THE CITY CLUB OF NEW YORK
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East Midtown is for People Too

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Like the centers of other great cities of the world, East Midtown has its own distinctive character. It has a variety of old and new architectural styles, scale ranging from the Chrysler Building to Greenacre Park, and streetscapes enlivened by a wealth of small stores, restaurants and galleries. These attributes – plus a major transit hub – are what make the area, as it now exists, one of the premier business centers of the world.

The proposed rezoning plan threatens to turn this area into another monotonous glass curtain-walled mass of skyscrapers such as can be found in lesser cities throughout the world that you would not go out of your way to visit. It would double the permissible mass of buildings in the most prominent areas, diminish the variety on side streets, and encourage large indistinguishable stores that would crowd out the boutiques.

The Proposed Rezoning and Its Insufficient Justification

Most notably, on Park Avenue north of 47th Street, the maximum floor area ratio ("FAR")[1] would increase from 15 FAR to 28 FAR (the latter includes an extra 3 FAR "public concourse" bonus.[2] In the area around Grand Central, maximum FAR would double from 15 to 30. In much of the rest of the 78 block area, FAR would increase from either 12 (mid-blocks) or 15 to 18, 21.6 or 23, plus the 3 FAR "public concourse" bonus. We currently have few buildings with as much as 30 FAR – the Empire State Building and the Chrysler Building may reach those figures, but they are surrounded by much lower buildings and are set back in tiers, like a wedding cake. The proposed plan would sharply diminish required setbacks and crowd tall buildings together, cutting one's view of the sky to pencil thin proportions.

While additional retail space would be encouraged, no attempt is made to retain what a Steering Committee calls the "smaller and eclectic retail that keeps East Midtown from being 'anywhere U.S.A.'" (Report pg. 26).[3] For many reasons, such as financing, and the comfort of long leases with

[1] FAR is the ratio of built floor area to lot size.

[2] The "public concourse" bonus is available only on large sites located on wide streets. It is granted on a discretionary basis.

[3] The Steering Committee was created by Mayor Bill de Blasio in early 2014 to formulate principle guidelines for the rezoning project. Chaired by Borough President Gale Brewer and Council Member Dan Garodnick, it included delegates from local Community Boards, economic interests, and various community and advocacy organizations. The City Club did not formally participate, though John West, Chair of its Urban Design Committee, frequently

financially secure, brand-name retailers, it seems advisable to zone so as to restrain the pattern of a bank, or drugstore, or big box on every block.

The City's Planning Department endorses radical surgery but with no presentation of hard facts and analysis to support its recommended treatment. Here is the lead paragraph on the project on the Department's website (and please note our added emphasis):

> The Greater East Midtown business district is one of the largest job centers in the region and one of the *highest-profile business addresses in the world*. It contains more than 60 million square feet of office space, more than a quarter million jobs, and numerous Fortune 500 companies. While the Greater East Midtown area *currently performs well in terms of overall office district cachet, rents, and vacancy rates*, DCP has identified a number of long-term challenges that must be addressed to reinforce this area's position. A primary challenge is the area's office building stock. DCP is concerned it *may not—in the long run*—offer the kinds of spaces and amenities desired by tenants, which can only be provided through new construction. As a result, Greater East Midtown faces several challenges that *may compromise* its long-term competitiveness, including an aging building stock, limited recent office development (and few available office development sites), an existing zoning framework that hinders new office development, and public spaces and transit infrastructure that are stretched to capacity.[4]

This leaves the public, and its elected representatives, in a quandary. DCP might, or might not, have good reasons for promoting this plan, and it might have the facts to support its opinion. But the public and public officials should be skeptical. Major decisions require major disclosure of the precise data and reasoning on which the recommending agency has based its advice, and ample time to review those materials. This is too important and impactful a matter to undertake without conviction that it is necessary. The burden to convince is on DCP, but it has not carried that burden.

We have asked various parties interested in the rezoning for well-researched and analyzed proof of the need for the rezoning. But we have gotten no satisfactory answers. DCP says that buildings in East Midtown do not provide enough modern space, meaning high ceilings and few or no columns. But there is a countervailing belief that the need for these qualities is declining as desks replace trading floors and communications travel by Wi-Fi rather than wires.

