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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 certain alarming events that transpired during the course of the hearing held before the Board on December 17, 2019 and to amplify further concerns that were not adequately addressed by the Board at the hearing.[1] The focus of the hearing was 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. The Board previously instructed the DOB to provide its complete analysis of the appropriateness of the amount and size of the mechanical equipment and its congruity with the full floor area deductions that the owner claimed on the ZD1 and other forms. The Board instructed that the DOB's analysis go along the lines of the analysis that the DOB had previously done in a BSA appeal case 2016-4327-A, by now commonly known as "the *Skyhouse* Case".

However, at the hearing, the DOB counsel did the exact opposite, admitting for the first time on record that it had never performed a full and proper analysis of the FAR deductions for mechanical space in the *Skyhouse* Case; it had not done so in this case, nor does it intend to correct this irresponsible abstention of its code responsibilities in the future. Instead, the DOB, as its policy, simply trusts, at face value, whatever calculations the owner or the owner's representative, puts down on paper. It does so simply because it has refused to establish a concrete set of criteria to compute FAR deductions for mechanical space as required by the ZR, if the ZR is to be enforced in full measure. A refusal that appears to have gone on for decades

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[1] In this submission, appellant will not address the jurisdictional argument raised by the owner in its November 27, 2019 submission. The Board made a final determination to consider the issue of accuracy of FAR deductions for mechanical space in its October 14, 2019 written resolution. The owner had 30 days to challenge that determination in court via an Article 78 proceeding pursuant to Administrative Code §25-207. It has failed to do so. Nor has the owner formally moved the Board for reargument pursuant to Rule 1-14.2 of the BSA Rules of Practice and Procedures. Accordingly, this issue is now foreclosed from further review by the Board.

since the definition section of the ZR was first passed into being. DOB's willful acceptance of the owner's unverified calculations, its refusal to require detailed plans and documents concerning mechanical equipment's requisite access space and operational clearance and its failure to develop specific criteria to guide plan examiners' review for compliance with applicable FAR limitations by, inter alia, disallowing excessive deductions for mechanical space, amount to a minimum, a violation of lawful procedure or an error of law, constituting arbitrary and capricious actions or, at worst, belligerent and willful disregard for the law, allowing developers to play fast and loose with the ZR.

Such actions and omissions constitute a dereliction of duties under the City Charter. Section 643 of the City Charter specifically provides:

> § 643. Department; functions. The department shall enforce, with respect to buildings and structures, such provisions of the building code, zoning resolution, multiple dwelling law, labor law and other laws, rules and regulations as may govern the construction, alteration, maintenance, use, occupancy, safety, sanitary conditions, mechanical equipment and inspection of buildings or structures in the city . . .

With respect to the 36 West 66th proposed construction, the DOB has emphatically failed to perform its duties to review the mechanical plans and determine the appropriateness of the calculations for the proposed bulk. This has resulted in approval of an over-built structure in this case, and given the DOB's stated abandonment of its statutory duty, we can only assume that other, too numerous to quantify overbuilt structures are pock-marked throughout the boroughs, brought about by unbridled developers. If left unchecked, the DOB's abandonment of its statutory duties will doubtless result in continuous violations of bulk regulations in other large structures with multiple mechanical floors.

Appellant would respectfully remind the Board that the purpose of the Zoning Resolution (ZR) is to regulate use and bulk. Bulk restrictions are the combination of controls (lot size, floor area ratio, lot coverage, open space, yards, height and setback) that determine the maximum size and placement of a building on a zoning lot. The floor area ratio is one of the principal bulk regulation controlling the size of buildings. Each zoning district has an FAR which, when multiplied by the lot area of the zoning lot, produces the maximum amount of floor area allowable on that zoning lot.

DOB'S DERELICTION OF DUTY

The subject of this appeal is the accuracy of calculation of the allowable floor area by the owner. Pursuant to Section 12-10 of the Zoning Resolution (ZR), floor area is defined broadly as

"the sum of the gross areas of the several floors of a #building# or #buildings#, measured from the exterior faces of exterior walls or from the center lines of walls separating two #buildings#." The ZR continues by listing fifteen kinds of floor space that explicitly count as floor area. Of particular relevance to the exemption of certain floor space in 36 West 66th Street, among these fifteen items explicitly included as floor area are, "(k) floor space that is or becomes unused or inaccessible within a #building#;" and "(o) any other floor space not specifically excluded." On the other hand, space used for mechanical equipment is specifically excluded as floor area by the ZR.

