

TOWNSHIP OF MIDDLETOWN
Zoning Board of Adjustment and Appeals

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TECHNICAL MEMORANDUM

DATE: June 15, 2022
BOARD: Zoning Board
APPLICATION: Nicolissa, LLC (#2022-003)
160 Highway 35 and 170-180 Highway 35
Block 942, Lots 70 and 72
R-O Zone
Amended Preliminary and Final Major Site Plan
“D-2” Expansion of a Nonconforming Use Variance and Bulk Variances

PROPOSAL

The applicant presently owns and operates Nicholas’s Barrel and Roost restaurant located at 160 Highway 35 on Block 942, Lot 70 (corner of Highway 35 and Cooper Boulevard). The neighboring lot (Block 942, Lot 72), located to the north of the subject property on Highway 35, currently contains two (2) one-story commercial buildings that the restaurant shares parking with, and is part of this application.

The applicant seeks amended preliminary and final major site plan approval and “D2” Expansion of a Nonconforming Use Variance approval for the restaurant. The most notable proposed improvement is the reconfiguration of the site’s circulation and parking lot so that both lots appear to exist as one with continuous parking lot, driveway, curbing, and striping between both lots. The circulation of the site and parking lot will be reconfigured to accommodate 38 additional parking spaces. The cross access between Lots 70 and 72 exists as an 8’ wide angled paved drive and is proposed to be eliminated and replaced with a more free-flowing movement between both lots. The restaurant proposes to expand the existing outdoor patio space. The new patio will replace the existing circular driveway originally intended to function as a drop-off and valet area. Additional improvements include a 15’ x 10’ outdoor covered storage area to the rear of the restaurant, new pergola over the existing outdoor restaurant patio; and new curbing, striping, landscaping and lighting throughout the entire site.

Additional variance relief is required for providing less than the minimum required for off-street parking; deficient residential buffer; and excessive lot coverage for both lots.

PROPERTY APPROVAL HISTORY AND COMPLIANCE REVIEW

In 2003-04, the subject property obtained site plan approval and "D2" use variance approval from the Zoning Board to expand the restaurant. With the approval came many Findings of Facts and Conditions related to parking, circulation, hours of operation, number of seats for dining, and other items.

In June 2020 and in response to COVID 19 and indoor dining restrictions set by the State, Restaurant Nicholas (now known as Nicholas' Barrel and Roost) was approved by the Township Zoning and Engineering Departments for exterior improvements including construction of an outdoor patio, ADA access ramp and accessible walkway, and associated drainage improvements.

The Finding of Facts and Conditions associated with the 2003-04 approval are listed below. The applicant shall address every item in comparison to the proposal and current application.

Finding of Fact 1. The subject 0.44 acre corner property is located in the Residence and Office (R-O) Zone. The site presently contains the single story "Nicholas" restaurant with an associated parking area. Prior to the applicant's building occupancy, the site had historically accommodated other restaurant uses. **Informational comment, no testimony required from the applicant.**

Finding of Fact 2. On June 16, 2003, the Middletown Township Committee adopted Ordinance #2003- 2723 rezoning the subject parcel and other properties along Route 35 from Business (B-2) to Residence and Office (RO). While Nicholas restaurant was previously permitted in the B-2 Zone, the RO zone does not permit retail service uses such as restaurants. Therefore, A "D(2)" Variance is required for the expansion of a nonconforming use per N.J.S.A. 40:55D-70.d(2). **Informational comment, no testimony required from the applicant.**

Finding of Fact 3. The building addition will accommodate reconfigured main dining room space, and will provide lounge and waiting areas at the street level accessory to the main dining room. Kitchen and reconfigured storage areas will be provided in the cellar. **Testimony required. The applicant shall describe the interior and exterior space of the restaurant including uses, capacity, number of seats, etc.**

