

**2016-1208-BZ**

APPLICANT – Akerman, LLP, for 300 East 64<sup>th</sup> Street Partners LLC c/o RFR Holding, LLC, owner; Barry Bootcamp NYC, LLC, lessee.

SUBJECT – Application January 13, 2016 – Special Permit (§73-36) to permit a physical culture establishment (*Barry's Bootcamp*) within a portion of an existing building's ground and second floors. C2-5/R8B & C2-8 zoning districts.

PREMISES AFFECTED – 300 East 64<sup>th</sup> Street, Block 1438, Lot 7502, Borough of Manhattan.

**COMMUNITY BOARD #8M**

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

**THE VOTE TO GRANT** –

Affirmative: .....0

Negative: Chair Perlmutter, Vice-Chair Chanda, Commissioner Ottley-Brown, Commissioner Sheta and Commissioner Scibetta.....5

**THE RESOLUTION** –

WHEREAS, the decision of the Department of Buildings (“DOB”), dated January 8, 2016, acting on DOB Application No. 122619639 reads in pertinent part:

ZR 32-31, ZR 73-36: Proposed use [*sic*] as a Physical culture establishment is not permitted and is contrary to ZR 32-31. This job must be referred to the Board of standards and appeals for approval pursuant to ZR 73-36; and

WHEREAS, this is an application under ZR §§ 73-36 and 73-03 to legalize, on a site partially located within a C2-8 zoning district and partially located within an R8B (C2-5) zoning district, a physical culture establishment (“PCE”) on portions of the ground floor and second floor of a 27-story mixed-use residential and commercial building, contrary to ZR § 32-10; and

WHEREAS, a public hearing was held on this application on December 11, 2018, after due notice by publication in *The City Record*, with continued hearings on February 12, 2019, March 26, 2019, May 7, 2019, May 21, 2019, and then to decision on May 21, 2019; and

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

WHEREAS, Commissioner Ottley-Brown performed an inspection of the subject site and surrounding neighborhood; and

WHEREAS, the subject site is located on the northeast corner of East 64<sup>th</sup> Street and Second Avenue, partially located within a C2-8 zoning district and partially located within an R8B (C2-5) zoning district, in Manhattan; and

WHEREAS, the site has approximately 125 feet of frontage along East 64<sup>th</sup> Street, 50 feet of frontage along Second Avenue, 6,302 square feet of lot area and is occupied by a 27-story mixed-use residential and commercial building; and

WHEREAS, ZR § 73-36(a) provides that in C1-8X, C1-9, C2, C4, C5, C6, C8, M1, M2 or M3 Districts, and in certain special districts as specified in the provisions of such special district, the Board may permit physical culture or health establishments as defined in Section 12-10 for a term not to exceed ten

years, provided that the following findings are made:

- (1) that such *use1* is so located as not to impair the essential character or the future use or development of the surrounding area; and
- (2) that such *use* contains:
  - (i) one or more of the following regulation size sports facilities: handball courts, basketball courts, squash courts, paddleball courts, racketball [*sic*] courts, tennis courts; or
  - (ii) a swimming pool of a minimum 1,500 square feet; or
  - (iii) facilities for classes, instruction and programs for physical improvement, body building, weight reduction, aerobics or martial arts; or
  - (iv) facilities for practice of massage by New York State licensed masseurs or masseuses.

Therapeutic or relaxation services may be provided only as accessory to programmed facilities as described in paragraphs (a)(2)(i) through (a)(2)(iv) of this Section.; and

WHEREAS, ZR § 73-36(b) sets forth additional findings that must be made where a physical culture or health establishment is located on the roof of a commercial building or the commercial portion of a mixed building in certain commercial districts; and

WHEREAS, because no portion of the subject PCE is located on the roof of a commercial building or the commercial portion of a mixed building, the additional findings set forth in ZR § 73-36(b) need not be made or addressed; and

WHEREAS, ZR § 73-36(c) provides that no special permit shall be issued unless:

- (1) the Board shall have referred the application to the Department of Investigation for a background check of the owner, operator and all principals having an interest in any application filed under a partnership or corporate name and shall have received a report from the Department of Investigation which the Board shall determine to be satisfactory; and
- (2) the Board, in any resolution granting a special permit, shall have specified how each of the findings required by this Section are made.; and

WHEREAS, the Board notes that in addition to the foregoing, its determination is also subject to and guided by ZR § 73-03; and

WHEREAS, as a threshold matter, the Board notes that the site is within the boundaries of a designated area in which the subject special permit is available; and

WHEREAS, the subject PCE occupies approximately 333 square feet of floor area on the

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1 Words in *italics* are defined in Section 12-10 of the Zoning Resolution.

