BSA Cal. No. 2019-94-A
Supplemental Statement of Law and Facts

This Supplemental Statement of Law and Facts is submitted on behalf of West 66th Sponsor LLC ("Owner") in opposition to the arguments raised by Landmark West! ("LW") in its Supplemental Statement of Facts, dated November 6, 2019 (the "LW Supplement"), regarding mechanical deductions approved by the Department of Buildings ("DOB") for the new development at 36 West 66th Street (the "Building").

This supplemental statement first addresses the threshold question of whether the Board has statutory authority and jurisdiction to entertain these arguments, and we show that the Board does not and that the proceeding should therefore be discontinued and dismissed. We then demonstrate that LW's arguments fail on the merits in any event.

I. THE BOARD LACKS AUTHORITY AND JURISDICTION UNDER THE CITY CHARTER TO EXPAND THE SCOPE OF THE APPEAL, SUA SPONTE, TO INCLUDE ISSUES NOT TIMELY RAISED BY APPELLANT IN ITS APPEAL

Issues concerning mechanical deductions were not timely raised by LW when it initiated this appeal.[1] Indeed, the Board expressly ruled in its written decision on Cal. Nos. 2019-89-A and 2019-94-A, filed on October 15, 2019 (the "Decision"), that LW failed to timely raise a challenge to the mechanical deductions:

> a timely third issue has not been presented by Appellants regarding whether the amount of floor space used for mechanical equipment in the New Building is excessive or irregular, and Appellants' discussion of mechanical space in the New Building in their initial filings instead center on the volume and floor-to-ceiling heights of mechanical spaces.

BSA Cal. No. 2019-89-A; 2019-94-A, 3, n. 1. Accordingly, the Board has definitively concluded that the mechanical deduction issue was not timely raised by LW under applicable appeals procedures.

The Board nevertheless announced at its September 17, 2019 meeting that it would consider LW's new argument and established a supplemental briefing schedule for doing so.

[1] As demonstrated in our August 28, 2019 Supplemental Statement of Facts and Law and discussed at length at the September 10, 2019 Public Hearing, the issues raised by LW in its appeal were limited to the legality of the floor to ceiling heights of the Project's mechanical spaces and whether the Project complies with bulk distribution regulations for zoning lots located in the Special Lincoln Square District in accordance with ZR Section 83-34. (See September 10, 2019 Public Hearing Transcript, Transcript 1 hereto.)

At the September 10 Public Hearing, Counsel to the BSA thus advised counsel for LW that "because you did not raise this [the mechanical deduction] issue in your papers within 30 days, that is why it is not before the Board." (Transcript 1 at 38). The Chair likewise stated that issues "need to be raised at the outset so that the Board gets the right information and that it's properly before us, according to statutory requirements." (Id. at 68.) She continued that "to bring up things on the eve of decision, really, because it was clear that we were going to be deciding this on the next hearing, right, I think for one, I think is improper." (Id. at 69)

The Board stated that it would reopen the appeal sua sponte to expand the scope of the appeal LW had filed. As discussed below, however, the City Charter grants the Board only limited authority to review a DOB determination upon its own initiative and circumscribes the relief available in such a sua sponte review. In exercising this limited authority, for example, the Board is not permitted to direct a revocation of Owner's building permit or otherwise impair Owner's rights under the DOB permit issued for the Building.[2]

The Decision cites Section 72-11 of the Zoning Resolution as legal authority for the decision to reopen the hearing. BSA Cal. No. 2019-89-A; 2019-94-A, 3, n. 1. Section 72-11 provides, in relevant part:

> The Board of Standards and Appeals shall hear and decide appeals from or may, on its own initiative, review any rule or regulation, order, requirement, decision, or determination of the Commissioner of Buildings, of any duly authorized officer of the Department of Buildings, or of the Commissioner of any agency which, under the provisions of the New York City Charter, has jurisdiction over the use of land or over the use or bulk of buildings or other structures, subject to the requirements of this Resolution.

But the Board's appeals jurisdiction is defined by the City Charter, not the Zoning Resolution. Section 72-11 is, at most, a paraphrase (and, as discussed further below, one that is both imprecise and incomplete) of relevant City Charter provisions. There is plainly no basis to conclude that the Zoning Resolution can modify or augment the powers and duties of the Board under the City Charter, including the scope of its appeals jurisdiction. The City Charter governs.

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[2] In reopening the hearing sua sponte to consider the mechanical equipment issue, the Decision cites a statement made by DOB counsel at the September 10 Public Hearing that should LW file a new complaint with DOB regarding the mechanical equipment, and DOB decide that there is no basis for rescinding the building permit it issued for the Project in April 2019, DOB likely would not issue a final determination from which Appellant could appeal to the BSA. BSA Cal. No. 2019-89-A; 2019-94-A, 3, n. 1.

