# The City Club of New York

**Fighting vigorously for the urban environment and responsible government**

Report of the City Club of New York
Concerning East Midtown Rezoning Proposal
August 19, 2013

Main Text

## OVERVIEW

The City proposes to upzone an area of about 70 blocks around Grand Central and northwards through the prime Midtown office district. The move would, in some cases, as much as double the permissible floor area of a new building. The plan calls for a thinly veiled arrangement to sell the new development rights that the new zoning would create. For the most part, the deal the City offers would be quite simple: the developer pays $250 per additional square foot above what is allowed by existing zoning, no strings attached.

Many speakers on behalf of real estate interests at the City Planning Commission's hearing on the proposal, held on August 7, 2013, addressed the proposed charge. Almost to a person, they commented on the price level, opining that $250 per square foot was too much, too little, just right, or should be more flexible to reflect market value variations throughout the area. The assumption was always that selling development rights was appropriate. Only the price was at issue.[1]

The City Club rejects the assumption that the City may sell zoning development rights. Such an action is beyond the legitimate scope of the zoning power and would suffer defeat in the courts if adopted.

This Report sets out the City Club's full position and reasoning.

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[1] These positions have been aired before. See the Real Estate Board website and the real deal blog: https://members.rebny.com/pdf_files/rew-071812.pdf; http://therealdeal/blog/203/06-03/grand, both visited July 16, 2013.

The difference of opinion arises for a simple reason. The Department of City Planning,[2] sponsor of the rezoning, has set the price at estimated market value. In doing so, DCP has candidly, if not explicitly, announced that when it rezones to increase available floor area and thereby increase the value of affected land, the City should share in the added wealth. It, therefore, offers to sell the newly minted rights: owners will have a choice; they can build to a maximum base floor area ratio of 12 or 15,[3] or, they can go as high as 21.6 or 24 FAR by the simple expedient of paying for at least much of the excess over the base maximum. In fact, they can go even higher, up to 30 FAR, if they satisfy the Planning Commission that their buildings will be exceptionally beautiful and energy efficient, and the owner pays the $250 per square foot price for the additional allowance under this "superior development" further bonus program.

The purpose of zoning is to adjust the competing interests of property owners so that all can flourish without unnecessarily damaging one another. It requires that zoning decisions must, not only as a matter of good government but as a matter of law, be exercised solely with a view to carrying out a comprehensive land use plan for the general public welfare.[4] Zoning authorities may not regulate land to other ends. Specifically, they may not put zoning rights up for sale.

There is an area of exception. Property development, though otherwise desirable, may impose burdens on infrastructure. Therefore, under very restrictive conditions, it may be appropriate to require the developer to contribute to the mitigation of those burdens. This is commonly seen in rural areas where a subdivider who formerly used his 100 acres solely to accommodate one family, breaks it up into smaller lots accommodating 100 families. The increased population may put pressure on limited parkland or adjacent roads, and there are laws allowing the municipality to impose conditions to ensure that the subdivider fairly contributes to remediation of the burdens he will create if permitted to subdivide. Where the issue is parkland, and it would be impractical to require the owner to set aside parkland within the subdivision, local zoning boards may condition approval of the subdivision on the owner's contribution of an appropriate amount of money for creation of parkland elsewhere within the community. The idea has been applied to require urban developers to provide plazas or other pedestrian and rest

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[2] We use "DCP" to refer to the City Planning Department, and "CPC" to refer to the City Planning Commission (the board of Commissioners responsible for initially adopting zoning provisions).

[3] "Floor area ratio" or "FAR" refers to the ratio of built floor area to the area of the lot on which a structure is built. For example, 5 FAR would allow a five story structure covering the entire lot. Open space and set-back requirements often result in much greater height because each floor may be far smaller than the area of the lot. In general, the Zoning Resolution assigns maximum floor area ratios for various types of buildings in every zoning district.

[4] See e.g. Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926).

space, or to provide subway access, to compensate for introducing a larger population to their sites.

Where such conditions or "exactions" are allowed, they must comply with standards intended to ensure that the zoning authority acts within its proper limited authority to address land use issues, and in the public interest, not simply to extort payment as the price of conferring benefits to owners.

Our following discussion shows that the proposed East Midtown zoning scheme violates these standards and exceeds the zoning power. In brief, the zoning power does not extend to the sale of zoning rights or other illegal exercises of zoning power. Conditions and exactions may be imposed, but only where there is a reasonable relationship between the condition or exaction, on the one hand, and the burden created by the owner if permitted to do what he proposes, on the other. Where the condition or exaction is not sufficiently related, or is excessive, the courts deem it void. The East Midtown zoning proposal fails these tests.

The price formula alone makes the scheme look, smell and feel like zoning for dollars, not for good land use purposes. Other evidence tends to confirm this conclusion. For example:

- The City proposes that the proceeds of sale of the zoning rights will go to a special mayoral fund dedicated to making improvements in pedestrian circulation within, and adjacent to, the East Midtown area. DCP identifies only a few possible improvements, but the MTA had previously undertaken to perform some of the very same improvements that are identified. To that extent at least, the proceeds of zoning rights sales go to relieving the City or its surrogate (such as the MTA) of expenses they would otherwise have absorbed out of general funds rather than to new projects causally related to the burdens created by new development.

- The environmental impact statement reveals that new development will actually have almost no impact on pedestrian circulation throughout most of the area. It will have a little on the Grand Central subway stations where, by one measure, it will increase existing overcrowding by 0.8%. The necessary connection between created burden and exaction to mitigate is missing.

- That the rather small impact is focused on the Grand Central subway situation makes one wonder why the developer of new square footage at 57th Street should pay the same into the fund as a developer on 42nd Street. The contribution rates are, in fact, unrelated to the degree of burden each developer imposes. But the law requires that there be such a relationship, determined on an individualized basis, if the scheme is to survive judicial review.

- Although DCP has tentatively identified some projects for the fund, the fund's management committee will actually decide what projects get funded. At this point, it is not known what the projects will be nor how much they will cost. In that factual vacuum, it is hard to say that $250 per square foot will raise too much,

too little, or just the right amount to fund such projects as are necessitated by a duty to mitigate. The absence of evidence of the identity and cost of potential projects precludes any rationalization that the price might somehow relate to anticipated needs.

We believe that, in its present condition, the financing scheme is doomed to failure in any prospective litigation. Major rethinking is necessary.

DETAILED DISCUSSION

1. Specific Background.

The area proposed to be rezoned lies largely between 40th Street and 57th Street, and between Third Avenue and a line running mid-block between Madison and Fifth Avenues.

Other organizations (including the Municipal Art Society, and the Multi-Board Task Force on East Midtown[5]) have extensively analyzed the planning issues raised by the proposal. We largely agree with their analysis. We are particularly concerned, for example, with the encouragement the proposal gives for demolition of older buildings, including some 14 or more landmark-quality buildings, which serve as reminders of our roots and history; the impact of further development of East Midtown at the possible risk of reversing growth of other business centers, particularly in outer boroughs; and failure to encourage small retail space to accommodate and encourage non-chain stores.

