180-05-BZ
CEQR #05-BSA-008M
APPLICANT – Wachtel & Masyr for 1511 Third Avenue Association/Related/Equinox, owner.
SUBJECT – Application August 4, 2005 – Special Permit under Z.R.§§73-03 and 73-367 approval sought for the legalization of a physical culture establishment located on the entire second floor portion of the third floor and the entire fourth floor with a total of 34, 125sq.ft. of floor area. The site is located in a C2-8 zoning district.
PREMISES AFFECTED – 1511 Third Avenue aka 201 East 85th Street, northeast corner of 85th Street and Third Avenue, Block 1531, Lot 1, Borough of Manhattan.
COMMUNITY BOARD #8M
APPEARANCES –
For Applicant: Ellen Hay.
ACTION OF THE BOARD – Application granted on condition.
THE VOTE TO GRANT –
Affirmative: Chair Srinivasan, Vice-Chair Babbar, Commissioner Chin and Commissioner Collins.....4
Negative:.....0
THE RESOLUTION –

WHEREAS, the decision of the Manhattan Borough Commissioner, dated August 1, 2005, acting on Department of Buildings Application No. 103869182, reads, in pertinent part:

> "Proposed Physical Culture Establishment is not permitted as of right in C2-8A zoning district. This is contrary to section 32-10 ZR"; and

WHEREAS, this is an application under ZR §§ 73-36 and 73-03, to permit on a site partially within a C2-8A zoning district and partially within an R8B zoning district, the legalization of a physical culture establishment ("PCE") located on all floors of a four-floor plus mezzanine and basement commercial building, contrary to ZR § 32-10; and

WHEREAS, a public hearing was held on this application on February 7, 2006, after due notice by publication in *The City Record*, and then to decision on February 28, 2006; and

WHEREAS, Community Board 8, Manhattan, recommends approval of this application; and

WHEREAS, the New York City Fire Department has indicated to the Board that is has no objection to this application; and

WHEREAS, the subject tax lot (lot 1) is a corner lot with approximately 77 feet, 6 inches of frontage on Third Avenue and 125 feet of frontage on East 85th Street, with approximately 100 feet of frontage within the C2-8A zoning district and the remainder within the R8B zoning district; and

WHEREAS, lot 1 is part of a newly created larger zoning lot, consisting of lot 1 and the lots to the north of the site, designated lots 4, 48, 47, 46, 45, 43, and 6 (the "ZL"); and

WHEREAS, lot 1 is improved upon with a four-story plus mezzanine and basement commercial building; and

WHEREAS, this building is currently occupied by a retail clothing store on the first floor and mezzanine, and by the subject PCE (an Equinox Gym), primarily on the second and parts of the third and fourth floors (the PCE entrance is on the first floor); and

WHEREAS, the site and the PCE have been the subject of six prior BSA actions; and

WHEREAS, under Calendar No. 34-96-BZ, an application for a special permit pursuant to ZR § 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), sought a revocation of Department of Buildings ("DOB") permit 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 ZR § 33-23(b); and

WHEREAS, under Calendar No. 332-01-BZ, which was an second application for a special permit under ZR § 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 (the "CF") 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 DOB 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 (again the neighbor) in 139-02-A contended that the presence of the PCE in the subject building constituted a non-conforming use subject to the lapse provisions of ZR § 52-60 et. seq.; and

WHEREAS, upon a review of the record and of the definition of non-conforming use as set forth at ZR § 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 lawful non-complying condition with regard to the commercial floor area as per ZR § 33-12; and

WHEREAS, after dispensing with the substance of the appeal, the Board also concluded that the Certificate of Occupancy for the building 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 a modification; and

WHEREAS, certain conditions in this resolution read 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 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 ZR § 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 CF 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 ZR § 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 ZR § 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, subsequently, in 2005, an application was made under the subject calendar number pursuant to Section 1-10(e) of the Board's Rules of Practice and Procedure for a re-hearing of the special permit application previously denied by the Board in 2003, as well as an application for a potential technical amendment to the condition as to maximum commercial floor area imposed by the Board in the previously decided appeals case; and

WHEREAS, a new applicant, unrelated to the applicant in the past cases, contended that the changes to the third and fourth floor plan and the egress path, as well as the discovery of new plans from 1930 showing that the second floor was not a full floor as previously thought, constituted substantial new evidence sufficient to allow the matter to be re-opened; and

WHEREAS, the Board agreed, finding that the material changes to the plans and the new evidence, as noted above, were sufficient to warrant a re-opening of the special permit application for legalization of the subject PCE; and

WHEREAS, the applicant also asked for a re-opening of BSA Cal. No. 139-02-A, for the sole purpose of amending the condition language concerning the amount of available commercial floor area within the building, based upon a new evaluation of said floor area by a new architect; and

WHEREAS, the Board ultimately dismissed this application as moot, since it was deemed premature; specifically, the Board stated that if the 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, at a later date; and

WHEREAS, in the instant case, the applicant maintains that the amount of lawful non-complying commercial floor area ascribed to the subject lot is 34,127 sq. ft., and has submitted revised floor area calculations based upon its new review of the building and the available plans; said calculations are undisputed; and

WHEREAS, additionally, the applicant has provided the Board with a DOB reconsideration that allows the transfer of additional lawful non-complying commercial floor area to the subject lot from lot 45 (which is part of the ZL), which increases the total commercial floor area of the building to 36,461 sq. ft.; and

