

Date: January 14, 2020

Examiner's Name: Toni Matias

BSA Calendar #: 2019-94-A

Electronic Submission: Email CD

Subject Property/
Address: 36 West 66th Street, Manhattan

Applicant Name Klein Slowick, PLLC on behalf of Landmark West!

Submitted by (Full Name): David Karnovsky, Fried, Frank, Harris, Shriver & Jacobson LLP on behalf of West 66th Sponsor LLC

A) The material I am submitting is for a case currently **IN HEARING**, scheduled for _____.
The reason I am submitting this material:

- Response to issues/questions raised by the Board at prior hearing
- Response to request made by Examiner
- Other: Post-hearing statement

Brief Description of submitted material: Statement on behalf of West 66th Sponsor LLC

List of items that are being voided/superseded: _____

B) The material I am submitting is for a **PENDING** case. The reason I am submitting this material:

- Response to BSA Notice of Comments
- Response to request made by Examiner
- Dismissal Warning Letter

Brief Description of submitted material: _____

List of items that are being voided/superseded: _____

MASTER CASE FILE INSTRUCTIONS

- ***Bind one set of new materials in the master case file***
- ***Keep master case file in reverse chronological order (all new materials on top)***
- ***Be sure to VOID any superseded materials (no stapling!)***
- ***Handwritten revisions to any material are unacceptable***

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January 14, 2020

Honorable Members of the Board
NYC Board of Standards and Appeals
250 Broadway, 29th Floor
New York, NY 10007

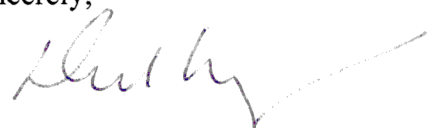
Re: Cal. No. 2019-94-A
Premises: 36 West 66th Street

Dear Honorable Members of the Board:

On behalf of West 66th Sponsor LLC, the owner of the property at 36 West 66th Street, enclosed is one original and one copy of a post-hearing statement responding to Appellant’s December 31, 2019 submission to the Board.

This submission is also being filed electronically by email.

Sincerely,



David Karnovsky

Enclosures

cc: Michael Zoltan, Assistant General Counsel, NYC Department of Buildings
Mona Sehgal, General Counsel, NYC Department of Buildings
Stuart A. Klein, Esq. (On Behalf of Landmark West!)
Susan Amron, General Counsel, NYC Department of City Planning
Ellen V. Lehman, Esq., Fried Frank Harris Shriver & Jacobson LLP

BSA Cal. No. 2019-94-A
Post-Hearing Statement

This post-hearing statement is submitted on behalf of West 66th Sponsor LLC (“Owner”) in opposition to the arguments raised by Landmark West! (“LW”) at the public hearing on December 17, 2019 and in its Supplemental Statement of Facts, dated December 31, 2019 (the “LW Supplement”) concerning the mechanical deductions approved by the Department of Buildings (“DOB”) for the new development at 36 West 66th Street (the “Building”).

The LW Supplement does not present any new or different arguments. Accordingly, this statement summarizes our presentation at the December 17 hearing, demonstrating that the mechanical floors were carefully designed in accordance with sound engineering practice, and that the amount of mechanical space and floors is comparable to that found in similar buildings. It also highlights the several admissions made by LW at the hearing regarding the flaws and limitations of its analyses. We also respond to points raised by LW regarding certain portions of the 17th floor, showing how LW’s assertions are flawed and understate the size and scope of the mechanical equipment and related spaces in these areas for the same reasons discussed in our November 27 submission, as well as at the December 17 hearing.

Finally, we demonstrate that, contrary to LW’s assertion, the fact that DOB does not review mechanical drawings based on a so-called “scientific” method does not mean that DOB’s approval of the mechanical deductions was improper. As discussed, DOB applies a rational standard that is practical, reality-based and consistent with how mechanical layouts for major buildings are designed and prepared.

For the reasons set forth in our supplemental submission dated November 27 and discussed at the December 17 hearing, we believe that this continued hearing should be dismissed on the basis that LW did not properly raise issues concerning mechanical deductions in its May 13, 2019 appeal, and that the City Charter does not give the Board jurisdiction to expand the scope of an appeal, acting sua sponte.¹ Should the Board conclude otherwise, the appeal should be denied for all the reasons set forth in our submissions and presented at the December 17 hearing.

