

AFFIDAVIT OF MICHAEL PARLEY

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

Michael Parley, being duly sworn, deposes and says:

1. I am the President of Development Consulting Services, Inc. (“DCS”), a firm which provides zoning consulting services to developers, institutions and architects related to New York City property. Prior to forming DCS in 1984, I held positions as an urban designer and planner at the New York City Department of City Planning (the “DCP”). While at the DCP, I wrote many zoning texts including Midtown zoning, plaza zoning and others. In total, I have over 46 years of concentrated, continuous experience as a zoning specialist.
2. I have worked on behalf of building owners and developers with respect to hundreds of residential and commercial buildings both large and small in New York City. I have extensive knowledge of the Zoning Resolution in its details, conceptual underpinnings and its day to day applications and interpretation by the Department of Buildings (the “DOB”) and the DCP. I have acceded to the level of a preeminent expert on the subject within the private sector, attributable to, at least, longevity but I would like to think to acuity also. In addition to providing consulting services, I participate in industry activities, mainly through the professional committees of the Real Estate Board of New York (“REBNY”). I am qualified as an expert by the New York State Supreme Court, as well as by many appraisers who engage me as an expert witness for arbitrations and eminent domain proceedings.

3. I have acted as zoning consultant to the owners of 36 West 66th Street in connection with the development at that site approved by DOB. I submit this affidavit in opposition to the arguments made by Landmark West! in BSA Cal. No. 2019-94-A that the mechanical deductions from the calculation of floor area for the building are not permitted under the Section 12-10 definition of “Floor Area,” as well as in order to address certain questions regarding mechanical space raised by the Chair at the Board’s September 17 Public Meeting.

4. More specifically, I address two points below:

First, I submit that there is no standard amount of deduction for mechanical equipment in residential buildings measured as a percentage of gross floor area, nor a typical number of mechanical floors, nor is developing one standard practical. Additionally, I submit and will show that the subject building is within the statistical norm both as to amount of mechanical space and the number of those floors; and

Second, that Landmark West!’s citation to draft Buildings Bulletin 2013-xxx (the “Draft Bulletin”) as a source of fixed standards for determining what qualifies as mechanical equipment and how determinations are made whether a full floor may be deducted from the calculation of Floor Area is misleading and ignores the reasons why a final version of this Bulletin has not been promulgated. The Draft Bulletin has no official status, as has been specifically recognized by the DOB itself.

**THERE IS NO STANDARD AMOUNT OF DEDUCTION
FOR MECHANICAL EQUIPMENT IN RESIDENTIAL BUILDINGS,
NOR A TYPICAL NUMBER OF MECHANICAL FLOORS**

5. 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 is appropriate, based on a standard formula. The Chair cited what she described as a "5 percent rule" in effect at one time. (September 17 Transcript at 15); and

Second, whether there is a typical number of full interstitial mechanical floors in buildings similar to 36 West 66th Street. 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 36 West 66th Street has four such floors. (September 17 Transcript at 26).

My responses are below.

The Amount of Mechanical Equipment Deduction

6. The first question raised by the Chair was also raised previously by members of the City Planning Commission (the "CPC") during its deliberations over the Mechanical Voids Text Amendment (CPC N190230 ZRY), with Planning Commissioners asking me and others whether provisions of the Zoning Resolution governing residential buildings should be amended to establish a cap upon the maximum amount of gross floor area in and above zoning floor area. My answer to the CPC was, and remains, "no" for reasons explicated herein.
7. The Chair's 5% "rule of thumb" for deductions is correct, but only as far as it goes. It is not complete in consideration for how much mechanical and other deductions are incorporated in a building. In our practice, for bulk studies, we empirically allot a basic 4-

5% of the gross floor area on each occupied floor for mechanical deductions (5% when a heat pump system is used, now more common than the old P-tacs, the latter of the two fit into a sleeve under a window and are not deductible from ZFA.) The 5% rule of thumb is, however, merely a starting point, with other deductible items over and above the 5%, as explained following. Moreover, in further response to the Chair, the DOB has no standard for percentages of mechanical deductions.

