

**139-02-A**

APPLICANT - Jesse Masyr, Wachtel & Masyr, LLP, for 1511 Third Avenue Assoc., owner.

SUBJECT - Application January 19, 2005 - request for a rehearing to permit the filing of a new special permit application pursuant to Z.R. §73-36 to legalize the operation of a physical culture establishment based on substantial new evidence and material changes in the proposed plans. Based on the new evidence, this application requests that the Board permit the filing of a modification to a condition in a previously decided Appeals case under Cal. No. 139-02-A.

PREMISES AFFECTED - 1511 Third Avenue, a/ka 201 East 85th Street, southwest corner bounded by Second and Third Avenues and East 85<sup>th</sup> and 86<sup>th</sup> Streets, Block 1531, Lot 1, Borough of Manhattan.

**COMMUNITY BOARD #8M**

APPEARANCES - None.

**ACTION OF THE BOARD** - Application granted in part and dismissed in part.

**THE VOTE TO GRANT** -

Affirmative: Chair Srinivasan, Commissioner Miele and Commissioner Chin.....3

Negative:.....0

Absent: Vice-Chair Babbar.....1

**THE RESOLUTION** -

WHEREAS, this is an application made pursuant to Section 1-10(e) of the Board's Rules of Practice and Procedure for a re-hearing of a special permit application previously denied by the Board, as well as an application for a potential technical amendment to a condition imposed by the Board in a previously decided appeal; and

WHEREAS, a public hearing was held on this application on April 20, 2005, after due notice by publication in the *City Record*, and then to decision on June 7, 2005; and

WHEREAS, the subject premises is a corner lot with approximately 77 feet, 6 inches of frontage on Third Avenue and 125 feet of frontage on East 85<sup>th</sup> Street, with approximately 100 feet of frontage within a C2-8A zoning district and the remainder within an R8B zoning district; and

WHEREAS, the subject premises is improved upon with a four-story and basement commercial building; and

WHEREAS, this building is currently occupied by a retail clothing store on the first floor, and by the subject Physical Culture Establishment ("PCE") on the second and parts of the third and fourth floors; and

WHEREAS, the site has been the subject of five other applications at the Board; and

WHEREAS, under Calendar No. 34-96-BZ, an application for a special permit pursuant to Z.R. § 73-36 was made in order to legalize the subject PCE; this application was converted to a variance and

subsequently denied; and

WHEREAS, under Calendar No. 119-99-A, an administrative appeal, the appellant (an adjacent property owner who is in opposition to the instant application, hereinafter referred to as the "opposition"), sought a revocation of Department of Buildings ("DOB") permits that legalized the construction of a rear yard encroachment on the second, third, and fourth floors of the subject building; this appeal was granted, with the Board finding that the rear yard encroachment could not be considered a permitted rear yard obstruction as defined in Z.R. § 33-23(b); and

WHEREAS, under Calendar No. 332-01-BZ, which was an application for a special permit under Z.R. §73-36, the applicant proposed to rectify the unlawful enlargement of the PCE on the third and fourth floors through an arrangement that purported to provide separation between a proposed community facility tenant and the subject PCE; this application was denied by the Board; and

WHEREAS, while the public hearing process of Calendar No. 332-01-BZ was proceeding, the Board also heard an application made under Calendar No. 139-02-A, an administrative appeal of an April 17, 2002 Department of Buildings determination declining to seek a revocation or modification of Certificate of Occupancy Number 107549, issued on July 7, 1995 to the subject building; and

WHEREAS, the appellant in 139-02-A (the opposition in the instant matter), contended that the presence of the PCE in the subject building constituted a non-conforming use subject to the lapse provisions of Z.R. §52-60 et. seq.; and

WHEREAS, upon a review of the record and of the definition of non-conforming use as set forth at Z.R. § 12-10, the Board found that, with the exception of the 4,400 square feet addition constructed after the 1995 Certificate of Occupancy was issued, the subject building's excess commercial floor area did not constitute a non-conforming use, but was rather a non-complying condition with regard to the commercial floor area as per Z.R. § 33-12; and