DOB is correct. LW has no right to the issuance of a final determination by DOB on this issue. See Matter of New York City Yacht Club v. New York City Dept. of Bldgs., 102 N.Y.S. 3d 19, 20 (1st Dep't. 2019) (petitioner not entitled to a final determination appealable to the BSA absent a clear legal right to such determination). DOB's final determination is the April 2019 permit approval, and the 30-day time period for appeal of that determination expired in May 2019 without LW having raised any issue regarding the mechanical floor space deductions. As described more fully in REBNY's October 14, 2019 letter to the Board, the Board's decision to consider LW's untimely argument has effectively required DOB to issue a new final determination to which LW is not entitled.

The Decision makes no mention of the key reason offered by the Board at its September 17 Public Meeting why a reopening of the hearing on LW's appeal was appropriate, i.e., that a similar procedure concerning mechanical equipment was followed in BSA Cal. No. 2016-4327-A. (See September 17, 2019 Public Hearing Transcript, Transcript 2 hereto, at 10-11.) However, as discussed in greater detail in the REBNY letter, the record in that appeal clearly shows that, in contrast to LW's failures here, issues regarding the propriety of mechanical deductions were raised squarely by the Appellant, Sky House Condominium, in its statement of facts. Sky House Statement of Facts, Exhibit E to the REBNY letter.

Owner adopts in full and incorporates by reference herein all arguments made by REBNY in its October 14 letter, including the exhibits thereto.

The relevant City Charter provisions are as follows:

First, Section 666(6)(a) of the City Charter provides that:

The Board shall have power: to hear and decide appeals from and review,

(a) except as otherwise provided by law, any order, requirement, decision or determination of the commissioner of buildings or any borough superintendent of buildings acting under a written delegation of power from the commissioner of buildings filed in accordance with the provisions of section six hundred forty-two or section six hundred forty-five of this charter . . . .

Second, Section 666(8) of the City Charter provides that:

The Board shall have power: . . . [t]o review, upon motion of any member of the board, rule, regulation, amendment, or repeal thereof, and any order, requirement, decision or determination from which an appeal may be taken to the board under the provisions of this chapter or of any law, or of any rule, regulation or decision of the board; but no such review shall prejudice the rights of any person who has in good faith acted thereon before it is reversed or modified. The provisions of this chapter related to appeals to the board shall be applicable to such review.

Third, Section 669 of the City Charter, governing "Procedure on appeals," defines who may file an appeal (subd. a), the procedure for the filing of an appeal in accordance with rules of the Board (subd. b), the timing for the hearing of appeals and notice thereof (subd. c), and the method for appeal of a decision of the Board (subd. d).

The above City Charter provisions make clear that an "appeal" filed by an aggrieved party under Section 666(6)(a) is distinct from a "review" undertaken by the Board under Section 666(8).

Importantly, unlike in the case of a "review" initiated by the Board under Section 666(8), the provisions of Section 666(6)(a) governing appeals initiated by a third party (like the appeal in this case) do not impart to the Board any authority to expand the scope of an appeal, acting on its own initiative upon the motion of a Commissioner. That authority is strictly limited to a "review."

Critically, a "review" undertaken by the Board upon the motion of a Commissioner under Section 666(8) can be undertaken sua sponte but is subject to a crucial limitation:

> **no such review shall prejudice the rights of any person who has in good faith acted thereon before it is reversed or modified**.

(emphasis added). The plain language of this provision thus does not authorize the Board, acting sua sponte to review an issue, to render a decision adverse to a party who has in good faith acted

in reliance on the DOB determination at issue. If the Board overturns a rule, regulation, determination or decision of the DOB Commissioner under that Section in a way that would prejudice a party who has relied upon the DOB action at issue it can have prospective application only.[3]

It follows from the above that the Board cannot graft a "review" under Section 666(8) onto a pending "appeal" brought under Section 666(6)(a) in order to expand the scope of the appeal beyond what LW has timely presented to the Board. To do so would expose Owner to an adverse determination and thereby violate the Charter's requirement that "no such review shall prejudice the rights of any person who has in good faith acted thereon before it is reversed or modified."[4] Stated differently, the Board cannot, by means of a "review" initiated sua sponte pursuant to Section 666(8), grant the relief LW requested in its appeal. That is, it can neither vacate the building permit granted to Owner nor grant any other relief that would prejudice the rights of Owner, which has acted in reliance on that permit.

