

DATE: May 28, 2020

TO: City Council, City Manager, Assistant City Manager, and Interim City Attorney

FROM: Sheila Harrington, City Clerk

SUBJECT: **E.2 Appeal to Conditional Use Permit for Fitness 19– from Deputy Community Development Director Interiano.**

After distributing the City Council packet, staff noticed two typo's in the draft resolution. The draft resolution incorrectly states the first Planning Commission meeting was on January 11, 2020 when in fact the date was the January 14, 2020. The second clarification is that the Planning Commission vote on February 11, 2020 was actually 3 AYES, 2 ABSENT (Bridges and Becker absent) and not 5-0 as stated. A redlined copy of the resolution is attached.

Staff also received, after the meeting packet was distributed, the following documents:

1. An updated petition from Mr. Long with two additional names in opposition to the approval (signatures redacted by City Clerk);
2. A letter of commitment to the project from Mr. Rodgers; and
3. A letter from Mr. Sanders of Nossaman LLP, representing VN Investment Group, outlining their objections to the approval of the Fitness 19 Conditional Use Permit.

Copies of the documents are attached.

RESOLUTION NO.

RESOLUTION OF THE CITY COUNCIL OF THE CITY OF
NEWARK DENYING AN APPEAL AND UPHOLDING THE
PLANNING COMMISSION'S APPROVAL OF U-20-1, A
CONDITIONAL USE PERMIT TO ALLOW A FITNESS GYM AT
6203 JARVIS AVENUE. (APN: 537-521-37)

WHEREAS, Mitchell Gardner on behalf of Fitness 19, (the "Applicant") submitted an application to the City of Newark (the City") for approval of a Conditional Use Permit, to allow an indoor sports and recreation use, Fitness 19 at 6203 Jarvis Avenue ("Project"); and

WHEREAS, the property where the Project is located is designated Community Commercial in the City's General Plan and zoned Community Commercial Zoning District in the Newark Municipal Code (the "NMC"). The NMC requires a Conditional Use Permit for an Indoor Sports and Recreational Use (NMC § 17.08.020); and

WHEREAS, Conditional Use Permits are required for uses that are generally consistent with the purposes of the zoning district where they are proposed but require special consideration to ensure that they can be designed, located, and operated in a manner that will not interfere with the use and enjoyment of surrounding properties (NMC § 17.35.010.); and

WHEREAS, the Planning Commission held duly noticed public hearings regarding the Project on January 14, 2020 and continued the hearing to February 11, 2020, at which time all interested parties had the opportunity to be heard regarding the Project; and

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WHEREAS, the staff reports presented to the Planning Commission, on file with the Community Development Department and incorporated herein by reference, reflects the City's independent judgment and analysis of the potential impacts from the Project; and

WHEREAS, the Planning Commission found the Project exempt from the California Environmental Quality Act ("CEQA") pursuant to CEQA Guidelines, Article 19, Section 15301; and

WHEREAS, the Planning Commission, after considering the Project and entitlements, the staff report and all public comments and testimony provided at or prior to the public hearings on the Project, adopted a resolution and approved the Project subject to the conditions of approval on February 11, 2020 by a 3-0 decision; and

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WHEREAS, following the February 11, 2020 decision of the Planning Commission, Nossaman LLP on behalf of VN Investment Group LLC, filed an appeal with the City Council of the City of Newark of the Planning Commission's approval of the Project; and

WHEREAS, pursuant to NMC Section 17.31.060, a public hearing notice was published in the Tri City Voice on May 12, 2020 and mailed as required, and the City Council held a public hearing on said appeal at 7:30 p.m. on May 28, 2020 where the City Council had an opportunity to consider all arguments made by and on behalf of the Appellant, the staff report, and all other testimony and evidence presented at the public hearing; and

WHEREAS, pursuant to NMC Chapter 17.35 (Use Permits), the City Council has determined that it can make the below required findings pursuant to Newark pursuant to NMC Section 17.35.060 to grant the conditional use permit:

- 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 that states, "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". The proposed use is also consistent with GP Policy LU-1.6 Strengthening the Retail Base that states "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 proposed 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 by the City Council of the City of Newark as follows:

Section 1. That the forgoing recitals are true and correct and made part of this Resolution.

Section 2. That the City Council has reviewed, considered and evaluated this Appeal based on the entirety of the record and following consideration of all materials and public comments received at the hearing.

Section 3: That the Project qualifies as categorically exempt from CEQA per CEQA Guidelines, Article 19, Section 15301, because it is an Existing Facility that involves minor alterations and negligible expansion of use; and

Section 4. That the City Council hereby denies the appeal and upholds the decision of the Planning Commission to approve an application for the CUP 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.

BE IT FURTHER RESOLVED, that the City Council has determined that it could make the necessary findings pursuant to NMC Section 17.35.060 and directs that a copy of the Resolution be mailed to the applicant.

BE IT FURTHER RESOLVED, that this Resolution shall take effect immediately upon passage.