Having presumed a need for more "modern space," the Department goes on to assume (a) that a governmental incentive is necessary to induce owners to undertake the long and costly process of vacating buildings, then building anew; and (b) that the appropriate nature and level of incentive is an increase in FAR that can amount to doubling. Neither proposition is demonstrated. In a rational

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attended its meetings. Its Report, released in October 2015, is available at http://manhattanbp.nyc.gov/downloads/pdf/East%20Midtown%20Report%2010-13-15.pdf.

[4] http://www1.nyc.gov/site/planning/plans/greater-east-midtown/greater-east-midtown.page, visited 3-22-17.

process, one would identify the pivotal issues for a developer, such as whether there is a market for new space of the type DCP is encouraging. Whether there are competitive markets for the same type of space, such as new developments already in process in several other parts of the City, most notably Hudson Yards and Downtown Manhattan, and also including Downtown Brooklyn and Long Island City. What the cost of rebuilding would be. And what profit owners can project.[5]

Ultimately, one should select a level of incentive that is sufficient to attain the desired level of rebuilding, but stops at that point so as not to eliminate more of the attractive characteristics of the area than is necessary to achieve that objective. Just providing an incentive jolt to the market, however, is clearly not DCP's sole purpose. An additional, and perhaps dominant, purpose is to raise money for financing transit improvements primarily to subway stations in and around the East Midtown district. So, unlike most zoning, which sets bulk limits based on what is a desirable environment and what the infrastructure can satisfactorily service, this proposed rezoning sets outside parameters but requires owners to pay for all zoning rights beyond those existing under current law. In East Midtown, all new zoning rights are for sale.

Zoning for Sale v. Zoning for Publicly Oriented Land Use Benefits

The proposed charge for buying zoning rights takes various forms. But the bottom line is that no owner will be able to add one square foot beyond what the currently existing zoning allows without paying a substantial price. The details are provided below under the heading, "The Law . . . " (pp. 6 ff).

The very act of demanding payment compromises the credibility of the Department's claim that the upzoning is necessary to save the district. Is it acting in the interest of good land use planning? Or is it bending its professionalism for the benefit of the Department of Finance? How does one weigh the DCP's advice where that advice rests on the assumption that its implementation will produce at least $600 million, from the sale of 6.5 million square feet of development rights for new office space at a minimum of approximately $79 per square foot[6]?[7]

The structure of the purchase scheme itself demonstrates that a doubling in FAR cannot be the minimum tipping point for inducing owners to rebuild. The FAR increase functions as an economic

[5] On these issues, DCP makes reference to a Landauer Valuation & Advisory market study dated December 2016. The report presents data on land and TDR sales, but does not attempt to come to a conclusion as to the value of TDRs in East Midtown in the context of the proposed plan. As to determining a tipping point, it makes some reference to the Steering Committee Report, but that does not evidence any empirical study of these issues. The Landauer report may be found at http://www1.nyc.gov/assets/planning/download/pdf/plans-studies/greater-east-midtown/market-study.pdf. By way of contrast, see the Cushman & Wakefield 2006 "Hudson Yards Demand and Development Study" at http://nycbonds.org/HYIC/pdf/HYIC_2007_A_Appendix.pdf.

[6] See DEIS pg. 1-24, https://www1.nyc.gov/assets/planning/download/pdf/applicants/env-review/gem/01_deis.pdf.

[7] Seventy-nine dollars is a rounded-up figure set in the proposed rezoning text for the minimum payment buyers of landmark TDRs would have to pay into the public benefit fund. We understand that payment for other FAR purchases are intended to reflect the same minimum of $79.

inducement. It purports to ensure that, after paying all the costs of vacating his existing building, and constructing a larger building, the owner will make an acceptable profit. If the City simply increased FAR to the extent necessary to reasonably assure that level of profit, it would fix the percentage increase in FAR at X. But if it adds to the owner's costs by charging for the additional FAR, the owner will need additional incentive in order to cover the additional cost. The City must offer not just X FAR, but X plus Y.