The essence of the rezoning has two aspects: First, a sharp increase in the amount of allowable floor area on large lots fronting on wide streets[6] throughout the district. In some areas, the "as of right" floor area limit is increased by as much as 80%, or 100% for "superior developments." Second, a required "contribution" to a special mayoral fund of $250 per square foot of planned floor area above the "maximum base" amount, which generally corresponds to the current zoning. (Proposed Sections 81-621 and 81-624).

The City Club is concerned that, all too often, the City's governing bodies view City assets – including the dignity and beauty of its streetscapes, its public buildings, and, in the present context, development rights – as saleable commodities, there to be cashed in to finance city operations or to make up for past failures to maintain capital infrastructure. We see this in the MTA's use of its sidewalk entrances as scaffolds for advertising, in the sale of libraries to

[5] The Task Force is comprised of several community boards.

[6] A "wide" street is generally 75 feet or more across (NYC Zoning Resolution 12-10); in Manhattan, "wide" streets are generally avenues and major cross streets such as 42nd and 57th Streets.

raise operating funds or make up for deferred maintenance, and the introduction of unrelated commercial uses into public parks to support park operations.

Often such practices elevate financial interests to a level overwhelming other aspects of the City's welfare. Often they compromise the integrity of governmental operations by inviting an inference of abuse of authority even where agencies may believe they are acting in the utmost good faith. The East Midtown rezoning proposal may have many good intentions and laudable provisions. But what jumps out and eclipses all else are doubts inspired by the seemingly paramount purpose of raising revenues through the sale of development rights. The motive impugns too many other aspects of the plan and, whether consciously or not, invites such questions as: Is DCP's primary purpose really what it claims – to replace older buildings and make the City more competitive with other cities? (The answer may be, yes, but DCP offers very little solid evidence of pernicious obsolescence or impending decline.) Will upzoning to increase bulk solve the supposed problem? (Again, no significant evidence.) Is DCP falsely minimizing the probability that the proclaimed purpose of replacing older buildings will result in wholesale demolition of landmark quality buildings? (DCP soothingly assures that its efforts will not be devastatingly successful. But it offers no evidence.)

DCP's assigned function is land use planning. Other sectors of government, more directly responsible to voters, have the power to raise money, generally by taxation. When DCP and the Commission venture into planning for fund-raising purposes, they compromise their own integrity and lead the public, quite rightfully, to ask whether these planning bodies choose, for example to upzone to increase density, because increased density is desirable from a planning point of view, or because doing so serves as a disguised substitute for taxation.

The proposed fixed price dissolves the disguise. Two hundred fifty dollars per square foot does not relate to the cost of district-wide improvements necessitated by the new construction. As far as the supporting description and Environmental Impact Statement[7] reveal, that cost is not known. Nor is the price otherwise based on planning considerations. City Planning candidly discloses that the price is equal to the estimated market price of transferrable development rights from landmark buildings to nearby receiving sites, that is to say, the market value of the right to construct floor area above the basic zoning standard. The City would simply charge what it believes the market will bear for a zoning commodity that the City creates.

We believe that the courts will find the fee-for-zoning scheme illegal and void. They may leave the increased development rights in place, but they will not allow collection or retention of the payments. This could result in construction of much more floor area than the

[7] The description was produced by DCP to explain the proposals and the need for them. It is divided into sections which we refer to following each citation to the Description (e.g. "DCP Description, Background & Existing Conditions," referring to the first section). The Description is available on the DCP's website as is the Environmental Impact Statement (referred to herein as "EIS.") References to the EIS are followed by the relevant section or table number.

City would choose to allow if it had assumed to begin with that it could not collect the payments.[8]

A second area of concern is that the proposed amendments would give broad and undefined discretion to the Commission to issue special permits for still greater FAR to encourage outstanding design, planning and energy performance. (Proposed Section 81-624). We question whether the guidelines for such "superior developments" are specific enough to satisfy legal requirements for delegation of power to an administrative agency.

2. Sale of zoning rights.

2.1 The opportunity.

The Commission proposes that an owner of a "qualifying site" (i.e. one having at least 200 feet frontage on a wide street,[9] and total lot area of 25,000 square feet if on Park Avenue, or 40,000 square feet if in the area surrounding Grand Central Terminal) may increase its buildable floor area above the basic maximum amounts (either 12 or 15 FAR) in two ways:

> The owner may increase FAR by 44 to 80 percent *as of right* simply by making a monetary contribution to the District Improvement Fund for use in improving pedestrian circulation within, or immediately adjacent to, the East Midtown Area. (Proposed Section 81-621).[10]
>
> In a slightly smaller portion of the same Grand Central/Park Avenue area, the owner may increase the FAR still more, from 24 to 30 (Grand Central), or from 21.6 to 24 (Park Avenue), by making a further contribution, and by satisfying the Commission that the project will meet the Commission's vague requirements for

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[8] See City of New York v. 17 Vista Associates, 84 N.Y.2d 299, 618 N.Y.S.2d 249 (1994), where defendants gave a promissory note to the City for expediting and assuring issuance of a demolition permit, and the court refused to enforce the note as illegal because the City had, in effect, extorted it. Significantly, the Court was aware that the building had already been demolished by the time the case reached the courts. Voiding the note had the effect of confirming the demolition but eliminating the City's quid pro quo.

[9] On avenue sites, 200 feet almost always represents the entire width of the block.

[10] As we read the somewhat ambiguous language of the Table of allowable increases in FAR at Proposed Section 81-62, and text of Proposed Section 81-621, an owner may get an increase of 20 to 25% of base FAR by payment alone. For the next 35% to 60%, the owner has a choice of either making further monetary contributions to the District Improvement Fund or buying transferrable development rights on the market, or a combination of both. (DCP East Midtown Description, Proposal, confirms this reading).

excellence in design, planning, and energy performance. (Proposed Section 81-624).

2.2 The price.

The price is fixed at $250 per square foot of additional FAR. An exception is made for grandfathered buildings constructed before December 15, 1961 which exceed the basic maximum FAR of 12 or 15. The owner may knock down such a non-conforming building and rebuild it to the same FAR it formerly had on condition that he contribute $125 per square foot of the former excess. These dollar amounts may be changed annually to reflect changes in average asking rents in the area, but may never be reduced below the fixed figures of $250 or $125 per square foot.

There are no catches in the "as of right" portion of the deal. You pay your money, you get your additional floor area.[11]

The $250 price is not related to any estimate of the cost of needed or desirable pedestrian circulation improvements. Rather, it is what the City estimates is the market value of transferrable development rights. (DCP East Midtown Description, Proposal).

2.3 Limits of zoning power.

New York State has defined zoning authority as "not a general police power, but a power to regulate land use." Sunrise Check Cashing v. Town of Hempstead, 20 N.Y.3d 481, 485, 964 N.Y.S.2d 64, 66 (2013). The zoning board of a municipality may not reach beyond that scope to achieve other objectives nor employ methods inconsistent with its limited power. So, for example, Sunrise holds that the Town acted beyond its zoning authority in adopting a zoning regulation banning check cashing businesses because the evidence showed that the Town acted out of animosity against the particular type of business rather than to achieve land use objectives such as limiting commercial activities in residential areas. Similarly, the zoning power does not extend to "spot zoning" or creation of exceptions to a uniform plan to suit a specific user. Dexter v. Town Bd. of Town of Gates, 36 N.Y.2d 102, 365 N.Y.S.2d 506 (1975).