8. We have seen that the gross area of residential buildings varies widely by project and by building type. Excluding below grade space, i.e. cellars, from consideration, so that we are considering above grade space only, below are factors which we would expect to see with respect to “deductions” or exclusions in a residential project (of course not all will exist in the same building):
 - a. As already mentioned above, for a residential building, we would expect standard mechanical deductions of 4-5% for every occupied floor. This would consist of space for ducts, shafts, plumbing chases, as well as mechanical equipment in each dwelling unit (heat pumps), etc. on each floor, but not other deductible areas, specifically such as full or partial mechanical floors.
 - b. Quality Housing deductions for a QH building can be 3-5% additional per occupied floor (range attributable to the disparate amounts of corridor deductions one encounters).
 - c. Green zone deductions for exterior wall and extra wide stairs can yield another 2% deduction.
 - d. Where there are full interstitial mechanical floors, each of these levels can typically add 2-3% additional, depending on the floor size. In high rise buildings, there may be

more than one interstitial mechanical floor, which floors which may be grouped together.

- e. Mechanical equipment, stair bulkheads and elevator overruns, at the roof level, add 2-5%.
- f. Elevator machine rooms of low-rise elevators above the last floor at which they stop, add 1-2% more.
- g. Buildings being constructed in flood zones have to take almost all of their mechanical equipment out of the cellars and place them above grade, i.e., boilers, emergency generators, pumps for domestic water and sprinklers, etc. All these are placed above grade when they would otherwise be in the cellar if not in a flood zone. This could add 2-3%.

Thus, there is too wide of a range to establish a uniform standard. A low-rise building could have as low as 6% above grade deductible for various features, while a taller building may have up to 20% deductions or more. For example, a QH building in a flood zone may have 22% deductions, while a standard 32-35 story tower on a base building (w/o QH deductions) outside the flood zone might have only 5% deductions per occupied floor, perhaps overall 7% with Green Zone deductions, and with rooftop mechanical space adding another 2-4% for a total of 9-11%. Some tower on a base buildings are allowed QH deductions and thus might have an overall gross that is 15% higher than their ZFA. Very tall high rises, say 600' tall or higher, could have one, two, or (as the height increases) even three levels of interstitial mechanical floors, with each such level adding at least 2-3% to the gross. Thus the percentage number is highly variable and unpredictable, not supportive of nor conducive of

establishing overall “rules of thumb.” Accordingly, a standard measure of “gross to zoning” does not exist and is not assumed or applied by DOB.

9. In order to provide some specific back-up to the above, I have prepared an analysis, attached as Exhibit 1 hereto, which shows the percentage of gross floor area that does not count towards zoning floor area, i.e., the percentage deducted, for a number of prominent buildings falling into two categories: (a) buildings that are 1000-1500 feet tall; and (b) buildings that are 665-880 feet tall. The analysis is based on my review of filed drawings for each of the buildings. It focuses exclusively on gross floor area above grade and therefore excludes cellar space. It does not distinguish between deductions for mechanical equipment and other deductions, such as Green Zone deductions; in my experience deductions for other than mechanical equipment typically amount to no more than 1-2% of gross floor area.
10. The results of the analysis show a wide variation in the amount of deductions from floor area as a percentage of total gross floor area. Among the buildings which are between 1000 and 1500 feet high, the so-called “Supertalls,” the percentages ranges from 9.02% to 22.41%, with an average of 16.24%. These statistics do not include 111 West 57th Street, a statistical anomaly with 49.36% deductions, probably due to stacking of mechanical equipment in multiple floors due to the building’s very small floor plates. Among the buildings between 665 and 880 feet high, the percentages range from 13.45% to 21.60%, with an average of 16.87%.
11. As shown in my analysis, the deductions for the building at 36 West 66th Street constitute 13.45% of gross floor area, well within these ranges and less than the averages.

12. It deserves mention that 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 gross floor area, a percentage higher than that for 36 West 66th Street. (I understand that 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, this figure is not supported by the calculations set forth in the ZD-1 for that building, dated October 5, 2017, which I reviewed as part of my analysis.) In short, the analysis shows that the amount of gross floor area at 36 West 66th Street deducted from the calculation of floor area is not an outlier or in any way atypical.