We estimate Y at approximately 25% of X, meaning that, if an unconditional 50% increase in FAR (an arbitrary number) would be the requisite tipping point, requiring that the owner pay for the 50% increase forces an increase in the FAR bonus to 62.5% to achieve the same incentive effect.[8] Our object is not to provide a precise calculation, but to demonstrate a point. More FAR is being offered than is necessary, and that imposes burdens on the public.[9] The public loses in terms of human scale, variety of retail and spatial experience, light and air, sky visibility, avoiding "heat islands" where heat is trapped near ground level due to lack of air circulation, and even safety (sidewalks are not being widened), among countless other factors. As the Steering Committee Report concludes, "East Midtown will

[8] An example will illustrate the point. Suppose a building in what is currently an FAR 15.0 district, occupying a 20,000 square foot lot, and currently built to the maximum FAR at 300,000 square feet. Further suppose that, If the allowable FAR were increased by 50% to 22.5, the owner would rebuild; without that 50% FAR incentive, the owner would not rebuild. But, he also has to take into consideration that each additional square foot costs him at least approximately $79, that being the minimum price that DCP projects. The $79 represents 20% of the estimated market value of a square foot of transferable development rights (i.e. $390). So, a further subsidy is needed to provide reimbursement for the 20% tax. The amount of allowable FAR has to be hiked up by Y' square feet to cover the tax computed thus far, divided by $390, to cover the earlier tentatively calculated tax. The calculation continues similarly with Y''until one reaches a vanishing point:

Add'l Sq. Footage	Chge. per foot	Aggregate Chge. ("Tax")	Add'l Sq. Footage Needed to Pay for Add'l Cost (tax÷value of one square foot of TDR)
150,000	$79	$11,850,000	30,385
30,385	79	2,400,415	6,155
6,155	79	486,245	1,247
1,247	79	98,513	253
253	79	19,987	51 (etc., towards a vanishing point)

Resulting in additional floor area of upwards of 38,040 square feet (or roughly 25% over the tentative "tipping" amount), simply to cover the cost of reaching the tentative tipping point. The adjusted, or real, tipping point becomes more than 188,000 square feet, and the FAR increases not by 50% but by 62.5% , from total FAR of 15.0 to about FAR 26.25. Again, actual figures may differ, but the amount of FAR will certainly substantially exceed what would be required if there were no sale of zoning rights.

[9] It does not matter that the tipping point among different owners, in different circumstances, may vary. The DCP, assuming it is not acting arbitrarily, must choose a tipping point that will induce the desired number of owners to reconstruct and pay the price the plan demands for the amount of FAR the City wants to sell. To accomplish that, DCP may have to set the offered FAR at what the neediest owner needs to tip the scale. Less needy owners may get a windfall that way. But, over-all, the amount of required increased FAR will still be X plus Y.

continue to be a sought-after location for international and local businesses and visitors only if its streets, subways, and pedestrian amenities become increasingly inviting . . . ." (SCR pg. 13).[10]

Planning With Regard to Effects

A second major problem with the assumption that the very latest in modern open office space is imperative for East Midtown is that just such space is planned and being built in other business districts around the City. In the past couple of decades, the City has been promoting alternative business districts, mostly in previously industrial areas such as Hudson Yards and Long Island City, as well as Lower Manhattan and downtown Brooklyn. For example, Hudson Yards is expected to provide 12 to 25 million square feet of new office space.[11] There is talk of developing the 180 acre Sunnyside Yard in Queens and one scenario would add between 4.1 and 5.6 million square feet of office space there.[12] The East Midtown plan would add an estimated 6.5 million square feet of new office space in East Midtown according to DCP.[13] We have not found any explicit assessment of how much modern office space of the type sought for East Midtown could be accommodated at such other locations. It would seem desirable to consult such a study before risking overbuilding East Midtown to the extent of imperiling the character that makes it desirable.[14]

A last question, though it may seem surly in an age where we are bathed in the unction of newer-is-better: Having created new business centers such as Hudson Yards with just the kind of modern office space that is considered most desirable, would it be appropriate to retain as much of the character of East Midtown as possible, much as the French did in building La Defense just outside the boundary of central Paris, thereby fully protecting the historical character of central Paris?

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[10] East Midtown Steering Committee Final Report, October 2015 available at http://manhattanbp.nyc.gov/downloads/pdf/East%20Midtown%20Report%2010-13-15.pdf.