PETITION OPPOSING F-19 FITNESS CENTER

CONDITIONAL USE PERMIT

FOUR CORNERS – SPROUTS SHOPPING CENTER

For the reasons stated below, we oppose approval of the F-19 Fitness Center conditional use permit:

We were only recently made aware of a "6203 Jarvis Ave Parking Study" which purports to demonstrate that there are no impacts to parking that may affect the customers of the shopping center in which we are tenants. We are very concerned with the acknowledgements contained in the conclusion of the Parking Study that state:

- 1.) "However, it must be acknowledged that a lot of this available parking is not necessarily located the most convenient areas of the parking lot"
- 2.) "However, it must be acknowledged that some of parts of shopping center parking lot are not necessarily conveniently located for the restaurants."

Because of the conclusion of the Parking Study with these acknowledgements, we currently DO NOT support approval of a conditional use permit for the F-19 Fitness Center to occupy the 28,242 vacant space at the Four Corners – Sprouts Shopping Center.

| Print Name | Tenant Name | Signature | Date |
|------------------------|---------------------------|------------|-----------|
| 1. Vimal Patel | Burger King (owner) | [Redacted] | 1/27/20 |
| 2. John You | Tasty Pot (manager) | [Redacted] | 1/27/20 |
| 3. Karim Hotaki | Vaporation (owner) | [Redacted] | 1/27/20 |
| 4. Kristy Wong | i Tea (For owner) | [Redacted] | 1/27/20 |
| 5. Shital Patel | UPS store (Manager) | [Redacted] | 1/27/20 |
| 6. Hay-Chong Hsu | Cham See Bistro (owner) | [Redacted] | 1/27/2020 |
| 7. VIET DO | PHO NATION (owner) | [Redacted] | 1/27/20 |
| 8. Mubsh Haniff | SIPP/LOBE | [Redacted] | 1/27/20 |
| 9. AMILIA BAILON | Comil Babla (owner) | [Redacted] | 1/27/2020 |
| 10. KANDEE SINGH | SANDRAS Curry House | [Redacted] | 1/27/2020 |
| 11. Jessica Voh | R & S Business Services | [Redacted] | 1/27/20 |
| 12. PETER KWONG | VENUS CAFE OWNER | [Redacted] | 1/27/2020 |
| 13. Tao Wang | BITER OWNER | [Redacted] | 1/27/2020 |
| 14. Jenny Fan | Alan Cheng Dental Group | [Redacted] | 1/27/2020 |
| 15. Ramon Pacios | Tutoring Club OWNER | [Redacted] | 1/27/20 |
| 16. Wali Zai | Tobacco on Sale owner | [Redacted] | 1/27/20 |
| 17. Lynette Maria | Dollar Cleaning Hall | [Redacted] | 1/27/20 |
| 18. Christine Atchison | Forever Beauty & Slimming | [Redacted] | 1/27/20 |

19. DEBBIE JIN BUMBLEBEE PLAYSACE (OWNER) [REDACTED] 1/27/2020
20. VANESSA Lam EXOTIC NAILS (PART OWNER) [REDACTED] 1/27/2020
21. ZHI BIAO HUANG PIER 98 SUSHI (OWNER) [REDACTED] 1/27/2020
22. Kenny Tee Pure Water & Ice (OWNER) [REDACTED] 1/27/2020
23. Michael Tse Pure Water & Ice (OWNER) [REDACTED] 1/27/2020
24. Carrie Kimball West Coast World Martial Arts (Proprietor/Instructor) [REDACTED] 1/27/2020
25. Belinda Maloney Jewelry by Design [REDACTED] 1-27-2020
26. Judy Byrne [REDACTED] 1-28-2020
27. GEORGE FEI JEWELRY BY DESIGN (OWNER) [REDACTED] 1-28-2020
28. PISITH LIMSUMALEE SIMPLY THAI [REDACTED] 1-28-2020
29. Hoang Nam Hoa Hoa [REDACTED] 1-28-2020
30. Miriam Preston World Hair Design [REDACTED] 1/28/2020
31. KC Chay world Hair Design [REDACTED] 1/28/2020
32. Lena Sainbark World Hair Design [REDACTED] 1-28/2020
33. Maranda Decierdo Bella Eye care Optometry (for owner) [REDACTED] 1/28/2020
34. Georgie Pisco Wi Time (For owner) [REDACTED] 1/28/20
35. Minal Patel Subway [REDACTED] 1/28/20 m8 Patel
36. VIRENDRA CHAND PIZZA HUT [REDACTED] 1/28/2020
37. Chazelle Nam America Finance [REDACTED]
38. Masako Yamamoto Masako's Music Studio (owner) [REDACTED] 1/28/2020
39. HANH TRAN FRESH LOOK [REDACTED] 2/7/20
40. Michael Torre Dr. Michael Torre [REDACTED] 02/07/20



Bob Rodger

Mr Interiano,

I wanted to write you and the Newark City of Council to reaffirm Fitness 19's commitment to building and opening our new fitness center in Newark. Despite the changing economic conditions and the inevitable reshaping of our industry we remain excited about the opportunity ahead of us in Newark. We still believe the area is under-served, especially by low cost fitness options, and represents a tremendous opportunity for our organization. While our model will evolve as a result of this crisis we believe we have an overall product and price point that will attract a broad base of community support, will fill a junior anchor space that has been vacant for too long, will bring even more life to a successful shopping center, and help Newark and the surrounding communities live healthier lives.