Accordingly, with regard to the 15th, 17th, 18th and 19th floors, for which the owner claimed full floor area mechanical equipment deduction, the DOB had/has an obligation to review the plans and determine the proper square feet dedicated to the foot print of the mechanical equipment, with any associated access and service area, and what portion of the remaining space would count as unused and therefore chargeable as floor area. The DOB must do so with the expectation that an owner has an incentive to exaggerate the amount of area attributable to the mechanical equipment deduction so as to correspondingly enlarge the residential area that could be built. Particularly with regards to this building, where a member of the development team admitted, quite proudly, that the over height floors were planned to raise the view on the upper floors and thereby drastically increase the selling price of these higher units. Is it not fair to assume that a similar mindset is the animating force behind the inexplicably high ME deduction? I think not. Afterall, the financial incentive is staggering. An ultra-luxury condominium super tower, such as the one envisioned at 36 West 66th Street, sells apartments at $5,000 to $10,000 a square foot according to the most recent sales data published by multiple organizations.[2] Each excess square foot deducted as mechanical area translates into a substantial dollar figure. On a grand scale, a developer stands to be unjustifiably rewarded with millions of dollars in excess profit by violating the ZR's bulk limitations applicable to a given zoning district.

Instead of the diligent review of the mechanical plan for the FAR calculation, the DOB counsel admitted that DOB did no such thing **as a matter of policy**. The DOB understood its obligation under the law generally, and to the BSA in this particular appeal, by referencing the review performed in the *Skyhouse* case:

> "As articulated in the Department's August 25th, 2017 submission to the Board in that case, in explaining its determination that the floors with mechanical equipment were exempt from floor area calculations, the Department stated: 'the Department has reviewed the mechanical space drawings for the space at issue, including new, more

[2] Because of the page limitations imposed by the chairperson, appellant is prevented from attaching the supporting materials.

> detailed approved drawings for the space at issue, and concluded that the floor space on such floors is devoted to housing the mechanical equipment of the building and it cannot be occupied for purposes other than housing such equipment. As such, the floor space devoted to mechanical equipment is properly exempt from floor area,' and the Department attached the mechanical drawings as an exhibit. Likewise, as directed by the Board, in our October 16th, 2019 submission in the instant matter, we [the DOB] explained that the Department reviewed the approved mechanical drawings, as it had done in the *Skyhouse* case, and *concluded that the space as shown on the approved mechanical plans cannot realistically be occupied for purposes other than housing such equipment and, as such, is properly exempt from floor area…* (emphasis added).

When prodded, the DOB Counsel explained that DOB examiners do not review mechanical plans for accuracy of the FAR calculations and deductions, but only for code compliance. With regard to the FAR deductions, the examiner merely looks at the plans[3] to check if the submitted plan in essence appears to be a floor designated as one fully dedicated to the mechanical, and as long as there is more than one piece of mechanical equipment on such a floor, the examiner accepts the applicant's claimed FAR deductions without further inquiry. Further adding that the examiner also looks for the presence of any suspended ductwork or sprinkler piping that adds to what can only be described as a "feeling" (Read instead: Suspicion) that the full floor is a "mechanical" floor. Is the DOB now reviewing plans intuitively, having officially abandoned the actual science required to analyze plans? I suggest to you that this "reliance on the developer" turns logic on its head by substituting the developer's needs in place of a proper and fair-minded scientific inquiry. In this regard, the DOB's mindset should be "we rely on science" and not "we rely on developers" to review plans.

Appellant proposed using the 2013 draft Building Bulletin (the Draft Bulletin) prepared by Thomas Fariello, R.A. who at the time was the First Deputy Commissioner, which details the DOB's interpretation of these spaces. The Draft Bulletin underwent certain changes in the following years, changes that do not in any way detract from its applicability to the current appeal. Indeed, the purpose of the BB specifically states: "This document is to clarify the text to which floor space used for mechanical equipment may be excluded from the sum of a building's zoning floor area as defined by the Zoning Resolution (ZR) Section 12-10." The Draft Bulletin Part A(1) lists mechanical items that may be exempted from Floor Area. The Draft Bulletin Part A(2) identifies as exempt "[f]loor space directly adjacent to mechanical equipment necessary for the purpose of access and servicing of such equipment (except as otherwise noted in Part C)." The Draft Bulletin then goes on to explain that this adjacent space is either equal to the size of the equipment to which it provides access or the manufacturer's recommendation. In addition,

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[3] In the instant matter the reviewer was an architect, not a qualified mechanical engineer of even a structural engineer versed in mechanical installation

the Draft Bulletin would clarify that there is no access space for several exempt mechanical items, such as ducts, chutes, flues, and chases, which the DOB would have determined not to require circulation or access space.