[11] The 12 million figure is provided by the City's Hudson Yards Development Corporation at http://www.hydc.org/. The 25 million figures comes from the Cushman & Wakefield study at http://nycbonds.org/HYIC/pdf/HYIC_2007_A_Appendix.pdf.

[12] https://www.nycedc.com/sites/default/files/filemanager/Sunnyside-Yard-Feasibility-Study-2017-Executive-Summary.pdf, pp. 2 and 5.

[13] See DEIS pg. 1-24, https://www1.nyc.gov/assets/planning/download/pdf/applicants/env-review/gem/01_deis.pdf.

[14] The Cushman & Wakefield study estimates that approximately 100 million square feet of new office space in Downtown (below Canal Street) and Midtown (from Canal to 72nd Street) Manhattan could be absorbed by the market in the 30 year period from 2006 to 2035. It does not indicate just where that could be built. (http://nycbonds.org/HYIC/pdf/HYIC_2007_A_Appendix.pdf at pg. 3-25). More importantly, it defines a desirable development parcel for the type of office space it envisions as market-desirable as 100,000 square feet or more. at pp. 3-18 to 3-19. No such parcels appear to be available in East Midtown. The largest likely development site that the DEIS identifies in East Midtown is about 78,000 square feet; the largest potential development site is about 47,000 square feet. If C&W is right, there may be no amount of incentive that will produce satisfactory "modern space" in East Midtown. (https://www1.nyc.gov/assets/planning/download/pdf/applicants/env-review/gem/01_deis.pdf, Appendix A-1.

The law requires the Planning Commission to create a master plan for the City and zone to best effectuate that plan. It is by no means apparent that the Commission is doing that.

Rejection of a Similar Plan in 2013

The proposed plan for East Midtown derives from a rift between what the City promised to contribute to transit improvements at Grand Central and its ability to pay. By 2013, major projects had begun – in part to connect Hudson Yards and Penn Station to Grand Central, in part to alleviate overcrowding at Grand Central – for which the City had agreed to contribute approximately $42,500,000, but was hard put to pay. Former Mayor Michael Bloomberg proposed a major rezoning for East Midtown, featuring selling air rights, to take up the slack. Its basic features looked very similar to the current plan. The project was withdrawn after the public objected to various planning deficiencies, and the City Club publicized its view that the scheme to sell zoning rights was illegal.

The current plan is a more sophisticated version of the one that failed in 2013. But, it has the same problems of hyper-increase of FAR and consequent decrease in environmental comfort. It also has the same legal issues.

The Law Barring Sale of Zoning Rights and Unjust Exactions

The problem here is one of appearance as much as fact. It appears that a major planning project is being primarily driven by fiscal needs/desires rather than planning concerns. This inevitably gives rise to a perception, whether right or wrong, that planning issues may not get the attention and priority they deserve and that this may compromise the Planning Department's primary mission of land use planning.

The problem is not a new one and the courts have addressed it in some depth.

First, zoning may not be sold. Zoning is a power limited to regulating land use. Raising money is not a part of regulating land use.[15]

Second, the Supreme Court has, over the past three decades settled the law concerning "exactions," meaning charges by government for permitting particular land uses, commonly either in cash or by providing a public amenity. Sometimes such exactions are permissible. For example, not uncommonly a zoning board in a rural area will require an owner of property not served by the local sewage system to install a sewage connection as a condition of subdividing the property – and that imposition might be legal because it relates directly and proportionately to the increased populace the land will accommodate after subdivision. But it is easy to envision such a demand becoming extortionate, for example if the price for permission to subdivide five acres into five building lots were that the owner construct an entire new sewage system serving the entire township.

[15] Sunrise Check Cashing v. Town of Hempstead, 20 N.Y.3d 481, 485 (2013); Municipal Art Society of New York v. City of New York, 137 Misc.2d 832 (Sup.Ct. N.Y. Co. 1987).

