

**146-03-BZ****CEQR #03-BSA-184M**

APPLICANT - Kramer Levin Naftalis & Frankel, LLP, for 1511 Third Avenue Associates, LLC, c/o The Related Companies, L.P., owner; Equinox 85th Street, Inc, lessee.

SUBJECT - Application May 9, 2003 - under Z.R. §73-36 to permit the legalization of an existing physical culture establishment, located on the second floor, and portions of the third and fourth floors, in a four story commercial and community facility building, in an C2-8A zoning district, which requires a special permit.

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

**COMMUNITY BOARD #8M****APPEARANCES -**

For Opposition: Martin Mitzner.

**ACTION OF THE BOARD** - Application denied.

**THE VOTE TO GRANT -**

Affirmative: .....0

Negative: Commissioner Chin, Vice-Chair Babbar, Commissioner Caliendo and Commissioner Miele .....4

**THE RESOLUTION -**

WHEREAS, the decision of the Manhattan Borough Commissioner, dated April 9, 2003 acting on Alt. 1 Application No. 102589110 reads:

“1. Proposed use is a physical culture establishment, which requires a special permit from the Board of Standards and Appeals pursuant to Zoning Resolution Section 73-36”; and

WHEREAS, a public hearing was held on this application on June 24, 2003, after due notice by publication in *The City Record*, with continued hearings on August 13 and October 21, 2003, and then to December 9, 2003 for decision; and

WHEREAS, the site and surrounding area had a site and neighborhood examination by a committee of the Board consisting of Chairman James Chin, Vice-Chair Satish Babbar, Commissioner Peter Caliendo and Commissioner Joel Miele; and

WHEREAS, on previous occasions and under separate applications related to the site, a site and neighborhood examination was conducted by former Vice-Chair Paul Bonfilio, former Chairman Gaston Silva, former Vice-Chair Robert Flahive, former Commissioner Cecil P. Joseph, former Commissioner Rosemary Palladino and former Commissioner Mitchell Korbey; and

WHEREAS, this is an application under Z.R. §73-36 to permit the legalization of a physical culture establishment (“PCE”) on the second and portions of the third and fourth floors of a four story mixed-use building, which requires a special permit pursuant to Z.R. §32-10; 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, and is partially within a C2-8A and partially within an R8B zoning district; and

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

WHEREAS, the applicant states that the subject building is currently occupied by a retail clothing store on the first floor, and by the PCE on the second and parts of the third and fourth floors; and

WHEREAS, at the time of application, the applicant represented that the site has a total lot area of 10,285 square feet, with 34,770 square feet of floor area; and

WHEREAS, the subject premises and PCE has been the subject of four prior Board cases, filed under Calendar Nos. 34-96-BZ, 332-01-BZ, 119-99-A and 139-02-A; and

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

WHEREAS, the Board reviewed the initial application and noted that the building originally had a rectangular foot print at the first and second floors, but that the third and fourth floors had a smaller “L” shaped configuration with a gap in the rear; and

WHEREAS, at some point before applying to the Board under Calendar No. 34-96-BZ, the applicant enlarged the third and fourth floors to match the size of the floors below; and

WHEREAS, upon further review of the initial application, the Board noted that the building was non-complying with regards to commercial floor area as originally built (without the enlargement), but was under the limits for residential or community facility floor area; and

WHEREAS, the plans submitted by the applicant under Calendar No. 34-96-BZ showed that 2,200 square feet of floor area was added to the building on each of the third and fourth floors, leading to a total of 4,400 square feet of new floor area; and

WHEREAS, in response to the Board’s inquiry regarding the infill enlargement, the applicant revised the application to provide for 4,852 square feet of community facility floor area; and

WHEREAS, under Calendar No. 34-96-BZ, through the course of hearings and site inspections by the Board, it was discovered that contrary to the applicant’s representations, the space that was designated for community facility use was in fact being used by the PCE; and

WHEREAS, subsequently, the applicant was informed that since the area used for the commercial use exceeded the maximum commercial floor area for

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the applicable zoning district and also increased the existing non-complying condition, a special permit under Z.R. §73-36 was no longer the appropriate relief and a variance application under Z.R. §72-21 was indicated; and

WHEREAS, consequently, the applicant revised the application to request a variance under Z.R. §72-21; and

WHEREAS, subsequent to its site visit and a thorough review of the record, the Board determined that the applicant failed to provide substantial evidence of a practical difficulty arising from a unique physical condition related to the site, and also failed to prove that they could not realize a reasonable return from a use that conformed with the underlying zoning regulations, and that therefore the findings set forth at Z.R. §72-21(a) and (b) were not met; thus, on July 18, 2000, the Board denied the variance application made under Calendar No. 34-96-BZ; and