In view of the above, Owner respectfully requests that the Board reverse its September 17 determination to reopen the appeal filed by LW to consider issues that LW failed to properly raise in its appeal. Neither ZR Section 72-11 nor the City Charter authorizes the Board to expand the scope of an appeal *sua sponte*. Rather, the Board's authority is limited to initiating a "review" subject to the proviso of Section 666(8). Any decision in favor of LW in the reopened appeal would therefore be ultra vires.

For these reasons, the proceeding should be discontinued and dismissed.

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[3] Section 666(8) was enacted as Section 719(6) of the City Charter under Chapter 503 of the Laws of 1916, the original legislation that established the Board. (See Exhibit 1 hereto.) While the legislative history does not discuss this provision, the language of its proviso is clear and unambiguous.

[4] The Board's conflation of a "review" with an "appeal" also fails to recognize that a "review" under Section 666(8) is a separate proceeding subject to all the procedural provisions governing an appeal: "The provisions of this chapter relating to appeals to the board shall be applicable to such review" under Section 666(8). Among other things, this would indicate that if the Board wishes to conduct a "review" of its own initiative under Section 666(8), it is bound by the Board's own rules governing the time period within which an appeal may be filed. See BSA Rule 1-06.3.

II. THE DOB PROPERLY APPROVED THE MECHANICAL DEDUCTIONS FOR THE BUILDING.

A. The Amount of Mechanical Space and Number of Full Mechanical Floors in the Building Are Comparable to That Found in Similar Buildings.

At the Board's September 17 Public Meeting, the Chair posed the following two questions:

First, whether DOB has a method of determining whether the amount of floor space devoted to mechanical space in a building is appropriate, based on a standard formula. The Chair cited to what she described as a "5 percent rule" utilized at one time. (Transcript 2 at 15.)

Second, whether there is a typical number of full interstitial mechanical floors in buildings similar to the Building. The Chair observed in this regard that the tall buildings with mechanical "void" spaces brought to the Board's attention in Cal. No. 2016-4327-A (Sky House Condominium) had three full interstitial mechanical floors while the Building has four such floors. (Transcript 2 at 25-26.)

As set forth in the accompanying affidavit of Michael Parley (the "Parley Affidavit"), a preeminent zoning expert who provides consulting services to developers, institutions and architects for sites in New York City, there is no standard amount of deduction for mechanical equipment in residential buildings measured as a percentage of gross floor area, nor is developing a uniform standard practical. (Parley Aff. ¶¶ 6-10.) Further, there is no typical number of full interstitial mechanical floors in tall buildings, including those with so-called mechanical "voids." (Id. ¶¶ 14-16.)

1. The Amount of Mechanical Deduction as a Percentage of Gross Floor Area

The 5% rule noted by the Chair refers to the mechanical deductions on each occupied floor, which are generally 4-5% of the gross floor area on each floor. (Id. ¶ 7.) Beyond that, however, there is too wide a range of variation among buildings to indicate a uniform amount of total mechanical deductions. (See id. ¶ 8 (describing variations by building type).) For example, a low-rise building may have deductions of as low as 6%, while a taller building may have deductions up to 20% or more. Id. For that reason, "a standard measure of 'gross to zoning' does not exist and is not assumed or applied by DOB." Id. This assessment is consistent with DOB's position as presented during the Sky House proceedings; DOB submitted a letter to the Board on August 25, 2017 stating that "there is no such rule of thumb" used "to determine the maximum mechanical space allowed for a building based upon the percentage of the building's zoning floor area." (Exhibit 2 hereto at 2.)

In order to understand how the Building compares in this regard to other tall buildings, Mr. Parley prepared an analysis, attached as Exhibit 1 to the Parley Affidavit, which shows the total percentage of gross floor area that does not count towards zoning floor area, i.e., the percentage deducted, for a number of prominent buildings that fall into two categories: (a) buildings that are between 1000 and 1500 feet tall; and (b) buildings that are between 665 and

880 feet tall. This analysis was based on Mr. Parley's review of filed drawings for each building. The analysis focuses exclusively on gross floor area above grade and therefore excludes below-grade space. It does not distinguish between deductions for mechanical equipment and other deductions, such as Green Zone deductions; however, deductions other than mechanical deductions typically amount to no more than 1-2% of total building gross floor area. (Parley Aff. ¶ 8.)

The result of this analysis shows a wide variation in the amount of deductions from floor area as a percentage of total gross floor area. Among the buildings that are between 1000 and 1500 feet high, i.e., the so-called "Supertalls," the percentages range from 9.02% to 22.41%, with an average of 16.24%. (Id. ¶ 10, Exhibit 1 thereto.)[5] Among the buildings that are between 665 and 880 feet high, the percentages range from 13.45% to 21.60%, with an average of 16.87%. (Id.)

As detailed in the Parley analysis, the deductions for the building at 36 West 66th Street constitute 13.45% of total gross floor area, an amount well within these ranges and less than the averages. (Id.)