The Court has developed certain principles to separate legitimate exaction from extortion. First, the exaction must have a close relationship ("nexus") to a legitimate governmental objective that would be achieved by denying the permit. This rationale is often used in New York City where an owner obtains a permit to add FAR beyond the standard allowance, thereby creating a further burden on public sidewalks or nearby parks, and the permit is conditioned on the owner adding a plaza or arcade to the building to alleviate added congestion. The City could deny a permit to build additional FAR and thereby prevent a population overload on the adjacent sidewalks. Instead, it grants the permit, but on condition that the owner alleviate the prospective problem. That is "nexus." Second, the exaction must bear "rough proportionality" to the burden created by the owner's proposed action; it must treat the owner fairly, not take advantage of his need for a permit by demanding a price that imposes on the applicant a burden that should in fairness be borne by the public. [16]

The Court has also declared that these rules are not open to evasion. One cannot, for example, play with words by calling the exaction "voluntary," even though the owner will not get the advantage he seeks if he does not "contribute" what is "suggested."[17] The City may not, in other words, offer a Hobson's choice.[18]

These principles are not arbitrary legalisms. They are directed to practical issues that affect publicly perceptible outcomes. One outcome concerns fair distribution of both the burdens and benefits of taxation. A financing system that raises money through ostensibly non-tax methods within a particular district, and spends the proceeds primarily within that district (and, purportedly, entirely for the benefit of that district) may raise public concern whether similar needs of other parts of the City are ignored because those areas are unable to pay for themselves. A good analogy is public-private park maintenance partnerships which, almost invariably, favor parks in wealthy districts and disfavor poorer areas, especially in economically tight times with diminishing public funding for parks.

Another outcome, as we have said earlier, concerns diversion of the attention of planning departments from planning to fund-raising, from guiding private construction and uses in a manner that creates pleasant and varied communities, to ever-increasing constriction of narrow canyons between the collective long walls of very large buildings.

The Proposed Rezoning Does Not Meet the Legal Standards

The proposed rezoning offers an extensive menu of options, all raising serious legal issues, and most being likely to fall short of legality:

> Option One. An owner can buy unused development rights on landmark sites and transfer them to any site owned by the buyer within the East Midtown Subdistrict. (Proposed

[16] Nollan v. California Coastal Commission, 483 U.S. 825 (1987); Dolan v. City of Tigard, 512 U.S. 374 (1994).

[17] Koontz v. St. Johns River Water Management District, 133 S. Ct. 2586 (2013).

[18] A Hobson's choice occurs where the offeree gets nothing if he does not accept the offeror's unsatisfactory offer. The term is said to come from the practice of a 16th century livery stable owner, Thomas Hobson, who offered his customers the horse tethered nearest the front of his stable or none.

ZR 81-642). A "contribution" of the greater of 20% of the sales price or 20% of the "floor price" (a minimum value for air rights set by proposed ZR 81-642(a)(6) and adjustable every three to five years by the Commission) must be paid to a Public Realm Improvement Fund, a quasi-governmental fund for financing improvements in the East Midtown area. Essentially, this is a tax. In principle, no additional FAR is being created because the landmark owner could use the full FAR, as of right or subject to certain conditions, in various ways (such as zoning lot merger under ZR 12-10, or transfer to neighboring sites under ZR 74-79). The proposed additional charge payable to the Fund is not based on any specific harm that the landmark owner will cause by the sale of the transferable rights and, therefore, does not depend on any "nexus." Moreover, the charge is unrelated to the possibility that the transfer to the buyer's chosen location may, or may not, cause a public burden (such as increased foot traffic) at the new location. For example, the transfer might be to a location just outside the area permissible under current law (a location that might be within the same block where the landmark is located) and cause no increase in traffic or other public burden beyond what would be caused if the transfer were to a currently legal recipient site. Or the transfer might be to a relatively distant recipient site and cause a discernable impact. The "tax" payable to the Fund is the same in both cases though the impacts may differ greatly. And, the tax is not being measured by the degree of impact but by the actual (or even presumed) market value of the development rights. In general, there is neither nexus nor proportionality.

