

***CORRECTION**

This resolution adopted on December 13, 2011, under Calendar No. 152-11-BZ and printed in Volume 96, Bulletin No. 51, is hereby corrected to read as follows:

152-11-BZ

CEQR #12-BSA-026M

APPLICANT – Kramer Levin Naftalis & Frankel, LLP, for 240 East 38th Street Condominium on behalf of New York University, owner.

SUBJECT – Application September 19, 2011 – Variance (§72-21) to allow modifications to the existing plazas and arcades associated with the partial re-use of an existing building for a community facility (*NYU Langone Medical Center*), contrary to §37-625. C1-9 zoning district.

PREMISES AFFECTED – 240 East 38th Street, East 37th Street, Second Avenue, East 38th Street and Tunnel Exit Street, Block 918, Lot 1001-1026, Borough of Manhattan.

COMMUNITY BOARD #6M

APPEARANCES –

For Applicant: Elise Wagner.

ACTION OF THE BOARD – Application granted on condition.

THE VOTE TO GRANT –

Affirmative: Chair Srinivasan, Vice Chair Collins, Commissioner Ottley-Brown, Commissioner Hinkson and Commissioner Montanez5

Negative:.....0

THE RESOLUTION –

WHEREAS, the decision of the Manhattan Borough Commissioner, dated September 16, 2011, acting on Department of Buildings Application No. 120803746, reads, in pertinent part:

1. Certain changes to existing plazas are not in greater accordance with the standards set forth in ZR 37-70, and therefore certification by the Chair of the City Planning Commission cannot be obtained, contrary to the requirements of ZR 37-625.
2. Proposed passenger drop-off and a driveway are located within and within 10 feet of arcade, contrary to ZR 37-80.
3. Proposed planters and seating are located within arcades beneath a height of 12 feet, contrary to ZR 37-80; and

WHEREAS, this is an application under ZR § 72-21, by NYU Langone Medical Center to permit, on a site in a C1-9/C1-9 Transit Land Use District (TA) zoning district, the modification to existing plazas and arcades including the introduction of a driveway and other obstructions, contrary to ZR §§ 37-625 and 37-80; and

WHEREAS, a public hearing was held on this application on November 22, 2011, after due notice by publication in the *City Record*, and then to decision on December 13, 2011; and

WHEREAS, the premises and surrounding area had site and neighborhood examinations by Chair Srinivasan, Commissioner Hinkson, and Commissioner Ottley-Brown; and

WHEREAS, Community Board 6, Manhattan, recommends approval of the application with the recommendation that the Medical Center post signage and paint curbs and the drop-off driveway to make it clear that there is no parking or standing and that the Medical Center employ a concierge to help direct vehicles; and

WHEREAS, this application is brought on behalf of the NYU Langone Medical Center (the “Medical Center”); and

WHEREAS, the site is located on a through lot with frontage on East 38th Street and East 37th Street, between Third Avenue and Second Avenue within a C1-9/C1-9 (TA) zoning district; and

WHEREAS, the site is part of a single zoning lot with the adjacent site at 221 East 37th Street (Block 918, Lot 14) (the “Zoning Lot”); and

WHEREAS, the adjacent site is owned by Verizon New York and is occupied with a nine-story building constructed in 1912 and subsequently enlarged pursuant to a bulk variance (BSA Cal. No. 304-38-BZ), because it exceeds floor area and height regulations; and

WHEREAS, the adjacent building is not proposed to be changed and is not part of the subject application except that it shares the subject Zoning Lot; and

WHEREAS, the Building has a plaza and arcade on East 37th Street (the “South Plaza” and “South Arcade”) and a plaza and arcade on East 38th Street (the “North Plaza” and “North Arcade”); and

WHEREAS, NYU owns a condominium interest in the building (the “Building”) for the benefit of the Medical Center, which will occupy 13 of the 24 non-mechanical floors of the Building for use as an Ambulatory Care Center; and

WHEREAS, Verizon owns a condominium interest in the Building and occupies the portions that are not occupied by the Medical Center; the current certificate of occupancy lists all floors above the first floor as offices and/or mechanical equipment (Use Group 6); and