The building at 15 East 30th Street, which was the subject of Cal. No. 2016-4327-A (Sky House Condominium), has deductions that constitute 15.14% of total gross floor area, a percentage higher than that for 36 West 66th Street. (Id. ¶ 12, Exhibit 1.) The owner in that proceeding stated that mechanical deductions in the building constituted 5% of the total above-grade square footage, Cal. No. 2016-4327-A, 3; however, Mr. Parley finds that this figure is not supported by the calculations set forth in the ZD-1 for that building, dated October 5, 2017. (Parley Aff., Exhibit 1.)

2. The Number of Full Interstitial Mechanical Floors

For each building in the two categories considered above (buildings between 1000-1500 and 665-880 feet tall), Mr. Parley also identified the number of full mechanical floors exclusive of rooftop mechanicals, i.e., so-called full "interstitial" mechanical floors.

The results show that there is a wide variation in the number of such interstitial full mechanical floors within the sample, ranging from 2 floors (1 building) to 3 floors (3 buildings) to 4 floors (4 buildings) to 5 floors (1 building) to 6 floors (2 buildings) to 12 floors (1 building). (Parley Aff. ¶ 14, Exhibit 1.) The analysis thus shows that the number of full interstitial mechanical floors at 66th Street (4 floors) is in no sense an outlier, or otherwise indicative of an excess amount of mechanical space. It is entirely within the spectrum of the number of such floors in other tall buildings.

At the Board's September 17 Public Meeting, the Chair suggested that existing buildings with mechanical "voids" identified to the Board in the proceedings under Cal. No. 2016-4327-A each had three full floor interstitial floors. (Transcript 2 at 26). However, Mr. Parley's analysis

[5] These statistics do not include one building included in the analysis, 111 West 57th Street, which Mr. Parley describes as a statistical anomaly with deductions of 49.36%. Mr. Parley attributes this to the building's very small floor plates, which resulted in a stacking of mechanical equipment on multiple floors. (Id. ¶ 9)

shows that 220 Central Park West, 111 West 57th Street, 217 West 517 Street and 432 Park Avenue, all cited to the Board in that proceeding as buildings with mechanical "void" spaces each have greater numbers of such floors. See Cal. No. 2016-4327-A, 5. (Parley Aff. ¶ 14, Exhibit 1.)

In sum, the Parley analysis demonstrates, in response to the questions raised by the Chair at the Board's September 17 2019 Public Meeting, that the amount of mechanical space and number of full mechanical floors in the Building are comparable to that found in similar tall buildings and are in no sense atypical. These comparisons to other buildings belie any claim that the amount of mechanical space and numbers of mechanical floors in the Building are improper or excessive.

B. The DOB Draft Bulletin Cited and Relied Upon by LW Does Not Dictate the Amount of Mechanical Deductions at the Building

LW argues that the mechanical deductions approved by DOB for floors 15, 17, 18 and 19 are improper based on an analysis prepared by Michael Ambrosino which purports to apply a method derived from a draft Buildings Bulletin, dated 2013 (the "Draft Bulletin") relating to mechanical equipment. Mr. Ambrosino states in his affidavit that the Draft Bulletin "provided the criteria for determining floor area deductions [in his analysis]" and concludes that floors 15, 17, 18 and 19 fail to meet those criteria. (Ambrosino Aff. at 2.) However, the Draft Bulletin has not been promulgated, and does not dictate how mechanical deductions are made.

It is DOB procedure to publish final Buildings Bulletins and post them on its website with an issuance date and bulletin number.[6] The Draft Bulletin is not posted on the website, and permit applicants are under no notice that it applies.

The history of the Draft Bulletin illustrates why it has not been adopted and is not operative. A first draft of the Draft Bulletin was circulated by DOB to industry professionals for review and comment in 2012. (Parley Aff. ¶ 17.) Since that time, revised versions of the Draft Bulletin have been circulated for review and comment no less than five times, the most recently in 2015, a copy of which is attached hereto as Exhibit 3. (Id. ¶ 17.) (The document cited by and relied upon by Mr. Ambrosino is in fact a superseded draft circulated in 2013). Since 2015, there have been no indications that DOB is engaged in efforts to finalize and promulgate a Bulletin. (Id.)

Over the years, industry professionals have raised significant issues and problems with respect to the Draft Bulletin. This is undoubtedly one of the reasons why, almost eight years after the first version was circulated by DOB for comment, it has not been adopted. (Id. ¶ 22.) Industry issues and concerns regarding the Draft Bulletin (including, in particular, how its various provisions would apply to severely restrict the deduction of an open floor from the calculation of floor area), have generally fallen into three categories:

[6] See NYC Buildings, 2019 Buildings Bulletins, https://www1.nyc.gov/site/buildings/codes/building-bulletins-current.page.

