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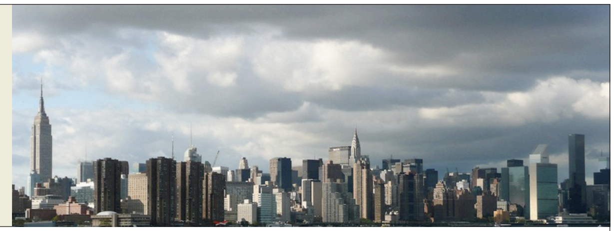


POLICY BRIEF

BUYING SKY: The Market for Transferable Development Rights in New York City

New York City's zoning code (known as the "Zoning Resolution") regulates land use in part by limiting the square footage of the building that landowners can develop on their property. Some buildings are built below the applicable limit—because they are constrained by other regulations such as historic preservation rules, they were built subject to earlier, more-restrictive zoning rules, or the owner chose to develop the property less intensely than the zoning allows because of market conditions or other considerations applicable when the building was built. The Zoning Resolution provides limited opportunities for an owner of land that is less than fully developed to transfer her unused development rights to other properties. This enables the recipients of those development rights (known at that point as "transferrable development rights," "TDRs," or "air rights") to develop larger buildings than the Zoning Resolution otherwise permits, while the seller loses the right to ever use those rights on her own property.

TDRs are an important tool for developers building in the densest parts of the city and can be very valuable. Almost a third of the large residential and commercial buildings recently constructed in Manhattan below Central Park used development rights acquired from other lots.[1] Citywide, between 2003 and 2011, developers paid more than a billion dollars for TDRs. However, the TDR market is largely opaque. Information about most individual transfers is publicly available in the city's recorded property documents, but is generally difficult or time-consuming to identify and interpret. In this Policy Brief we explore the TDR market in New York City using a new dataset of transactions completed between 2003 and 2011 that the Furman Center has compiled.[2] Information about the market for TDRs is particularly relevant today because the proposed East Midtown rezoning currently under City Council review would permit larger buildings through the wider use of TDRs and incentive zoning linked to the value of TDRs.

1. How do New York City's Development Rights Transfer Programs Work?

The Zoning Resolution specifies, for each lot in the city, a maximum number of square feet of building area per square foot of lot area. This ratio (known as the "Floor Area Ratio" or "FAR") depends on the location of the lot (e.g., the zoning district in which it is located and, in some cases, whether it faces a wide or narrow street), the use

1 Buildings larger than 50,000 square feet completed between 2007 and 2012.

2 The Furman Center has previously shared much of these data in public events, academic presentations and articles, and discussions with the city and other stakeholders.

to which the building would be put (e.g., residential, commercial, community facility, or manufacturing), and whether or not the developer includes certain amenities or land uses that allow for a bonus of higher permitted FAR (e.g., a public plaza or affordable housing). For example, a landowner with a 5,000 square foot lot with a maximum residential FAR of 2.5 could construct a residential building with 12,500 square feet of floor area. However, if this lot has an existing building with only 10,000 square feet of floor area, the landowner has 2,500 square feet of unused floor area development rights she may be able to transfer.

Currently, the Zoning Resolution allows an owner to transfer unused development rights only in very limited cases:

Zoning Lot Mergers

Through a process known as a "zoning lot merger," owners of adjacent land in the same zoning district (or zoning districts permitting the same uses and same maximum FAR) can agree to group their properties together and have them treated as one lot for zoning purposes. This effectively allows underbuilt properties to transfer unused development rights to other properties in the group, as the unused FAR of the grantor lot(s) and additional development on the recipient lot(s) cancel one another out. Developers often pay other landowners to enter into zoning lot mergers as a way to transfer development rights through contiguous lots to their building site (see inset box).

Landowners can orchestrate this type of transfer "as-of-right," meaning that they must execute and record certain types of transaction documents the city requires, but do not need any approval from the city. However, because the lots in a zoning lot merger must form a contiguous group, the market for available development rights is very constrained and idiosyncratic: developers can only buy unused rights located on the same block as their building site; owners of unused rights can only sell if there is a development opportunity and interested purchaser on the block; and owners of lots needed to connect developers to properties with unused development rights can have considerable negotiating leverage.

Landmark Transfers

To help compensate owners of designated landmarks for the burden of preserving old structures and for their inability to capitalize on any unused development rights through redevelopment, the Zoning Resolution allows officially designated landmarks in mid- and high-density zoning districts to transfer unused development rights not only to adjacent lots (similar to a zoning lot merger), but also across the street or, in some circumstances, across an intersection. This type of transfer requires the building owner to enter into a binding agreement to maintain the landmark and secure a special permit from the City Planning Commission, which, in turn, requires public review through the city's lengthy Uniform Land Use Review Procedure ("ULURP"). Even with the expanded right to transfer compared to zoning lot mergers, the number of viable purchasers for a landmark's unused rights is often very small or non-existent.

