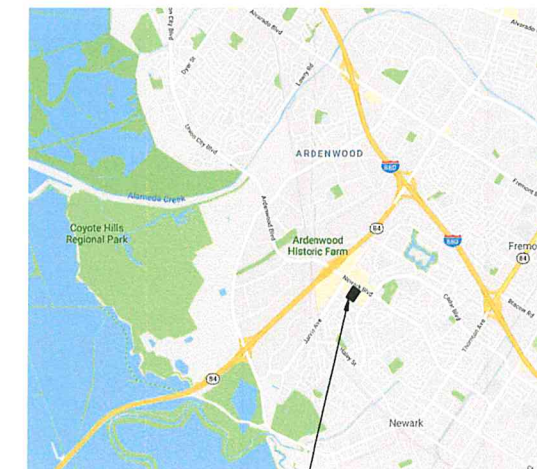
ASSESSORS PARCEL NO

53752137

CODE/PERMIT ANALYSIS

JURISDICTION:	CITY OF NEWARK
CODE:	2018 CALIFORNIA BUILDING CODE
OCCUPANCY TYPE:	A-3
CONSTRUCTION TYPE:	TYPE III-B, SPRINKLERED
FIRE SPRINKLERS:	YES NFPA 13
FLOOR AREA HEALTH CLUB (A3):	27,508 SF
ZONING:	SC

PROJECT VICINITY MAP (N.T.S.)



SITE

FITNESS 19
 CONDITIONAL USE PERMIT APP.
 6203 Jarvis Ave
 Newark, CA 94560

PROJECT NO. CA-418 NEWARK
 ARCHITECT



ENGINEER

NOTES

INITIAL SUBMITTAL 07.22.19

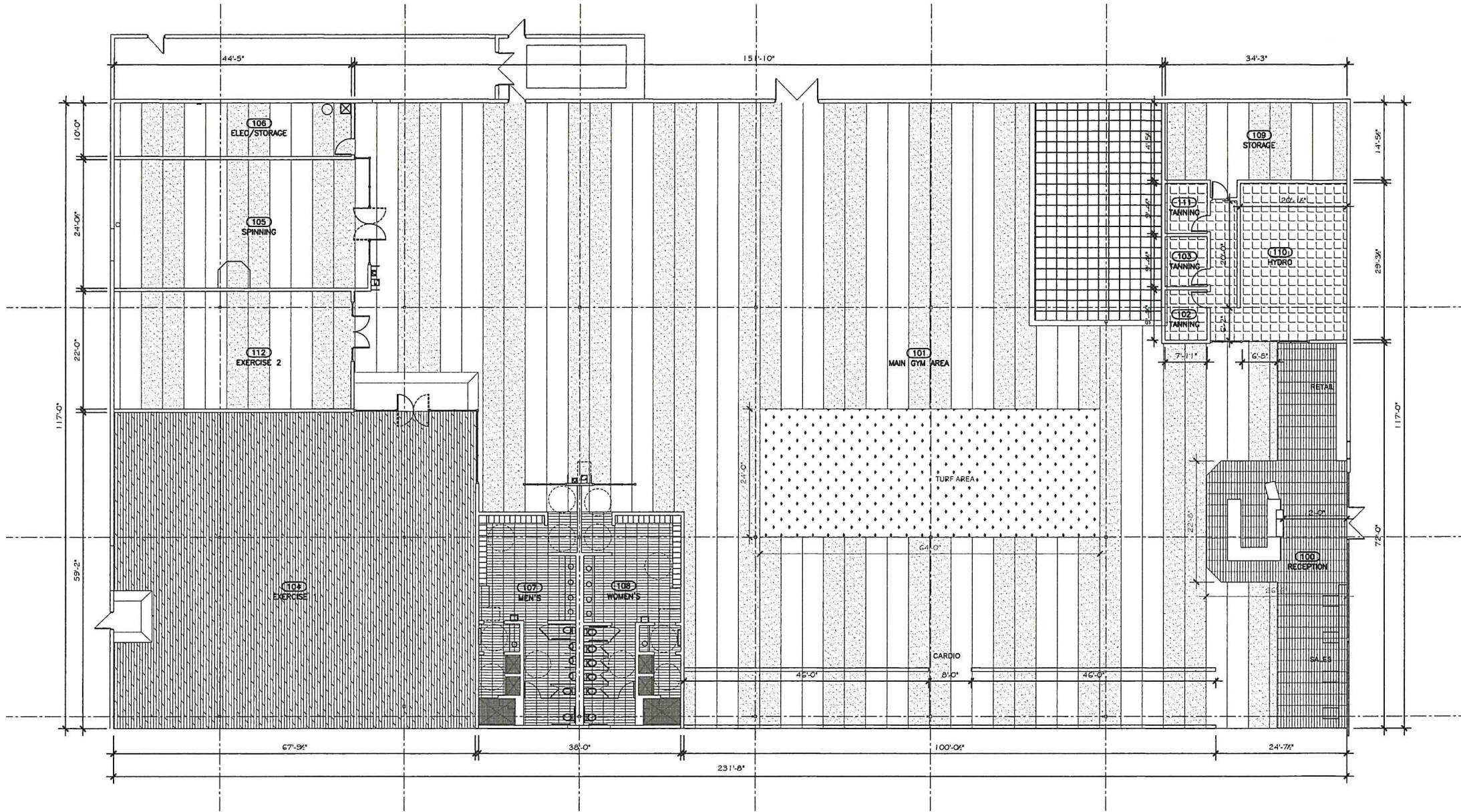
NO.	DESCRIPTION	DATE

ISSUED

TITLE
COVER SHEET

DRAWING NO.