WHEREAS, 26,666 sq. ft. of this commercial floor area will be occupied by the PCE: 569 sq. ft. on the first floor; 149 sq. ft. on the mezzanine; 9,393 sq. ft. on the second floor; 9,090 on the third floor; and 7,465 on the fourth floor; and

WHEREAS, the applicant states that the subject PCE shares some common areas with the CF (the CF will be located primarily on the fourth floor); the floor area of said common areas was divided between the PCE and the CF; and

WHEREAS, as to the unacceptable egress route for the CF identified in the prior case, the applicant has provided the Board with a sign-off from DOB indicating that the revised egress route now complies with the Building Code; and

WHEREAS, accordingly, for purposes of this application, the Board finds that the applicant has adequately addressed the floor area and egress issues, as well as the procedural history of the application; and

WHEREAS, at hearing, the Board asked the applicant to address the small rear yard extension located on the north side of the building, located partially within the R8B portion of the lot and constructed after 1974; and

WHEREAS, the applicant stated that the extension complied with applicable yard regulations, as it is a permitted obstruction; and

WHEREAS, however, the Board will defer the accuracy of this representation to DOB, through a condition, as set forth below, and should it be determined that it is not a permitted obstruction, it should be removed or modified so that it does comply with the permitted obstruction regulations; and

WHEREAS, having resolved these issues, the applicant asks the Board to legalize the PCE on the basis that the relevant findings set forth at ZR § 73-36 are met; and

WHEREAS, the applicant represents that the PCE will provide gym equipment, aerobics, other classes in physical improvement and massage services by licensed massage professionals; and

WHEREAS, the applicant states that an approved interior fire alarm system will be installed in the entire PCE space, with the addition of smoke detectors, manual pull stations, local audible and visual alarms, and be connected to a FDNY-approved Central Station; and

WHEREAS, the PCE will have the following hours of operation: Monday through Thursday 5:30AM to 11PM, Friday 5:30AM to 10PM, and Saturday and Sunday 8AM to 9PM; and

WHEREAS, the Board finds that this action will neither: 1) alter the essential character of the surrounding neighborhood; 2) impair the use or development of adjacent properties; nor 3) be detrimental to the public welfare; and

WHEREAS, the Department of Investigation has performed a background check on the corporate owner and operator of the establishment and the principals thereof, and issued a report which the Board has determined to be satisfactory; and

WHEREAS, the proposed project will not interfere with any pending public improvement project; and

WHEREAS, the Board finds that, under the conditions and safeguards imposed, any hazard or disadvantage to the community at large due to the proposed special permit use is outweighed by the advantages to be derived by the community; and

WHEREAS, therefore, the Board has determined that the evidence in the record supports the requisite findings pursuant to ZR §§73-36 and 73-03; and

WHEREAS, the project is classified as an Unlisted action pursuant to 6 NYCRR Part 617; 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 06-BSA-008M, dated August 4, 2005; and

WHEREAS, the EAS documents show 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; Hazardous Materials; Waterfront Revitalization Program; Infrastructure; Solid Waste and Sanitation Services; Energy; Traffic and Parking; Transit and Pedestrians; Air Quality; Noise; Construction Impacts; and Public Health; and

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

Therefore it is Resolved that the Board of Standards and Appeals issues a Negative Declaration prepared in accordance with Article 8 of the New York State Environmental Conservation Law and 6 NYCRR Part 617 and §6-07(b) of the Rules of Procedure for City Environmental Quality Review and Executive Order No. 91 of 1977, as amended, and makes each and every one of the required findings under ZR §§ 73-36 and 73-03, to permit on a site partially within a C2-8A zoning district and partially within an R8B zoning district, the legalization of a physical culture establishment with a total floor area of 26,666 sq. ft., located on all floors of a four-floor plus mezzanine and basement commercial building, , contrary to ZR § 32-10; *on condition* that all work shall substantially conform to drawings as they apply to the objections above noted filed with this application marked "Received February 14, 2006"-(5) sheets; and *on further condition*:

THAT the term of this grant shall be for ten years, from February 28, 2006 to February 28, 2016;

THAT there shall be no change in ownership or operating control of the physical culture establishment without prior application to and approval from the

Board;

THAT the hours of operation shall be limited to Monday through Thursday 5:30AM to 11PM, Friday 5:30AM to 10PM, and Saturday and Sunday 8AM to 9PM;

THAT all massages shall be performed only by practitioners with valid and current NYS massage licenses;

THAT the above conditions shall appear on the Certificate of Occupancy;

THAT a certificate of occupancy shall be obtained within one year from the date of this grant;

THAT Local Law 58/87 compliance shall be as reviewed and approved by DOB;

THAT fire safety measures, including a sprinkler system, shall be as installed and maintained on the Board-approved plans;

THAT an interior fire alarm system shall be provided as set forth on the BSA-approved plans and approved by DOB;

THAT DOB shall review the rear yard encroachment as shown on the BSA-approved plans and confirm that it is a permitted obstruction in the R8B district portion of the lot;

THAT the owner shall take appropriate remedial action, as directed by DOB, if DOB determines that the encroachment is unlawful;

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

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

THAT the Department of Buildings must ensure compliance with all of the 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, February 28, 2006.

A true copy of resolution adopted by the Board of Standards and Appeals, February 28, 2006.
Printed in Bulletin Nos. 10-11, Vol. 91.

Copies Sent
To Applicant
Fire Com'r.
Borough Com'r.