WHEREAS, the Building was developed in the mid-1960s pursuant to the 1961 Zoning Resolution’s plaza regulations, which allowed bonusable plazas with broad standards about dimensions and openness to the sky; arcades were subject to standards similar to those in effect today, including minimum dimensions and that they be open along their entire length; and

WHEREAS, pursuant to ZR § 37-625, design changes to existing plazas may be made only upon certification by the Chair of the City Planning Commission that such changes would result in a plaza that is in greater accordance with the public plaza standards set forth in ZR § 37-70; and

WHEREAS, the subject variance is required because some of the proposed design changes to the plazas, including the driveway, canopy, and baffle wall, would result in new non-compliances or increased degrees of non-compliance with the public plaza standards and therefore require a waiver of the ZR § 37-

625 certification requirement and because the proposed driveway, planters, and movable seating do not comply with the arcade standards of ZR § 37-80 and also require waivers; and

WHEREAS, the Department of City Planning (DCP) has reviewed the changes and supports the plan submitted with this application as Drawings A-02.00 through A-026.00 and L-001.00 through L-520.00; and

WHEREAS, by letter dated September 14, 2001, DCP Counsel stated that a certification under ZR § 37-625 is unavailable for the proposed changes and that it would be appropriate to seek a variance from the Board to waive the requirement that the design changes must be in greater accordance with the public plaza standards and that a certification be obtained; and

WHEREAS, the applicant has acknowledged that the proposed passenger drop-off and driveway located within, and within ten feet of, the North Arcade is the Medical Center's primary need which triggers the remainder of the non-compliances (ZR § 37-80); and

WHEREAS, the applicant has identified the following specific non-compliances which necessitate the variance for the North Plaza: (1) the proposed driveway and passenger drop-off are not permitted obstructions (ZR § 37-726(d)); (2) the proposed canopy exceeds the area, projection, and height limitations for permitted obstructions (ZR § 37-726(c)); (3) more than 50 percent of the sidewalk frontage area is obstructed, and no portion of the unobstructed area has a width of at least eight feet (ZR § 37-721(a)); (4) the circulation paths at their narrowest points are five feet in width, less than the minimum eight feet required (ZR § 37-723); and (5) there are fewer than four trees (ZR § 37-742); and

WHEREAS, the applicant has identified the following specific non-compliances which necessitate the variance for the South Plaza: (1) the proposed baffle wall within the South Plaza is not a permitted obstruction and obstructs the visibility of the major portion of the plaza (ZR §§ 37-726 and 37-715); (2) less than 50 percent of the trees are planted flush at grade (ZR § 37-742); (3) the lawns at the west end exceed a height of six inches above the plaza surface (ZR § 37-742); and (4) permitted obstructions including planting beds and walls and expanded seating exceed 40 percent of the plaza area (ZR § 37-726(b)); and

WHEREAS, the Board agrees with DCP that this case, involving the modification of plaza and arcade conditions for a non-profit institution is a rare example of when a variance is an appropriate means of modifying a site under CPC's jurisdiction and there is limited

applicability of such practice; and

WHEREAS, further, the Board notes that the proposed modifications are within the spirit of the plaza and arcade text; and

WHEREAS, the Medical Center proposes to occupy the building with its Ambulatory Care programs including the following: (1) the first floor and mezzanine will be occupied primarily by registration and pre-admission testing; (2) the 11th and 12th floors will be occupied by Dermatology; (3) the 13th floor will be occupied by Dialysis, Nephrology, and Hyperbaric services; (4) the 15th through 17th floors will be occupied by Rusk Home, a rehabilitation program; the 18th and 19th floors will be occupied primarily by the Cancer Center and Infusion; (5) the 20th floor will be occupied by Clinical Services; (6) the 22nd floor will be occupied by Clinical Labs; (7) the 23rd floor will be occupied by Endoscopy; and (8) the 2nd and 24th floors will be occupied by Infrastructure; and

WHEREAS, the applicant states that the following are the programmatic needs of the Medical Center: (1) to provide reasonable access to the building for Ambulatory Care Center patients who are visit the building for out-patient services but who may be frail and have mobility impairment; and (2) to enhance the open space environment for patients and the community; and