Finding of Fact 4. The Applicant testified regarding intended hours of operation within the context of the site's overall suitability for the expanded Nicholas restaurant use. The facility will be during the evening for dinner service only. The restaurant will open for business at 5:30PM Tuesday through Friday, with last seating at 9:30 PM. On Saturdays, the restaurant will open for business at 5:30PM, with last seating at approximately 11:30PM. The restaurant will be closed on Mondays. A total of fifteen (15) employees will work on-site. **Testimony required. The applicant shall indicate in testimony the proposed hours of operation for the restaurant, and number of employees.**

Finding of Fact 5. The aesthetics of the existing building exterior will be improved. Landscaping will be added to the southerly building facade to reduce visual clutter, and solid-waste container area will be moved closer to the building and away from adjacent residential properties. A circular driveway to function as a drop-off and valet area will enhance the appeal of the northerly building face. **Testimony required how conditions will change by the proposal. The Landscape Plan proposes to remove**

some existing vegetation along the western edge of the subject properties, and install an approximately 20' wide planting strip along the western edge of Lot 70 (restaurant lot); and an approximately 10' wide planting strip along the western edge of Lot 72 (medical office lot). A dumpster is proposed on Lot 70, west of the Cooper Boulevard ingress/egress, and will be enclosed on three sides by a 6' high masonry wall and gated. The circular driveway is proposed to be replaced by an outdoor patio with pergola and sidewalk.

Finding of Fact 6. Dinner service is traditionally provided to parties with advanced reservations. A full service bar dispensing alcohol will be provided to dinner patrons awaiting a seat within the dining room. **Testimony required. The applicant shall testify how the restaurant will operate related to taking reservations and walk-ins, etc.**

Finding of Fact 7. Testimony was presented regarding the restaurant facility's seating plan. A maximum of sixty-five (65) permanent seats will be provided in the main dining room. The lounge area will provide approximately sixteen (16) barstools and up to twelve (12) other incidental seating spaces. **Testimony required. The applicant shall indicate in testimony the restaurant's seating plan, and how the existing and proposed outdoor patio space will be utilized by patrons. A floor plan indicating seating (indoor and outdoor) shall be provided for the Board's review.**

Finding of Fact 8. The existing parking area will be reconfigured to accommodate twenty-seven (27) parking spaces. Five (5) of these spaces will be provided on adjacent Lot 72 on the westerly side of a parking aisle. Eight (8) parking spaces within the existing parking lot on adjacent Lot 72 will be set aside for restaurant employee parking, with an additional eight (8) parking spaces within the existing parking lot at Lot 72 set aside for patron parking during peak restaurant operating hours. This will make available at least forty-three (43) parking spaces to patrons and employees, an amount that the applicant testified is sufficient to address the restaurant's demand. **Testimony required. The table below indicates the minimum off street parking requirements for each use, existing and proposed conditions:**

	Minimum Off-Street Parking Required (540-627)	Existing	Proposed
Nicholas' Barrel and Roost (Lot 70)	1 parking space per 50 SF of GFA = 3,291 SF / 50 = 66	26	23
Dental/Medical Offices	1 parking space per 150 SF of GFA = 7,242 SF / 150 = 48	42	84
Total	114	68 (# to be confirmed by applicant)	107

The applicant proposes to reconfigure the site circulation and parking lot to accommodate 38 additional parking spaces for a total of 107 parking spaces (23 spaces on Lot 70 and 84 spaces on Lot 72). The applicant is proposing shared parking among the restaurant and dental/medical office buildings. Ch. 540-627S allows for the joint use of off-street parking facilities but because the total proposed number of parking does not meet the minimum required, the applicant must present substantial proof and assurances and it is determined by the Zoning Board that the use of this parking will not be simultaneous.

The applicant must address hours of operation of the restaurant and adjacent dental/medical offices. Our office conducted a review of the hours of operation of the uses on the subject property and found that there appears to be overlap of hours of operation among the uses everyday. The table below indicates hours of operation for the medical / dental uses on the adjacent lot 72.