[11] The proposed amendments lay down blanket rules for obtaining the "as of right" additional FAR. A single exception allows an owner to build a pedestrian circulation improvement himself, but the project must be on the Committee's priority list and be approved by the Committee, and the cost must be at least as great as the required monetary contribution. Thus, the option has little to no practical effect in terms of what improvement gets built and how much it costs the "contributor." But it does further confirm that what matters in this proposed law is not merely whether the owner satisfactorily ameliorates a specific burden he creates, but the monetary value of the "contribution," whether in money or in kind.

Another limitation on the scope of zoning power bars a municipality from simply selling zoning rights. Municipal Art Society of New York v. City of New York, 137 Misc.2d 832, 522 N.Y.S.2d 800 (Sup. Ct. N.Y. Co. 1987). In that case, the City agreed to sell the former Coliseum site at Columbus Circle on the condition that, if the buyer was unable to obtain a special permit to build an entrance to the adjacent subway station on the property (which would enable the buyer to increase its permissible FAR by 20%), the price would go down by $57 million. If, on the other hand, the special permit was issued, the City would keep the $57 million in its general funds. The court voided the permit on the ground that the price in reality had two distinct components: one price for the land, and an add-on of $57 million for the increased floor area if the buyer obtained the special permit. In the Municipal Art Society case, the $57 million charge had nothing to do with land use planning. It had to do with a commercial deal wrapped in a thin veil of zoning.

Other courts implicitly recognize the general illegality of zoning for dollars by explicitly recognizing that the limited scope of zoning authority (and related exercises of police power, such as issuing building permits) bars agencies involved in regulating real estate development from imposing charges (sometimes termed "impact fees" or analogous names) on owners and developers that are not directly and exclusively related to, and proportional to, the burdens a permitted new development place on the community. An excessive charge ceases to be merely an act of regulation (exercise of police power) and becomes a disguised exercise of the power to tax – i.e. to generate funding for purposes going beyond simple mitigation of an impact directly resulting from land use regulation. See e.g.:

- Idaho Bldg. Contractors Ass'n v. City of Coeur d'Alene, 126 Idaho 740, 743, 890 P.2d 326, 329 (1995) (if an "impact fee" on new construction is imposed primarily for revenue raising purposes, it is in essence a tax and can only be upheld under the power of taxation," not under the police power; court concludes that there is a lack of substantial relationship between the intended use of the fee and the plaintiff's development and that the fee is, therefore, in reality, a tax).

- Country Joe, Inc. v. City of Eagan, 560 N.W.2d 681, 686 (Minn. 1997) (fee imposed on property owners to build and improve streets is a tax, though "cloaked" as an exercise of police power; "we find it significant that revenues collected from the road unit connection charge are not earmarked in any way to fund projects necessitated by new development, but instead fund all major street construction, as well as repairs of existing streets").

- Mayor & Bd. of Aldermen, City of Ocean Springs v. Homebuilders Ass'n of Mississippi, Inc., 932 So. 2d 44, 56 (Miss. 2006) (a series of development impact fees adopted by city were not earmarked for the primary or exclusive benefit of those obliged to pay them and, therefore, could not be approved as an exercise of police power).

As will appear from discussion below, some of these fact patterns bear a remarkable relationship to characteristics of the "development incentive bonus" program of the proposed rezoning, such as the anticipated use of the funds raised to support improvement projects to remedy conditions that either already exist and are, therefore, totally unrelated to new development, or which are necessitated by new construction only to a very limited extent, and then only by new construction near Grand Central.

There are also constitutional limitations. Zoning restricts free use of property and, therefore, implicates Fifth and Fourteenth Amendment provisions prohibiting takings without just compensation, and deprivation of property without due process of law. Traditionally, zoning finds justification on the ground that some restrictions are necessary for the common welfare; restrictions provide reciprocal benefits assuring, as best one can, that each owner may enjoy his property undisturbed by his neighbors. If your use is restricted, at least you have the benefit that your neighbor's otherwise cherished right to carry on a junk yard business next to your home is also restricted. To carry out these requirements, the law requires that a comprehensive plan form the basis for all zoning and that the plan and its execution equitably allocate the rights and burdens of ownership. See Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926).

Euclid adds that a zoning law which is "arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare" would be unconstitutional. (272 U.S. at 395). The New York Court of Appeals agrees that a zoning ordinance that does not substantially advance a legitimate zoning objective is invalid under the Due Process clause, and the Supreme Court from time to time confirms the same. Bonnie Briar Syndicate, Inc. v. Town of Mamaroneck, 94 N.Y.2d 96, 105, 699 N.Y.S.2d 721, 974 (1999); see e.g. Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 125 S. Ct. 2074, 61 L. Ed. 2d 876 (2005).

A zoning restriction may also so inhibit use of land, or otherwise seize property, that it violates the Takings clause unless just compensation is paid. For example, government raises both taking and due process issues when it conditions the bestowal of a governmental benefit – such as permission to build – upon the beneficiary's giving back something of value if the government's seizure of that give-back would itself constitute a taking. If the quid pro quo reasonably relates to a special burden the individual would impose on the public in exercising the permit, and a reasonable level of use remains, the government's demand is not a taking.[12] But remove the reasonable relationship, and the government's demand becomes pure and simple extortion. Nollan v. California Coastal Commission, 483 U.S. 825, 107 S.Ct. 3141 (1987); Dolan v. City of Tigard, 512 U.S. 374, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994).

Extortion takes the form of using governmental regulatory authority to force owners to purchase from the government something they already own. A fundamental proposition lies at the heart of much of our political and economic system: real property is the exclusive property

[12] For a more complete general formulation of what amounts to a taking see Penn Central Transp. Co. v. New York City, 438 U.S. 104, 124, 98 S.Ct. 2646, 2659, 57 L.Ed.2d 631 (1978).

of its owner, and extends not merely over the surface of a platted parcel, but from the core of the Earth to the heavens above. See, Macmillan, Inc. v. CF Lex Associates, 56 N.Y.2d 386, 392-393 (1982) (treating "air rights" – also known as "development rights" – as an attribute of property rights and expressly rejecting the idea that they are a product of zoning). Society has agreed that government may regulate the use of property to prevent conflicting or noxious uses and otherwise to promote the general health, safety and welfare. So government may, within reason, put a ceiling on the amount of floor area owners may build on their property. That does not alter ownership of development rights inherent in the ownership of property; it merely limits their use. Government might appropriately reduce the regulatory strictures by upzoning as the municipality grows and improved infrastructure comes into place supporting greater density. If government relaxes the regulation so as to allow more FAR, then tells the owner that he may build to the new level only upon paying government for the development rights he already owns, it crosses beyond the bounds of regulation into the realm of extortion. It tells the owner that he may enjoy his property, including constructing what government has demonstrated that it regards as reasonable by adopting the particular FAR limit, but only by purchasing development rights (rights he already owns by virtue of owning the land) from the government. There is even an inherent element of economic strong-arming: so long as the price government demands still allows the owner to make a profit, the owner's financial self-interest militates in favor of getting ahead of his competitors by paying the price (much as entrepreneurs throughout the world grease palms) with no more than a wince.