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ground floor and 5,100 square feet of floor area on the second floor of the existing building; and

WHEREAS, the second floor consists of a lobby, fitness studios, changing rooms, bathrooms and storage; and

WHEREAS, the PCE has operated as Barry's Bootcamp since January 2016 from 5 a.m. to 11 p.m., seven days a week; and

WHEREAS, the applicant represents that the subject PCE will neither impair the essential character nor the future use or development of the surrounding areas because it is located in a commercial district and surrounded by properties that are similarly occupied by mixed-use commercial and residential buildings with commercial uses on the ground floor and/or second floor and residential uses above; the applicant further asserts that the subject PCE is compatible with surrounding uses; and

WHEREAS, the Board received letters, email and testimony at hearing from residents of the subject building complaining about loud music, the audibility of class instructors' voices and vibrations associated with the dropping of weights in the PCE space and insisted that the applicant engage an acoustical consultant to complete noise testing, incorporate measures in the PCE space that would adequately attenuate the issues identified by the residential tenants and immediately alter the PCE's operations by lowering the volume on speakers and mics and enforcing a "no dropping" policy with regards to weights; and

WHEREAS, despite adjusting sound levels in the PCE space, further isolating the speakers from the wall and installing mat tiles on the floors on the recommendation of an acoustic consultant, residential tenants continued to complain that music from the PCE and instructors' voices continued to be audible in their dwelling units, located on the fifth floor of the subject building, most notably during classes scheduled around 5:30 a.m. and 8 or 9 pm; and

WHEREAS, the fourth continued public hearing on this application was originally scheduled for June 11, 2019, but, upon the continued receipt of emphatic complaints from residential neighbors about noise emanating from the PCE after the March 26, 2019, public hearing, including weekly noise logs in which tenants listed the date and time of disturbances, the Board notified the applicant that the hearing would be moved to the May 7, 2019, public hearing calendar; and

WHEREAS, at the May 7 hearing, the applicant's representative stated that additional noise testing would be conducted, that prior testing had not revealed audible levels in the residential units tested, that the overall audio in the PCE space had been lowered remotely by 2 decibels and that the applicant was hopeful that such change would mitigate the remaining noise complaints; and

WHEREAS, at that hearing, the Board requested

that all issues regarding noise in the facility be cured by the next hearing, scheduled for May 21, specifically, the Board requested that there be no amplified sound—either music or instructors' voices—in the PCE space until that hearing and the applicant take that time to investigate the nature of the problem, which may ultimately be structural, including coordinating with residential tenants to confirm whether certain improvements remediated the source of their complaints; and

WHEREAS, the applicant nevertheless continued its operations as usual, the Board received noise logs from the two residential tenants who had previously complained about disturbances from the PCE indicating that both residents continued to hear the sound of weight drops, bass from amplified music and instructors' voices in their dwelling units after the May 7 hearing as well as testimony from a third residential tenant of the building, complaining of hearing weight drops from the PCE space in her fifth-floor dwelling unit; and

WHEREAS, pursuant to ZR § 73-03 (General Findings Required for All Special Permit Uses and Modifications), to grant a special permit use, the Board must make, not only the findings required in the applicable Zoning Resolution section, but also find:

[t]hat, under the conditions and safeguard imposed, the hazards or disadvantages to the community at large of such special permit use or modification of use, parking or bulk regulations at the particular site are outweighed by the advantages to be derived by the community by the grant of such special permit. In each case the Board shall determine that the adverse effect, if any, on the privacy, quiet, light and air in the neighborhood of such special permit use or modification of use, parking or bulk regulations will be minimized by appropriate conditions governing location of the site, design and method of operation; and

WHEREAS, the Board cannot determine that the adverse effects of the subject PCE use, which has operated at the subject site since January 2016 without a PCE special permit, on the privacy, quiet, light and air in the neighborhood, and more specifically, in the subject building, can be minimized by appropriate conditions as evidenced by the operator's failure to adequately address the concerns of the tenants raised in public hearing; and

*Therefore, it is Resolved*, decision of the Department of Buildings ("DOB"), dated January 8, 2016, acting on DOB Application No. 122619639, is sustained and this application is hereby *denied*.

Adopted by the Board of Standards and Appeals, May 21, 2019.

**A true copy of resolution adopted by the Board of Standards and Appeals, May 21, 2019.**

**Printed in Bulletin Nos. 21-22, Vol. 104.**

**Copies Sent**

**To Applicant**

**Fire Com'r.**

**Borough Com'r.**