The Number of Full Mechanical Floors

13. With respect to the second question raised by the Chair, my analysis shows each building the number of full mechanical floors exclusive of the rooftop mechanicals, i.e., so called “interstitial” floors.
14. The results show that there is a wide variation in the number of interstitial floors, 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).
15. At the Board’s September 17 Public Meeting of the Board, the Chair noted that the buildings with mechanical voids identified to the Board in the proceedings under Cal. No. 2016-4327-A each had three full floor interstitial mechanical floors. However, my analysis shows that 220 Central Park West, 111 West 57th Street, 217 West 57th Street, and 432 Park Avenue, cited in that proceeding, each have greater numbers of such floors.
16. In short, the analysis shows that the number of full mechanical floors at 36 West 66th Street (four) is not an outlier or in any way atypical.

THE DRAFT BULLETIN IS NOT OPERATIVE DUE TO SIGNIFICANT DEFICIENCIES AND INDUSTRY CRITIQUES OF ITS METHODOLOGY. AT MOST, IT OCCASIONALLY PROVIDES INFORMAL GUIDANCE IN PLAN EXAMINATION

17. A first version of the Draft Bulletin relied upon by Landmark West! was provided by DOB to the development community for comment in March of 2012, with 5 revisions circulated by DOB for further comment in 2012, 2013 and 2015, for a total of 6 versions of the draft that I know of. (The November 6 Landmarks West! submission to the BSA attaches a 2013 revision which is not the most recent draft. In fact, there were two later drafts with concomitant changes). There have been no further revisions since 2015, and to my knowledge DOB's efforts to promulgate a further Draft Bulletin, or even a final, are no longer on going.
18. The originally stated purposes of the Draft Bulletin were to: (1) stop various abuses of mechanical deductions (such as ne'er-do-well applicants placing an HVAC heat pump in the corner of a bedroom and then deducting the whole bedroom as mechanical, or at least attempting to), (2) "regularize" standards governing the types of mechanical equipment which may be excluded from the calculation of Floor Area, and (3) address the results of BSA Cal. No. 315-08-A. In revisions after the first draft of March 2012, it also sought to establish a methodology for determining the circumstances under which a room or open floor layout may be deducted entirely from the calculation of Floor Area on the basis of the amount of floor space within the room or open space layout that contains qualifying mechanical equipment or is necessary for purposes of access and servicing of the equipment.

19. I participated in the extensive reviews of successive versions of the Draft Bulletin undertaken by architects, engineers and others under the auspices of a REBNY committee (the “Review Committee”). From the outset, the professionals on the Review Committee had serious concerns about numerous aspects of the Draft Bulletin and its implications.

20. These concerns included, among many others, the following:

- **Incomplete List of Deductible Mechanical Equipment:** The first Draft Bulletin was a sparse 2 pages. The list of mechanical equipment which would have been deducted from Floor Area set forth in the first Draft Bulletin did not include a variety of equipment types that are part of base building systems. For example, it did not include deductions for fuel pumps, elevator machine rooms, water tanks, steam equipment risers, and emergency generators. Over time and in response to comments made by the Review Committee, the list was expanded to include many previously omitted items. The 2015 Draft Bulletin still does not permit, for example, a deduction for building-system wide telecom equipment, which the architects and the building industry believe is an omission still to be corrected.
- **Inadequate Allowance for Deduction of Floor Space for Direct Access to and Servicing of Equipment and Circulation to and around the Equipment:** The Draft Bulletins appeared to the architects, engineers and builders to be unrealistic in what they were allowing for space around mechanical equipment in every Draft of the Bulletin, inclusive of the 2015 Draft. The Second Draft Bulletin provided that floor space directly adjacent to