Why the fuss? one might ask. If a municipality can do the same thing by, for example, taxing or by enacting a criminal law against engaging in a check cashing business, what does it matter that it uses the zoning power instead? Without going into details, the answer is that different standards and limitations may apply. A town may not have legislative authority from the state to enact such a criminal law which concerns state-wide policy issues rather than local likes and dislikes. Taxation has uniformity and general use requirements, and the option of adopting a particular type of tax may not be authorized by the state legislature for given types of municipalities. Furthermore, as mentioned before, the public's expectation of fairness in zoning would be seriously undermined if, in practice, some owners could buy their way out of restrictions that apply to most others, or if the public perceived that zoning boards were more concerned with raising money than with enacting land use laws for the general public welfare.

#### 2.3.1 Zoning action must substantially advance a legitimate zoning goal.

A zoning ordinance that does not substantially advance a legitimate zoning objective is invalid under the Due Process clause. Bonnie Briar Syndicate, Inc. v. Town of Mamaroneck, 94 N.Y.2d 96, 105, 699 N.Y.S.2d 721, 974 (1999). That rule encompasses sub-rules mentioned above, such as that zoning may not be used simply as a device for extracting money from persons applying for permits.

The formula expresses two independent requirements: the objective must be a legitimate land use purpose, and the action taken must substantially advance it.

If either requirement is not met, the New York courts treat the action as void. See e.g. Fred F. French Investing Co., Inc. v. City of New York, 39 N.Y.2d 587, 385 N.Y.S.2d 5 (1976), rearg. denied 40 N.Y.2d 846, 387 N.Y.S.2d 1033, 356 N.E.2d 491, appeal dismissed and cert. denied 429 U.S. 990, 97 S.Ct. 515, 50 L.Ed.2d 602) (holding invalid a rezoning, as public parkland, land formerly zoned residential that the owner had used as a private park for residents of the housing units on the same property).

Thus, though the action may purport to be zoning, it fails if not properly undertaken. The effect is the same as if the action were completely outside the zoning power.

The East Midtown proposal's sale of rights orientation is hard to justify either as a legitimate zoning goal or as substantially advancing any stated goal.

2.3.1.2 Legitimacy of zoning purpose.

DCP does not explicitly state what its zoning purpose is for charging a fee for extra FAR.

Fund-raising in itself is, as we have shown above (2.3), not a legitimate zoning purpose.

In its public presentation, DCP says that its over-all purpose for recommending the rezoning is to encourage increased development in an area at risk of decline because its office space does not meet modern requirements, and its buildings are old, all to the City's disadvantage in competing with other cities throughout the world. As the Description says, "Existing commercial zoning in most of the area allows commercial density to an as-of-right Floor Area Ratio (FAR) of only 15 along the avenues and 12 on some mid-blocks." "Current zoning has proven to be an impediment to reinvestment in East Midtown." Existing special permit provisions for extra FAR, the Description says, have failed to generate new development except for 383 Madison Avenue, built in 2001. (DCP East Midtown Description, Background & Existing Conditions).[13]

While that premise may justify upzoning, it cannot credibly be offered as a justification for charging a very substantial fee to the developer for taking advantage of the upzoning. Inevitably, the charge exerts a contrary influence just as higher construction costs or interest rates would. It certainly cannot be credited with *promoting* development.

Alternatively, we might suppose that DCP would claim, although it has not done so thus far, that the purpose of the charge is to mitigate burdens caused by the prospective new construction. (The Mayor's reported deal with the Manhattan Borough President to complete all pedestrian circulation improvements out of other funds and before the new zoning becomes available for use starting in mid-2017 may deprive the City of the ability to make this argument.)

[13] Although not mentioned by the Description at this point, the SL Green company is also in process of planning development of the 42nd Street block between Vanderbilt and Madison Avenues.

In any event, it too lacks credibility. There are many reasons to believe that there is simply no rational relationship between the charge and the perceived burdens, and these will be discussed in the next section. Suffice it for now to focus on one: although the EIS indicates that there are many problems with the pedestrian circulation system around Grand Central, they exist now and will barely be affected by the anticipated future development. That being the case, the problems would have to be resolved somehow with or without the zoning amendment. Charging a fee for FAR is merely a device for raising money to take care of this pre-existing problem and avoid having to pay to remedy it out of general funds. Again, it looks like the motive is fund-raising rather than a planning objective.

In fairness, the EIS does indicate that, even if a very large proportion of the problems to be remediated exist already, there are some that will be caused by new development. But one must quantify that to make a case for charging $250 for every square foot of new development. DCP documents do not reveal estimated costs nor what aggregate amount of fees can reasonably be expected and when; nor are projects even specifically identified. So meaningful quantification is impossible. One thing we do know is that almost all of the *newly* added pedestrian circulation issues will be at the Grand Central subway stations, and *new* population will add about 0.8% to existing burdens. Being more generous, let us arbitrarily suppose that say, 10% of the costs of remediation for pedestrian circulation problems would be attributable to new construction, and that 100% of the funding raised by charges for zoning rights went to pay for 100% of the remediation required by present and future conditions. That would necessarily lead to the conclusion that 90% of the purpose for the charges is fund-raising. One could change the assumptions, perhaps to say that the charges would pay for only 50% of the needed remediation. The contribution from new development would still be five times what that development caused to be required. It seems fair, at a minimum, to be very skeptical that the City can demonstrate a legitimate planning objective for the exaction.

For many reasons, the charge appears to be an end in itself and, therefore, invalid, or at best, highly suspect so as to compel the closest scrutiny.

- That the amount of the fee is fixed on the basis of market value – i.e. the theoretical maximum that a willing buyer would pay in order to acquire the right to construct more FAR and still make an acceptable profit on his investment – marks the charge as representing what the City figures it can extract as a quid pro quo rather than as a charge related in some way to legitimate planning purposes.

- The price will be adjusted annually to reflect increased asking rents in the district, though it cannot go below the initial $250 per square foot. This appears to be merely a method of indexing to keep the "contribution" at market value. It, therefore, tends to confirm that it represents what the City believes it can extract as a quid pro quo rather than a payment to further legitimate planning objectives. The idea of basing the index on asking rents, incidentally, must amuse space marketers who know full well that one can as easily "remeasure" space to increase it by ten percent as raise the asking rental rate by ten percent; the result is the same, but only the latter raises the index for development rights.

- The price serves to oblige the owner to pay for the privilege of developing space that the City wants to see built anyway. The City actually characterizes most of the increased allowable FAR as "earned as of right" development. (DCP Description, Proposal). More correctly, one should call it "purchased as of right" FAR as the developer is not required to do anything to "earn" it; he only has to pay.