First, industry professionals have expressed concern that Section A(1) of the Draft Bulletin, which lists the types of mechanical equipment that qualify for a floor area deduction, is under inclusive. The list has been expanded over time, but industry professionals have identified additional types of equipment that are not listed and should be included. (See Parley Aff. ¶ 20; Russo Aff. ¶ 9.) These include, by way of example: expansion tanks, air separators, VFDs, control panels, HVAC chemical treatment stations, pool equipment rooms.

Second, industry professionals have pointed out that Section A(2) of the Draft Bulletin would unduly restrict mechanical deductions for areas needed to service equipment. In this regard, the Draft Bulletin only permits deductions of floor space for equipment service areas (a) in the amount of a 1:1 ratio of equipment area-to-adjacent service area or (b) as set forth in the manufacturer's specifications for the equipment. However, a 1:1 ratio of equipment area-to-adjacent service area is typically insufficient and the clearance requirements set forth in manufacturer's specifications are generally the bare minimum only (e.g., limited to the amount of space needed to swing open an access door to a piece of equipment). Neither standard adequately accounts for the amount of space needed to perform a variety of activities, for example, to walk around an entire piece of equipment, open up the piece of equipment, remove parts from within the equipment and set them down safely on the floor, or temporarily remove or replace the entire piece of equipment or large components thereof from the floor. (See Parley Aff. ¶ 20; Russo Aff. ¶ 10.) The Draft Bulletin also does not recognize the need for adjacent service area for horizontal piping and ducts. (See Russo Aff. ¶ 11.)

Third, industry professionals have also advised DOB that the Draft Bulletin does not adequately account for the fact that mechanical floors, like any floor, require corridors, vestibules and general access routes that allow an individual to traverse the floor and that meet life safety requirements for evacuation in an emergency. The 2015 version of the Bulletin continues to present issues in this regard, since it effectively allows a maximum of only 10% of the floor space to be deducted for circulation purposes. (See Parley Aff. ¶ 21; Russo Aff. ¶ 12.)

Overall, the standard set forth in the Draft Bulletin which allows for deduction of a full floor only where at least 90% of the floor space is occupied by mechanical equipment and adjacent service area is unduly rigid and artificial (and, for various reasons such as those outlined above, is virtually impossible to achieve under the terms of the Draft Bulletin). (See Russo Aff. ¶ 15.)[7]

[7] Further, the Draft Bulletin assumes that it is possible to produce an exact calculation of the amount of mechanical equipment and related access space on the basis of MEP drawings submitted during the permit application phase, despite the fact that these drawings do not fully depict the dimensions of certain types of equipment. In particular, the MEP drawings do not fully depict the dimensions of most pipes, ducts and other connections. Instead, these are most often shown on the MEP drawings using a simplified graphic to indicate their location, e.g., a single line or two lines. The exact locations of these connections and their actual width is depicted on shop drawings produced only at a later date. For this reason, the MEP drawings tend to understate the actual amount of area occupied by mechanical equipment. (Russo Aff. ¶ 14.) Exhibit A to the affidavit of Luigi Russo consists of two diagrams showing a portion of a mechanical floor in an existing building. The first shows the space as depicted on an MEP drawing; the second shows the same space as depicted on a shop drawing. The difference between the two is striking, and demonstrates how the shop drawings "densify" what is only shown in outline on MEP drawings.

The accompanying affidavits of Michael Parley, Igor Bienstock and Luigi Russo, three industry professionals who work in different disciplines (Parley - Zoning Consultant; Bienstock - Mechanical Engineer; and Russo - Architect), each make clear that the Draft Bulletin is not reflective of current DOB practice. (See Parley Aff. ¶ 22; Russo ¶¶ Aff. 4-5; Bienstock Aff. at 2.) As stated by Mr. Russo:

> Based on my professional experience, DOB's review of the mechanical plans for 36 West 66th Street was typical of how DOB reviews mechanical plans in the normal course of plan examination. The plan examiner reviews each floor by examining all of the drawings for a floor relating to each mechanical trade: HVAC mechanical ductwork, HVAC mechanical piping, fire protection, and plumbing. These drawings *in combination* provide the plan examiner with an understanding of the overall use of the space. Based on this examination, the plan examiner determines both whether the space is occupied by mechanical equipment and whether the type and amount of equipment is generally consistent with that found in a residential building.
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> In my experience, DOB has not required a calculation of the area of each piece of equipment, and has not applied a fixed ratio of area of equipment to overall floor space in determining whether to allow for deduction of an entire floor. Rather, examiners seek to ensure that the floor will be devoted to housing mechanical equipment and cannot realistically be occupied for other purposes.
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> (Russo Aff. ¶¶ 4-5.)

