

East Midtown – City Club Testimony

City Council Public Hearing Tuesday 20 June 2017

The City Club of New York has been carefully examining and commenting on the series of proposals to rezone East Midtown during the last several years. We agree with the stated goal of maintaining East Midtown as a premier business address and our cautions and recommendations have been intended to help achieve that vision. We regret that we disagree with the means City Planning has chosen to achieve its goals.

We start by thanking the East Midtown Steering Committee for its efforts to understand East Midtown and to address its problems. We also thank City Planning for its efforts to craft solutions and to explain them. And now we are hopeful that the City Council will improve the City's proposal by turning it back toward the recommendations of the Steering Committee.

Our general criticism is, and has been, that the proposals for East Midtown are not founded on a well-considered plan. Such a plan would put East Midtown in a regional context and would address issues of transit access, local circulation in an improved public realm, and the interrelationships of uses in a complex urban ecosystem.¹

Our specific concerns are of three types:

- Departures from the recommendations of the East Midtown Steering Committee,
- Conflicts of interest between implementing a well-considered plan and zoning for dollars, and
- Conflicts with constitutional protections.

¹ What would make East Midtown more attractive?

- Completion the Second Avenue subway from 63 Street to Lower Manhattan: this would improve access from the Upper East Side and further reduce congestion on the Lexington Avenue line.
- A direct rail connection between Grand Central and Penn station: this would allow NJ Transit trains to bring passengers directly from New Jersey to Grand Central, allow Metro-North trains to travel through Grand Central to Penn Station, and allow Amtrak to serve the east side of Manhattan.
- Direct rail access to the airports.
- A public realm that better connects transit, buildings, and streets.
- A public realm with more and better POPS (Privately Owed Public Space) such as plazas, arcades, and atriums.
- A public realm with streets that better serve all their users, most of whom are pedestrians, but also buses, taxis, trucks, bicyclists, and others. This should include the conversion of 42 Street to landscaped open space and a light rail line as proposed by Vision42¹.
- Preservation of the area's rootedness. (A palimpsest is a page that has been erased and reused but on which the older information is still discernable. The richest built environments are often palimpsests in that the inquiring eye can see their history.)

Steering Committee Recommendations: There are three major recommendations of the East Midtown Steering Committee that the City's proposed zoning contradicts. One is the addition of public open space to the public realm through the encouragement of POPS, another is keeping the Special Midtown height and setback regulations to protect daylight, and the third is maintaining the lower scale of the midblocks.

- The East Midtown Steering Committee report recognizes the dearth of public open space in East Midtown and recommends creating a plan for the public realm that includes on-site spaces such as plazas and covered plazas. By contrast, the proposed rezoning encourages very large buildings to be developed using transferred air rights and off-site subway improvements as-of right and discourages on-site public spaces by limiting them to a new special permit for "public concourse". Consequently, the DEIS finds the lack of public open space in the proposal to be a largely unmitigated significant impact.

With respect to open space and a plan for the public realm the proposed zoning turns the recommendations of the Steering Committee upside down.

- The East Midtown Steering Committee report recommends that new development adhere to the height and setback rules of the Special Midtown District, although a special permit review was anticipated for buildings that tried to fit too much zoning floor area into the zoning envelope. Indeed, sensing a potential conflict between very big buildings with FARs up to 30.0 and maintaining some daylight in the streets, the committee recommended a compromise in which City Planning should examine reducing the passing Daylight Evaluation score from 75 to 66. (Remember that this was in the context of the recently approved One Vanderbilt, a 30.0 FAR building, having a score of negative 62.)

However, the proposed zoning goes further and changes the scoring process for "qualifying sites" to allow much greater encroachment. With respect to protecting light and air in East Midtown the proposed zoning appears to be surreptitiously ignoring the recommendations of the Steering Committee. By way of example, One Vanderbilt if scored using the proposed scoring would earn a score of positive 20 rather than negative 62 – a large difference. (Also, the impact of these changes does not seem to be disclosed or analyzed in the DEIS.)

- The East Midtown Steering Committee report recommended increasing density along wide streets, not in the midblocks. However, the proposed zoning allows greater increases in FAR in the 12.0 FAR midblocks than on the 15.0 FAR wide streets such that the FARs on the midblocks become the same as on the avenues. The proposed zoning also allows the height of the street walls on the midblocks to be as tall as the street walls on the wide streets. Furthermore, these changes seem to obviate the split lot rules.