WHEREAS, after dispensing with the substance of the appeal, the Board also found that the Certificate of Occupancy needed modification to provide an adequate representation of permitted uses; and

WHEREAS, in its resolution issued under Calendar No. 139-02-A on December 10, 2002, the Board set forth such modification; and

WHEREAS, certain conditions in this resolution reads as follows: "That commercial usage in the subject building shall be limited to the pre-existing, legally non-complying 30,340 square feet of area; That any additional floor area other than aforementioned 30,340 square feet and in particular, the 4,400 square foot infill addition, shall be built and

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used in compliance and conformance with all underlying zoning regulations.”; and

WHEREAS, in 2003, an application was made under the subject calendar number for a special permit pursuant to Z.R. § 73-36; the application again sought approval to legalize the existing PCE; and

WHEREAS, on December 9, 2004, the Board denied the special permit application; and

WHEREAS, in denying the application, the Board found that the proposed egress path for the occupants of the proposed community facility was not compliant with the Building Code; and

WHEREAS, because of this potentially dangerous egress path, the Board determined that the finding set forth at Z.R. § 73-36 (1) - specifically, that there would be no impairment on the use of an adjacent area due to the grant of the special permit - had not been met; and

WHEREAS, also because of this potentially dangerous egress path, the Board determined that one of the general findings applicable to all special permit applications, set forth at Z.R. §73-03(a) – specifically, that the hazards or disadvantages of the proposed special permit use are outweighed by the advantages to be derived by the community by the grant of the special permit – had not been met; and

WHEREAS, additionally, the Board noted that the applicant appeared to have engaged in a pattern of misrepresentation in the subject application, insofar as it had: supplied the Board with contradictory information concerning the available legal commercial floor area, failed to remove a rear yard obstruction in its entirety as it promised and as it was ordered to do, and failed to adequately address the concerns of the Board as to the creation of a completely separate community facility space; and

WHEREAS, the applicant now applies for a rehearing of the previously denied special permit application, on the basis that there has been a material change in the plans and that there is substantial new evidence; and

WHEREAS, Section 1-10(e) of the Rules of Practice and Procedure provides: “A request for a rehearing shall not be granted unless substantial new evidence is submitted that was not available at the time of the initial hearing, or there is a material change in plans or circumstances or an application is filed under a different jurisdictional provision of the law.”; and

WHEREAS, the applicant states that the following constitutes new evidence and/or a material change in plans or circumstances: (1) a new third and fourth floor plan that consolidates the entire community facility use on the third floor so that there is a logical separation between the PCE and community facility use; (2) the substitution of a Building Code-compliant egress path for the

previously proposed egress path; (3) a new co-applicant (the owner of the subject building); and (4) new plans from 1930 that show that the second floor was not a full floor as previously thought, thus decreasing the overall amount of commercial floor area that can be developed at the premises, versus what amount was previously represented to exist in the prior hearing under this calendar number; and

WHEREAS, the Board observes that the new application attempts to address the concerns expressed in the resolution issued under the subject calendar number; and

WHEREAS, therefore, the Board finds that the material changes to the plans and the new evidence, as referenced above, are sufficient to warrant a re-opening of the special permit application for legalization of the subject PCE; and

WHEREAS, opposition to this application for a re-hearing argues that the Board should not entertain it because the proposed PCE, if legalized, will use more commercial floor area than is allowed per the above-mentioned condition, listed in the resolution issued under BSA Cal. No. 139-02-A; and

WHEREAS, the Board disagrees that this prevents the special permit application from being re-opened; and

WHEREAS, the PCE may be legalized through a special permit only if it occupies existing lawful commercial floor area; and

WHEREAS, in the context of the new special permit application, the applicant will have to prove that the floor area calculations, based upon the newly discovered evidence, are accurate; and

WHEREAS, however, this showing need not be made during the subject application; the only relief being requested is a re-opening; and