mechanical equipment necessary for the purpose of access and servicing of the equipment can be deducted from the calculation of Floor Area based on either of two standards: (a) a 1:1 ratio of equipment area-to-adjacent service area; or (b) the Manufacturer's recommendation for accessing and servicing area for a particular equipment item or clearance specified by NYC construction and electrical codes. (The sixth, 2015 version of the Draft Bulletin adds a 3' X 3' area for each electrical service panel and fire alarm control panel.) From the outset, the Review Committee determined that the 1:1 ratio of equipment area-to-adjacent service area is too limiting and that strict reliance on a Manufacturer's specifications for access and servicing a particular form of equipment is too restrictive since these specifications typically only include the immediately adjacent access requirements (e.g., how much space it takes to open an access panel). They do not typically address the amount of space needed to work efficiently to make repairs or remove and replace equipment.

- **Failure to Account for Circulation Space:** Early versions of the Draft Bulletin did not account for access/egress routes and corridors within an open floor layout providing access to and from mechanical equipment, thereby requiring that this space be counted towards Floor Area. Subsequent versions of the Draft Bulletin allows for circulation space on an open floor to be deducted from "Floor Area," but only under a residual provision that allows a maximum 10% of the floor space to be deducted for additional area not expressly listed therein Section A. This formulation is far too restrictive.

21. As a result of the above, as well as other limitations and restrictions in the Draft Bulletin, members of the Review Committee determined that the provisions of the Draft Bulletin which allow a full open floor to be deducted from the calculation of Floor Area only when 90% of the floor space is occupied by deductible equipment and floor space required for access and servicing (each as defined under the Draft Bulletin) are unduly restrictive. Test fits showed that under the standards set forth the Bulletin, an overall deduction of approximately 60% only would be more typical. In the absence of any basis in the Zoning Resolution for a 90% threshold, and given the various limitations upon the ability to achieve it under the standards of the Draft Bulletin, the 90% figure was a matter of great concern among the members of the Review Committee. Extensive analyses by the architecture firm of Skidmore Owings and Merrill (“SOM”) were especially convincing as to the inadequacy of the Draft Bulletins’ proposed standards. Later versions of the Draft Bulletin respond in certain ways to the analytics provided by SOM and other architects, but do so in a limited fashion. For example, “circulation space” can be deducted under later versions, but only to a degree and within narrow limits.
22. The significant problems with the Draft Bulletin raised by the Review Committee are undoubtedly one of the reasons why, almost eight years after the first version was circulated by DOB for comment, it has not been adopted and is not operative as a set of “rules.” This does not mean, however, that it has no relevance. In my experience, it is used in the following limited way: I have observed instances where a DOB examiner has issued an objection disallowing the deduction of particular type of equipment, which the applicant feels is unjust or incorrect. In such instances, if the architect can point to the Draft Bulletin as evidence that DOB accepts the equipment as deductible from Floor

Area, the matter is typically resolved in the applicant's favor. Empirically, and in consultation with architects and expeditors who are constantly in front of DOB, it is rare, at best, and unheard of, at worst, for an examiner to use the Draft Bulletin as a set of rules or a checklist. For example, in DOB plan examination, should there be an instance where there is some question about the amount of deductible area in a mechanical room or area, where the stringent 90% standard set forth in the 2015 Draft Bulletin is met, inclusive of adjoining servicing and circulation space, there is no doubt that DOB will accept a deduction of the entire floor. Satisfaction of its standards thus provides a kind of 'safe harbor' for applicants. Importantly, however, failure to strictly adhere to the Draft Bulletin's standards is not a disqualification. In these ways, the Draft Bulletin operates as guidance only.

23. This is reflected in a ZRD-1 determination issued by the DOB in January 2019 with respect to a building proposed for 1230 Madison Avenue (Manhattan Block 01500, Lot 0055) (Control No. 56035) (the "ZRD-1"). The ZRD-1 determination request in that case sought confirmation that the eighteenth through twentieth floors of that building would not count towards Floor Area, based upon a representation that the eighteenth through twentieth floors would consist "only of mechanical use and containing elevators, elevator vestibules, stairwells & corridors for maintenance access only." (ZRD-1 at 3.) The ZRD-1 request did not include any detailed calculations of the mechanical deductions and other deductions from Floor Area.

