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SUPPLEMENTAL STATEMENT OF FACTS

BSA Calendar No: 2019-94-A

Premises:	36 West 66th Street, a/k/a 50 West 66th Street, Manhattan Block 1118, Lot 45 ("the Parcel")
Determination Challenged:	Issuance of Permit No. 121190200-01-NB ("the Permit")

Appellant LandMark West! ("LW!") submits this supplemental statement of facts to address the FAR deductions taken on the April 4, 2019 Zoning Diagram (ZD1 form) for the mechanical equipment on the 15th, 17th, 18th and 19th floors.

At the outset, LW! wishes to address the rather peculiar path that the DOB and Developer took with respect to the supplemental submissions. On September 17, 2019, the Board stated that it would be severing and continuing review of the issue of FAR deductions for mechanical equipment areas. To that end, the Board requested additional analysis from the DOB, LW! and Developer according to a particular schedule. The Developer was supposed to have provided all the relevant plans and equipment specifications in time to enable the DOB to produce complete analysis on or before October 16, 2019. Commissioner Scibetta also requested from Developer the mechanical plans for the original building, developed prior to the PAA. These are critical for any sober analysis of the mechanical deductions.[1]

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[1] Developer has apparently ignored this request.

Then, it would be LW!'s turn to submit a response to the DOB's analysis by November 6, 2019. Developer specifically requested that it have an opportunity to review LW!'s submission before submitting its own response. Therefore, the Board set November 27 as the deadline for Developer's submission. The continued hearing is currently scheduled for December 17.

On October 16, 2019, the DOB submitted what it purported to be its analysis. It annexed certain mechanical plans, including the composite plans that Developer prepared on the DOB's request and turned over to the DOB on October 11, 2019. At the present time, it is not necessary to flesh out the woeful deficiency of the October 16 submission. Suffice it to say that the DOB submitted a hollow and superficial statement, with no supporting analysis from a single engineer. On top of that, the attached exhibits were quite minimal, as they contained no specifications on the equipment to be used in claimed mechanical spaces. Without such specifications, it is simply not possible to determine that the foot print and service area for the equipment marked on the plans matches the equipment's operational requirements.

Apparently realizing the extent of deficiency of the DOB's October 16th submission, Developer volunteered, out of turn and without BSA's prior permission, a statement with annexed schedules of plans and list of equipment on October 21, 2019. Not surprisingly, the October 21 plans did not completely match the plans submitted by the DOB on October 16. For example, the following additional plans were added: M-307.00, M-316.00, M-319.00, M-320.00, M-321.00. The equipment schedule was completely new and something that LW! had not seen before and was not able to obtain earlier: M-501.00, M-502.00, M-503.00, M-504.00.

Upon receipt of the October 21st submission, the undersigned reached out to the DOB's counsel, Mr. Michael Zoltan, on October 23, 2019 to confirm if the DOB's October 16th analysis

was based on review of the additional drawings disclosed by Developer on October 21. The following day Mr. Zoltan responded:

> The Department's October 16, 2019 analysis was based on a review of all the plans approved prior to permit issuance. The "composite drawings" are based on the approved plans.

Finding this answer to be underwhelming to say the least, the undersigned sent another email on October 24, 2019, asking for clarity and specificity as to the discrepancy between the plans that DOB and submitted separately. This clarification was important simply because at the September 17, 2019, the Board instructed Developer to first provide the DOB with all necessary documentation and for the DOB to then analyze it. If there was something that DOB missed or failed to analyze, it could certainly impact its analysis. LW!'s obligation to respond should be triggered only after the DOB prepares its final, not intermediary, analysis.

Mr. Zoltan did not respond to the October 24, 2019 email. On October 29, 2019, the undersigned emailed Mr. Zoltan yet again, asking for the response. The silence from Mr. Zoltan was denser than the London fog in Conan Doyle's stories. (Relevant emails are annexed hereto as Exhibit A). On November 1, the undersigned reached to the BSA to seek guidance, as LW!'s engineers were simply not certain as to what weight to give to Developer's October 21 submission without confirmation from Mr. Zoltan. (Email of Stuart A. Klein is annexed hereto as Exhibit B).

On November 4, mere two days before the November 6th deadline, and 11 days after the initial request for clarification, Mr. Zoltan submitted a formal response where he addressed the discrepancy and for the first time confirmed that the additional plans were filed and approved by the DOB and that the DOB had them at its disposal prior to submitting its statement on October 16. (Exhibit C). The November 4th statement made no mention of whether these plans were ever

reviewed. Given the history of DOB's delays, obfuscations and incomplete responses, that these plans were overlooked. After all, they were not included in the October 16th exhibits. Otherwise, the DOB should provide greater detail of the review process from any and every engineer who performed such review.