WHEREAS, instead, if it become apparent during the new hearing that the PCE occupies more floor area than what is lawful, then use of Z.R. § 73-36 to legalize the PCE would not be appropriate; and

WHEREAS, the opposition’s other arguments concerning the PCE operator’s past behavior also appear to be made on the assumption that the Board is granting the special permit through the instant application; and

WHEREAS, again, the only outcome of the Board’s decision herein is that the applicant will be afforded the opportunity to convince the Board that the special permit is appropriate to grant; and

WHEREAS, the opposition also argues that the applicant should not be allowed to apply to re-open BSA Cal. No. 139-02-A; and

WHEREAS, the Board disagrees and notes that 139-02-A – which, as discussed above, was an appeal of a DOB determination not to revoke the certificate of occupancy based on opposition’s theory that the PCE was a non-conforming use – is not being re-opened for a full discussion of the merits of the

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appeal; the Board's decision on the merits stands and will not be revisited; and

WHEREAS, rather, in the interest of administrative convenience, transparency of process and good record keeping, the Board asked the applicant to apply to have this matter re-opened for the sole purpose of amending the floor area limitations set forth in the resolution, assuming, of course, that the applicant successfully convinces the Board during the new hearing on the special permit application that its floor area calculations are accurate; and

WHEREAS, the opposition will be afforded the opportunity to challenge the accuracy of all proffered evidence in the new special permit hearing, including evidence related to available lawful commercial floor area; and

WHEREAS, the Board recognizes that it has the authority to modify and/or make technical corrections to prior resolutions pursuant to the Charter and its own Rules of Practice and Procedure; however, rather than making such technical correction to the resolution for 139-02-A on its own outside of any formal process or on its own application, the Board felt it made more sense for the applicant to apply for this potential technical correction, which, again, would only be granted if the Board agreed it was appropriate; and

WHEREAS, the opposition argues that since the Board's Rules do not specifically state that a case may be re-opened for only a discrete specific matter related to the case, the appeal must be re-heard in its entirety; and

WHEREAS, however, the opposition cites no authority for such a conclusion; in any event, through this resolution, the Board is plainly establishing the parameters of its procedure as to 139-02-A; and

WHEREAS, thus, the opposition's insistence that they should be allowed to present evidence on the appeal in general is unavailing and will not be honored by the Board; and

WHEREAS, the opposition also argues that only they should be allowed to re-open the matter, since it brought the appeal initially; and

WHEREAS, this argument ignores the Board's authority to direct its own process, as well as the fact that the merits of the appeal are not being revisited; and

WHEREAS, it also ignores the fact that the

conditions in the resolution for 139-02-A function as a limitation on the property rights of the building owner; and

WHEREAS, an application for a re-opening of an appeal, the resolution of which contains conditions that limit the property rights of the affected property owner, may be appropriately brought by the owner so long as the standards for re-opening are met; and

WHEREAS, the Board concludes that this standard has been met, given the existence of new plans that could potentially affect the floor area calculations for the subject building; and

WHEREAS, nonetheless, the Board, through this resolution, dismisses as moot the application for re-opening of 139-02-A as presented by the applicant, since it is premature; if the represented amount of available commercial floor area is confirmed by the Board, then the floor area conditions set forth in the resolution for 139-02-A can be modified in the interest of good record keeping, on the Board's own authority.

*Therefore it is Resolved* that, based upon the above, the application for a re-hearing of the special permit application made under BSA Calendar No. 146-03-BZ is granted; a new calendar number will be assigned. The Board also dismisses the application to re-open BSA Cal. No. 139-02-A and asserts its authority to modify conditions in the resolution issued under this calendar number, should the Board deem such modification necessary.

Adopted by the Board of Standards and Appeals, June 7, 2005.

**A true copy of resolution adopted by the Board of Standards and Appeals, June 7, 2005.**

**Printed in Bulletin Nos. 25-26, Vol. 90.**

**Copies Sent**

**To Applicant**

**Fire Com'r.**

**Borough Com'r.**