¹ The Appellant fails to rebut the law demonstrating that the Board lacks jurisdiction to consider the validity of the mechanical deductions because Appellant failed to properly and timely raise the issue. Instead, the Appellant asserts in a footnote that Owner is precluded from arguing to the Board that it lacks jurisdiction to consider the validity of the mechanical deductions because the decision to entertain this issue was included in the Board’s October 14, 2019 resolution, and Owner did not thereafter file an Article 78 challenge seeking to overturn the determination. Appellant is incorrect. The proper time to initiate an Article 78 challenging an agency decision to consider an issue not properly or timely initiated by the challenger, and with respect to which an adverse agency decision would thus be “without or in excess of jurisdiction,” is after the agency grants the relief requested and the determination becomes final. CPLR 7803; see *Essex County v. Zagata*, 91 N.Y.2d 447, 453-55 (1998) (“An agency’s erroneous assertion of jurisdiction may ultimately never cause any real injury” and an Article 78 proceeding may only be brought at such time that such real injury is inflicted). Appellant also incorrectly argues that the Owner should have filed a formal “request to reargue” pursuant to Section 1-12.4 of the BSA Rules. Under that section, a party can move for reargument after a case is “denied, dismissed, or approved.” Because LW’s appeal application has not yet been denied, dismissed or approved, reargument was not available.

A. The Building's mechanical layouts were carefully designed in accordance with best practices and design criteria in order to meet the specific needs of the Building.

That the mechanical floors are properly deducted from the calculation of floor area is substantiated by the composite drawings of each floor. These composite drawings for floors 15, 17, 18 and 19 overlay on a single drawing all of the separate mechanical drawings approved for each floor (HVAC mechanical ductwork, HVAC mechanical piping, fire protection, and plumbing), illustrating the full range of mechanical equipment. The drawings clearly show that the floors are “used for mechanical equipment”; they are occupied by mechanical equipment, equipment access areas and circulation space throughout and cannot realistically be occupied by other uses.

To provide additional explanation regarding the mechanical spaces, Igor Bienstock, the Building's engineer of record, submitted an affidavit with a detailed description of the design of each mechanical floor layout and equipment on each floor; likewise, Vivek Patel, the senior mechanical engineer and project manager for the MEP design of the Building, gave a presentation at the December 17 public hearing to further describe the mechanical plans and answer questions. (Hearing at 2:06:00.)²

As they explained, the mechanical engineer is tasked with designing a mechanical floor layout that meets the needs of the building, that the installing contractors can feasibly construct and that, when built, provides personnel with ample space to safely move around the floor and access each piece of equipment. The mechanical engineer must coordinate with the architect and work within the constraints created by the architectural elements of the building. The mechanical engineer must also coordinate with the structural engineer to ensure that heavy equipment is properly supported and is distributed on the mechanical floor in a way that is consistent with the load bearing capacity of the structure and that any planned penetrations of shear wall and other structural elements can be accommodated. (*Id.* at 2:19:38 - 2:21:42.) The mechanical engineer seeks to put equipment and systems in close proximity to the occupied spaces they serve in order to promote efficiency. (*Id.* at 2:08:55 - 2:09:21; Bienstock Aff. at 3.) Within each floor, certain equipment requires proximity to exterior walls for air intake and exhaust, certain equipment is best placed in close proximity to other equipment for efficiency, and certain systems must be separated pursuant to the Building Code. (Bienstock Aff. at 3.)

The testimony of Igor Bienstock and Vivek Patel demonstrates in detail how the mechanical layouts at the Building depicted in the mechanical drawings reflect these sound engineering practices and implement a variety of design criteria. (*Id.* at 4 - 9.) The layouts shown on the composite drawings are thus the final product of a design process that involved coordination with the architect and structural engineer and careful consideration of various factors in order to satisfy the needs of the Building while ensuring safety and operational efficiency.

While Mr. Bienstock and Mr. Patel explained how the mechanical engineer identifies mechanical systems based on the needs of the building and that there is variation in the types of

² Citations to “Hearing” refer to NYC Board of Standards and Appeals December 17, 2019 Public Hearing, YouTube (Dec. 18, 2019), <https://www.youtube.com/watch?v=7ZpbkkkqjE&t=12300s>.

systems provided (Hearing at 2:07:42 - 2:09:38; Bienstock Aff. at 4), the analysis provided by Michael Parley likewise shows that there is significant variation in the amount of mechanical space and floors in residential buildings. The Parley affidavit illustrates that there is a wide range in the amount of mechanical space and that it is not possible to establish a standard “gross to zoning” ratio. (Parley Aff. ¶¶ 6 - 12.) To demonstrate this, Mr. Parley prepared an analysis of a number of prominent buildings with heights ranging between 665 feet and 1500 feet. The analysis lists the percentage of above-grade gross floor area deducted from zoning floor area, which ranges from 9.02% to 22.41%. (Id. ¶ 10.) The deductions for the Building constitute 13.45% of total gross floor area, a percentage that falls within the lower end of that range. Mr. Parley’s analysis also lists the number of above-grade full mechanical floors in the buildings, exclusive of rooftop mechanicals, which range from two floors to 12 floors. (Id. ¶ 14.) The Building has four such full mechanical floors. (Id. ¶ 16.) Under both metrics (amount of mechanical space and number of full mechanical floors) the Building is comparable to similar tall buildings.