Unless the City succeeds in establishing a prima facie case that it is imposing the sale price for legitimate planning purposes, rather than to wrest a commercial deal, the inquiry stops here.

2.3.1.3 Substantially advancing the legitimate zoning purpose.

Assuming that there is a legitimate zoning purpose served by the fee requirement, even if it is secondary to the primary purpose of promoting development, does the fee substantially advance the secondary legitimate purpose?

An "exaction" is any give-back for public use that the zoning authority requires as a condition for granting zoning approval.

Exactions fall into two categories: those that serve to promote legitimate zoning objectives, and those that do not. The Coliseum site case discussed above (2.3) illustrates both. In the first type, the buyer was allowed to build more floor area if it provided an entrance to the adjacent subway station, a need presumably created by the excess floor area. As far as the court's decision reveals, the buyer did not bother to challenge this, apparently satisfied with that part of the deal financially and, perhaps as a legitimate exercise of zoning power. But the buyer did attack the second type, in that case a raw extortion of payment, essentially for ensuring that the Planning Commission would cooperate in giving the permit contemplated by the Zoning Resolution for such a subway entrance bonus.

Most contemporary litigation on exactions concerns the more sophisticated form of exaction where the property owner's activity imposes a burden on the public; and the municipality, to alleviate the burden, demands what at least appears to be a related remedial give-back.

Authoritative cases over the past 25 years have established the following criteria to determine whether an exaction is valid:

(a) Is there a "**nexus**" or sufficiently close connection between the exaction and a legitimate governmental objective the zoning authority seeks to achieve? Nollan v. California Coastal Commission, 483 U.S. 825, 107 S.Ct. 3141 (1987). In Nollan, the plaintiff wanted to expand his beachfront house. The Coastal Commission, whose permission was necessary, denied permission unless Nollan would agree to grant an easement for the public to pass along the beach on the shorefront side of the house after reaching the beach from other public access points. It

justified the denial on the ground that expansion of the house would cut off the public's view from the road on the opposite side of the house. The Court ruled that there was no nexus between the justification for denying the permit (that the house would impair vision from the road) and the exaction (giving public access to walk along the beach in front of Nollan's house if one already had access to the beach through other means). See Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 547-548, 125 S.Ct. 2074, 2086-2087, 161 L.Ed.2d 876 (2005), further explaining Nollan.

(b) Is there "**rough proportionality**" between the burden imposed by the owner and the exaction imposed by the zoning authority? Dolan v. City of Tigard, 512 U.S. 374, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994). I.e., assuming there is a nexus, is the exaction roughly proportional to the burden created by the property owner upon exercising the permit the owner is seeking? The plaintiff in Dolan sought a building permit to enlarge her hardware store on a downtown parcel bordering the Fanno Creek. The municipality had adopted a program to impose conditions on building permits to achieve two public objectives: (a) to contain flooding from the Creek by preserving an unpaved flood zone along the creek; and (b) to alleviate traffic congestion in the downtown area. To help achieve this, the town conditioned the issuance of a building permit to Mrs. Dolan on her agreeing to convey the flood plain portion of her parcel to the City for the City's use as a pedestrian and bicycling area. The Court held that the exaction did not pass the rough proportionality test because it required granting title to the flood area to the Town whereas simply imposing an easement prohibiting paving would suffice, and the Town's use of the land for general alleviation of a traffic problem could not be sustained in the absence of evidence that the bike and pedestrian path's absorption of traffic would bear an acceptable quantitative relationship to the amount of additional traffic which the store enlargement would create. That relationship should take into account the inequity of burdening a private owner with the expense of resolving a public problem if that burden should justly should be borne by the public at large (citing Armstrong v. United States, 364 U.S. 40, 49, 80 S.Ct. 1563, 4 L.Ed.2d 1554 (1960)).

Dolan left the concept of "rough proportionality" rather vague except to indicate that it falls between standards previously adopted by various states, which required either little to no proportionality at one extreme or something close to equality at the other. Dolan added that "no precise mathematical calculation is required." (512 U.S. at 391).

(c) Third, the zoning authority cannot apply a flat formula to the question of proportionality; there must be an **individualized determination** in each case. Dolan v. City of Tigard, 512 U.S.374, 114 .Ct. 2309, 129 L.Ed.2d 304 (1994). At least in theory, Dolan suggests, in each case the burden

imposed by the owner's action will be unique, as will its satisfactory proportionality to the exaction imposed.

Although Dolan does not directly say so, we take individualized determination to imply that there must also be a reasonable relationship between the exactions on persons imposing burdens within a given area, which are similar in nature but different in degree. The point is to be fair to all.

Nevertheless, the New York Court of Appeals held in Twin Lakes Development Corp. v. Town of Monroe, 1 N.Y.3d 98, 769 N.Y.S.2d 445 (2003), that a flat fee of $1,500 per lot resulting from the subdivision is presumptively constitutional because of the "plaintiff's heavy burden to rebut the presumption of constitutionality of this law" and the Court's inability to perceive of anything in Dolan that would preclude a flat fee. (1 N.Y.3d at 106, 769 N.Y.S.2d at 449). The Court's reasoning is less than persuasive especially without a detailed exposition of the facts. Reading between the lines, one can imagine a context warranting by-passing individual determinations where the fee is relatively small so that it would not be economical to administer if an individualized determination were required, and where, by virtue of proximity and similar circumstances within the regulated area, there might be little variation in impact.

In a fairly similar situation to Twin Lakes, the New Hampshire Supreme Court ruled otherwise in J.E.D. Assocs., Inc. v. Town of Atkinson, 121 N.H. 581, 584, 432 A.2d 12, 14 (1981), overruled on other grounds, Town of Auburn v. McEvoy, 131 N.H. 383, 553 A.2d 317 (1988).[14] The town adopted a provision requiring that, as a condition of approval of a subdivision, the owner must contribute land to the town for park or other municipal purposes (otherwise unspecified) representing approximately 7 1/2 % of subdivision area. The Court held the provision was illegal because unrelated to any specific burden the owner would be imposing on the community and because the town had not demonstrated any particular need for the land. J.E.D. has been favorably cited in Nollan and Dolan, and by the New York Court of Appeals in Seawall Associates v. City of New York, 74 N.Y.2d 92, 544 N.Y.S.2d 542 (1989), cert. denied, 493 U.S. 976, 110 S.Ct. 500 (1989).[15]

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[14] The overruling is on limited procedural grounds not related to the substantive holding.

[15] The factors described in the foregoing text apply generally throughout the land use field, not just to zoning. See Manocherian v. Lenox Hill Hospital, 84 N.Y.2d 385, 618 N.Y.S.2d 857 (1994) (rent stabilization); City of New York v. 17 Vista Associates, 192 A.D.2d 192, 599 N.Y.S.2d 549 (1st Dep't 1993) (expedited issuance of building permit for a fee).

