THE CITY CLUB OF NEW YORK
Advocating For All New Yorkers

Statement of Michael Gruen
To City Council
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Concerning East Midtown Rezoning

My name is Michael Gruen. I am President of The City Club of New York. Thank you for the opportunity to share some of our views about problems with the East Midtown rezoning plan.

1. Let good enough alone. The proposed rezoning of East Midtown is built almost exclusively upon a quasi-perceived need for vast increase of so-called "modern" office space with large floor areas, few columns, and high floor to floor height to accommodate wiring. With its doubling of FAR in much of the area; its insensitivity to canyonization (street wall at the property line and absence of set-backs as the building rises), and the consequent loss of any sense of connectivity to the sky; its disinterest in ensuring survival and perpetuation of the small retail that distinguishes this from the typical ho-hum downtowns throughout the world that no sensible traveler seeks out; this plan threatens the very character of East Midtown that makes it uniquely appealing.

Although supporters refer to such a quasi-perceived need, there is in fact no solid evidence or study purporting to justify it. Even its lead proponent, the City Planning Department, is nothing but ambiguous. As DCP says on its web page concerning the rezoning, the area "*currently performs well in terms of overall office district cachet, rents, and vacancy rates.*" But, DCP is concerned that the area "*may not—in the long run*—offer the kinds of spaces and amenities desired by tenants." That is not reasoning; it's conjecture.

One assumption is that the business world needs very large floor plates with few columns, such as is desirable for trading floors. But isn't the demand for trading floors diminishing as trading is increasingly accomplished electronically? Doesn't a large segment of commercial renters consist of small businesses requiring much less space? If they are ousted from East Midtown, won't that encourage displacement of the fashion district, also an extremely important part of the City's economy? And how does the City's encouragement of other huge new office areas, such as Hudson Yards and downtown Brooklyn, interact with

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rezoning of East Midtown? Can all such areas, competing against one another, be successful? A partial answer appears to be that Hudson Yards is not being developed at the expected rate and the City is carrying much greater cost for that area than it expected to. (See "Hudson Yards Offered a Payday for the Subway, but We Got Offices," New York Times 6-15-17.) Another answer we have heard is, "Don't worry. Different renters prefer different types of locations." To which one might ask, "If the rezoning changes the character of East Midtown, will it continue to appeal to those renters who are attracted to it now?"

Lots of questions; no satisfactory answers. 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.

2. Follow the money. When government promotes a major project without clearly explaining why, the natural response of constituents is to wonder what the real reason is. It's not hard to find. Money is the dominant theme of the proposal. Wherever you look, there is a scheme for turning the newly minted FAR into dollars for a quasi-governmental committee to apply to transit improvements to the area.

Money plays such a paramount role here that it is allowed to interfere with the purported planning goal of inducing owners to build. Here's why. We must assume that, from a planning point of view, the City would offer no more incentive than what it calculates is necessary to induce owners to build the amount of new office space that the City thinks is desirable. To offer more would waste public funds or the public's interest in an attractive environment. But where, as here, the City demands that an incentivized owner must pay a hefty price for every square foot of "bonus" floor area, the incentive effect is reduced by that additional cost. For the incentive to be effective, it must, therefore, be increased to cover the owner's additional cost – we have roughly estimated 25% more than necessary.

3. Selling zoning rights is illegal. The zoning power of any municipality is limited. It must be used solely for regulating land-use. Courts have voided attempts to use it for other purposes, including raising money. (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).)

4. If you want amelioration, ask nicely. The US Supreme Court too takes a dim view of municipalities that demand a quid pro quo from the owner for a zoning or other land use benefit. It can be done, on the theory that exercise of the permission imposes a new burden on

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the public, but only if the governmental "exaction" would clearly achieve substantially the same legitimate governmental goal as denying permission would achieve ("nexus"), and the government asks for no more than what is reasonably necessary to achieve that goal ("rough proportionality"). (Nollan v. California Coastal Commission, 483 U.S. 825 (1987); Dolan v. City of Tigard, 512 U.S. 374 (1994).) The Court has also made clear that evasion of these rules, no matter how cleverly, is the same as violating them. (Koontz v. St. Johns River Water Management District, 133 S. Ct. 2586 (2013).)

This proposed rezoning largely fails these tests.

Take a relatively simple example. Existing law allows the owner of an oversized, but grandfathered, building to rebuild the building to its grandfathered size if at least 25% of the original structure is retained after rebuilding. That is a right; no payment is required. The rezoning would provide a unique opportunity to the owner of such buildings, in East Midtown only, to tear down 100% of the overbuilt structure and rebuild to its grandfathered size, but the owner must pay a fee of approximately $70 per square foot for the excess space over that allowed under the now existing zoning. (Proposed ZR 81-643). Whichever of the two options the owner chooses, the end result is a permitted building that contains the same number of square feet as before. The owner adds no burden on the public. If he chooses 100% demolition rather than 75%, he neither gains nor loses any space and imposes no additional land-use burden. The only thing he is being asked to pay for is the permit itself. That is a perfect example of selling a zoning permit. It is illegal. (See Municipal Art Society, cited above.)

A second example, and we will stop with that, is a complicated, and much more sophisticatedly camouflaged, scheme to allow an owner to build FAR above the otherwise applicable limit if the owner will finance subway transit improvements. The first choice would normally be to finance an improvement in the same sub-subdistrict where the owner intends to build, maybe no more than a few blocks away. Depending on such factors as the actual distance between the owner's building and the transit improvement, the likelihood that additional users of the building will also use that subway station (rather than Uber or a limousine), and the cost relationship between the additional burden the new building imposes and the price of the exacted transit improvement is reasonable, this could work. But if all the permitted slots for a nearby transit improvement have been taken, the owner (say, at 57th Street and Lexington) may have to finance a transit improvement a mile or so away at, say, 42nd Street and Sixth Avenue (Bryant Park) serving – if the owner is lucky – a line that at least runs through his own sub-subdistrict, though without stopping there, or if he is not so lucky, a line

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that has no relationship whatsoever to his sub-subdistrict. These situations, quite obviously, stretch the ideas of nexus and proportionality to their limits and well beyond.

5. Don't invite lawsuits, especially meritorious ones. The adoption of the Vanderbilt Avenue rezoning in 2014 was immediately followed by a lawsuit by Argent Company, owner of the transferable development rights of Grand Central Terminal. Argent argued invalidity under Nollan/Dolan. It settled in a deal that involved sale of its development rights.

It is easy to imagine a similar case based on the payment scheme as presently written. An owner who believes that he should not have to pay just to exercise so-called "as of right" zoning, nevertheless accepts the deal, gets his building permit, starts construction, then sues to void the part of the deal involving illegal sale of zoning rights. He may well win, especially if he drew an improvement a mile from his own construction. Since the purpose of the Nollan/Dolan cases is to deter government from over-reaching, odds are that a court will void the exaction, but allow the owner to complete his building. Result: the public gets all the disadvantages of over-building – excessive height and bulk, canyonization, loss of the ambience East Midtown is now known for. Plus, as taxpayers, the public still has to pay for the subway improvements a mile away. Those voters could get angry as hornets.

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