WHEREAS, the applicant states the following existing conditions limit the ability of the building to satisfy the Medical Center's programmatic needs: (1) the existing plazas and arcades designed nearly 50 years ago provide minimal amenities and landscaping; (2) both plazas have significant change in grade which impede access (the South Plaza is approximately four feet above the sidewalk, requiring a flight of stairs and a portion of the North Plaza is located 2'-6" below the sidewalk, requiring steps); (3) critical components of the Building's infrastructure and Verizon's facilities are located within the cellar, which precludes a re-grading of the South Plaza; (4) there is a distance of 56 feet between the North Plaza and the main entrance at East 38th Street; and (5) an existing exhaust vent faces the South Plaza and discharges large volumes of hot air from Verizon's generators, negatively affecting its habitability; and

WHEREAS, additionally, the applicant notes that there are unique vehicular traffic conditions adjacent to the site including that a portion of East 38th Street is a heavily used access route to the Queens-Midtown Tunnel and that MTA buses use the lane in front of the buildings; and

WHEREAS, the applicant states that the noted physical constraints preclude the Medical Center from occupying the site in compliance with applicable zoning regulations in a way that would satisfy its primary programmatic needs of providing the Ambulatory Care Center's patients with appropriate and reasonable access to the building and enhancing the plazas and arcades to provide an improved environment for patients and community members; and

WHEREAS, in order to meet its programmatic needs, the applicant seeks a variance pursuant to ZR § 72-21; and

WHEREAS, the applicant identifies the following insufficiencies of a design that is fully compliant with zoning regulations: (1) the requirement to climb stairs and travel a distance of 56 feet between the main entrance and the East 38th Street curb; (2) the use of the East 38th Street curb lane for patient drop-off/pick-up would exacerbate existing traffic congestion, increase waiting times, and conflict with MTA bus use; and (3) the existing minimal amenities and landscaping is barren and uninviting; and

WHEREAS, the applicant asserts that, in contrast, the proposal will improve the site conditions and allow it to accommodate the Medical Center's programmatic needs; and

WHEREAS, the applicant proposes the following improvements to the plazas and arcades: (1) the North Plaza will include a driveway and canopy to create a convenient all-weather drop-off/pick-up area providing frail, elderly, and/or mobility-impaired patients with appropriate access; (2) an accessible pedestrian ramp in the North Plaza will provide access from the sidewalk to the entrance and an ADA-lift will be installed within the South Plaza to provide access; (3) varied landscaping and seating will be introduced to the plazas to create a more inviting environment for patients and community members, a landscape buffer will separate pedestrians from traffic; (4) the South Plaza will have broad seating terraces and benches and a shaded tree-lined area; (5) a green-screen baffle wall within the South Plaza will protect the adjacent plaza from hot air emitted by the building's exhaust vent, which would improve the environment for landscaping; (6) the plazas will include improved lighting, public information signage, and bicycle racks; (7) the plazas will be resurfaced; and (8) a trellis will be installed in the South Arcade to provide shade and planters and seating will be added; and

WHEREAS, the applicant states that the following conditions which create non-compliances or increase the degree of existing non-compliance are necessitated by the Medical Center's programmatic needs; and

WHEREAS, specifically, the applicant states that the proposed driveway, passenger drop-off, and canopy, which are not permitted plaza obstructions, are needed to provide the Ambulatory Care Center's frail and mobility-impaired patients with immediate, protected access to the building from ambulances and other vehicles; and

WHEREAS, the applicant states that the configuration of the driveway, though designed with the minimum dimensions necessary to accommodate patient vehicles, constrains circulation paths within the plaza to widths of approximately five feet (at least one circulation with a width of eight feet is required) and the presence of

the driveway contributes to the obstruction of the plaza's sidewalk frontage, and it limits the width of the access areas along this frontage to less than eight feet (the sidewalk obstruction is required to be limited to 50 percent of the sidewalk frontage and at least one unobstructed portion is to have a width of at least eight feet); and

WHEREAS, the applicant states that other modifications are necessitated by the goal of providing an appropriate and welcoming entry and departure for patients and of improving the open space experience for the community; and