(d) Koontz v. St. Johns River Water Management District, 2013 WL 3184625 (U.S. Sup. Ct. June 25, 2013), further explains the rationale of the principle that, absent the necessary nexus and proportionality, an exaction is unconstitutional. The zoning authority is saying, in essence, we will not give you a benefit which would otherwise be available unless you pay for it, whether in kind or in cash. Clearly, the zoning authority could not directly seize a material interest in property (such as an easement for public passage – Nollan – or outright title to a portion of the parcel – Dolan) without compensation. See Fred F. French. But it is doing much the same thing by demanding it as a quid pro quo because it is in a position to force you to accept the "deal." You are interested in getting a permit, say to add 5 FAR to your building. The permit has a value to you in terms of a capitalized value of future earnings from the extra floor area. So long as the zoning authority demands something having less cost to you than that capitalized value plus the estimated cost of litigation, you will make the "deal" even though what the zoning authority demands has no significant relationship to any burden you would be causing by acting on the permit. Essentially, the zoning authority has placed itself in a position to act arbitrarily and to extort your "contribution." The Court condemns this as an "**unconstitutional condition**"

(e) The theory in exactions cases has elements of both due process and takings analysis. But, for present purposes, we believe that such classification is unimportant. New York courts generally tend to treat zoning and other land use regulations that violate due process or constitute de facto takings as void. See Fred F. French (rezoning of private residential property as public park is void); Vernon Park Realty, Inc. v. City of Mount Vernon, 307 N.Y. 493 (1954) (confiscatory zoning regulation is void); Manocherian v. Lenox Hill Hospital, 84 N.Y.2d 385, 618 N.Y.S.2d 857 (1994) (extension of rent stabilization in such manner as to protect charitable corporation's interest in housing its employees – and terminating their subtenancy at will – is inconsistent with general purpose of rent stabilization to protect interest of occupying tenants and is, therefore, unconstitutional and void). In these cases and others, the courts hold the statute void because the enacting entity exceeds its authority when it enacts unconstitutional regulation. The question may remain whether the court should award damages, or even just compensation for the period during which the regulation was in effect against the plaintiff. That issue may be of some importance to the owner if he brought the challenge. But, where the challenge is brought by a non-owner, an interested member of the public, with the goal of obtaining a declaratory judgment that the zoning scheme is void, whether and on what theory the owner might be able to recover damages from the City will not affect the declaration that the regulation is void.

2.4 Application of law to "as of right" FAR bonuses (for a price) (Proposed section 81-621).

These are the bonuses that apply to all "qualified sites" (200 feet frontage on a wide street, and minimum lot size of 25,000 square feet). The proposal grants these bonuses subject only to payment of $250 (generally) into a District Improvement Fund devoted to pedestrian circulation improvements anywhere within, or adjacent to, the East Midtown Subdistrict. This allows an increase from a present maximum of 15 FAR in the affected areas to 21.6 FAR, a 44% increase. The only requirement is to pay for it.

2.4.1 Nexus.

We have discussed above whether the exaction is motivated by legitimate planning concerns or really expresses nothing more than a market trade-off: zoning for dollars. Finding legitimate planning concerns amid the fog of commercial trade-off evidence is not easy. Here are some of the problems:

(a) The City does not explain in a meaningful and evidence-based manner what its needs are, either as they relate to increasing the availability of modern office space and making East Midtown more like other cities' downtown areas, or as they relate to pedestrian circulation. It does not explain how imposition of a flat charge per square foot of additional FAR serves either purpose.

(b) The charge presumably actually works against the goal of increasing modern office space and renovating Midtown, just as higher construction costs or increased interest rates would. The City says nothing to explain how increasing costs would encourage construction. But it does recognize that existing special permit devices (including exactions) have not worked.

(c) If the charge is to be justified by a need to mitigate additional burdens on existing pedestrian circulations systems, the City's evidence is not persuasive. It is not persuasive precisely because of the irrationality and lack of proportionality between undefined needs (known only to be concentrated in and around Grand Central) and monetary "contributions" at a fixed rate with regard to buildings more distant from Grand Central which may have substantially no impact on pedestrian use of Grand Central.

We do not believe that the City has satisfactorily demonstrated, at least at this time, that the necessary nexus exists to establish that the exaction serves a legitimate public purpose.

2.4.2 "Rough Proportionality."

Assuming, however, that the nexus requirement might be satisfied, we move on to the question of "rough proportionality" between the exaction and the impact of each development that creates a need for mitigation.

Neither the proposed amendment nor the accompanying Description contributes much to analyzing the "rough proportionality" issue. We do not believe the City's burden of establishing rough proportionality has been met.

Notably, the EIS suggests that, except for impacts on the Grand Central subway stations, relatively few pedestrian circulation burdens are attributable directly to the rezoning (and consequent construction), and many of those are readily remediable using what would appear to be relatively inexpensive means. The EIS findings strongly suggest that pedestrian circulation impacts occur and are caused disproportionately at the southern end of the district. For example:

> Subway stations. The rezoning would have no significant impact on stations at 47th-50th Streets/Rockefeller Center; 51st Street/Lexington/53rd Street; and 5th-6th Avenues/Bryant Park. (EIS 12.2.2, 19.6.1).
>
> Even the impact of nearby new construction on conditions at Grand Central appears largely illusory. As the EIS says, the subway station at Grand Central is already "one of the busiest in the entire subway system with nearly half a million daily users . . . and experiences pedestrian circulation constraints, including platform crowding and long dwell times for the Lexington Avenue line (4, 5, and 6), which limits train through-put, creating a subway system bottleneck." (EIS 1.3.1.3). The EIS estimates that new buildings resulting from the rezoning would add about 4,000 users of the subway platforms at Grand Central at peak hours (divided approximately evenly between the morning and evening peak hours). (EIS 15.5.2.1). This is about 0.8% of the current half million daily users. The cited figures might not be exactly comparable (the peak hour traffic, for example, does not include non-peak users who might be contributed by the rezoning) but they raise an unanswered question as to just how significantly the rezoning would add to the existing "bottleneck."
>
> The EIS assumes that added burdens caused by increased traffic through the Grand Central stations would be fully mitigated by anticipated projects under the DIB (district improvement bonus) program. (EIS 12.2.2). Whether the projects funded by the DIB program would also clear up existing "bottleneck(s)" is not entirely clear. What does appear, is that the existing problems at Grand Central are already quite severe (as anyone using the Terminal's subway facilities at rush hour knows well). Where DCP provides no information to the contrary, one must assume that adding 0.8% usage is not the straw that will break the camel's back. More likely,

the Fund will go primarily to remediating existing problems, not new ones.

Buses. Increased bus traffic could be fully mitigated by adding bus runs or using articulated buses, which are larger. (EIS 19.6.2). That would not appear to fall within the scope of pedestrian circulation improvements to be performed by the Fund.

Sidewalks. The rezoning would adversely affect two sidewalks, located on 43rd Street between Fifth and Vanderbilt Avenues on the north side. The problems can be fully resolved by widening one by 1.5 feet, and by moving the location of tree pits on the other. (EIS 19.7.1). Seemingly, a minor matter.