24. 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: "Additionally, the Department has also used the enclosed draft

Buildings Bulletin as a guide for establishing mechanical spaces that are excluded from floor area [with two citations to provisions of the Draft Bulletin].” (ZRD-1 at 3.)

25. In its determination, the DOB stated, 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 and stairwell and elevator shaft space] may be excluded as mechanical deductions from the zoning floor area.

(ZRD-1 at 1 (emphasis added).)

The applicant was directed to submit detailed plans for review by an examiner to verify the deductions.

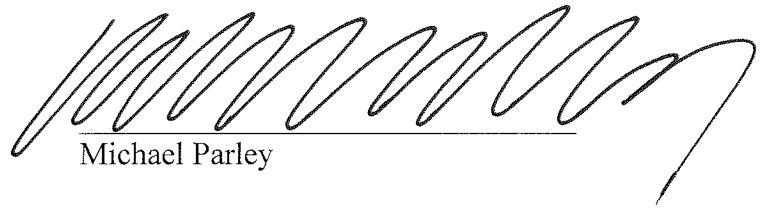
26. The ZRD-1 demonstrates the present status of the Draft Bulletin. It is not adopted but can serve to provide guidance, mainly for the benefit of applicants. As a practical matter, where its standards are met, an application’s mechanical deductions should be unassailable. This does not mean, however, that DOB will even reference the Draft Bulletin in plan review, and it certainly does not apply those standards rigidly, such that, for example, mechanical equipment not found on the list of deductible equipment in the Draft Bulletin is automatically excluded from the calculations of deduction. It also does not mean that DOB applies the Draft Bulletin such that deduction of a full floor from the calculation of Floor Area is disallowed if equipment access clearances exceed a 1.1 ratio or the manufacturer’s specifications. Those reference standards and calculations are, to my knowledge, quite frankly, never invoked on a day to day practical level. A fair

description of the role played by the Draft Bulletin in practice is that, where a concern is raised about a deduction in plans in front of a DOB examiner, it provides some guiding principles regarding deductions for mechanical equipment and related floor space.

27. Landmark West!, I suspect is not aware of the foregoing administrative history and practices. Or maybe it was, but chose to ignore same. The copy of the Draft Bulletin which Landmark West! attaches as an exhibit to its November 7 Supplemental Statement is in fact Attachment 2 to the ZRD1, is included therein as pages 5-7 of the ZRD1 determination, and bears DOB's approval stamp ("Approved With Conditions") for Control No. 50635. Yet Landmark West! has failed to disclose to the Board that the copy of the Draft Bulletin it attaches is part of the ZRD1. More importantly, it has failed to disclose what DOB's ZRD1 determination states: "The attached 'draft' Bulletin has not been officially issued by DOB and may not be deemed as such." (ZRD-1 at 1 (emphasis added).) Moreover, even in 2019, when this ZRD1 was approved, the Draft Bulletin that was supplied to the examiner had already been superseded by later Drafts (the specific one used was #4 of 6 Draft Bulletins); more recent versions of the Draft Bulletin contain some changes from the version cited by Landmarks West!, such as the limited allowance for circulation space on a mechanical floor noted above.


28. In conclusion, I submit that my empirical knowledge, and recent research, of the practice of mechanical deductions yields no possible uniform "standard" for deductions, that the per cent of deductions and number of full mechanical floors are highly varied from building to building, and that the DOB Draft Mechanical Bulletin, never completed nor issued in final form, is referenced only occasionally, and usually only where an applicant for a building permit uses it to correct what they perceive to be a serious misjudgment in

plan examination. Lastly, my research has shown that the subject building is statistically consistent with other contemporary buildings in both the number of mechanical floors and the percentages of deductions from the gross floor area, and even more modest in these criteria than many of the others.



Michael Parley

Sworn to before me on
this 27th day of Nov., 2019



Notary Public

MALCOLM A. KAYE
Notary Public, State of New York
No. 01KA6242573
Qualified in New York County
Commission Expires June 6, ~~2016~~
2023