WHEREAS, towards those goals, the applicant proposes the following: (1) the North Plaza will be planted with low greenery instead of trees to allow maximum access to sunlight (the text requires trees within the plaza); (2) the baffle wall will block hot air emitted from generators (the text prohibits such obstructions and requires visibility of the major portion of the plaza); (3) less than 50 percent of the trees within the South Plaza will be planted flush at grade because of existing below-grade conditions and the lawns would exceed a height of six inches above the plaza to allow a planting berm for trees; (4) new seating and landscape features within the South Plaza, which along with existing permitted obstructions exceed 40 percent of the plaza area, will significantly improve the plaza environment; and (5) the planters and movable seating in the South Arcade will make the area more inviting (the text requires that an arcade be unobstructed to a height of 12 feet); and

WHEREAS, the Board acknowledges that the Medical Center, as an educational institution, is entitled to significant deference under the law of the State of New York as to zoning and as to its ability to rely upon programmatic needs in support of the subject variance application; and

WHEREAS, specifically, as held in Cornell Univ. v. Bagnardi, 68 N.Y.2d 583 (1986), an educational institution's application is to be permitted unless it can be shown to have an adverse effect upon the health, safety, or welfare of the community, and general concerns about traffic, and disruption of the residential character of a neighborhood are insufficient grounds for the denial of an application; and

WHEREAS, the Board finds that the Medical Center's programmatic needs are legitimate, and agrees that the proposed modifications are necessary to address its needs, given the site's current limitations; and

WHEREAS, accordingly, based upon the above, the Board finds that the limitations of the current site, when considered in conjunction with the programmatic needs of the Medical Center, create unnecessary hardship and practical difficulty in developing the site in compliance with the applicable zoning regulations; and

WHEREAS, since the Medical Center is a nonprofit educational institution and the variance is needed to further its non-profit mission, the finding set forth at ZR § 72-21(b) does not have to be made in order to grant the variance requested in this application; and

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WHEREAS, the applicant represents that the variance, if granted, will not alter the essential character of the neighborhood, will not substantially impair the appropriate use or development of adjacent property, and will not be detrimental to the public welfare; and

WHEREAS, the applicant represents that the land uses surrounding the site are characterized by a mix of mid- and high-rise residential and mixed-use buildings, with commercial buildings to the north and medical and other institutional uses to the south and east; and

WHEREAS, the applicant asserts that the proposal will not alter the scale or envelope of the Building; and

WHEREAS, the applicant asserts that the proposal will enhance the open space to the benefit of the community by introducing landscaping, comfortable seating, and art to the plazas and arcades; and

WHEREAS, the applicant asserts that the design changes would transform the plazas and arcades from their current inaccessible and uninviting appearance to lush and diverse public spaces which are comfortable and aesthetically pleasing; and

WHEREAS, the applicant notes that the proposal has been reviewed by DCP to ensure that the plazas and arcades are as consistent as possible with the public policies served by the ZR's current design standards; and

WHEREAS, the applicant states that the proposed driveway within the North Plaza would reduce vehicular traffic congestion in the area around the Zoning Lot by replacing on-street patient drop-off/pick-up and reducing lane-changing maneuvers; and

WHEREAS, the applicant asserts that the driveway will have little effect on pedestrians as pedestrian volumes on the block are relatively low for the area; and

WHEREAS, the applicant has agreed to employ a concierge to help direct vehicles and to keep the site well-lit; and

WHEREAS, the applicant asserts that the proposal will serve the goals of the 197-a Plan for the Eastern Section of Community District 6, including increasing the amount of useful public open space in the district; maintaining the character of the neighborhood while accommodating "specialized non-residential uses such as Bellevue/NYU Hospitals;" and

WHEREAS, accordingly, the Board finds that this action will not alter the essential character of the surrounding neighborhood nor impair the use or development of adjacent properties, nor will it be detrimental to the public welfare; and

WHEREAS, the applicant states that the hardship was not self-created, and that no proposal that would meet the programmatic needs of the Medical Center could occur given the existing conditions; and