Crosswalks. Twenty-six crosswalks would be severely impacted. Remediation would "generally consist of crosswalk widening and minor traffic signal timing adjustments," following which only four would continue to present problems." No further solutions are offered for those four. (EIS 19.7.2). No cost estimate, but it cannot be much.

If additional pedestrian traffic follows perforce from the increased FAR which the City views as a boon, then surely, at a minimum, the calculation of rough proportionality of exaction to burden created by the developer should take into account the public benefit of the construction. J.E.D. Assocs., Inc. v. Town of Atkinson, 121 N.H. 581, 432 A.2d 12 (1981). But a fixed price based on market value of TDRs does not do that.

Nor does a fixed price appear to have any relationship at all to the burden created, much less a roughly proportional one.

The task of identifying appropriate pedestrian circulation projects, prioritizing them, planning them, and pricing them, falls to the as-of-yet non-existent District Improvement Fund Committee. The Description provides essentially no information on these points other than an implication that creating a pedestrian zone on Vanderbilt Avenue would be a priority. (DCP Midtown Zoning Description, Proposal). The amendment text suggests that the Committee should give priority to projects in the immediate Grand Central area. (Proposed 81-681(a)). Without these basic decisions having been made, one clearly cannot know what the total cost will be. Whether or not one allocated part of the cost to developers and part to the public, one cannot know what the developers' share should be. Would $250 per square foot fairly approximate the cost of all likely pedestrian improvements? Might it be grossly excessive? There is no basis for even beginning to answer this. One cannot know whether there is any rough proportionality between the burden any particular development imposes on the pedestrian circulation system and the cost of ameliorating that burden (i.e. the required level of contributions) without knowing what the solution is and how much it will cost to implement it. See J.E.D. Assocs., Inc. v. Town of Atkinson, 121 N.H. 581, 432 A.2d 12 (1981) (exaction void where town failed to demonstrate particular needs). Inevitably a court would have to conclude that rough proportionality is unproven.

A fixed price also cannot cover the varied circumstances strewn over a large area of about 160 acres and some 70 blocks. From 40th Street to 47th Street, much (but not all) of the district lies within two blocks of Grand Central and the teeming railroad and subway terminals centered there. At the northern reaches of the district (as far up as 58th Street, one would expect that commuting life might focus considerably more on closer subway stations and on bus lines, not to mention taxis. As noted above, the EIS concludes that the rezoning will not result in any substantial adverse impacts on the northernmost subway station within the district – the one at Lexington/51st to 53rd Streets – nor at the stations at Rockefeller Center and Bryant Park. Accordingly, the proposed rezoning text prioritizes pedestrian circulation projects at and immediately around Grand Central; there is no mention of what might be done farther north. (Proposed 81-681(a)). While the $250 per square foot paid by a developer at 42nd and Madison might go largely to remediating the excess pedestrian traffic emanating from his building (although it will more likely go to remediating existing problems), the same amount paid by a developer 15 blocks north at 57th and Madison may be spent on projects nearly three-quarters of a mile to the south having very little, or even nothing, to do with the pedestrian traffic newly added at 57th Street.

Buildings of exactly the same floor area, located in substantially similar locations, may nevertheless have quite different impacts on use of transit infrastructure. Take, for example, a hotel and an office building, both on Park Avenue near Grand Central. The office building likely would add subway traffic at rush hours; the hotel might add less total subway traffic and disperse it throughout the day and evening hours.

Of course, not all pedestrian traffic in the Grand Central Subarea is generated by buildings located within the Subarea. Many thousands of people daily no doubt use the Terminal but have no other connection whatsoever with the Subarea. They may walk to and from the Terminal, or take taxis, buses, or subways. Tourists may enter the area for no purpose other than to look at the main hall of the Terminal and take a picture or two of the Chrysler Building. Workers might get off the Lexington line at 50th Street and walk to their jobs to the west of Fifth Avenue. All of these people are contributing to the pedestrian traffic jams that the Planning Commission proposes should be ameliorated at the cost of developers within the Subdistrict. Yet it may well be argued that, in all fairness, the City should be paying the public's fair share of the burden.[16]

The Planning Department's underlying Description specifically recognizes that the rezoning has far broader public benefits than mere improvement of a single business district. Rezoning, it states, is necessary to encourage construction of new buildings with more usable office space, including higher ceilings and more column-free floor area. It is necessary to promote new jobs and expand the tax base. And it is necessary to capitalize on both the existing

[16] This concept of fairness underlies much of the law of regulatory takings. Although the concept is difficult to apply, an ultimate issue is whether some people alone should bear public burdens which, in all fairness and justice, should be borne by the public as a whole. See Penn Central Transp. Co. v. New York City, 438 U.S. 104, 124, 98 S.Ct. 2646, 2659, 57 L.Ed.2d 631 (1978); J.E.D. Assocs., Inc. v. Town of Atkinson, 121 N.H. 581, 432 A.2d 12 (1981).

concentration of regional rail infrastructure in the area and on the addition of the Second Avenue subway line and East Side Access (providing Long Island commuters with one-seat access to both the West and East sides). (DCP East Midtown Description, Background & Existing Conditions).

Indeed, it might be argued that pedestrian traffic around major urban transportation centers – including train stations and subway stations – is largely, if not entirely, a public responsibility. These facilities, after all, serve the general public. True, commerce tends to gather around such centers and reaps enormous advantage from what real estate experts call "location, location, location." But increased value is reflected in higher tax assessments, so the owners pay higher taxes for such locations, just as they should. See Municipal Art Society of New York v. City of New York, 137 Misc.2d 832, 522 N.Y.S.2d 800 (Sup. Ct. N.Y. Co. 1987). The legal notion that private owners should pay exactions only when they themselves impose specific extra burdens may not be out-of-line with common sense.

There are other asymmetries in the scheme, again suggesting absence of rough proportionality. For example, suppose two adjacent locations where, under the rezoning, 15 is the maximum base FAR. One is occupied by an 18 FAR grandfathered building which the owner would like to rebuild to exactly the same size. The other now has a 15 FAR building and this owner too wants to rebuild to 18 FAR. Both owners must buy 3 FAR. Owner A gets a discounted rate of $125 per square foot to the extent he is replacing existing floor area. Owner B pays the full $250 per square foot. Yet owner A has added nothing to the existing pedestrian burden, while owner B has added whatever pedestrian volume pours in and out of 3 FAR. Clearly, the difference in treatment does not depend on the new burdens imposed by each owner, as Nollan/Dolan require.

High appellate courts reputedly express themselves in the driest of language. But, when the Supreme Court looked for an appropriate term to describe the City of Tigard's convoluted efforts to explain the proximity of relationship between easing traffic and controlling flooding, on the one hand, and exacting Mrs. Dolan's creek-side land for a public park as a condition to approving her application to expand her hardware store, the Court came up with "gimmickry." (512 U.S. 387) The relationship here between mitigating the effects of new development on pedestrian traffic by exacting fixed monetary contributions which may be spent far from the developer's site strikes us as far more tenuous than anything in Dolan, and invites one to speculate as to what harsher term a reviewing court might employ.