Both the owner and the DOB attacked the Draft Bulletin as being just a draft that was never adopted and cannot possibly be made applicable the subject mechanical drawings.[4] DOB

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[4] DOB Counsel maintains that the DOB could not reach an agreement with industry actors on the Draft Bulletin, which hampered its adoption by the DOB. As a result, the DOB never developed any policy principles with regard to enforcement of the portion of the Zoning Resolution that concerns mechanical deductions and the counting of unused space towards floor area. The DOB's apparent position that it cannot adopt any policy position absent approval from the real estate community is tantamount to capitulation by a government agency to entrenched private interests. If the industry leaders in real estate development had veto power on the DOB, the DOB would not exist, nor would the Zoning Resolution. Accordingly, the DOB should not be allowed to just not adopt specific means to enable proper review of FAR deductions for mechanical use claimed by applicants, especially on complex project, where substantial amounts of mechanical equipment and ductwork make it easy to hide white space, empty areas, that the owner elects not to use and instead add additional FAR in the residential portion of the structure. The DOB can be said to possess the administrative discretion necessary to carry out a variety of important administrative functions, but discretion can be a veil for laziness, corruption, incompetency, lack of will, or other motives, and for that reason "the presence of discretion should not bar a court from considering a claim of illegal or arbitrary use of discretion." L. Jaffe, Judicial Control of Administrative Action 375 (1965). By extension, the same principal should apply to the BSA.

After all, the BSA did upend DOB's long-standing reading of the Zoning Resolution with regard to the lack of definition of "height" in the ZR as it applied to the DOB's policy of excluding from height limitations recessed penthouses in buildings subject to the Sliver Law, Matter of Benjamin Shaul, Magnum Management, BSA Cal. 67-07-A, involving the premises 515 East 5th Street. In that case, the DOB decided that

> "It has been the Department's practice to allow building height (which is not a defined term in the Zoning Resolution) of penthouses to exceed the width of the street for buildings covered by the Sliver Law in instances similar to the project in question, particularly in cases such as this where the penthouse in not visible from the street. It would be inconsistent with these prior decisions to overturn the approval of the penthouse here. It is the Department's position that the addition of a penthouse at the building in question does not violate the Sliver Law as the continuity of the street wall has been maintained.
>
> In accordance with this interpretation, the penthouse, as constructed with a twenty-foot setback from the street wall, complies with ZR § 23-692."

At the BSA, the Department argued that "because 'height' is not defined within the ZR, it is within DOB's authority to construe the meaning of 'height' in interpreting the ZR in a way that gives effect to the legislative intent of its drafters.

The word "height" was not defined in the Zoning Resolution. A developer betted that the absence of the definition created an ambiguity as to whether the limitations on the vertical height of the building could be defeated by setting back penthouses deep out of sight from the street view. The DOB adopted the "penthouse" trick, erroneously believing that as height limitations under the Sliver Law were merely aesthetic in purpose, the "word" height meant "visual" height, as opposed to "actual" height. The BSA disapproved of such a gallingly twisted logic, and adopted a definition of the word height as the vertical distance from curb to the highest roof level. The BSA relied on a common-sense principle that where the Zoning Resolution uses a word that has an accepted common meaning, no discrete definition is required.

At the December 17, 2019 hearing, the chairperson attempted to distinguish the BSA's approach in the Benjamin Shaul case from the current matter stating that this case does not involve a question of statutory construction of a term in the ZR. Quite to the contrary, this case involves the reading of the term "used". It is a question of whether mechanical

Counsel strenuously asserted that the DOB does not use it, except as a "safe harbor." DOB Counsel candidly admitted that the DOB allows applicants to submit proof that its mechanical deductions should be allowed, as they meet the criteria listed in the Draft Bulletin. She went on to add that in such a case, the DOB would review the argument in light of the Draft Bulletin and if it conforms to the standards set therein, it would approve the deductions. So, if it is used as a guideline by applicants to prove their deductions accurate, how, other than through some form of legal alchemy, can the DOB shamefacedly argue that it's standards are not used in the review process? That the DOB disingenuously argues that the Draft Bulletin was not officially adopted does not alter the fact that the Draft Bulletin and its more limiting successors are used by both examiners and applicants. In fact, the owner's own engineer, called as an expert before the board, testified that the DOB uses it as a general guide, despite the fact that DOB Counsel claimed "no Bulletin exists". If it does not exist, it raises a question, "Why did she describe it as a 'safe harbor'? "What is its purpose?"