	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday	Sunday
Nicholas' Barrel and Roost	<i>Applicant shall provide in testimony</i>						
Infinity Chiropractic and Acupuncture Wellness Center*	9am-1pm, 3pm-7pm	3pm-7pm	9am-1pm, 3pm-7pm	3pm-7pm	9am-1pm, 3pm-7pm	Closed	Closed
Counseling and Psychology Services*	<i>Virtual only appointments</i>						
BiroVenus Medical Spa*	10am-6pm	10am-6pm	10am-6pm	10am-6pm	9am-1pm	9am-12pm	Closed
Navesink Dental**	9am-6pm	9am-6pm	9am-5pm (2 select Wednesdays)	12pm-8pm	9am-3pm	9am-3pm (1 select Saturday per month)	Closed

*Conducted a site visit to verify hours of operation

**Verified over phone the hours of operation

Also, it is recommended to incorporate on-site signage directing patrons of the restaurant that there is additional parking on Lot 72 to prevent on-street parking.

Should the Board permit the proposed parking plan, a lease agreement for shared parking on Lots 70 and 72 shall be submitted to the Zoning Board Attorney and Planning Office for review and approval.

Finding of Fact 9. The Board determined that applying the Zoning Ordinance parking standard of 1 space per 50 square feet of gross floor area (88 spaces required) is not reasonable based on the proposed intensity of use. Relaxation of parking requirements is justified since the restaurant will have limited hours of operation, will apply a dinner reservation policy and will include a maximum of sixty-five (65) permanent seats in the main dining room. Many employees do not drive to the facility or carpool to work, thus relieving parking demands. Further, the lounge area will serve as an incidental waiting area where bar service will be provided to patrons anticipating a seat in the main dining room.

Determination not applicable to the current proposal.

Finding of Fact 10. The Board determined that the applicant's request for a parking variance would not have a substantial detriment on the adjacent office's parking needs, since peak hours for each use do not coincide. The adjacent office development contains at least forty five (45) parking spaces, and can reasonably accommodate restaurant employee parking and patron parking during peak hours.

Determination not applicable to the current proposal.

Finding of Fact 11. The Board required the applicant to reduce the number of parking spaces located within the required residential buffer at adjacent Lot 72. The applicant agreed to construct only five (5) parallel parking spaces within the buffer area instead of thirteen (13) parking spaces oriented at 90-degree angles. The difference, i.e. eight (8) parking spaces, will be set aside within the existing parking area on Lot 72. **Testimony required. The subject property requires a variance from providing a 50' planted buffer strip along the western perimeter that abuts conforming residential uses. A 6' fence (mix of chain link and vinyl) exists along the western perimeter. The applicant proposes a planted buffer varying in width from 12' to 40'. Forty-one (41) parking stalls, driveway, and the dumpster are proposed within the 50' required buffer.**

Finding of Fact 12. The Board determined that it was impractical for all Zoning Ordinance design standards to be met based upon the particular physical challenges unique to the site. While the applicant will be unable to provide an undeveloped 50' wide buffer to a residential property, a 6' fence with landscaping will be provided to screen adjacent residential backyard areas from the restaurant use. The drop-off area obviates the need for an extensive on-site sidewalk pedestrian network. Additionally, the applicant will broker an agreement with the owner of adjacent Lot 72 to ensure that off-street parking will be accomplished. **New testimony is required for the proposal.**

Finding of Fact 13. Based on the property's established mixed commercial use, the Board finds that the site is particularly suited to the proposed expanded restaurant use. The proposed development use will further the purposes of the Municipal Land Use Law by promoting the general welfare, and by promoting a desirable visual environment through creative development techniques. **New testimony is required for the proposal.**

Finding of Fact 14. The proposed development will not have a substantial negative impact on the purpose and intent of the Master Plan or Zoning Ordinance. The development will promote the purposes of the Master Plan by improving the aesthetic value of a site in need of rehabilitation, by encouraging an overall 15% reduction in lot coverage, by enhancing landscaping and green space, and by following the design principles espoused in the Master Plan. **New testimony is required for the proposal.**

Finding of Fact 15. Based on the proofs provided by the applicant, the Board concludes that the requested variance is justified under N.J.S.A. 40:55D-70.d(2) because the property is particularly suited to the restaurant use. Further, the proposed development will further the purposes of the Municipal Land Use Law, and will not have a substantial negative impact on the purpose or intent of the Master Plan and Zoning Ordinance. **New testimony is required for the proposal.**