A-100



Proposed Finish Floor Plan
 3/32" = 1'-0"

FITNESS 19
 CONDITIONAL USE PERMIT APP.
 6203 Jarvis Ave
 Newark, CA 94560

PROJECT NO. CA-418 NEWARK
 ARCHITECT



g2 design/build inc.
 mitchell wade gardner, architect/floorner
 10000 Wilshire Blvd, Suite 1000
 Beverly Hills, CA 90210
 213.400.5358

ENGINEER

NOTES

INITIAL SUBMITTAL	07.22.19

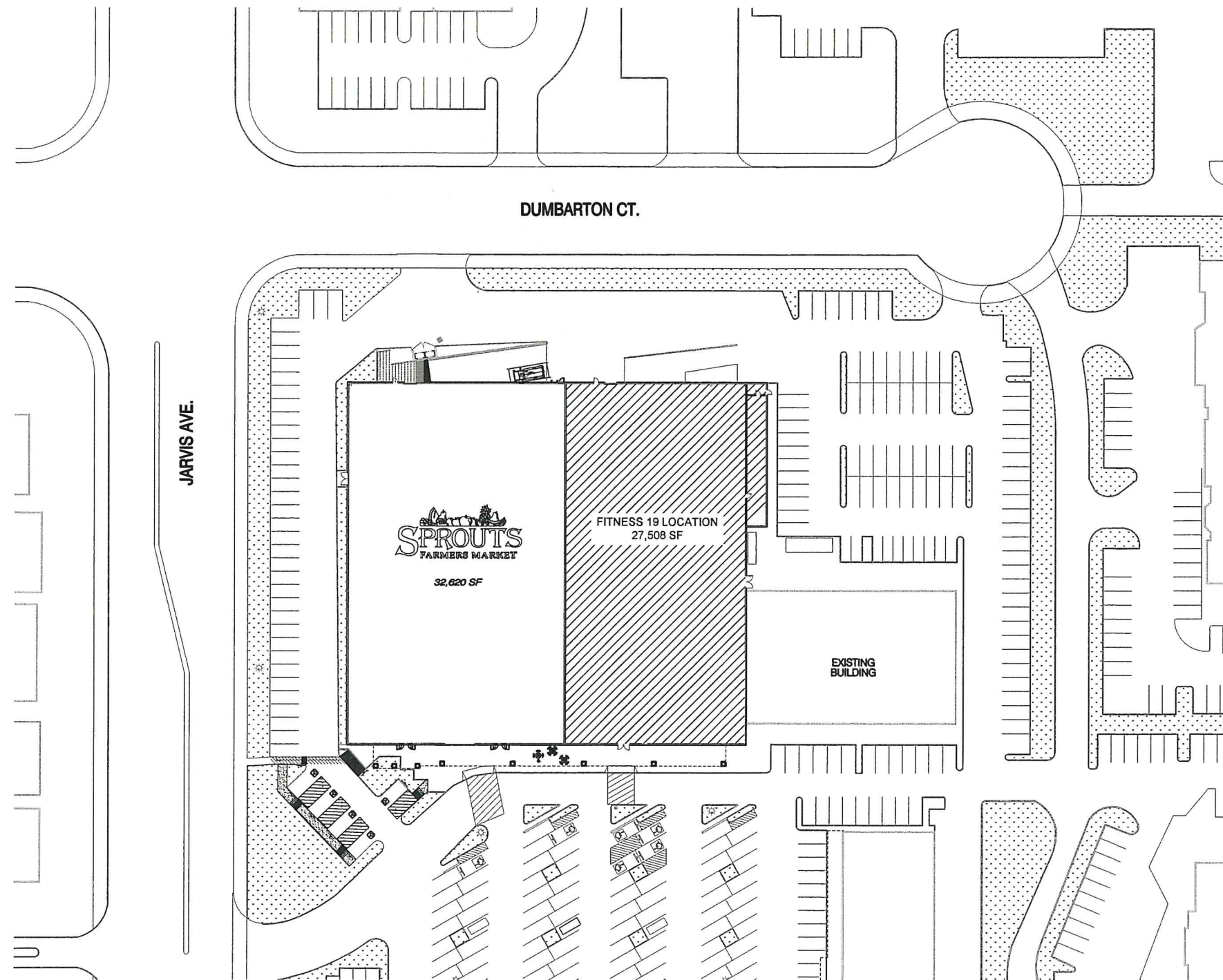
NO.	DESCRIPTION	DATE
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ISSUED

TITLE
PROPOSED FLOOR PLAN

DRAWING NO.

A-101



 **Site Plan**
NTS

FITNESS 19
CONDITIONAL USE PERMIT APP.
6203 Jarvis Ave
Newark, CA 94560

PROJECT NO. CA-418 NEWARK

ARCHITECT



g2 design/build inc.
mitchell wade gardner, architect/owner
150 linda vista ave
pasadena, ca 91105
626-790-0328

ENGINEER

NOTES

INITIAL SUBMITTAL 07.22.19

NO.	DESCRIPTION	DATE

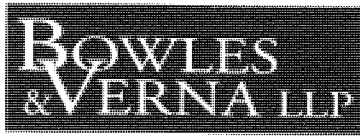
ISSUED

TITLE

**SITE
PLAN**

DRAWING NO.