It would be fair to suggest that there may be, and probably even are, cases where the owner of a landmark cannot, as a practical matter, sell his landmark TDRs under present law because there are no buyers within the limited qualified recipient area immediately around the landmark. Liberalizing his ability to sell in itself may have a substantial impact. The issues, however, are not materially different. At very least, proportionality is lacking because the tax is based on market value rather than burden created by the transfer. It is doubtful that the nexus requirement would be satisfied. The function of the nexus requirement is to ensure that an exaction distinctly serves the same purpose as denial of the permit would. Here, denial of permission to transfer landmark TDRs beyond the recipient area available under current law would prevent the burdens created by excessive building at the recipient site. That is not what is happening though. The tax paid upon the TDR transfer goes into a general Public Realm Improvement Fund and may be used for to pay for improvements anywhere throughout East Midtown or even beyond, not necessarily to ameliorate the public burden specifically caused by transfer of these TDRs to the specific recipient site.

We appreciate the policy of allowing landmark owners fair opportunity to realize the value of air rights above their landmarks which could not be used but for transferability to other sites. At the same time, allowing transfers to distant sites may have the unintended result of creating more density of development in those distant areas than would be desirable. Possibly, limits should be imposed on the amount of landmark development rights that can be transferred into sensitive areas.

Option Two. The owner of an existing non-compliant building may demolish the building and replace it with a new building with the same amount of FAR. (Proposed ZR 81-643). The owner must contribute a stated amount (20% of the "floor price" of TDRs) to the Public Realm Improvement Fund for each square foot of replacement floor area over the base amount

of FAR allowed for the site. Current law allows such replacement only where 25 percent of the original structure is retained. Each solution imposes the same amount of burden on the public – a given amount of over-building with resulting imposition on public facilities, at precisely the same location. Thus, there is no justification for a charge under the new law; it is exacted simply on the basis that an owner may find it more profitable to replace the building entirely and be willing to pay for that "privilege." The arrangement is an exaction without "nexus," and is not saved by the owner's possible willingness to pay (Koontz). It is, therefore, illegal.

Here, the nexus/proportionality law fits in with the policy underlying grandfathering of existing buildings that become non-conforming due to down-zoning. One could argue that they should be required to be made to conform within a given amount of time so that zoning accomplishes its intended purpose of subjecting all buildings within a district to uniform rules. A common, and perhaps fairer solution, however, is to allow them to remain until destroyed by casualty or erosion by age, while still allowing maintenance and even replacement of portions of the structure. The new proposed rule would jettison the traditional view that grandfathering must come to an end, and substitute a principle that a totally demolished building still has grandfathering rights. The nexus/proportionality rule would require that any increase in FAR above the new base limit relate to the burden imposed by the additional FAR rather than just the owner's willingness to buy the FAR he forfeited when his non-conforming building was demolished.

Option Three. An owner may acquire additional FAR by agreeing to contribute to a specific public improvement project. (Proposed ZR 81-641). For this purpose, the East Midtown Subdistrict is divided into sub-areas. Many of these have either subway stations within them or subway lines passing through them. Others have neither. The applicant begins by picking the number of square feet he wishes to add to his project's FAR, the choices being 40,000, 80,000 or 120,000. Prospective transit improvement projects are assigned to one or another of these categories. The applicant selects a transit project within the sub-area in which his property is located from the appropriate category. (Call it Group 1). If no such project is available, the applicant must select a transit improvement project for a station in another sub-area or even outside the East Midtown Subdistrict but which services a subway line running through the applicant's sub-area (Group 2). If that is unavailable, the applicant must choose from any other available transit improvement (Group 3), some of which are well outside the East Midtown area.

a. In evaluating this array of options, start with the question whether there will ever be a meaningful nexus. Is the developer's selection ever going to ameliorate an adverse impact that the developer's action causes? The draft environmental impact statement for the rezoning is, at best, ambiguous on this issue. On the one hand, it states that the rezoning will not result in a significant increase in the number of subway trips at peak hours. (Pp. 12-6 to 12-7). On the other hand, it concludes that a number of circulation improvements (largely with regard to a limited number of specific stairways and escalators) within subway stations will be required. But it does not make clear whether these improvements are necessitated by current usage conditions (see pg. S-4), or because of new demand caused by the rezoning (pg. 12-6). Some of the projected improvements to be paid for by exactions would very

likely have to be made whether or not the rezoning is adopted, such as installation of ADA accessible elevators (see pg. S-13).[19] The DEIS concedes as much by stating that the projects that would be financed by exactions from owners who want to construct additional FAR will address both "current issues that impact the area's transit network and anticipate potential needs of the area based on future development." (Pg. S-12). The incongruity is further confirmed by the decision to spend exaction proceeds on projects in six different subway stations (see DEIS pg. 1-15) even though only three of them may be materially affected by increased traffic attributable to the rezoning (DEIS pg. 12-6). Without clear differentiation between existing issues and issues created by the rezoning, it will be difficult at best to establish nexus and proportionality.