Mr. Bienstock’s and Mr. Patel’s detailed descriptions of the way the Building’s mechanical floors were designed, and Mr. Parley’s survey of the amount of mechanical deductions and numbers of full mechanical floors at other buildings, together belie Appellant’s claim that the amount of mechanical space in the Building is somehow improper or excessive.

B. The LW analyses do not accurately reflect the mechanical layouts and do not demonstrate credible alternative designs.

LW has provided two analyses in support of its arguments, both of which are severely flawed and fail to demonstrate that the mechanical floors are not used for mechanical equipment or represent “excessive FAR deductions.” (LW Supplement at 7.) The first analysis consists of color-coded diagrams of the mechanical floors with purported percentage calculations of the area occupied by equipment and service area. The second analysis consists of alternative layouts of three mechanical floors.³ The flaws and errors in these materials are discussed in detail in the affidavits of Mr. Bienstock and Luigi Russo, the architect of record for the Building, and were highlighted at the December 17 hearing.

The diagrams purporting to show the Building’s mechanical layouts, as well as the diagram attached to the LW Supplement, significantly understate the amount and types of mechanical equipment on the floor. First, the diagrams are based on the HVAC mechanical ductwork plans alone and omit all of the equipment shown on the three other sets of mechanical plans: HVAC mechanical piping, fire protection, and plumbing. (Bienstock Aff. at 2.) Mr. Ambrosino confirmed this significant omission at the December 17 public hearing, stating “I did not in detail review the sprinkler, electrical or plumbing systems.” (Hearing at 19:49 - 19:54.) Second, the diagrams omit pieces of equipment shown on the HVAC mechanical ductwork plans. (Bienstock Aff. at 1.) For example, in the two areas on the 17th floor discussed in the LW Supplement, the diagram attached to the LW Supplement does not show fans, heaters, mechanical shafts, chases, horizontal ductwork distribution, and plenums. The full range of

³ We note that only one alternative layout was included in LW’s submission on November 6, 2019. Two others were sent to the Board on December 3, 2019. The Board rejected the submission as untimely. The layouts were nevertheless presented by LW at the December 17, 2019 public hearing.

mechanical equipment is shown on the composite drawings, which were ignored by Mr. Ambrosino; Exhibit B to Mr. Bienstock's affidavit provides a comparison between LW's diagrams and the composite drawings, demonstrating the deficiencies of the LW diagrams.

The second analysis consisting of hypothetical alternative layouts is misleading because the layouts were not developed using the design process employed by mechanical engineers, described above, which involves consideration of a number of design criteria and coordination with the other consultants. In his presentation to the Board, Mr. Ambrosino acknowledged this glaring limitation, stating "I don't know the design principles" and "I was only looking to save space." (Hearing at 38:46, 34:28.) His alternative layouts that purportedly "save space" ignore the multiple other considerations that mechanical engineers must take into account when designing mechanical systems.

The impractical and inefficient results that flow from Mr. Ambrosino's single minded focus on "saving space" were on full display in his presentation on December 17. For example, Mr. Ambrosino stated that mechanical equipment could be suspended and accessed by catwalks in order to conserve space. (*Id.* at 31:12.) This is, to say the least, not a practical approach, as the Chairperson recognized. (*Id.* at 31:39.) Quite simply, equipment should be located on the floor, where personnel can most easily access, service and replace it. Similarly, Mr. Ambrosino asserted that ductwork and piping could be run at a significant height above the floor without any resulting inefficiencies. However, as Mr. Patel explained, it is preferable to place horizontal connections at a "reachable level" for purposes of service or maintenance, e.g., to access valves, cleanouts, or dampers. (*Id.* at 2:30:07 - 2:30:33.) Also, with respect to piping that distributes horizontally between equipment on the same floor, running it at a greater height would add material cost and likely require larger equipment to compensate for the added run lengths.