WHEREAS, accordingly, the Board finds that the

hardship herein was not created by the owner; and

WHEREAS, as to the minimum variance, the applicant states that it designed the driveway with the minimum dimensions necessary to satisfy the Medical Center's programmatic need for a patient drop-off area and that the curb cuts are of the minimum width to accommodate the turning radii of ambulances and other large medical transport vehicles, and the 22-ft. width of the internal driveway area is the minimum needed for two vehicle lanes – one for patient drop-offs/pick-ups and one for passing; and

WHEREAS, further, the applicant asserts that the dimensions of the canopy relate to those of the driveway and the existing arcade and were calculated to provide an adequate amount of weather protection for patients; and

WHEREAS, the applicant states that the other non-complying modifications to the plazas and arcades are the minimum necessary to enhance the open space environment for patients and community members within the design constraints created by the existing building; and

WHEREAS, the Board finds that the requested relief is the minimum necessary to allow the Medical Center to fulfill its programmatic needs; and

WHEREAS, therefore, the Board has determined that the evidence in the record supports the findings required to be made under ZR § 72-21; and

WHEREAS, the project is classified as an Unlisted action pursuant to 6 NYCRR, Sections 617.6(h) and 617.2(h) of 6NYCRR; and

WHEREAS, the Board has conducted an environmental review of the proposed action and has documented relevant information about the project in the Final Environmental Assessment Statement (EAS) CEQR No. 12BSA026M, dated September 15, 2011; and

WHEREAS, the EAS documents that the project as proposed would not have significant adverse impacts on Land Use, Zoning, and Public Policy; Socioeconomic Conditions; Community Facilities and Services; Open Space; Shadows; Historic Resources; Urban Design and Visual Resources; Neighborhood Character; Natural Resources; Waterfront Revitalization Program; Infrastructure; Hazardous Materials; Solid Waste and Sanitation Services; Energy; Traffic and Parking; Transit and Pedestrians; Air Quality; Noise; and Public Health; and

WHEREAS, no significant effects upon the environment that would require an Environmental Impact Statement are foreseeable; and

WHEREAS, the Board has determined that the proposed action will not have a significant adverse impact on the environment; and

Therefore it is Resolved that the Board of Standards and Appeals issues a Negative determination, with conditions as stipulated below, prepared in accordance with Article 8 of the New York State Environmental Conservation Law and 6 NYCRR Part 617, the Rules of Procedure for City Environmental Quality Review and

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Executive Order No. 91 of 1977, as amended, and makes each and every one of the required findings under ZR § 72-21 and grants a variance to permit, on a site in a C1-9/C1-9 Transit Land Use District (TA) zoning district, the modification to existing plazas and arcades including the introduction of a driveway and other obstructions, contrary to ZR §§ 37-625 and 37-80, *on condition* that any and all work shall substantially conform to drawings as they apply to the objections above noted, filed with this application marked "Received November 18, 2011" – eighteen (18) sheets; and *on further condition*:

THAT any change in control or ownership of the Medical Center's condominium interest be reviewed and approved by the Board;

THAT the Medical Center will provide a full-time concierge who will help direct vehicles in the driveway;

THAT the above-noted conditions be noted on the certificate of occupancy;

THAT this approval is limited to the relief granted by the Board in response to specifically cited and filed DOB/other jurisdiction objection(s);

THAT the approved plans shall be considered approved only for the portions related to the specific relief granted;

THAT construction shall proceed in accordance with ZR § 72-23; and

THAT the Department of Buildings must ensure compliance with all other applicable provisions of the Zoning Resolution, the Administrative Code, and any other relevant laws under its jurisdiction irrespective of plan(s)/configuration(s) not related to the relief granted.

Adopted by the Board of Standards and Appeals, December 13, 2011.

***The resolution has been revised to amend a *whereas* clause, which read in part: *WHEREAS, the applicant has agreed to comply...* and now reads: *WHEREAS, the applicant has agreed to employ a concierge to help direct vehicles and to keep the site well-lit; and* and to removed part of the 2nd condition. Corrected in Bulletin Nos. 1-3, Vol. 97, dated January 18, 2012.**

**A true copy of resolution adopted by the Board of Standards and Appeals, December 13, 2011.
Printed in Bulletin No. 51, Vol. 96.**

Copies Sent

To Applicant

Fire Com'r.

Borough Com'r.