This has left LW! only two days to prepare its response. It would not be beyond the pale to characterize what the DOB and Developer jointly did as sandbagging. Appellant now finds itself responding to an avalanche of half-facts and misleading arguments in two days' time. Nonetheless, the instructions that the undersigned received from the Board is to submit what appellant currently can, and request additional time for a more thorough submission. Annexed to this letter, the Board will find affidavits of Michael Ambrosino and George Janes, with relevant exhibits supporting the fact that the mechanical deductions are simply illusory and solely meant to artificially increase the sellable floor area.

Sadly and fortunately, their detailed analysis exposes Developer's rarely transparent scheme, a scheme that should have been exposed in the first instance had the DOB diligently examined the plans as per its own protocol. They provide a partial analysis – based on the information supplied to date – explaining the extent of unjustified mechanical FAR deductions that the DOB has credited for the floors 15th, 17th, 18th and 19th. Spreading the equipment as thin as possible to take up unnecessary space, Developer is attempting to get the entire area of the four mechanical floors excluded from the FAR calculations.

In order to illustrate this and the amount of equipment, the "footprint" and spatial organization, Mr. Ambrosino color-coded all of the differing components of the MEP system. The attached color-coded Existing Conditions Drawings, D-15, D-17, D-18, and D-19 of each major mechanical floor identifying the area of the equipment, the access/service space required

for each, as well as other uses on the floor and the unassigned or "white space." As designed, the equipment and service area requirements are approximately as follows:

- 15th floor..... 18 %
- 17th floor..... 20 %
- 18th floor..... 27 %
- 19th floor..... 28 %

Via the example of the 17th floor, Mr. Ambrosino shows how the mechanical equipment can be more efficiently positioned without negatively impacting on its operability, exposing substantial amounts of empty space that Developer is simply electing not to use. Such marked inefficiency in the outlay of the equipment appears to be intended to mask the empty space.[2] Mr. Ambrosino identifies a mean 60% deduction that should be made from the claimed deductible floor area. Simply put, most of the area on the subject mechanical floors is empty space. Further analysis is currently being conducted as to the physical dimensions of the scheduled equipment and the possible incongruence between the actual dimensions and the scaled demarcation on the plans corresponding to the equipment.

Mr. Ambrosino is also working on preparing additional efficient arrangement plans for the remaining floors to show just how little space on the mechanical floors is dedicated to the mechanical equipment and the requisite service area. Supplemental affidavits and argument will be submitted as soon as they become available.

Mr. Janes, on his part, analyzes the impact that the improper deductions for unused space and the firefighter access, refuge and storage areas have on the overall FAR calculations on the

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[2] As Mr. Ambrosino states in his affidavit, he was not able to review the mechanical equipment outlay for energy efficiency, code conformance or system performance. This is partly because these documents, typically included as part of the DOB filing set, were not provided. LW! requests that the Board compell the DOB and Developer to disclose them for a more thorough review.

ZD1. Further, if Developer cannot show that the mechanical equipment and requisite service areas occupy at least 90% of the floor area, the area occupied by stairs, elevators and other points of access is also not deductible as per the draft Buildings Bulletin 2013-xxx ("the Bulletin"), authored by Thomas Fariello, R.A., to which both experts refer.

While the Bulletin is in a draft form, the DOB examiners routinely follow the instructions it contains for reviewing claims of mechanical equipment FAR deductions as it stands for a collection of the DOB's then-existing and currently continuing policies. If the DOB flippantly disowns the Bulletin, then it should offer any alternative writing that sets forth its relevant policy, especially as the Zoning Resolution is silent on the mechanics of reviewing such FAR deductions. While the DOB represented in the *Skyhouse* that its review of the mechanical equipment deductions is done on a case-by-case basis, its examiners must follow some common criteria and protocol. Otherwise, there will be no rhyme or reason to the DOB's decision making, which is a basic due process requirement applicable to all governmental actions. Therefore, the Bulletin, absent another, *approved* writing, has to be applied here.

To sum up, unlike in the *Skyhouse* case, appellant here has submitted affidavits of professionals that have evaluated whether the, "…[a]mount of floor space used for mechanical equipment in the Proposed Building is excessive or irregular...." (2016-4327-A, page 4). It is evident that aside from height voids, Developer here has floor area voids that it is trying to dress up as necessary for operation of mechanical equipment. It cannot have it both ways. Developer has already abused floor height. Now it is trying to get away with FAR deductions to which it is not entitled.

Accordingly, Landmark West requests that the Board grant it additional time of two weeks to complete its submission in view of the concerted dilatory practices deployed by the DOB and Developer and, in the interim, accept the partial response included herein.

Further, the principal of Developer, Gary Burnett, has on numerous occasions represented that the rationale behind the peculiar arrangement of the mechanical space was motivated by a desire to artificially increase the bulk of the building to generate greater sales. The Board must exercise its subpoena power and have him personally appear to explain these statements.

Dated: Nov 6, 2019
New York, New York

KLEIN SLOWIK PLLC

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Mikhail Sheynker, Esq.