In short, the diagrams prepared by Mr. Ambrosino do not depict realistic layouts because the diagrams do not take into account the full range of mechanical equipment shown on the mechanical drawings, and the reorganization of equipment on what Mr. Ambrosino conceded are "just sketch layouts" (*id.* at 47:01) was performed without consideration of any design criterion other than "saving space"—that is, without regard to the multiple considerations that mechanical engineers take into account in designing a mechanical floor, and that guided the layout design prepared by Mr. Bienstock and Mr. Patel for the Building.

C. The DOB properly approved the mechanical deductions for the Building.

As stated by the Chair at the December 17 public hearing, the question before the Board is whether floors 15, 17, 18 and 19 are used for the Building's mechanical program in a manner sufficient to qualify for deduction of the full floor space on these floors. (*Id.* at 3:16:50 - 3:17:45.)

DOB reviewed the detailed mechanical drawings submitted by Owner and advised the Board in its October 16, 2019 submission that:

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.

(DOB letter statement dated October 16, 2019 at 3.) 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.)

In the LW Supplement, Appellant nevertheless argues that DOB conducted no review whatsoever and improperly failed to adopt “specific criteria to guide plan examiners’ review for compliance with applicable FAR limitations.” (LW Supplement at 2.)

In doing so, Appellant asserts that the review of mechanical drawings should be governed by “actual science” and “scientific inquiry” (id. at 4), allowing for what Appellant has simplistically characterized as a “straight line equation” of the amount of allowed floor area deduction (Hearing at 16:35). Appellant has further stated that DOB’s Draft Bulletin provides such a “scientific” methodology and should therefore have been employed by DOB in its review of the Building’s mechanical drawings in order to ferret out whether there is even a single square foot of floors 15, 17, 18 or 19 that is not “actually used” for mechanical equipment. (LW Supplement at 4-7.)

The record before the Board amply demonstrates that the amount of mechanical equipment and number of full mechanical floors in buildings varies widely according to size, type and location of building (Parley Aff. at ¶¶ 6 - 16); that the mechanical needs of individual buildings also vary (Bienstock Aff. at 4; hearing at 2:07:41 - 2:08:10); and that mechanical layouts specific to a building are developed by mechanical engineers guided by a host of design criteria. Application of these criteria often result in different types of equipment being separated from each other among the mechanical floors and within each mechanical floor. (Bienstock Aff. at 3; hearing at 2:08:55 - 2:10:10.) The “actual science” and “straight line equation” assumed by Appellant simply does not exist in the real world.

The various reasons why the Draft Bulletin has not been adopted and its highly prescriptive standards have not been implemented (Russo Aff. ¶¶ 6 - 16) reflect this reality. While the Draft Bulletin may operate as a safe harbor for applicants able to demonstrate that they satisfy all of its parameters, and can provide guidance in certain instances, DOB has appropriately recognized that it has not been adopted and is not operative. (Hearing at 1:11:03 - 1:11:50.) Indeed, Appellant’s zoning expert, George Janes, despite having initially claimed that the Draft Bulletin sets forth detailed standards that reflect DOB practice (Janes Aff. at 4, n. 1), now agrees that this is not the case, that buildings vary widely in the complexity of their mechanical systems, and that any guidelines relating to the review of mechanical systems must be both general and flexible in nature. (See Hearing at 57:40 - 58:04, 1:02:29 - 1:03:34.)

At bottom, Appellant disputes the very concept of a full mechanical floor. According to Appellant, the entirety of a floor must be “dedicated to the foot print of the mechanical equipment, with any associated access and service area” in order to permit a deduction of the full floor, and any portion that is not so occupied is “chargeable as floor area.” (LW Supplement at 3.) Appellant cites as support subdivision (k) of the ZR Section 12-10 definition of “floor area,”

which includes within the calculation of floor area “floor space that is or becomes unused or inaccessible within a building.” (Id.)

This position ignores how mechanical floor layouts are designed and work in practice. A mechanical equipment layout for a large building is not a perfect jigsaw puzzle—it is not a collection of equipment spaces that fit perfectly on the floor space it occupies. (Russo Aff. ¶ 13.) Rather, mechanical engineers design mechanical floors within a floorplate that has a predetermined size and shape. (Id.) They need to incorporate and locate a large number of pieces of equipment that come in a variety of sizes and shapes and that, for a myriad of reasons, need to be located on specific floors or specific portions of floors and/or in proximity to other pieces of equipment. (Id.) Laying out a mechanical floor to accommodate these factors inevitably results in the creation of small, irregularly shaped residual areas that cannot practically be put to any other use. (Id.) These areas are the inevitable by-product of the process of designing a mechanical floor layout. According to Appellant, however, any such areas are “chargeable as floor area,” thereby disallowing a deduction of the entire floor space.

