

Midtown East Rezoning

Transferable Development Rights and Required Contributions

July 4, 2017

There is a disagreement before the City Council regarding the value of the transferable development rights that will be “released” by the proposed rezoning and the appropriate contribution or “tax”, when these development rights are sold.

The following are important considerations:

- There is no list, cost estimates, or prioritization of the public improvements that will be funded by these contributions. (This is not the case for the required transit improvements, which are clearly defined.)
- Available data is inadequate to a reliable valuation of East Midtown TDR’s under the proposed regulations.
- Defining the contributions as a percentage of either a minimum value or unknown sale prices will not ensure that needed public realm improvements are made.
- Clarifying the public realm improvements needed to mitigate increased density, will give the City Council a clearer basis for defining the “tax”.

The legality of the proposed contributions

In previous memoranda, the City Club has argued that the sale of zoning rights is illegal. The City may legally require ameliorative action from a property owner who proposes higher density and greater burdens to the public. But the legal standards for these exactions is clear, and the proposed contributions from sale of landmark development rights will not likely meet them.

While the purpose of this memo is to suggest improvements to the practical application of these contributions, it does not change our view that there are better, alternate, methods for funding public improvements.

Will the TDR contributions be adequate?

According to the proposal, the required contributions will be paid by landmark owners and developers who negotiate the transfer of these rights to new development sites; the funds will be deposited into a public Improvement Fund, with a Governing Group that will use the

revenue to pay for various public realm improvements needed to mitigate the impact of the additional density.

These improvements are generally but not specifically defined in section 81-683 of the proposed zoning text. They must be within the East Midtown Subdistrict, or immediately adjacent to it, or to a mass transit facility with substantial ridership to the district. They must be capital projects that either improve pedestrian or transit access below grade, or public realm improvements above grade that either improve pedestrian circulation or provide leisure space, such as pedestrian plazas.

The required TDR contributions are the only source of funds for above-grade improvements, in the proposed zoning changes, and they draw funds away from another above-grade public good, increased funding for landmarks, which the increased transferability of landmark development rights allows. ***No list or prioritization of public realm improvements, or cost estimates, have been provided, so that the entire discussion about the necessity for a minimum tax is without very important reference points—what is needed and/or an estimate of how much money is needed.***

The City Club has critiqued the legality of both the proposed transit and TDR contributions. The proposed contributions are certainly inadequate to existing transit needs in East Midtown, which should consider not only needed modification to subway stations, but also improvements to the existing, increasingly unreliable, subway system, further extension of the Second Avenue line and improved connections between Grand Central and Penn Station. In addition, the TDR contributions may be an unreliable source of revenue as the landmark development rights may be used without paying the tax—for example by merging zoning lots.

Additional or alternate funding mechanisms be considered, including tax increment financing, which would tax a portion of increasing real estate values in the district. Rahm Emanuel wrote recently (July 3, *New York Times*) about successful improvements to Chicago's transit system, relying on both federal funding and special taxing districts known as TIFs.

The proposed minimum TDR tax

The East Midtown Steering Committee final report (October 2016, page 30), directs that the contribution for the Improvement Fund should be from 20 to 40% of the consideration paid for Landmark TDR, “with a floor per square foot based on recent development site sales.”

This citation indicates that development right minimums should reflect both land and TDR sales, although on page 31, it is stated that the “Steering Committee heard opinions from market and development experts to the effect that the value of TDR's for commercial development can easily be \$400 or more under the current requirement for a special permit.”

City Planning has proposed a 20% “tax”, with a minimum payment of \$78.60, which presumes a minimum TDR valuation of \$393/SF. As a basis for its valuation, City Planning submitted a report prepared by Landauer Valuation and Advisory, dated December 22, 2016.

The Landauer report is a market study, and not an appraisal. It does *not* provide a value estimate for East Midtown TDRs. The report contains a list of prices and averages for commercial and office land sales and for TDR sales. The \$393 TDR valuation *selected by City Planning* is above the \$301 and \$374 averages (in 2015 dollars) for TDR sales within and outside the study area respectively, but considerably lower than the averages estimated for actual commercial land sales, including \$808 and \$749 for office land sales, again within and outside of the study area.

Given the discretion that City Planning retains to select the actual TDR minimum, the Council may want to consider the sufficiency of the protection provided by an applicant’s ability to request an updated transferable development rights valuation study, at the applicant’s expense.

The Real Estate Board of New York and some preservation organizations object to the idea of a minimum contribution, specifically to the \$78.60 minimum (based on a \$393 TDR valuation) which they view as too high, and a disincentive to landmark transfers and the associated development.

The Real Estate Board also critiques the \$393 figure as relying on land sales rather than TDR sales. As indicated above, this is not the case, although its criticisms regarding growth rates or the impact of economic benefits in the Hudson Yards, may or may not have validity. Indeed, it is difficult to predict whether the proposed regulations will increase or decrease the value of existing TDR’s, relative to historical sales prices. The differences between the mechanisms that will govern East Midtown TDR’s and those relevant to the TDR’s cited in the Landauer report are very difficult to quantify. There have been very few TDR transfers in East Midtown and 10 of the 14 transfers in the Theater district were for residential projects.

Experts can argue endlessly over what the market and prices for East Midtown TDR’s will be.

Consequently, a minimum contribution based on a minimum valuation may indeed be disincentive to transfers. Even a percentage of sale prices, be it 20% or more, will produce an unreliable revenue stream, and therefore a very unreliable number of public improvements.

An alternative basis for the tax

If the Council is unable to consider broader sources of additional funding, and if the only sources of additional revenue, in this zoning proposal, are to remain direct contributions to transit improvements and required TDR contributions, then the TDR contributions should be based on an outline of the minimum public improvements necessary to handle the increased density. As with the transit improvements, where a specific list of improvements has been

provided in the proposed text amendment (section 81-682), City Planning and the Department of Transportation should also provide a specified list of public realm improvements that the Governing Group (or perhaps the City) is required to consider, prioritize and fund, be they additional transit improvements or above-ground improvements. As has been done for the transit improvements, each item on the list should be associated with a specific monetary contribution and/or a specified amount of additional floor area.

This modifies the structure of the proposed Improvement Fund and Governing Group, but it will clarify what public realm improvements are needed, which and how many improvements can be reasonably required, and it will guarantee that these improvements are made as new buildings are developed.

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