A-102



Richard T. Bowles
Michael P. Verna
Robert I. Westerfield
Richard A. Ergo
K.P. Dean Harper
Bradley R. Bowles
Cathleen S. Huang
Kenneth B. McKenzie
Jason J. Granskog
Lawrence D. Goldberg
William T. Nagle
Cheryl A. Noll
Christopher D. Jew
Jonathan W. Lee
Daniel J. Zarchy
David A. Goldstein
Thomas V. McCarrick
Andrea L. Tool
Gerald C. Kipper
Alexandrea M. Tomp
Of Counsel
Bruce C. Paltenghi

December 5, 2019

Kristopher Kokotaylo
City Attorney
David J. Benoun
City Manager
Steven M. Turner
Community Development Director
City of Newark
37101 Newark Boulevard
Newark, California 94560
City.attorney@newark.org
City.manager@newark.org

**Re: Sprouts Center – Fitness 19 Conditional Use Permit Application
6203 Jarvis Avenue, Newark**

Gentlepersons:

The Newark Planning Commission will be hearing the application of Fitness 19 for a conditional use permit (“CUP”) to operate a health and fitness facility in the currently vacant property located at 6203 Jarvis Avenue in the Four Corners shopping center in Newark. The property is owned by 6203 Jarvis, LLC, a family limited liability company owned by our clients, Steven and Vickie Mavromihalis, and Dean and Xenia Kuvelis.

We write to request that the City approve the Fitness 19 application, and to bring to your attention certain other factual circumstances and legal claims which may arise if that CUP application is denied.

The Four Corners development is now commonly referred to as the “Sprouts Center” inasmuch as our clients were successful, at the City’s request, in procuring Sprouts Farmers Market to open a new store in Newark in July 2017 occupying approximately one-half of the 60,000 square feet formerly occupied by Raley’s Market at 6399 Jarvis Avenue.

By way of history, Raley’s vacated the Four Corners in September 2015. Thereafter our clients retained highly effective commercial real estate brokers to seek to locate retail tenants pursuant to the City Manager’s request. From the outset of the broker’s efforts there was strong interest in the Raley’s space from potential health and fitness clubs. Our clients were informed by Assistant City Manager, Terrence Grindall, that the City’s top priority was to have that space



City of Newark
December 5, 2019
Page 2

filled by a “top-notch grocer.” In agreeing to address that City priority, our clients received assurances that if they were successful in attracting a grocer to the Four Corners, they could count on support of the City Manager’s office to fill the remainder of the vacant space with a health and fitness use. Illustrative of these assurances is a June 2, 2016 e-mail written by Assistant City Manager Grindall to Steve Mavromihalis after Sprouts had expressed interest in the Four Corners location:

“Steven, I just wanted to check in and see if all was well with the Sprout’s to Newark deal. If you are going to bring the Gym – I’d like to get that teed up!”

Based on the assurances from the City Manager’s Office, our clients went ahead and executed the Sprouts lease and invested millions of dollars in tenant improvements, including a demising wall necessary to enclose the new Sprouts premises so that this upscale market could be brought to the Newark community. It took 21 month, at enormous financial risk to our clients, to bring the Sprouts Market to Newark. Our clients took on this risk in reliance on the City’s promises that it would approve a CUP for a health and fitness facility next door after Sprouts opened for business.

In addition, our clients continued looking for other credit retail tenants who might come to the center to occupy the rest of the vacant space at 6203 Jarvis Avenue. We can provide you with exhaustive documentation from the commercial real estate brokers of their efforts to find someone else for this space.

While the construction work was going on for the Sprouts Market, our clients repeatedly requested authorization to proceed with the health and fitness center, but were asked by City officials to “be patient” and keep looking for a credit retail tenant. At our clients’ request, the brokers revisited their previous retail contacts to see if anyone had changed their mind. Nobody had.

Since the opening of Sprouts Market, our clients have continued to look for other retail credit tenants and have continued to stay in touch with the City Manager’s Office. They have continually been told that they need to “be patient.”

The City’s requests for “patience” have cost our clients hundreds of thousands of dollars. Our clients endured this in reliance on the assurance that we would receive the support of the City Manager, not only if they brought Sprouts, but later if they could not find a credit-worthy retail tenant. It is now time for the City to approve the health and fitness center so that we do not lose this tenant as well.



LEGAL AUTHORITY

There can be no basis for the failure of the City to approve the conditional use permit for Fitness 19. This is an extremely appropriate family-friendly facility that will be an asset to the Newark community. There is nothing about the request for the conditional use that is contrary to other uses that the City has approved in this area. Indeed, the City has granted similar conditional uses for workout facilities in the immediate vicinity. The City granted a CUP to Anytime Fitness to operate a gym in the Four Corners center in 2012 – at a location right next door to Curves, another existing health and fitness facility.

Fifth Amendment Taking

On these facts, the City's denial of a conditional use permit in these circumstances would effect a taking of our client's property. The U.S. Supreme Court has made clear as a categorical matter that "the Fifth Amendment is violated where regulation denies all economically beneficial or productive use of land." *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (italics in original); see also, *Lingle v. Chevron USA Inc.*, 544 U.S. 528 (2005). Under *Lucas*, such a "total taking" is "compensable without case-specific inquiry into the public interest advanced in support of the restraint" by the government. *Lucas*, 447 U.S. at 1015. And the Court also pointedly observed that when governments prohibit or deny "a particular use [that] has long been engaged in by similarly situated owners", and "the fact that other landowners, similarly situated, are permitted to continue the use denied to the claimant", they are especially vulnerable to legal challenge. *Id.* at 1031.