The affiants' description of DOB practice is consistent with discussion during the proceedings in Cal. No. 2016-4327-A (Sky House Condominium). Significantly, DOB made no reference or citation to the Draft Bulletin at the hearing or in any of its submissions in that proceeding.

The Ambrosino Affidavit nevertheless describes the Draft Bulletin as "approved 1/14/2019" (Ambrosino Aff. ¶ 2). This is flatly wrong. The copy of the 2013 version of the Draft Bulletin attached to the Ambrosino Affidavit is in fact an attachment to a ZRD-1 determination request approved by DOB on January 14, 2019, and thus bears a DOB approval stamp reflecting its approval of the ZRD-1 ("Approved With Conditions"), not the Draft Bulletin. (See ZRD-1, dated January 14, 2019, Control No. 50635, Exhibit 4 hereto.)

LW not only fails to acknowledge the source of the copy of the Draft Bulletin attached to the Ambrosino Affidavit, i.e., the ZRD-1, but also fails to disclose to the Board what the ZRD-1 determination in fact states with respect to the Draft Bulletin:

> **The attached 'draft' Bulletin has not been officially issued by DOB and may not be deemed as such**.
>
> (Exhibit 4 at 1 (emphasis added).)[8]

[8] The ZRD-1 determination request in question was made with respect to a building proposed for 1230 Madison Avenue (Manhattan Block 1500, Lot 55) and sought confirmation that the eighteenth through twentieth floors of that building would not count towards floor area, based upon a representation that these floors would consist "only of

In sum, LW's argument that DOB's approval of the mechanical deductions for the Project was improper because DOB did not review the mechanical drawings under the Draft Bulletin's standards should be rejected. The Draft Bulletin is neither adopted nor an accurate reflection of DOB practice. For this reason, as well as the reasons set forth in Section C below, Mr. Ambrosino's analysis, which assumes incorrectly that the Draft Bulletin is approved and must be followed in all respects in evaluating mechanical deductions, should be disregarded and rejected.

C. The Mechanical Floors at the Project Were Properly Deducted from the Floor Area Calculations. The Ambrosino Diagrams and Calculations are Fatally Flawed.

In its October 16, 2019 submission, DOB confirmed that floors 15, 17, 18 and 19 contain substantial amounts of mechanical equipment and that a deduction of the full floors was warranted. Its submission states:

> The Department has reviewed the mechanical drawings for the Proposed Building and has concluded that the floor space on such floors is devoted to housing the mechanical equipment of the Proposed Building and those floors cannot be occupied for purposes other than the housing of such equipment. As such, the floor space devoted to mechanical equipment is properly exempt from the zoning floor area.

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mechanical use and containing elevators, elevator vestibules, stairwells & corridors for maintenance access only." (Exhibit 4 at 3.) The ZRD-1 request did not include any detailed calculations of the mechanical deductions and other deductions from floor area.

In support of its request, the applicant cited to the provisions of Section 12-10 of the Zoning Resolution which exclude mechanical equipment from the calculation of floor area and stated further that "the Department has also used the enclosed draft Buildings Bulletin as a guide for establishing mechanical spaces that are excluded from floor area," with citation to the provisions of the Draft Bulletin which allow for deduction of a full floor that is 90% occupied by mechanical equipment and access space, as well as the stairwell and elevator shaft space associated therewith. (Id.) The DOB determination states in relevant part that:

> The request to review and confirm the proposed mechanical deductions at the 18th through 20th floors of the attached plans is approved and clarified as follows:
>
> 1. The attached 'draft' Bulletin has not been officially issued by the DOB and may not be deemed as such. However, as per DOB policy both items noted by the applicant [floor space together with stairwell and elevator shaft space] may be excluded as mechanical deductions from the zoning floor area.

(Id. at 1.) The applicant was directed to submit detailed plans for review by an examiner to verify the deductions. (Id.)

The ZRD-1 thus makes clear that the Draft Bulletin is not adopted. At the same time, it also makes clear that the deduction of an entire floor occupied by mechanical equipment, inclusive of stairwell and elevator shaft space, may be accomplished consistent with DOB policy. That policy was confirmed in BSA Cal. No. 315-08-A.

(DOB Statement at 3.)[9] DOB further provided a detailed listing of the various types of equipment located on each of floors 15, 17, 18 and 19. (Id. at 3-4.)