Finding of Fact 16. The deviations from zoning requirements will have no substantial negative impact on the adjoining property owners or on the prevailing character of the neighborhood. The Board concludes that the proposed expansion of the restaurant use is consistent with the development of the neighborhood and the proposed expansion of the restaurant use will benefit the neighborhood. **New testimony is required for the proposal.**

Finding of Fact 17. The Board accepts the testimony and stipulations made by the applicant during the public hearing where such testimony and stipulations are part of the record and binding upon the applicant. **New testimony is required for the proposal.**

Further, the application was approved subject to the following Conditions:

1. Revised plans subject to the review and approval by the Township Engineer showing the location of a one-way driveway connection between the subject property and adjacent Lot 72. Said driveway shall include a gate to ensure its utility only during peak hours of operation for valet service only. **Not applicable to the proposal.**
2. Revised plans subject to the review and approval by the Township Engineer showing five (5) parallel parking spaces within the buffer area instead of thirteen (13) 90-degree angled parking spaces. **Not applicable to the proposal.**
3. A cross access easement shall be established between the subject parcel and adjacent Lot 72. This easement shall facilitate one-way vehicular access from the subject property to adjacent Lot 72 for valet service during peak periods only. **Testimony required. Should the Board approve the application, a cross access agreement will be required that establishes 2-way vehicular access between both lots.**
4. A lease agreement shall be established that sets aside a minimum eight (8) parking spaces within the existing parking area on adjacent Lot 72 for employee parking; at least eight (8) parking spaces within the existing parking area for patron parking during peak restaurant operating hours; and five (5) new parallel parking spaces at the westerly edge of the restaurant parking area. **Testimony required. See *Finding of Fact 8***
5. A solid waste enclosure area shall be located adjacent to the restaurant building as depicted on the approved site plan, subject to building code requirements. **Not applicable. The applicant proposes a solid waste enclosure area within the required buffer area, west of the Cooper Boulevard ingress/egress.**
6. A maximum of sixty-five (65) permanent dining seats shall be permitted in the main dining room. **New testimony required related to proposed restaurant capacity.**
7. Landscaping and a solid fence shall be provided at the westerly property line to provide screening from the parking area to adjacent residential properties. **New testimony required. See *Finding of Fact 11*.**
8. Final approval shall be obtained from the New Jersey Department of Transportation. **This shall be made a condition of approval.**
9. Final approval shall be obtained from the Freehold Soil Conservation District. **This shall be made a condition of approval.**

10. The applicant shall comply with the Township Engineer's letter dated February 12, 2004. **Not applicable.**
11. A contribution to the Township's Environmental Disturbance Fund shall be submitted prior to issuance of a construction permit. **This shall be made a condition of approval.**
12. A contribution to the Township's Affordable Housing Trust Fund shall be provided at the time a certificate of occupancy is issued. **This shall be made a condition of approval.**

PROPERTY DESCRIPTION, ZONING AND SURROUNDING LAND USE

The subject property (Block 942, Lot 70) contains Nicholas' Barrel and Roost restaurant and is located in the Residence and Office (R-O) Zone. The subject site has frontage along State Highway 35, and Cooper Boulevard. Ingress/egress is provided from both the highway and Cooper Boulevard. The site contains 24 parking stalls, outdoor patio, landscaping and lighting.

The neighboring lot (Block 942, Lot 72), located to the north of the subject property on Highway 35, currently contains two, one-story dental/medical office buildings that the restaurant shares parking, and is part of the application.

The properties to the rear of the subject property are single family residential uses in the Residential (R-10) Zone. Properties to the north and south of the subject property and across Highway 35 are commercial uses in the Residence and Office (R-O) Zone.

VARIANCES

"D2" Use Variance

- 1) Expansion of a Nonconforming Use - A variance is required pursuant to 540-902B for the expansion of a nonconforming use since a restaurant is not permitted in the Residence and Office (R-O) Zone. Pursuant to NJSA 40:55D-70D2, the applicant shall address in testimony the following items:
 - a. How the site is particularly suited to the proposed expanded restaurant use?
 - b. How will the proposed development further the purposes of the Municipal Land Use Law?
 - c. Whether the proposed development will have substantial negative impacts on the purpose and intent of the Township's Master Plan or Zoning Ordinance.