DOB Counsel could not otherwise list a single criterion that plan examiners use, hiding behind vague statements that different plans call for different "things" to look at. On one hand, the DOB argued that it conducts individualized review, while at the same time offered an inherently inconsistent view that compared the instant tower to other super towers (where, one must assume, the DOB failed to effect a proper, legal review) and determined that the amount of mechanical equipment proposed for the 36 West 66th project is comparable with other super towers. This only proved to show that the DOB likely allowed other high-rise developers to abuse mechanical equipment deductions in equal measure.

Such a hands-off approach offends the very principle of reasoned government action.[5] And yet, the DOB argued that it reviewed mechanical equipment deductions is done on a case-by-case basis. If that were truly the case, its stands to reason that its examiners must, as a matter of law follow some common criteria and protocol; otherwise, an accurate deduction can be made.

This is essential, especially where the subject building is proposed to be one square foot less than the maximum allowable floor area for the C4-7 portion of zoning lot, which means that just a single improper deduction of virtually any size will push the building out of compliance with the maximum allowable FAR for the zoning district and make the building too large for its

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deductions are taken based on "claimed" use, subjective standard of any space unilaterally designated for such use, or "actual" use, objective standard of use based on technical specifications for the operation of equipment. *See* discussion below.

[5] The DOB has non-delegable obligation to review the plans and has no authority to elect to transfer this duty to design professionals, except where permitted by law, as in the case of professional certifications under the Administrative Code Section 28-104.2.1 et seq., which provides for professional specifications as a means of delegating plan review to design professionals in certain circumstances.

district. Given that the 36 West 66th project is an as-of-right job, meaning that the owner does not require special permits or variances, the only gate-keeper that could enforce the ZR with regard to this project is the DOB—no other city land use agency has a say. Therefore, if the DOB is permitted to disinvolve itself from review of mechanical equipment FAR deduction, it will substantially weaken the bulk limitations sections of the ZR, as owners will be incentivized to spread their mechanical equipment as thin as they want, creating otherwise prohibited amounts of floor area.

EXAMPLES OF EGREGIOUS MECHANICAL EQUIPMENT FAR DEDUCTIONS

Unlike in the *Skyhouse* case, here the DOB's dereliction of its duty was brought to light by the presence of LW!'s expert. In order to illustrate the excessive FAR deductions regarding 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 %

In particular, in the example of the 17th floor, Mr. Ambrosino identified two instances of close to 4,297 SF in FAR deductions taken for two pieces of equipment covering, together with access space, 1,039 SF, which results in an excessive deduction of 3,257 SF. This translates into anywhere between $16,290,000.00 and $32,580,000.00 in illicit sales through violation of floor area limitations. (See attached Exhibit that identifies the subject areas on the 17th floor plan).

Specifically, the eastside boiler room is 3,289 SF and contains three heat pumps, one of which is hung and takes no floor space. There are five boilers. The total area of all the equipment and service areas in this room is 1,059 SF: 97 SF for the two heat pumps on the floor and 962 SF for the boilers. As already shown on this drawing, the other two heat pumps could be hung or moved so as not to artificially increase the MER deduction. This leaves 2,327 SF of unused floor area. The design employs a 32 % use factor. And with a ceiling height of 60 feet. — the owner's

expert admitted in response to Commissioner Sheta's question that such height was not required — there is no reason to consider the horizontal piping and ductwork[6]

The second example is the MER between columns 12 and 14 and is 1,008 SF. The room contains one heat pump and 2 tanks. The total area of the equipment and service areas is 77 SF. There is no justification in the record for awarding a 1,300% deduction of mechanical space, or 930 SF, for 77 SF of equipment footprint and 1 SF of ductwork.

These are just 2 examples. Given the DOB's admitted dereliction, it can only be assumed that similar overreach occurs on each and every ME floor and the deductions taken are more illusory than real. And, I submit, that once the true numbers are revealed, the additional deduction of the stairs, the elevators and the corridors will also be denied.