The DOB also provided the Board with a copy of a composite drawing for Floor 15 which overlays on a single drawing all of the separate mechanical drawings approved for that floor (HVAC mechanical ductwork, HVAC mechanical piping, fire protection, and plumbing) in order to illustrate the full range of mechanical equipment for that floor examined by DOB. Owner subsequently supplemented this composite for Floor 15 by submitting composites for Floors 17, 18 and 19.[10] The composite drawings amply illustrate that the floors are occupied by mechanical program (i.e., mechanical equipment, equipment access areas, and circulation space) throughout, and that they cannot be realistically occupied for purposes other than the housing of this equipment and associated space.[11]

Mr. Ambrosino argues otherwise, but his diagrams and analysis are replete with errors and severely understate the size and scope of the mechanical program. These errors are described in greater detail in the Russo and Bienstock Affidavits. We briefly describe them below.

First, Mr. Ambrosino fails to account for various forms of equipment that are clearly shown on the HVAC mechanical ductwork plans that he examined. In particular, he did not account for mechanical fans, heaters, shafts, chases, horizontal ductwork distribution and plenums. (Bienstock Aff. at 1.)

Second, and even more significantly, Mr. Ambrosino's analysis is based on the HVAC mechanical ductwork plans alone. That is, he omits *all* of the equipment shown on the three other sets of mechanical plans for each floor, i.e., HVAC mechanical piping, fire protection and plumbing. (Bienstock Aff. at 2.)

Third, Mr. Ambrosino applies standards in the Draft Bulletin that, as discussed above, are unduly restrictive and are not representative of DOB practice.

Lastly, Mr. Ambrosino's percentage calculations are faulty. To calculate the percentage of a floor used for equipment and service area to meet the Draft Bulletin's 90% threshold, Mr. Ambrosino includes the area of the building core, structure and curtain wall within the denominator, i.e., within the total area of the floor. However, these areas cannot be occupied by

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[9] Citations to DOB Statement refer to the Department of Building's Letter Statement dated October 16, 2019.

[10] In its October 16 submission, DOB had provided architectural drawings sheets for Floors 17, 18 and 19, which are not composite drawings and do not fully depict the various types of mechanical equipment. To provide the Board and LW with a complete and accurate set of drawings, Owner submitted composite drawings for Floors 17, 18 and 19 on October 21, 2019 as well as the mechanical equipment schedule drawings. In a letter to the Board dated November 4, 2019, DOB confirmed that the submission replacing the architectural drawings with true composite drawings was an "accurate representation of Department records" and "help[s] illustrate the complete layout of the mechanical equipment."

[11] The affidavit of George M. Janes argues that the area of FDNY corridors on the mechanical floors—areas that were requested by and designated for the FDNY in the event of an emergency—should not be deducted from floor area because FDNY access corridors are not deducted on other non-mechanical interstitial levels. However, the deduction for mechanical space is inclusive of circulation space. On floors that do not contain mechanical equipment, there is no deduction applicable to circulation space.

mechanical equipment and the building core by itself is nearly 10% of the total area of the floor. This method of calculation—which has no basis even under the rigid standards of the Draft Bulletin—virtually guarantees that an owner will be unable to deduct an entire mechanical floor.

In these ways, the diagrams and calculations provided by Mr. Ambrosino are not a fair measure of the mechanical floors at the Project. The full range of mechanical equipment is shown on the composite drawings, and these drawings accurately reflect that each floor is occupied by multiple systems of interconnected mechanical equipment and program. Exhibit B to the affidavit of Igor Bienstock provides a comparison between the diagrams prepared by Mr. Ambrosino and the composite drawings.

D. The Building Mechanical Layout Was Carefully Designed In Accordance With Best Practices To Meet the Specific Needs of the Building. Mr. Ambrosino's Hypothetical Alternative Layout of Certain Equipment for the 17th Floor Does Not Reflect A Complete Engineering Plan and is Unrealistic

In his affidavit, Igor Bienstock, a highly experienced engineer retained to design the mechanical layouts for the Building, explains that there are a host of considerations an engineer must take into account, including accessibility, constructability, proximity of equipment and systems to the occupied spaces they serve, required separations between specific systems, and proximity to exterior walls for air intake and exhaust, among others. (Bienstock Aff. at 3.) These considerations are highlighted in Mr. Bienstock's detailed description of the equipment found in each of Floors 15, 17, 18, and 19. (Id. at 4-8.) That description details why certain pieces of equipment are best located on a particular floor, why various types of equipment must be located in close proximity to each other, and why certain equipment is best located in a particular area within a floor. For example:

- The southern portion of the fifteenth floor contains the generator because the generator requires intake and exhaust louvers for ventilation and the louvers are only available at this location. In turn, the fifteenth floor contains the automatic transfer switch (ATS) because it is efficient to have the ATS located on the same level as the generator. The electrical room in which the ATS switch is located is positioned on the northern portion of the fifteenth floor for its close proximity to the shaft carrying emergency risers to serve the floors above.