The holding and reasoning in *Lucas* are applicable here. Despite strenuous marketing efforts by our clients and their brokers, the demised premises have been empty for more than four years since Raley's closed. The City's insistence that we "be patient" and leave the property empty, when it has approved other nearby health and fitness facilities sought by "similarly situated owners" (*id.*) in the same Community Commercial zoning district, is nothing more than a discriminatory denial of the proposed Fitness 19 use. To the contrary, "when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave the property economically idle, he has suffered a taking." *Lucas*, 447 at 1019 (italics in original).¹

¹ It is no longer necessary for a landowner owner who has suffered a taking of his property to first sue for just compensation under California law. He may now immediately seek relief in federal court under 42 U.S.C. § 1983 for the violation of his Fifth Amendment rights by the City. *Knick v. Township of Scott, Pennsylvania*, 588 U.S. ___, 139 S.Ct. 2162 (2019), overruling *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson County*, 473 U.S. 172 (1985). *Knick* is consistent with the recent pro-property rights trend in the Supreme Court.



City of Newark
December 5, 2019
Page 4

Separate and apart from *Lucas*, the City's denial of a CUP for Fitness 19 would also effect a regulatory taking under the multi-factor analysis set forth in *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 125 (1978), including the "economic impact of the regulation on claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations." The Supreme Court has confirmed this is the "primary" factor and thus the *Penn Central* inquiry "turns in large part" on "the magnitude of a regulation's economic impact and the degree to which it interferes with legitimate property interests." *Lingle*, 544 U.S. at 538-540 (Justice O'Connor writing for a unanimous Court). It is crystal clear from the facts here that the economic impact and burden on our clients' property flowing from a denial of a use permit would be severe, with damages (and potential City exposure) of several million dollars based on the rent and other financial terms of the signed Fitness 19 lease.

Denial of Equal Protection

The Supreme Court has repeatedly "recognized successful equal protection claims brought by a 'class of one,' where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000), and cases cited therein. This is in keeping with the purpose of the Equal Protection Clause of the Fourteenth Amendment "to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents." *Id.* The City may also wish to take note of the overlap between the Court's protection of "similarly situated" plaintiffs in both the equal protection and takings contexts, both deprivations of their property rights (e.g., *Lucas*). It is no coincidence and will be a central theme if litigation ensues here.

In *Olech* the Village conditioned the connection of the Olechs' property to the municipal water supply on their granting the Village a 33-foot easement over their property, despite having required only a 15-foot easement from other property owners seeking access. These facts, quite apart from the Village's subjective motivation for its differential treatment of the plaintiff, were held "sufficient to state a claim for relief under traditional equal protection analysis." *Id.* at 565; see also, *Fortress Bible Church v. Feiner*, 694 F.3d 208, 222-224 (2d Cir. 2012) (following *Olech* and affirming injunction requiring town to issue building permit, where plaintiff presented "overwhelming evidence that its [project] application was singled by the Town for disparate treatment" compared to other similarly situated property owners).

Equitable Estoppel

The doctrine of equitable estoppel is codified in California Evidence Code § 623, which states:

City of Newark
December 5, 2019
Page 5

“When a party has, by his own statement or conduct, intentionally and deliberately led another to believe a particular thing true and to act upon such belief, he is not, in any litigation arising out of such statement or conduct, be permitted to contradict it.”

Four elements must be present to apply the doctrine: (1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) he must rely on the conduct to his injury. *City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 489, citing *Driscoll v. City of Los Angeles* (1967) 67 Cal.3d 297, 305. *Mansell* is and remains the leading case upholding the application of equitable estoppel to public agencies.

Equitable estoppel “rests firmly upon a foundation of conscience and fair dealing.” *Mansell*, 3 Cal.3d at 488. Moreover, it is settled that the doctrine of equitable estoppel “may be applied against the government where justice and right require it.” *Id.* at 492, and see cases cited therein. In *Mansell* the California Supreme Court explained that “[t]he government may be bound by an equitable estoppel in the same manner as a private party when the elements requisite to such an estoppel against a private party are present, and in the considered view of a court of equity, the injustice which would result from a failure to uphold an estoppel is of sufficient dimension to justify any effect upon public interest or policy which would result from the raising of an estoppel.” *Id.* at 496-497; see also, *Kieffer v. Spencer* (1984) 153 Cal.App.3d 954, 958, 963-964 (applying estoppel doctrine to compel city to grant business license to operate videogame arcade, where petitioner incurred substantial expenses to their “immediate detriment”, including encumbering their property, in reliance on “affirmative representations” by city officials, and “no strong public policy other than ordinary considerations of the general welfare” justified the city’s actions in withholding the license).²

Each of these elements is present, and the City’s conduct gives rise to an estoppel in favor of our clients. Our clients acted in reasonable reliance on the City’s promise to approve the proposed health and fitness use if our clients delivered a “top-notch grocer” like Sprouts to the Four Corners center. Given that this was a “top priority”, the City clearly intended that the Mavromihalis family would act on its statement. Our clients changed their position, to their financial detriment, in reliance on the City’s assurances. They put off bringing a health and fitness facility to the shopping center. And not only that. Our clients made significant financial and other investments; proceeded to market half the building for the Sprouts Market and spend money on a demising wall to make that happen. They also configured and sized the empty space

² The City may think that it is immune from such equitable estoppel claims, which are relatively uncommon. However, this law firm has litigated and successfully raised an estoppel against the City of Napa based on the conduct of city staff in that case – including an assistant city manager – on which our clients reasonably relied to their detriment.