Conflict of interest: (zoning for dollars)² We are concerned that there is a conflict of interest when the City uses zoning to raise revenues rather than for the authorized purposes of zoning -- to regulate land use, light and air, and density in conformance with a well-considered plan -- and that this conflict results in bad planning. For example:

- If the City charges a fee for the privilege of the remote transfer of development rights from landmarks, as it does in the Theater Subdistrict and proposes in the East Midtown Subdistrict, is it likely to allow unused floor area to be transferred further and to allow greater increases on receiving sites? Such transfers violate the principle of a geographic nexus between the benefit of the preserved landmark and the burden of the larger building.
- If the City requires developers to improve subway stations, some of which are even outside of the East Midtown Subdistrict, to obtain bonus floor area it effectively supplements the MTA's budget. Does this financial benefit to the MTA influence the City to not require traditional, much needed, density ameliorating amenities on the development sites, such as plazas, covered pedestrian spaces, and access to adjacent subway mezzanines?
- If the City allows bonus floor area for an improvement in a subway station that then becomes the responsibility of the MTA to operate, maintain, repair, and replace, the development is relieved of the traditional obligation, which it would have in the case of a plaza, to maintain the density ameliorating amenity for the life of the bonus floor area on the top floors of the benefitted building. Does the City see the one time benefit to the MTA as more important than the long term relationship between the increased density and the public improvement?
- If the City charges a fee to reconstruct the portion of an overbuilt building in excess of the site's base FAR (rather than retain 25% of the existing structure) the City is collecting dollars rather than requiring the provision of the traditional plazas and arcades that would ameliorate the additional density. Does this reflect a greater interest in obtaining dollars than in increasing the amount of public space in East Midtown?
- If the City relaxes height and setback in order to facilitate the redevelopment of a site that will pay fees to reuse overbuilt zoning floor area and to transfer floor area and will make improvements to subway stations thereby supplementing the MTA's budget, is it doing so in furtherance of a well-considered plan or in order to raise revenues?

At issue is the height and setback exemption proposed along Vanderbilt Avenue. It would allow height and setback to be measured from the far side of the street rather than the near side, which is detrimental to the public's light and air but allows larger floors in the upper part of the building. Would the City include this provision if it were not benefiting financially?

² See the Coliseum case: *Municipal Art Soc. of N.Y. v. City of N.Y.*, 137 Misc. 2d 832 (Sup. Ct. N.Y. Co. 1987)

This only affects one site, the Postum Building at 250 Park Avenue, which would presumptively be illegal spot zoning.

- If the City insists on including Third Avenue in the rezoning of East Midtown does it do so in furtherance of a well-considered plan or to create more development sites?

In response to the draft scope of work for the environmental analysis of East Midtown Manhattan Community Board Six passed a resolution last year that an alternative be considered that omitted the area east of Third Avenue from the rezoning. The community board sees Third Avenue as an area of transition between the CBD and the residential neighborhoods of Turtle Bay and Tudor City in which development should be transitional in scale and mixed in use. It also sees it as an area that should not have its density increased until the Second Avenue subway is extended south.³

It appears that the City is including Third Avenue in order to have enough development sites to use all of the transferable development rights from landmarks and all of the bonus floor area for subway improvements in order to collect the fees for TDRs and pay for improvements to MTA facilities.

The City Club has repeatedly suggested that other ways than zoning be considered to fund public realm improvements, including the possibility of tax increment financing as a way to fund transit improvements in the area that will be served by East Side Access for the LIRR.

Alternatives such as the capital budget and tax increment financing would allow zoning to address improvements to the public realm on development sites rather than bonusing improvements within subway stations so as to supplement the MTA budget or collecting fees to supplement the DoT budget. These alternatives would avoid conflicts of interest between planning and raising revenue, would spread the cost over all the properties that benefit from the transit improvements, and, in the case of tax increment financing, would likely provide significantly more funds to the MTA. (Keep in mind that this is not an addition to the real estate tax, like a BID, but an assignment of a portion of the natural increase resulting from the completion of East Side Access – which should be appealing to local property owners).

³ Community District Six is the area generally east of Lexington Avenue between 14 and 59 Streets. This is the eastern edge of Midtown Manhattan. It is an area of transition between the Midtown Central Business District and the residential areas of Turtle Bay and Tudor City. It is an area of transition in scale and use.

Community Board Six has recommended that the area east of Third Avenue not be subjected to the large increases of density and scale of buildings proposed for East Midtown. It is also concerned that the uses be mixed or residential in character rather than primarily commercial. In addition it notes that residential development seems to be doing quite well in this area and to not be in need of any zoning incentives.