WHEREAS, under Calendar No. 119-99-A, an administrative appeal, the appellant, an adjacent property owner, 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; and

WHEREAS, evidence in the record indicates that the building permits were granted by DOB to allow for this extension to be used as mechanical space; specifically, for water conservation devices; and

WHEREAS, similar to the proceedings under Calendar No. 34-96-BZ, during the course of hearings and site inspections by the Board, it was again discovered that contrary to the applicant's representation, the area designated as mechanical space was actually being used by the PCE as commercial floor area for location of laundry machines, and not for water conservation devices; and

WHEREAS, on April 12, 2000, the Board granted the appeal under Calendar No. 119-99-A and revoked the Department of Buildings permits, finding that the rear yard structure could not be considered a permitted rear yard obstruction as defined in Z.R. §33-23(b); and

WHEREAS, the above Board determinations were adjudicated and upheld in court, and the impermissible portions of the rear yard structure were then supposed to be removed; 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; and

WHEREAS, upon evaluating the application, the Board noted that such arrangement was impractical in its configuration, as it divided the proposed community

facility between two floors and provided no separation between the proposed community facility space and the PCE, and also that no tenant had been secured for the community facility space; and

WHEREAS, the Board also noted a "pattern of misrepresentation with regard to the use of the illegally built space" by the applicant during the proceeding; and

WHEREAS, therefore, the Board denied the special permit application under Calendar No. 332-01-BZ on December 10, 2002; and

WHEREAS, the applicant subsequently challenged the Board's denial in an Article 78 proceeding, and the matter was remanded to the Board for further consideration; 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, an adjacent property owner, 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, the Board nevertheless 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 ordered such modification; and

WHEREAS, this modification to the 1995 Certificate of Occupancy reads: "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 used in compliance and conformance with all underlying zoning regulations."; and

WHEREAS, the applicant now asserts that the instant special permit application for a legalization of the subject PCE addresses the concerns of the Board set forth in its previous Resolutions related to the subject

premises, as described above, in that the community facility space on the third and fourth floors has been reconfigured, a path of egress benefiting the occupants of the proposed community facility has been approved by DOB, and a lease has been entered into between the owner of the building and the proposed community facility user (“JASA”); and

WHEREAS, in support of one of its assertions, the applicant submitted a copy of an executed Lease Agreement between the owner and JASA; and

WHEREAS, the applicant represents that DOB has approved, through a reconsideration, the means of egress from said community facility, provided that a restrictive declaration approved as to form by DOB is executed and filed, creating an easement through the PCE for the benefit of JASA; and

WHEREAS, the Board has reviewed the reconsideration and notes that DOB has in fact approved such an egress route; and

WHEREAS, the Board notes that, as represented by the applicant, the egress route will also be utilized by patrons and staff of the PCE in an emergency, and by handicapped patrons of the PCE on a non-emergency basis, and, as a consequence, the Board finds that there is no actual separation between JASA’s space and that used by the PCE; and

WHEREAS, additionally, the applicant has failed to demonstrate to the Board’s satisfaction why an egress corridor for JASA’s exclusive use could not be constructed at the rear of their space, thereby separating it from the PCE; and

WHEREAS, accordingly, the Board finds that the applicant has failed to address one of the primary concerns of the Board in this application and in the application under Calendar No. 332-01-BZ, namely the creation of a truly separate community facility space; and

WHEREAS, the Board also finds that the applicant has failed to address one of the other primary concerns of the Board in this application and in the application under Calendar No. 332-01-BZ, namely the impracticality of dividing a modest-sized community facility space between the third and fourth floor instead of consolidating the use on one floor; and

WHEREAS, moreover, the Fire Department has expressed its strong reservation to the proposed second means of egress, stating that the proposed egress path leading from JASA’s space is convoluted and could potentially be hazardous, especially to the elderly clientele of JASA; and

WHEREAS, the Board notes that, although the applicant did receive a reconsideration on the proposed egress path, it nevertheless does not comply with the strict letter of the Building Code’s exiting requirements, in that it proceeds through another tenancy; and

WHEREAS, therefore, the Board finds the

proposed egress path insufficient to provide safe and effective egress to the proposed community facility use; and

WHEREAS, pursuant to Z.R. §73-36(a)(1), the Board must find that the proposed PCE Ais so located as to not impair the essential character or the future use or development of the surrounding area”; and