2.4.3 Individualized determination.

Whatever nuanced meaning the Supreme Court's requirement of individualized determination may include, it surely means, at absolute minimum, that sufficient individualized determination must be conducted to ensure that the end result will satisfy the rough proportionality test. In this case, the variety of circumstances is too great, the needs too vaguely stated, the geographical area too large, to postulate that a one-size-fits-all contribution could possibly achieve rough proportionality or equitable apportionment of responsibilities. As we have shown, construction in one part of the Subarea may have vastly less impact on pedestrian circulation needs than construction in another part of the Subarea. Also, the proportion of

expense that the public ought appropriately to bear may differ significantly in different areas depending, for example, on the amount of use of pedestrian facilities by persons who do not work in the Subarea.

Again, we recognize the opinion expressed in Twin Lakes Development Corp. v. Town of Monroe, 1 N.Y.3d 98, 769 N.Y.S.2d 445 (2003), that a flat fee may suffice in the circumstances of that case. Those circumstances differ so greatly from the circumstances here – in terms of amounts of money, complexity, and presence or absence of standardized fact patterns – that we believe that Twin Lakes would not be applied in litigation concerning the validity of the East Midtown rezoning.

### 2.5 Special permits for superior developments (Proposed section 81-624).

#### 2.5.1 Same analysis applies in part.

Proposed section 81-624 allows additional FAR for "superior developments" immediately surrounding Grand Central and along Park Avenue. As-of-right bonuses bring allowable FAR in the Grand Central core area to 24, and along Park Avenue to 21.6. If one obtains a discretionary special permit from the Commission for a "superior development," one can increase the FAR in the Grand Central core area to a total of 30 (a 25% additional increase above the rights that can be purchased with no conditions attached), and along Park Avenue to a total of 24 (an 11% additional increase).

The additional FAR available under this section must be paid for at the same $250 rate and, in addition, the developer must provide more on-site above-grade and (for developments at Grand Central) below-grade pedestrian accommodations.

Generally, the "superior development" provisions raise the same issues as do the "as of right" FAR bonuses.

#### 2.5.2 Absence of regulatory guidelines.

In addition, the "superior development" provisions raise an issue as to endowing the Commission with legislative prerogatives by failing to set sufficient standards for the exercise of what are regulatory (i.e. executive branch) functions. Proposed section 81-624 lists criteria for the Commission's consideration of applications under this provision. But the criteria are dominated by such hyper-subjective adjectives as to raise serious question as to their sufficiency as guidelines. Thus, for example,

> The additional pedestrian circulation space must be "prominent," of "generous" proportions and "quality" design that is "inviting" to the public and provides "considerable" light and air. There should be "abundant" greenery and "generous" amounts of seating. The space should provide a "vibrant" streetscape and "well-designed" site plan.

Below grade improvements should provide "significant" and "generous" connections to the below-grade pedestrian circulation network and "major" improvements to public accessibility to transportation facilities.

Any modifications to bulk requirements should result in "compelling" distribution of bulk on the zoning lot.

Absence of clear guidelines always puts regulations in jeopardy because it allows the regulatory agency to act in a legislative rather than an administrative capacity. As the Court of Appeals has said with respect to legislative granting of authority to a zoning agency to issue special permits, "The standards for issuance of such a permit may not . . . be so general or imprecise as to leave issuance of a permit to the unchecked discretion of the issuing authority (Matter of Tandem Holding Corp. v Board of Zoning Appeals, 43 N.Y.2d 801)." Robert Lee Realty Co. v. Village of Spring Valley, 61 N.Y.2d 892, 894 (1984).

Here, the large sums of money that become available to the City upon approval by the Commission[17] exacerbate the problem by injecting financial interest on behalf of the City into what should be a totally objective evaluation by the Commission. See Municipal Art Society of New York v. City of New York, 137 Misc.2d 832, 522 N.Y.S.2d 800 (Sup. Ct. N.Y. Co. 1987). The lack of guidelines could also stamp this part of the proposal as "spot zoning" because it may so easily appear that standards, such as they are, are not equitably applied as to different owners in the same district. If owners are not treated substantially alike, someone gets favored by an exception to the standards applied to others.

We grant that outcomes of litigation over alleged unlawful delegation of legislative authority are often not readily predictable. We also recognize that the "superior development" bonus may be deemed something less than a total delegation of legislative authority as the procedure is subject to the Council's review under Uniform Land Use Review Procedure. It is safe to say, however, that reviewing courts will likely find the broad discretion inherent in the loose standards of this provision very troubling.

The vagueness of the standards for approval of "superior developments" will likely plague the Commission time and again with charges that it has, in one case or another, played favorites, discharged political obligations, or otherwise placed revenue above responsibility. The City Club respects the Commission's and Department's well-earned reputation for professionalism. Embracing ill-defined adjectives to describe the limits of power is all too likely to sully that reputation.

The "superior developments" section also allows various exceptions to otherwise applicable bulk distribution and use standards without adequate standards. For example, and of special concern, is that exceptions may be made to the requirements for retail density along the

[17] The award of a special permit for superior development in the Grand Central area would produce at least a $60 million "contribution" to the Fund (40,000 square feet times 6 FAR times $250). That does not include the "contribution" necessary to bring the building from the base maximum of 15 FAR up to 24 FAR, the limit for less than superior development.

street facades. We consider retail presence along streets very important to the safety and enjoyment of street life. It is just as necessary for large buildings as for small.

3. General comments and conclusions:

3.1 It has been suggested, with some reason, that the timing of getting this plan voted on by November is motivated more by politics than sound planning. We urge that action on the plan be deferred pending careful description of the needs of the project area and the entire City as the project area relates to it, and far more careful consideration of the wisdom of the proposed solutions.

3.2 The district improvement bonus at the heart of the plan rests on what we consider, at best, extremely shaky legal ground. As a matter of policy, it should be recognized that transportation and other infrastructure needs exist now, independently of any future development made possible by upzoning. They should be addressed now with existing resources, not deferred in the expectation that new construction, for which there is no proven need, will provide funding by legally doubtful means.

3.3 Judicial voiding of the sale of FAR would have dire implications. In theory, a court finding the entire transaction illegal, could require that the excess FAR be demolished as well as requiring the City to refund the sales price. More likely, given practical realities, and an easy supposition that the Council intends the "contribution" aspect of the proposal to be severed if found illegal, the court would require the City to refund the sales price, but would let the building stand. Because the City extorts the "contribution" to the fund, a court would likely hold the City responsible for making the refund even if the Committee had already spent the contribution. The proposal might be amended to provide that illegality of the specific provisions such as the purchase of air rights would automatically cancel the related bonus. However, a court would not likely apply such a provision to a project in which the developer had obtained vested rights by starting construction.

3.4 All this said, we do not mean to suggest that a system could not be devised which would impose the appropriate portion of costs of pedestrian impacts caused by new development on the developers. To do that, one would need substantial information about what those impacts are, how they vary among different locations, what projects are required to mitigate those impacts, and what the cost of those project would be. DCP may or may not have such information. But it has not provided it to the public