City of Newark
December 5, 2019
Page 6

Richard T. Bowles	Cathleen S. Huang
Michael P. Verna	Ethan K. Friedman
Robert I. Westerfield	William T. Nagle
Richard A. Ergo	Cheryl A. Noll
K.P. Dean Harper	Michael T. Krueger
Bradley R. Bowles	Mallory L. Homewood
Kenneth B. McKenzie	Shelley A. Molineaux
Jason J. Granskog	Jonathan W. Lee
Lawrence D. Goldberg	Daniel J. Zarchy

Of Counsel

Bruce C. Paltenghi

so that it could be marketed for the future health and fitness gym that the City had promised to get “teed up.”

In sum, while our clients dealt with the City in good faith, the same cannot be said of the City. On these facts, we believe a judge or jury will be sympathetic to our clients’ position if litigation becomes necessary for our clients to enforce their constitutional and private property rights. .

CONCLUSION

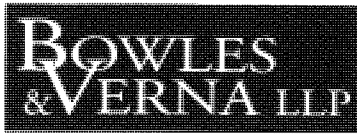
It is our clients’ fervent hope that nothing more than this letter is required to move this matter forward. Our clients are not litigious but are prepared to move forward with litigation to recover the damage that the City has caused them to incur based on the representations and promises made. We look forward to hearing from you. Thank you.

Very truly yours,



RICHARD T. BOWLES

RTB:dja



Richard T. Bowles
Michael P. Verna
Richard A. Ergo
Bradley R. Bowles
Cathleen S. Huang
Robert I. Westerfield
K.P. Dean Harper
Kenneth B. McKenzie
Jason J. Granskog
Lawrence D. Goldberg
William T. Nagle
Cheryl A. Noll
Christopher D. Jew
Jonathan W. Lee
Jin Im-Saetern
Christopher M. Wolcott
David A. Goldstein
Thomas V. McCarrick
Andrea L. Tool
Gerald C. Kipper
Alexandra M. Tomp

Of Counsel
Bruce C. Paltenghi
David F. Abele

January 3, 2020

Kristopher Kokotaylo
City Attorney
David J. Benoun
City Manager
Steven M. Turner
Community Development Director
City of Newark
37101 Newark Boulevard
Newark, California 94560
City.attorney@newark.org
City.manager@newark.org
Steven.Turner@newark.org

**Re: Sprouts Center – Fitness 19 Conditional Use Permit Application
6203 Jarvis Avenue, Newark**

Gentlepersons:

The Newark Planning Commission is now scheduled to hear on January 14, 2020 the Fitness 19 application for a conditional use permit (“CUP”) to operate a health and fitness facility in the currently vacant property located at 6203 Jarvis Avenue in the Four Corners shopping center. That property is owned by 6203 Jarvis, LLC, a family limited liability company owned by our clients, Steven and Vickie Mavromihalis, and Dean and Xenia Kuvelis.

In our December 5, 2019 letter, we requested that the City approve the Fitness 19 application, along with bringing to the City’s attention certain other factual circumstances and legal claims which may arise if that CUP application is denied. We write now to provide additional information which strongly supports the granting of a CUP to Fitness 19.

We respectfully request that this letter and the attached information be made a part of the Planning Commission Staff Report on this matter. Further, please be sure it is given to all Planning Commissioners in advance of the January 14 hearing. Thank you.

Seventeen Other California Cities in the Past Decade Have Approved New Use Permits for Fitness 19 Stores.

Those cities got it right. They recognized that Fitness 19 does generate sales tax revenue from its own operations. Contrary to apparent perceptions of City of Newark staff, Fitness 19 sells taxable products and services to its patrons. See December 27, 2019 letter to Deputy Community Development Director Art Interiano from Mitch Gardner of G2 Design Build Inc. and Bob Rodger of Fitness 19 (“Interiano Letter”), at pp. 1 - 2.

And at least as important, Fitness 19 will draw hundreds of thousands of fitness customers annually to existing retail shopping centers and stores nearby. The result? Fitness 19 has a track record of stimulating increased, sales tax generating activities in nearby shopping centers, retail stores and restaurants where it operates. Other California cities over the past decade have had the vision to recognize this positive economic spillover from the impacts and value that Fitness 19 brings to the community, to local residents and to adjacent retail uses.

Other cities have had the wisdom to approve Fitness 19’s CUP applications. **So should Newark.**

Health and Fitness Gyms Are a Good “Fit” for Malls and Shopping Centers Seeking to Increase Customer Visits.

We also refer the City to pages 2 – 7 of the Interiano Letter, where the findings and conclusions from several recent news articles are highlighted. A few quotes will suffice here. “Malls are turning to health clubs to help boost foot traffic.” “Put a gym in a mall, and boom, you suddenly have a busier mall.” “Malls never wanted gyms. Now they court them.” “Before or after working out, people are more likely to grab a quick bite to eat, shop for groceries, or pick up their dry cleaning from a neighboring business.” “Overall, the addition of a fitness tenant is a smart move for brokers and landlords when leasing a shopping center.”

Newark isn’t an island isolated from these nationwide retail trends. The experience in other communities is equally applicable here. Fitness 19 is and will be a good fit for the Four Corners center.

The Exhaustive, Four-Plus Year Marketing Efforts by John Cumberlich & Associates to Bring a Credit Retail Tenant to Our Clients’ Vacant Property in the Four Corners Center

John Cumberlich was the listing broker for the vacant premises at 6203 Jarvis Avenue in the Four Corners shopping center. We refer the City to the attached “Newark leasing summary” memorandum dated December 19, 2019, prepared by Mr. Cumberlich (the “Cumberlich Memo”). It describes and summarizes how, “over the past four+ years,” Mr. Cumberlich and his team “thoroughly and continuously marketed the property to the entire commercial real estate

City of Newark
January 3, 2020
Page 3

industry through multiple channels.” They also made direct outreach contacts with more than 120 first class Bay Area retailers, all of whom are listed in the three-page spreadsheet attached to the Cumberlich Memo.