Appellant’s interpretation also lacks any basis in subdivision (k). That provision was adopted in 1979 to address a practice wholly unrelated to the treatment of mechanical floors—to stop developers from sealing off whole buildings or portions thereof in order to avoid counting them as floor area.⁴

DOB’s practice reflects a rational interpretation of the statute which, reading the ZR Section 12-10 definition of “floor area” as a whole, recognizes that the residual spaces do not count as floor area when, as a practical matter, the floor is devoted to mechanical equipment and spaces. See BSA Cal. No. 315-08-A (246 Spring Street) (DOB practice that elevator shafts and stairwells do not count as floor area when the floor space is fully deducted as mechanical space appropriately harmonizes the components of the Zoning Resolution to achieve the legislative purpose). Contrary to Appellant’s argument, DOB has not thereby committed the same error found by the Board in BSA Cal. No. 67-07-A (515 East 5th Street) (DOB practice of interpreting the term “height” under ZR by reference to the Building Code in absence of ZR definition held

⁴ As stated by the City Planning Commission in 1979:

The proposed text amendment deals with a problem recently called to the Commission’s attention wherein a developer, anxious to secure his maximum floor area allowable in the zoning district in a new building on a zoning lot which contains an existing older building -- chooses to close or seal off portions of the existing building in order to take advantage of a Building Department interpretation which makes such sealed-off area invisible for floor area computation purposes. This interpretation encourages the cannibalization of older buildings often impairing their maintenance systems and causing visual blight on their exteriors through blockage of windows or doors. . . . The intent of the proposed amendment to the Zoning Resolution is to prohibit in new construction a duplication of floor area and building volume where existing floor area is sealed or otherwise abandoned.

CPC Report N 790181 ZRY (September 19, 1979).

In 2011, the City Planning Commission, under the “Key Terms Amendment”, added language to subdivision (k) to ensure that the technique of sealing off floor space in a building to avoid having it count as floor area cannot be similarly employed in new buildings. CPC Report N 110090(A) ZRY (January 5, 2011).

improper). Instead, DOB has acted within the scope of its interpretive authority. See BSA Cal. No. 67-07-A, 4-5.

Rather than pursue the false “science” and impossibly rigid standards urged by Appellants, DOB reviews mechanical drawings for deductions under what can fairly be described as a rule of reason. It reviews all the mechanical drawings in order to visualize and understand the full range of equipment and related space on a floor. (Russo Aff. ¶ 4.) In doing so, DOB recognizes, as stated at the December 17 public hearing, that: “[M]echanical footprint alone does not equate with how the space is used. The nature of the equipment and the relation between different systems and the space needed to maintain the system must be considered. For example, a [sic] large exhaust intake ducts pull volumes of air and need large space around it, around the ducts to accommodate that.” (Hearing at 1:11:52 - 1:12:15.) Further, DOB recognizes what architects and engineers involved in the design of a mechanical layout know full well: “We know for certain that equipment cannot cover 100 percent of the floor space.” (Id. at 1:12:16 - 1:12:24.) Accordingly, DOB has applied a rational approach towards the deduction of full mechanical floors which recognizes that the use and dedication of such floors for mechanical equipment includes not just the equipment itself, but also access space, circulation space, and residual interstitial areas.

Unlike Appellant, whose approach would have applicants demonstrate that there are no alternative layouts which would require less space, DOB acknowledges the difference between its role and that of the design professionals: “It’s an area we leave to the design applicant for them to consider.” (Id. at 1:12:36 - 1:13:00.) This is not, as Appellant would have it, a “capitulation” to applicants. (LW Supplement at 5, n. 4.) Rather, it is a reasonable approach that recognizes that DOB’s role is not to second guess the professional judgment of the mechanical engineer about the mechanical needs of the building and the design criteria which should govern the mechanical layout.

In short, DOB applied the following standard:

If the room contains so much equipment and associated room to maneuver around it and to be able to operate equipment such that the uses -- other uses can’t be occupied in the space, that would be what we’re looking for, you know, that would be considered deductible without a doubt.

(Hearing at 1:13:24 - 1:13:45). That this standard is not codified in the form of a rule or Bulletin does not make it any less valid. See BSA Cal. No. 67-07-A, 6 (“[T]he fact that DOB has not memorialized this longstanding policy is not a compelling reason to nullify DOB’s rational interpretation to exclude elevator shafts and stairwells from floor area calculations on a wholly mechanical floor.”)

CONCLUSION

Appellant’s continued appeal should be dismissed and, if not dismissed, should be denied.