b. Assuming, however, this basic theoretical nexus to exist, Group 1 will generally offer the best prospect of compliance with the nexus/proportionality test, being relatively close to the applicant's property in most cases (but not necessarily all).

c. The likelihood of nexus qualification declines as one goes to Groups 2 and 3. The relationship of Group 2 to the additional burden the applicant will place on the transit system is more tenuous than that for Group 1 stations. The mere fact that a subway line traverses the subject property does not mean that improvements to the M Line station at Bryant Park will alleviate a burden created at applicant's property at Park and 53rd in the subarea that the M train passes under. That tenuousness becomes still greater for Group 3 stations that are almost by definition entirely unrelated to the applicant. The only evident purpose of the Group 3 fall-back is to extract the money.

d. The "rough proportionality" test is difficult to evaluate because the relationship between the public project and the three square-footage options is not explained. Assuming that the most expensive projects are in the top group, less expensive are in the middle group and least expensive in the bottom group, there is still likelihood of a considerable range of prices per square foot in each sector. If one owner pays $250 per square foot of FAR and another pays $500, that may not be "roughly proportional" especially if the circumstances are otherwise similar. Or, if one owner at Park and 53rd Street gets to do a public project at the 47th/50th Street stop on the M Line, and another at a different corner of the same intersection gets a project only at the Bryant Park stop five to eight blocks further away, they may pay the same amount per square foot, but the two buildings would likely be contributing quite differently to the burden they generate at the respective stations.

Option Four. Having reached maximum as-of-right FAR by the above means, an owner has the additional option of building a "public concourse" within the immediate Grand Central area for a discretionary bonus of up to 3.0 FAR. (Proposed ZR 81-645). The CPC Chair has the power to grant permission upon finding that the offered concourse "merits" the amount of

[19] Under a settlement agreement in Eastern Paralyzed Veterans Ass'n v. Metropolitan Transportation Authority, (Sup. Ct. N.Y. Co. filed 1979), entered into in 1984, the MTA is required to provide elevator service in 100 stations by 2020. These include the Grand Central Terminal subway station. See 49 CFR §37.53, and http://www1.nyc.gov/assets/planning/download/pdf/plans/transportation/mobility_initiatives_aging_05.pdf. The settlement document has not been located.

additional floor area to be granted to the donor. There are no standards for exercise of the Chair's discretion. It is an open invitation to wheel and deal, the baldest form of selling zoning rights as flatly prohibited by law. The lack of guidelines for exercise of the Chair's discretion invites judicial voiding of the provision as a delegation of legislative authority.[20]

Conclusion

The rezoning has significant problems from a planning perspective. It would radically alter the existing character of the area, one which is recognized as a major draw for office tenants as well as shoppers, gallery goers, tourists and others. Yet the need for taking risks with an area of proven success has not been satisfactorily demonstrated.

Exacerbating the problem is the apparent purpose of using rezoning as a tool for funding transit and other area public improvements, in some significant part relieving the City as a whole of a commitment to finance MTA improvements associated with the East Side access project. The appearance, and the questions it raises as to DCP's focus on its statutory purpose of planning to achieve superior land use results, tend to negatively impacts DCP's stature.

The chosen fund-raising tool – one that invites the description, selling zoning rights – raises serious legal issues. The very idea of selling zoning rights is illegal. A transaction having the appearance of a sale can only be justified by refitting it into a narrow band that permits owner actions on condition that the owner take ameliorative steps directly countering the negative impacts of the permissive action. On the whole, the provisions of the proposed rezoning do not comply with the standards set by the U.S. Supreme Court for legal use of such "exactions."

[20] A final option allows the now-customary possibility of providing on-site improvements that would ostensibly directly alleviate the burdens of additional traffic created by the FAR bonus. While all such exactions are subject to challenge on their specific facts, we do not see a facial violation in this provision and, therefore, have not discussed it in detail.