On the other hand, we also understand that there are arguments against tax increment financing, not least of which is that it diverts tax revenues from the City's general budget. Nevertheless, we believe it is a tool that is worth thorough and objective consideration.

Constitutional Protections: We believe that the proposed rezoning of East Midtown threatens three constitutional protections generally enjoyed under zoning: **Nexus** -- there should be geographic proximity such that the same community enjoys the benefit and carries the burden of an action such as transfers of development rights from landmarks and bonus floor area for density ameliorating amenities. **Proportionality** -- there should be a proportional relationship between the impact of increased density on a site and the amenity that is intended to ameliorate that density and that the relationship should be maintained for the life of the increased density. **Exactions** – the agreement of a supplicant to a deal does not make it right.

For example:

- There needs to be a geographical nexus between the benefit of a preserved, smaller, landmark building and the burden of the larger development that uses its air rights. For instance, the daylight in the street that is assured by the granting site should be enjoyed by the same community that suffers the shadows and increased congestion of the receiving site.

The proposed rezoning would allow unused development rights to be transferred from any landmark in the East Midtown Subdistrict to any “qualifying site”⁴ in the subdistrict. It would also allow the fee charged for the privilege of a remote transfer to be spent on subway or street improvements anywhere in East Midtown.

This might, for example, allow air rights from St Patrick's at Fifth Avenue and 50 Street to land on the Pfizer site at 42 Street and Second Avenue and improvements be made to a subway station at Lexington and 53 Street. As a result, the burden of increased density, less light and air, and greater congestion would be at one corner of East Midtown, the light and air benefit of St Patrick's at another and the circulation improvement in a subway station somewhere else. Is this fair?

We suggest that smaller transfer districts, such as the existing Grand Central Subdistrict, be established rather than allowing air rights to be transferred throughout East Midtown.

- There is a need for proximity between a density ameliorating amenity and the development that incorporates its bonus zoning floor area. Traditionally, a plaza provides public open space on the same site as the building generating the need,

⁴ A “qualifying site” qualifies for the transit improvement bonuses and district-wide transfers of landmark development rights by (i) having buildable frontage on a wide street, (ii) having no more than 20% of its zoning floor area in residential use, (iii) being environmentally efficient (ZR 81-681), and (iv) if in a transit improvement zone providing required subway station improvements (ZR 81-682).

although it probably could also be justified by separate sites that are adjacent or nearly so.

The proposed rezoning would allow “qualifying sites” located in the Grand Central Transit Improvement Zone Subarea and in the Other Transit Improvement Zone Subareas to earn bonus zoning floor area from improving subway stations as far away as outside of the East Midtown Subdistrict.⁵

We suggest that the subway station being improved be much closer to the development using the bonus floor area such that the increased density is more convincingly ameliorated by the improvement to the subway station.

- Is there adequate proportionality between the impact of a development on a subway station and the bonus floor area received for improving that station when the bonus is the same whether the station is adjacent to the development or many blocks away?

If the subway station being improved is adjacent to the site that is being developed it seems likely that the new building will be creating some of the congestion being mitigated in the station; if the station is remote it is likely that only a diminishingly small portion of the congestion will be caused by the new building. To maintain proportionality less bonus floor area should be given for the remote improvement. If not, this may risk a finding that the cost of the improvement to the non-adjacent subway station amounts to an unconstitutional exaction.

We suggest that the subway station improvement bonus only be allowed when the station is near, preferably adjacent, to the site on which the increased density will be developed.

- As proposed, the subway improvement is to be built by and at the expense of the developer and then operated, maintained, repaired, and replaced by and at the expense of the MTA. This means that in the long run the MTA, rather than the developer, is paying for the development’s bonus floor area.

We suggest that in addition to building the subway improvement the developer establish a trust fund for its operation, maintenance, repair, and replacement and that the building replenish the fund as necessary as long as the bonus floor area exists.

- The zoning resolution requires overbuilt buildings to follow the current zoning regulations if redeveloped. There is, however, a sort of casualty provision that allows the building to retain its excess zoning floor area if no more than 75% of the building is demolished. The proposed zoning would allow the existing building to be completely demolished and

⁵ ZR 81-682 prioritizes improvements to stations close to the development site but allows more remote stations when closer stations are not available.

to pay a fee to reuse the overbuilt floor area. Because there is no difference in the impact of the overbuilt portion on the city the fee becomes an exaction.

We suggest that the overbuilt provisions be left as is and that the developer use other provisions of the zoning, such as transfers of development rights or bonus floor area from density ameliorating amenities to achieve greater FAR.

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