At the hearing, Mr. Kurt Steinhouse, BSA's General Counsel stated that under the ZR, an applicant needs to establish only that the deducted space is *used* for mechanical equipment as opposed to *required to be used*. The fallacy of this argument is exposed when viewed on the flip side: it would mean that the ZR reads that for deduction to apply, the subject space needs to be *claimed to be used*, as opposed to be *actually used* for mechanical equipment. The Webster's dictionary definition of the word "use" is to put into action or service, to employ, to "utilize". The owner can subjectively claim that it will *use* any square footage for operation of mechanical equipment it needs to square away its FAR calculations, but only objective review of operational requirements for the amount of space that the mechanical equipment needs can lead the DOB to determine what square footage will actually be utilized or *used*. No maintenance worker will ever employ more space than he needs. Alternative interpretation is absurd on its face and would, if applied, lead to oversized buildings predicated on false mechanical space deductions. For the DOB to merely rely on the owner's own mechanical deduction calculations would read into the ZR language of "used" an additional phrase "claimed to be used". This is very the type of error the led the Board to reverse the DOB in the *Benjamin Shaul* case. A common sense reading of the word "used" must mean "actually used". There is simply no other use but actual use. This calls for a review of the mechanical equipment's operational specifications. This was not done here.

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[6] At the hearing, when presented with an example of the very room where the hearing was held as one containing suspended ductwork, yet not used purely for mechanical exploitation, the chairperson distinguished the hearing room from the mechanical floor based on the fact that the hearing room had ductwork without the equipment. Well, to be fair, the presence or absence of the mechanical equipment is a function of where the sheet rock is placed. The subject mechanical floors have so much empty space and meandering ductwork that it would not be a strain to drywalls around open areas with suspended ductwork and turn them into, for example, storage. The only practical limitation here is one of willingness—as a tired-and-true adage goes, "where there is a will, there is a way". But greed stands in the way: a square foot of accessory storage would sell for less than a square foot of residential living space.

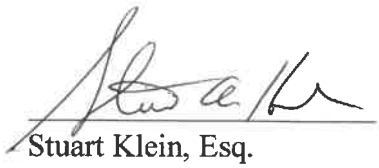
On a personal note, while I deeply respect each and every board member and acknowledge the difficulties they face in reviewing the myriad difficult cases they must review, I weigh the following comments in the context of my 42 years of experience of working before the Board. I fear that if the Board fails to require the DOB exercise its legal obligations by revisiting the instant plans and by doing so enforce the ZR, it will be failing in its own statutory obligations to serve as an independent appellate body. Instead, the Board will have diminished its stature in the eyes of those who come before it in the hope of finding a fair and just arbiter.

The Board can deny us the right to submit a full and complete response; the Board can deny our ability to dispute the record, the Board can deny our request to have the plan examiner, the primary and best witness, to testify; the Board can deny my client's right to demand that the DOB exercise its obligation under the ZR; but the Board cannot deny the facts. By so doing, the Board is applying a relativistic and sterilized interpretation of the case before it: that this building, an illegally overbuilt structure that will negatively affect the lives of thousands, will be allowed to proceed solely due to institutional apathy combined with a developer's contempt for lawful process.