The upshot of those efforts? The Comments section of the spreadsheet documents a litany of reasons why other retailers declined or weren’t interested in coming to the Four Corners location. It demonstrates that **the only potential tenants to express any interest in leasing our clients’ property, and who submitted offers to lease, were two health and fitness users – Fitness 19 and Crunch Fitness.** After determining that Fitness 19 had the stronger track record and was a better fit for the Newark community, our clients selected Fitness 19 as a leasing partner for the vacant premises.

The foregoing evidence – from the unanimous CUP approvals in other California cities, well-established retail trends and media reports on the synergy between retail and fitness uses in shopping centers, and the extensive, multi-year marketing efforts by Mr. Cumberlich – strongly support the Planning Commission’s approval of Fitness 19’s CUP application. Fitness 19 will bring an active, lively and family-friendly clientele to the Four Corners area. It will increase economic activity and retail sales, and will be a welcome addition to the center, and the City of Newark generally.

But that’s not the end of the story here. These and other facts also highlight the damages our clients will sustain, and the multi-million dollar legal and financial exposure the City will face, if it denies the proposed Fitness 19 use.

The City’s Liability for a Regulatory Taking

The Fifth Amendment prohibition against the taking of private property without just compensation “is violated where regulation denies all economically beneficial or productive use of land.” *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992); see also, *Lingle v. Chevron USA Inc.*, 544 U.S. 528 (2005). Just such a taking will occur if the City denies the Fitness 19 CUP application now – after four-plus years and concerted and extensive efforts to market our clients’ Newark property to retail users have come up empty. The record and evidence in this case shows that the proposed health and fitness use is, in fact, the *only* viable “economically beneficial or productive use” (*id.*) of the vacant premises at 6203 Jarvis Avenue. The circumstances encountered by Mr. Cumberlich and his team, and amply documented in the Cumberlich Memo, will weigh strongly against the City in future litigation if a CUP is not granted to Fitness 19.

Moreover, our clients’ damages are easily proven. Fitness 19 was ready to occupy the property over two years ago. Fitness 19 has now signed a 15-year lease for the premises, plus two (2) five-year options. The lease calls for minimum annual rent payments of approximately \$400,000 - \$500,000 during the initial 15-year term – which are of course contingent on the

City of Newark
January 3, 2020
Page 4

City's approval of a CUP. To this must be added our clients' very substantial financing and carrying costs that they incurred to keep their property vacant since the Sprouts market opened in mid-July 2017 – in compliance with repeated requests from City staff that they be “patient” and keep looking for a non-existent retail tenant.

The City is looking at a potential damages verdict against it of several million dollars, plus a likely seven-figure award of attorneys' fees and costs in favor of our clients under 42 U.S.C. § 1988.

In these circumstances, the City and its elected officials should reasonably ask themselves: Is a denial of the beneficial use proposed by Fitness 19 really worth taking this risk? Will Newark residents – your constituents – praise you for putting the City's finances at risk, or for wasting their tax dollars on the needless litigation that will result from denial of a CUP? The clear answer to both questions is a resounding NO. The only rational and sensible decision here is approval of Fitness 19's application without further delay.

The City of Newark Has Approved Other Health and Fitness Uses in the Four Corners Shopping Center. In These Circumstances, Denial of the Fitness 19 CUP Application Would Be Discriminatory and Unlawful.

Here too, the facts support our clients' position and fatally undermine any lawful basis for denying a use permit to Fitness 19. It is beyond dispute that the City permitted Curves, a women's fitness club chain, to operate in the Four Corners center more than a decade ago. Then in 2012, the City granted a CUP to Anytime Fitness to open a fitness gym right next door to Curves. The Curves and Anytime Fitness properties share the same Community Commercial zoning designation as our clients' property. Moreover, that Anytime Fitness isn't “high sales tax” generating retail store was not put forward by the City as a basis for denying it a use permit. Nor did the City deny a permit to Anytime Fitness because of its close proximity to, or the potential “anti-competitive” impacts that Anytime Fitness's opening might or might not have on Curves.

These facts have constitutional significance under both the Fifth Amendment taking and Fourteenth Amendment equal protection clauses. The Supreme Court made clear that a city which prohibits or denies a particular use that has “long been engaged in by similarly situated owners”, and/or where” other landowners, similarly situated, are permitted to continue the use denied to the claimant”, is especially vulnerable to a Fifth Amendment taking claim. *Lucas, supra*, 505 U.S. at 1031. In the same vein, a city violates the Equal Protection Clause where it intentionally treats a property owner “differently from others similarly situated” and there is “no rational basis for the difference in treatment.” *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000). The City cannot deny this application because of “concern” for the impact on Anytime Fitness.

City of Newark
January 3, 2020
Page 5

Long story short: Our clients will have strong constitutional claims against the City on both taking and equal protection discrimination grounds if the Fitness 19 use permit is denied, in view of the City's past disparate and favorable treatment of adjacent property owners seeking permission for health and fitness uses in the Four Corners area. The City needs to face up to its exposure under *Lucas* and *Olech*, and not try to downplay it.