Rest assured, our team is properly capitalized and equipped despite these difficult times. We will work expeditiously to build and operate a first class gym. A gym that you, your coworkers, Newark elected officials, the property owners, co-tenants, and residents will all feel proud to have in Newark.

Best,
Bob Rodger



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Refer To File # 503756-0001

VIA FEDEX AND EMAIL

May 26, 2020

Mayor Alan L. Nagy and
Members of the City Council
City of Newark
37101 Newark Boulevard
Newark, CA 94560-4330

Re: Appeal of Planning Commission Approval of a Conditional Use Permit for Fitness 19 at 6203 Jarvis Avenue, Newark, CA (APN: 537-521-37) (Agenda Item No. E.2, March 28, 2020)

Dear Mayor Nagy and Members of the City Council:

We continue to represent VN Investment Group, LLC (“VN Investment Group”), owners of the shopping center adjacent to the proposed location of the Fitness 19 physical fitness center with regard to all matters pertaining to the above referenced matter. The purpose of this letter is to inform you of our objections to the approval of the Fitness 19 conditional use permit and the bases for our client’s objections:

I. Approval of the conditional use permit is not eligible for a CEQA exemption.

The Planning Commission approved a Categorical Exemption from the requirements of the California Environmental Quality Act (Pub. Res. Code § 21000, et seq.) (“CEQA”) pursuant to CEQA Guidelines section 15301. The use of a Categorical Exemption for the Fitness 19 conditional use permit is wholly unlawful.

Section 15301 is clear an unequivocal in its limited application to structures and topographical features, not uses. “Class 1 consists of the operation, repair, maintenance, permitting, leasing, licensing, or minor alteration of existing public or private structures, facilities, mechanical equipment or topographical features, involving negligible or no expansion of use beyond that at the time of the lead agency’s determination . . . The key consideration is whether the project involves negligible or no expansion of an existing use.” (Emphasis added.) In the case of the Fitness 19 conditional use permit, there is clearly a change of use for which no consideration has been given. The Categorical Exemption approved by the Planning Commission simply cannot apply to the Fitness 19 conditional use permit approval.

The requirements of CEQA are clear. Pursuant to CEQA Guidelines section 15063, the City must conduct an Initial Study “to determine if the project may have a significant effect on the environment.” (CEQA Guidelines § 15063(a).) Without conducting an Initial Study, the City

cannot gauge whether or not the change of use of the building that Fitness 19 will result in significant environmental impacts that must be mitigated.

II. The “Parking Review” for the Fitness 19 conditional use permit and the follow-on explanation regarding time of occupation of parking stalls is not adequate.

We advised the Planning Commission that the June 21, 2019 “Parking Review” undertaken for the Fitness 19 applicant is inadequate because it does not consider the time of occupancy of the parking spaces that are shared with the adjacent shopping center owned by VN Investment Group. Assumptions that were originally made regarding shared use of the parking lot were predicated on the building Fitness 19 will occupy being used as a supermarket. Without an authoritative study documenting the amount of time that a patron of Fitness 19 will occupy a parking space, there is no way to determine whether there are a sufficient number of parking spaces to accommodate all of the uses that share the parking lot.

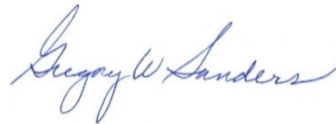
III. The Fitness 19 use has not been approved by VN Investment Group as required by the CC&Rs.

The use of the building by Fitness 19 is governed by an Agreement of Covenants, conditions and Establishment of Restrictions and Grans of Easements, dated October 1, 1989 (“Agreement”). Section 8.2 of the Agreement provides that no portion of the Entire Property, defined in the Agreement to include the location of the Fitness 19 facility, may be used for a recreational use without the prior written consent of VN Investment Group.

There is no doubt that the proposed Fitness 19 use is a recreational use. The only reason that the Fitness 19 use is permitted in the Community Commercial (CC) zone is because the Planning Commission has determined that the use falls within the “Indoor sports and recreation” use permitted within that zone. (Emphasis added.) If the proposed Fitness 19 use is not a recreational use, then it is not a permitted use within the Community Commercial zone and the appeal of the Planning Commission approval of the conditional use permit upheld. Further, unless and until VN Investment Group approves the recreational use, Fitness 19 cannot occupy the building approved for the use by the conditional use permit.

For all of the foregoing reasons, the City Council must, as a matter of law, uphold the VN Investment Group appeal.

Sincerely,



Gregory W. Sanders
Nossaman LLP

GWS:jg