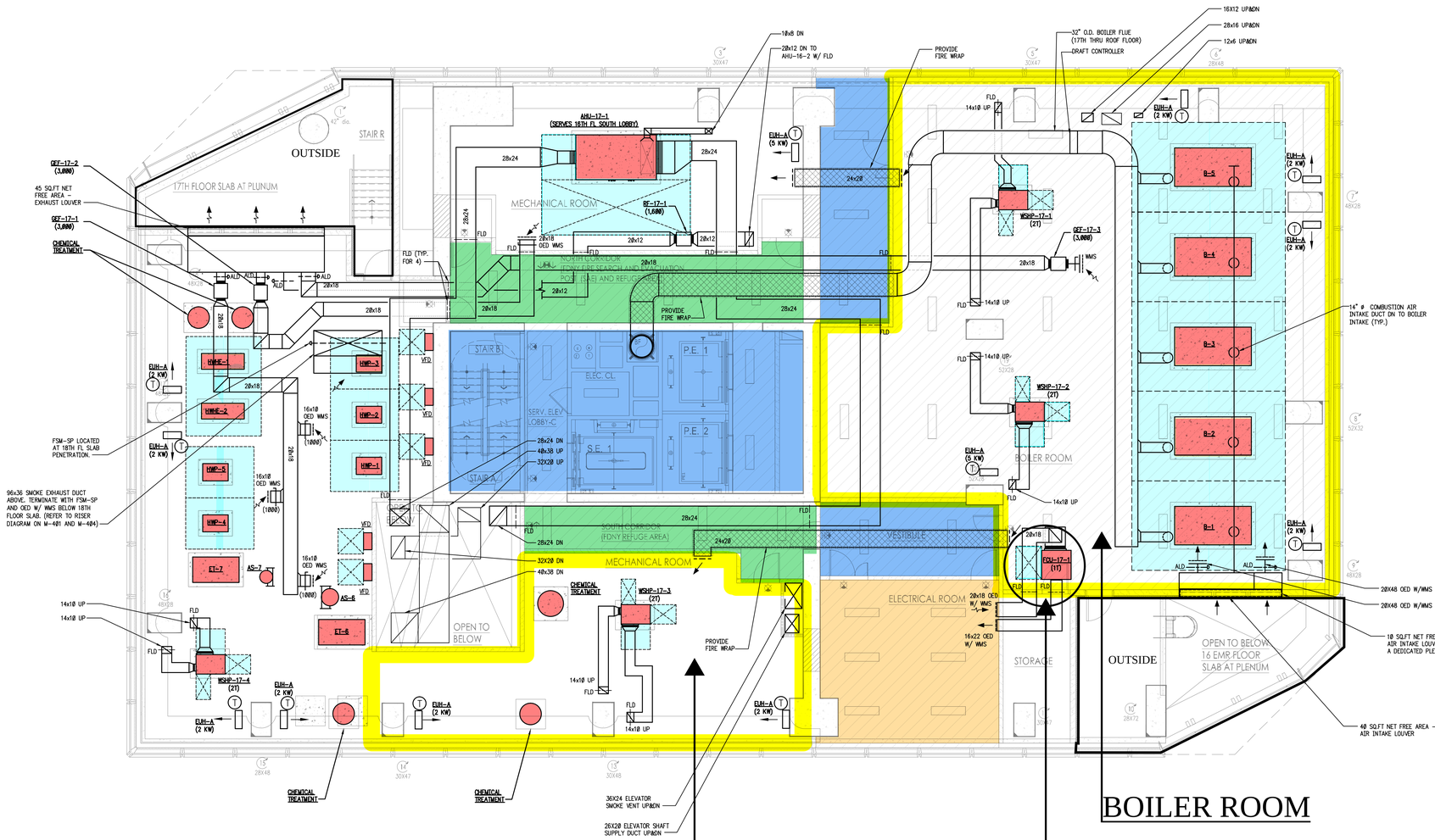
CONCLUSION

Accordingly, LW! requests that the Board revokes the underlying permit issued to the owner or to direct the DOB to properly review themechanical equipment deductions contained in the owner's April 4, 2019 ZD1 Form in accordance with the Zoning Resolution.

Dated: December 31, 2019



Stuart Klein, Esq.



LEGEND

- EQUIPMENT
- REQUIRED CLEARANCES
- FDNY ACCESS
- ELECTRICAL
- CIRCULATION
- WHITE SPACE

17TH FLOOR AREA CALCULATIONS

MECHANICAL EQUIPMENT	412.2 SF
REQUIRED CLEARANCES	1,308 SF
FDNY ACCESS	563 SF
ELECTRICAL	372 SF
CIRCULATION	1,171 SF
WHITE SPACE	6,418.8 SF
TOTAL FLOOR AREA	10,216 SF

TOTAL ALLOWABLE DEDUCTIONS MECHANICAL/ ELECTRICAL

412.2 + 1,308 + 372 = 2,092.2 SF

PERCENTAGE OF FLOOR AREA

2,092.2 / 10,216 = 20%

BOILER ROOM

UNIT HUNG ABOVE FLOOR AS DESIGNED

MER # 2

LANDMARKWEST!

THE COMMITTEE TO PRESERVE THE UPPER WEST SIDE

PREPARED BY MICHAEL AMBROSINO P.E.

EXHIBIT DRAWING NO: 17

DEPARTMENT OF BUILDINGS ORIGINAL FILED DRAWING

EXISTING MECHANICAL EQUIPMENT DIAGRAM

17TH FLOOR (NO CHANGES TO MECHANICAL LAYOUT)

11-06-2019