Equitable Estoppel

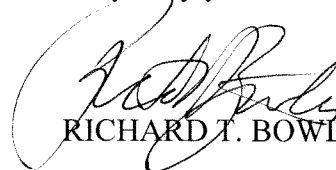
Finally, there is the matter of equitable estoppel, which "rests firmly upon a foundation of conscience and fair dealing" and "may be applied against the government where justice and right require it." *City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 488, 492. Our clients acted in reasonable reliance on the promise of City staff to get the proposed health and fitness use of their vacant property "teed up" for approval if and when our clients delivered a "top-notch grocer" like Sprouts to the Four Corners center. Our clients lived up to their side of the bargain. It is time for the City to do the same.

Conclusion

It remains our clients' earnest desire and hope that the City will review carefully the information in the Interiano Letter, the Cumberlich Memo and our letters. We hope it will weigh carefully its legal and financial exposure; reconsider its previously expressed position; and approve the pending Fitness 19 CUP application at the January 14, 2020 hearing. While it is not their first choice, our clients are fully prepared to pursue litigation against the City for any and all damages that will result from a denial of the Fitness 19 use.

We are available to meet with the appropriate City officials prior to the Planning Commission hearing if that would be helpful, and look forward to hearing from you. Thank you.

Very truly yours,



RICHARD T. BOWLES

RTB:dja

Enclosure

cc: Anne Stedler
Economic Development Manager
Anne.stedlar@newark.org

MEMORANDUM

To: Steven Mavromihalis, et al.
From: John Cumbelich
Date: December 19, 2019
Re: Newark leasing summary

Further to our ongoing discussions I have attached a spreadsheet that summarizes many of the retailers that our firm has been in dialogue with over the past four+ years in our efforts to lease the 28,000 SF co-anchor space at your Newark property.

In addition to our firm's direct outreach to the user community such as those noted on the spreadsheet, we have thoroughly and continuously marketed the property to the entire commercial real estate industry through multiple channels. These include:

- The property has been continuously posted at www.LoopNet.com, which is the industry standard forum for exposing commercial real estate listings. We have received occasional responses through LoopNet inquiries from uses such as banquet hall, night clubs and independent operators of martial arts, basketball courts or trampoline parks. None of these users generated offers.
- The property has been exposed for years at industry conventions of the International Council of Shopping Centers (ICSC), both regionally and nationally. ICSC is the largest trade organization in the shopping center industry.
- The property has been continuously marketed to the Northern California commercial real estate industry through our firm's daily marketing blasts send to over 800 commercial real estate brokers and professionals.
- The property has been continuously posted to our firm's available properties website, www.cumbelich.com
- The property has been continuously exposed to each of our firm's 35 partner offices throughout North America (X Team Retail Advisors), each of whom are exclusively focused on the leasing of best in class properties and representing first class retailers, as we are.

Perhaps just as telling as all of the users that have declined interest, due to a lack of interest in Newark in general or to this location in particular, are all of the first-class retailers that we have successfully consummated lease transactions with. Our firm has developed deep roots in the Northern California shopping industry over the past 30+ years, during which time our elite firm has consummated several of the most notable retail leases in Northern California. A partial list of uses with whom we have successfully consummated Bay Area leases with include:

- 24 Hour Fitness
- Apple
- BevMo!
- Big Lots
- Burlington

- Circuit City
- Cost Plus
- Crunch Fitness
- CVS/Longs Drugs
- Dick's Sporting Goods
- Famsa
- Fitness 19
- Forever 21
- Golf Mart
- Golfsmith
- Hobby Lobby
- Home Expo
- Kroger
- Lowes
- Orchard Supply Hardware
- Party City
- Petco
- Petsmart
- Pottery Barn
- Restoration Hardware
- Ross Dress for Less
- Smart & Final
- Sport Chalet
- Sprouts
- Stein Mart
- Target
- Tiffany & Co.
- TJ Maxx
- ULTA
- Villa Sport
- Wal Mart
- Walgreens
- Yoga Works

The partial list above demonstrates that our firm has one of the largest and most extensive resumes in successfully attracting first class retailers to Northern California locations of any professional currently active in this market.

The list above clearly suggests that if there were a good credit, good quality retailer other than Fitness 19 or Crunch, which was a candidate for this location, we would have identified them long ago.

Feel free to contact me with any questions about the summary above. Thank you

Newark Sprouts Co-Anchor Contact List		
Retailer	Declined?	Comments
24 Hour Fitness	Yes	Staying near mall
99 Only	Yes	decline
99 Ranch Market	Yes	declined interest in relocating
Alamo Draft House	Yes	decline
Aldi	Yes	not ready for Bay Area
AMC Theaters	Yes	regional locations only
Andronico's	Yes	not actively expanding
Arteagas Market	Yes	wrong demographic
Ashley HomeStore	Yes	Territory already covered by multiple other stores
At Home	Yes	Too small. Decline.
Babies R Us	Yes	prefers malls
Bed Bath & Beyond	Yes	Territory already covered, need more soft good co-tenancy
Berkeley Bowl	Yes	decline
Pet CLub	Yes	Not interested.
Bevmo	Yes	Not interested in Newark
Big 5 Sporting Goods	Yes	Their space requirements make it impossible to fit two tenants in the space
Blink Fitness	Yes	not ready for Bay Area
Bob's Discount Furniture	Yes	not ready for Bay Area
Bowlmor	Yes	regional locations only
Burlington	Yes	decline
Buy Buy Baby	Yes	prefers malls
California Family Fitness	Yes	decline
Cash & Carry	Yes	Toured, declined
Chavez Supermarket	Yes	wrong demographic
Chuze Fitness	Yes	not ready for Bay Area
Cost Plus World Market	Yes	Territory already covered, need more soft good co-tenancy
Crunch Fitness	No	submitted offer
CVS	Yes	declined relocation, despite drive thru opportunity
DD's discounts	Yes	Initial interest was conditioned on Tenant's right to terminate. Later withdrew.
Daiso	Yes	decline
Dave & Busters	Yes	regional locations only
David's Bridal	Yes	No requirement here
db Shoes	Yes	regional locations only
Dick's Sporting Goods	Yes	Too close to Hayward
Diddam's	Yes	decline
Dollar Tree	Yes	decline
DSW	Yes	No requirement here
Fitness 19	No	submitted offer
Floor & Décor	Yes	Decline. Too small.
Fresco Market	Yes	wrong demographic
Friedman's Home Improvement	Yes	seeks North Bay only
Gold's Gym	Yes	decline
Golf Galaxy	Yes	not active
Golfsmith	Yes	stopped expanding
Goodwill	Yes	decline
Grocery Outlet	Yes	too close to other store
H Mart	Yes	reviewed, pursued South Bay instead
Hankook Market	Yes	decline
Harbor Freight	Yes	decline
Hobby Lobby	Yes	regional locations only
Home Depot	Yes	too small
HomeGoods	Yes	regional locations only
In Shape Fitness	Yes	reviewed, declined
iPic Theaters	Yes	decline
Island Pacific Market	Yes	decline
Joann Fabrics	Yes	Too close to Pacific Commons in Fremont
Kirkland's	Yes	regional locations only
LA Fitness	Yes	reviewed, declined