WHEREAS, the Board finds that given the insufficient egress path, the legalization of the subject PCE at its present location would impair the use of the space of its proposed neighbor, JASA, in that JASA’s staff and clientele would not be afforded absolutely safe egress from the subject building through the PCE, and thus the finding set forth at Z.R. §73-36(a)(1) has not been met; and

WHEREAS, pursuant to Z.R. §73-03(a), the Board must find 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; and

WHEREAS, the Board finds that the disadvantages of the insufficient egress route to JASA are not outweighed by the advantages to the community of having the PCE, given the potential for injury during a fire or other emergency, and thus the finding set forth at Z.R. §73-03(a) has not been met; and

WHEREAS, at the August 13, 2003 hearing on the subject application, the applicant was instructed by the Board to allow the opposition to take measurements of the subject building in order to determine the respective square footages allocated between existing and proposed uses; and

WHEREAS, the applicant and opposition subsequently disagreed in correspondence as to the extent to which measurements were to be taken; and

WHEREAS, the measurements were finally taken by the opposition on October 15 and 16, 2003; and

WHEREAS, in a submission dated November 5, 2003, which included a series of drawings reflecting the results of the October 15 and 16 inspections, the opposition maintains that, among other things: there is a discrepancy between the amount of commercial floor area represented to exist in the subject building as stated by the applicant and the actual measured amount by the opposition, such that Equinox would be occupying 5,755 sq. ft. in excess of permitted commercial floor area; certain areas on the 3<sup>rd</sup> and 4<sup>th</sup> floor designated as mechanical space and therefore not included in floor area have now in fact been converted to floor area, thereby increasing the degree of non-compliance; a portion of the laundry room has been improperly deducted as mechanical space; the lobby areas in front of the elevators on the 3<sup>rd</sup> and 4<sup>th</sup> floors have been improperly designated as exclusively community facility floor area when they are in fact being used partially by the PCE; and there is a cavity

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above the rear yard enclosure that enlarges the height of said enclosure above what is permitted; and

WHEREAS, in a submission dated November 18, 2003 which included three sets of plans, the applicant responded to the opposition, contending, in part: that upon review of the subject building's pre-1974 and current existing floor area, the pre-existing floor area was 36,548 sq. ft. and the current commercial floor area is 34,973 sq. ft.; that the previously submitted drawings contained incorrect floor area calculations, in that they did not account for a mezzanine level used for commercial and mechanical uses that is noted on the two previous C of Os, and in that they failed to measure lot area correctly, but that said miscalculations do not impact a conclusion that the Building currently has less commercial floor area than existed pre-1974; that any conversion of mechanical space is offset by the addition of community facility or other mechanical space; that the mechanical deductions were approved in a DOB reconsideration; that the lobby spaces on the 3<sup>rd</sup> and 4<sup>th</sup> floors have now been allocated between commercial and community facility space; and that the PCE will address the three foot cavity above the rear yard enclosure through demolition, and has applied to DOB to reinstate its structural work application to allow it to remove the structure; and

WHEREAS, the Board notes that the applicant has submitted five separate sets of plans in conjunction with the subject application B one on May 9, 2003, one on July 15, 2003, and three on November 18, 2003; and

WHEREAS, the Board has not received an adequate explanation from the applicant as to why, after 4 previous applications and numerous hearings, it is now submitting plans with floor area calculations different from all other previously submitted plans; and

WHEREAS, the applicant has also not adequately addressed why its calculations differ from those of the opposition; and

WHEREAS, the Board further notes that only after the opposition has pointed out discrepancies between its own measurements and the previous representations of the applicant, has the applicant conceded that the measurements are inaccurate; and

WHEREAS, the applicant has failed to completely remove the impermissible rear yard obstruction, which it was ordered to do well before the filing of the instant application; and

WHEREAS, like in the prior cases, the Board finds that the applicant has engaged in a pattern of

misrepresentation in the subject application, insofar as it has: supplied the Board with contradictory information concerning the available legal commercial floor area, failed to remove the 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 Board possesses the authority under the law to deny the grant of a special permit if it determines that an applicant has engaged in misrepresentation before it; and

WHEREAS, moreover, as discussed above, the Board finds that the instant application fails to meet certain of the findings required for the grant of this special permit, set forth at Z.R. §73-36(a)(1) and §73-03(a).

*Resolved*, that the Board upholds the decision of the Manhattan Borough Commissioner, dated April 9, 2003, and hereby denies the instant application for a special permit.

Adopted by the Board of Standards and Appeals, December 9, 2003.

**A true copy of resolution adopted by the Board of Standards and Appeals, December 9, 2003.  
Printed in Bulletin No. 48-50, Vol. 88.**

**Copies Sent**

**To Applicant**

**Fire Com'r.**

**Borough Com'r.**