Bulk Variances

- 1) Deficient Buffer - As per 540-606, a variance is required for providing a deficient residential buffer on site. See Finding of Fact 11 for testimony required.
- 2) Excessive Lot Coverage - A variance is required for excessive lot coverage for Lot 70. 50% is the maximum permitted, 80.7% exists, and 81.8% is proposed.
- 3) Excessive Lot Coverage - A variance is required for excessive lot coverage for Lot 72. 50% is the maximum permitted, 60.3% exists, and 75.1% is proposed.
- 4) Deficient Off-Street Parking - A variance is required for providing a deficient number of off street parking for both uses. See Finding of Fact 8 for testimony required.

- 5) Outdoor Storage – The applicant shall address in testimony the proposed outdoor coverage storage area to determine compliance with the Township’s planning and development regulations. 540-518 prohibits outdoor storage of materials for any nonresidential use.
- 6) It should be noted no variances are required for the improvements within the side yard setback for both lots as most are existing.

Statutory Requirements for the granting of bulk variance relief

Based on the Municipal Land Use Law standard for granting bulk variance relief, the applicant shall indicate to the Board whether a “hardship” variance or “flexible C” variance will be sought for the bulk variance indicated above, and provide testimony supporting the chosen approach.

Physical Characteristics - N.J.S.A. 40:55D-70.C(1) (a/k/a Hardship Variance) – Testimony should indicate if strict application of the bulk requirements would result in peculiar and exceptional difficulties, or exceptional and undue hardship, to the applicant.

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

Benefits Outweighing Detriments - N.J.S.A. 40:55D-70.C(2) (a/k/a Flexible C Variance) - The applicant may also establish, in the absence of proving “hardship,” whether the granting of a variance will further the purposes of the Municipal Land Use Law, and if the benefits of granting the variance will substantially outweigh any detriment.

Negative Criteria - Additionally, with any type of C variance, testimony should confirm that the proposed changes requiring bulk variance relief will not create a substantial detriment to the public good or substantial impairment of the intent and purpose of the Master Plan and the Zoning Ordinance.

ADDITIONAL PLANNING COMMENTS

- A. Parking Lot Design – There are two (2) rows of parking proposed that contain more than 15 spaces in each row. Consistent with 540-622D, a landscaped divider at least 8’ wide should be provided to break up the rows. Additionally, Sidewalks or designated pathways with striping should be provided from each parking space area to the appropriate destination
- B. Lighting - The applicant shall address in testimony that the Lighting Plan is consistent with 540-623.
- C. Street Trees – Street trees are required along Route 35 and Cooper Boulevard and none are provided.
- D. Off-street Loading – The applicant shall address in testimony how deliveries are made to the restaurant, typical size of truck, and how often.
- E. A site inspection revealed a propane tank located on Lot 70 at the corner of Route 35 and Cooper Boulevard. The propane tank shall be removed.

DOCUMENTS REVIEWED

- Preliminary/Final Major Site Plan 160-180 Highway 35, consisting of 11 sheets, prepared by Shore Point Engineering, dated November 5, 2021, last revised March 21, 2022;
- Completeness Checklist Waiver Request, prepared by Shore Point Engineering;
- Boundary and Partial Topographic Survey Tax Lots 70 and 72 Block 942, consisting of one sheet, prepared by DPK Consulting LLC, dated August 19, 2021;
- Stormwater Management Report for Nicolissa LLC, prepared by Shore Point Engineering, dated November 5, 2021;
- Disclosure of ownership;
- Deed for Block 942, Lot 70;
- Zoning Officer Denial; and
- Development Permit.

I reserve the right to make additional comments based upon the submission of additional documents or testimony presented to the Board.

Report Prepared by:

Amy H. Citrano, PP, AICP
Director of Planning

LOCATION MAP