- The seventeenth floor houses the central heating plant for the building and is located in the middle of the building to serve apartments both below and above. The boiler room was located on the east side of the floor for proximity to an air intake louver. The air handling unit is located on the northern portion of the floor to serve the amenity space on the 16th floor below.

- The eighteenth floor contains equipment to serve all building cooling needs. The eighteen water cooled chillers, primary and secondary chilled water pumps and secondary condenser water pumps are located on the eastern portion of the floor because it is the most efficient location to distribute to the chilled water pipe riser locations, which are dictated by the apartment layouts above. Primary condenser pumps are located on the

western portion of the floor due for proximity to piping risers. Heat exchangers are located in the middle between these two areas as a central location to minimize piping distribution on either side.

- The nineteenth floor contains the air handling units that serve the residential units directly above. The units are located on the eastern portion of the floor for adjacency to the intake air louver as well as to the riser locations. The floor also contains a water reserve storage tank room and accompany fire pump room; it is necessary to locate the fire reserve tank in the middle of the building to maintain require pressure at the sprinkler heads and the standpipes located in the intermediate zone.

The Bienstock affidavit amply illustrates that the design of a mechanical floor layout is not a random affair, but is guided by a host of complex and interrelated considerations in order to promote safety and operational efficiency. No two buildings are exactly alike, and, in particular, there is no cookie cutter method of designing a layout for a large building such as 36 West 66th Street.

In his affidavit, Mr. Ambrosino proposes an alternative layout for certain equipment located on the 17th floor in order to demonstrate how less floor space could be used for mechanical equipment than under the plan Mr. Bienstock has designed. The Board should not credit this argument because it applies the wrong legal standard and the analysis is both flawed and incomplete.

DOB reviews mechanical plans to ensure that the floors are devoted to housing mechanical equipment for the building and those floors cannot realistically be occupied for other purposes. In doing so, DOB does not substitute its judgment for that of the mechanical engineer to determine whether the mechanical layout is well-designed, optimal for the needs of the building, and efficient. In particular, DOB does not consider alternative layouts or require that the mechanical engineer demonstrate that its layout conserves more floor space than alternate approaches. DOB is neither charged with this responsibility nor equipped to make this determination; there is, in any event, no basis to assume that having equipment occupy the minimum amount of space on a floor equates to mechanical efficiency. Rather, the mechanical engineer must consider a number of factors related to operational efficiency and safety, as outlined by Mr. Bienstock in his affidavit. (See id. at 3.)

Regardless, Mr. Ambrosino's alternative layout is a fiction. Quite simply, the alternative design was prepared without any investigation into the particulars of the building and is wholly unconstrained by any of the detailed considerations which govern Mr. Bienstock's actual design. Mr. Ambrosino in fact acknowledges that there are numerous design criteria that apply to mechanical layouts, but that he is "not privy to the original design principles for the HVAC systems for this building." (Ambrosino Aff. at 2.) He nevertheless puts forward what is essentially a cartoon, based on what he calls a "more aggressive design concept and philosophy." (Id. at 3.)

The diagram provided by Mr. Ambrosino depicts nine pieces of equipment that could purportedly be moved from the western portion of the floor to the eastern portion of the floor

(although only *eight* of those pieces of equipment appear in the "consolidated" layout). Mr. Bienstock outlines several reasons why this is not workable, as follows:

- The diagram used in the proposed layout does not depict all of the mechanical equipment on the floor. It does not depict certain pieces of equipment shown on the mechanical ductwork plans (expansion tanks, air separators, pumps, water source heat pumps, fans, VFDs and control panels). It also does not depict any of the equipment shown on the remaining sets of mechanical plans (HVAC mechanical piping, fire protection and plumbing).

- The proposed layout does not show or provide space for the necessary piping and ductwork distribution that connects to the HVAC equipment and the routes to the locations they serve. Much of the distribution system is routed to specific shaft locations that align with the apartment floor layouts above or below.

- Taking into account the omitted pieces of equipment, the alternative layout would not allow for adequate access to the equipment and circulation space and it could not be properly installed.

- The diagram used in the proposed layout also does not depict any equipment remaining on the western portion of the floor. However, there are additional pieces of equipment (fans and air handling units) and horizontal connection located on the western portion of the floor. The fans and air handling units require proximity to the air intake and exhaust louvers present only on that side of the floor and the horizontal connections are routed based on the floor layouts below. As a result, this equipment could not be relocated and removing the nine pieces of equipment would not empty the western portion of the floor.

III. CONCLUSION

For the reasons set forth above, this proceeding should be dismissed because the Board does not have statutory authority and jurisdiction to entertain these arguments. If the proceeding is not dismissed, the appeal application should be denied on the merits.