La Superior	Yes	wrong demographic
Las Montanas	Yes	wrong demographic
Lidl	Yes	not ready for Bay Area
Liesure Sports Inc.	Yes	prefers upscale trade areas
Lifetime Fitness	Yes	decline. Not a target market.
Lion Supermarket	Yes	decline
Living Spaces	Yes	decline. Too close to Fremont store.
Lowes	Yes	already in Fremont
Mancini's Sleepworld	Yes	decline
Marina Market	Yes	decline
Marshalls	Yes	regional locations only
Maya Cinema	Yes	decline
Metropolitan Theaters	Yes	not seeking this market
Mi Pueblo	Yes	declined interest in relocating
Michael's	Yes	already covered in market
New Seasons	Yes	decline
Nordstrom Rack	Yes	no soft good co-tenancy
Nugget Market	Yes	purchase only, not interested
Off Broadway shoes	Yes	prefers malls
Old Navy	Yes	Territory already covered, need more soft good co-tenancy
Orchard Supply Hardware	Yes	not interested in returning to Newark
Party City	Yes	already in Fremont
Pet Club	Yes	decline
Pet Food Express	Yes	Their space requirements make it impossible to fit two tenants in the space
Pet Supplies Plus	Yes	they are too small
Petco	Yes	Territory already covered, need more soft good co-tenancy
Petsmart	Yes	Territory already covered, too small of trade area
Pier 1 Imports	Yes	prefers malls
Pinstripes	Yes	prefers lifestyle centers
Planet Fitness	Yes	decline
Regal Cinema	Yes	prefers malls
REI	Yes	already in Fremont
Richard's Crafts	Yes	not expanding
Rite Aid	Yes	reviewed, declined
Ross	Yes	declined interest in relocating from across the street
Safeway	Yes	declined interest in relocating from across the street
Seafood City	Yes	decline
Shopko	Yes	not ready for Bay Area
Sierra Trading Post	Yes	not ready for Bay Area
Smart & Final	Yes	Toured, declined
Sport Chalet	Yes	stopped expanding
Stein Mart	Yes	prefers malls and regional locations
Strike	Yes	decline
Studio Movie Grill	Yes	regional locations only
Super Kyo Po	Yes	decline
Target	Yes	toured twice, declined
The Floor Store	Yes	decline
The Sports Authority	Yes	regional locations only
Thomasville	Yes	decline
TJ Maxx	Yes	regional locations only
Tokyo Central/Marukai	Yes	decline
Top Fit	Yes	decline
Total Wine	Yes	Too close to Pacific Commons in Fremont
Total Woman	Yes	prefers lifestyle centers
Toys R Us	Yes	staying at Newpark
Tractor Supply Hardware	Yes	prefers free-standing locations
ULTA	Yes	too small, decline
Villa Sport	Yes	too large, seeks 8 acres
Walgreens	Yes	reviewed, declined
West Marine	Yes	decline

Whole Foods	Yes	met at ICSC, toured, declined
Winco Foods	Yes	reviewed, declined
Zion Market	Yes	decline

October 2, 2019

Matt Morales
Anytime Fitness (Owner)
6347 Jarvis Ave
Newark, CA 94560
707-484-2200

RE: Requesting City of Newark deny Conditional Use Permit for Fitness 19

Dear Art Interiano,

It has come to the attention of business owners in the Sprouts Shopping Center that Fitness 19 has applied for a Conditional Use Permit to open a gym between Sprouts and Anytime Fitness (also a gym). We, business owners in the Sprouts Shopping center, are opposed to another gym opening in the center. Among the primary concerns, there is already an existing and well established gym in the center and across the street. In addition, the increased traffic and parking needs of a large gym during busy peak hours would be detrimental and negatively impact the many restaurants and other businesses.

We would kindly request that the City of Newark deny this permit.

Kind Regards,

Matt Morales (owner)
Anytime Fitness

GEORGE REID (OWNER)
JEWELRY BY DESIGN

[Signature]
SIMPLY THAI

Pier 98
Bill

[Signature]
Daany Parikh

[Signature] (owner)

[Signature] owners
of
milk Pure water ice

BELLA EYE CARE OPTOMETRY
[Signature]

THE NATION
CALVIN *[Signature]*