Special Purpose District Transfers

To better tailor zoning to specific neighborhoods, the city has created several "special purpose districts" in the Zoning Resolution that each have their own additional land use rules. In some of these districts the Zoning Resolution allows development rights transfers from designated grantor sites or zones to any property in a designated receiving zone. Two special purpose districts in particular have had active TDR markets in recent years:

- In the Special Midtown District, specified Broadway theaters have, since 1998, been able to transfer unused development rights to almost any other lot in the Theater Subdistrict (roughly between

6th and 8th Avenues, from 40th to 57th Street). Transfers require assurances (through restrictive covenants) that the granting site will remain a theater, along with a cash contribution to a fund dedicated to enforcing theater preservation measures and promoting Broadway's theater industry. Purchasers can increase the allowable bulk on receiving sites by up to 20 percent through such transfers as-of-right, and in some cases can use even more TDRs with a discretionary authorization from the City Planning Commission.

- In the Special West Chelsea District, owners of land underneath and immediately west of the High Line have, since 2005, been able to transfer unused development rights to receiving zones located along or near 10th and 11th Avenues. Developers can use TDRs to increase the allowable bulk on receiving sites by limited amounts as-of-right.

Because transfers made through the "listed-theater" program of the Special Midtown District and the Special West Chelsea District program are freed from the strict adjacency requirements of zoning lot mergers, these TDRs are sometimes called "floating rights." The Zoning Resolution also permits development rights transfers in special purpose districts established around the South Street Seaport, Grand Central Station, and, more recently, the Hudson Yards Special District, among others. There have been very few transfers, however, in these other special purpose districts in recent years.

What does a development rights transfer look like?

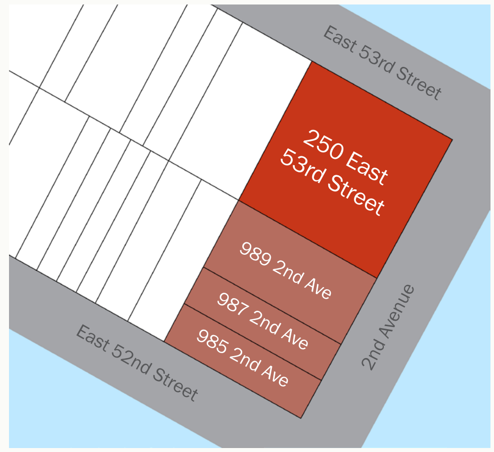
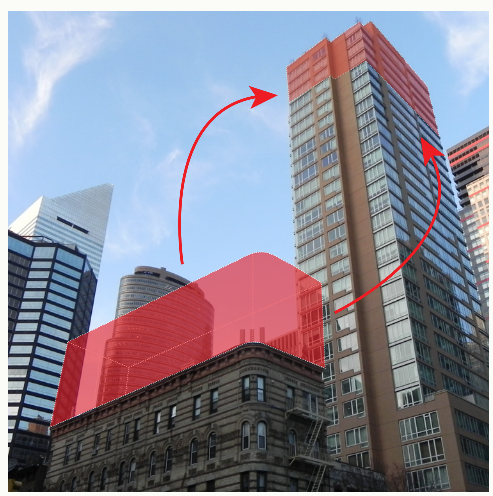


Figure 1: **Lots Included in Zoning Lot Merger for 250 East 53rd Street**

The developer of the residential condominium development at 250 East 53rd Street was able to build a taller tower by purchasing 72,000 square feet of development rights from three lots with which it entered into a zoning lot merger.



One of these grantor lots was 985 Second Avenue (shown in the foreground), a five-story pre-war walk-up building with a storefront and apartments, which transferred 14,235 square feet of unused rights to the tower site.

Table 1: Number of Development Rights Transfers by Type, 2003-2011

	Between affiliates	*Arm's length*	*Total*
Zoning lot merger	57	328	385
Landmark program	0	2	2
Special purpose district	3	31	34
Total	60	361	421

Sources: ACRIS, Furman Center analysis of recorded property documents

2. The Market for Development Rights

To better understand the market for development rights, the Furman Center searched the city's recorded property documents for transactions that occurred between 2003 and 2011.[3] We identified 421 development rights transactions that occurred over this period. As Table 1 shows, most recent transfers were accomplished through zoning lot mergers, but we also identified two landmark program transfers and 34 special purpose district transfers. Interestingly, although we identified only two transfers using the special landmark program,[4] 19 other landmarks were among the lots transferring rights through zoning lot mergers.

For several of the zoning lot merger transfers and three of the special purpose district transfers, it appeared that the same party, or an affiliated party, owned the grantor and recipient sites, so the transactions are unlikely to tell us much about the market for development rights. Three hundred sixty one of the transfers appear to have been "arm's length" commercial transactions between unaffiliated landowners, and the remainder of our analysis focuses on this group.

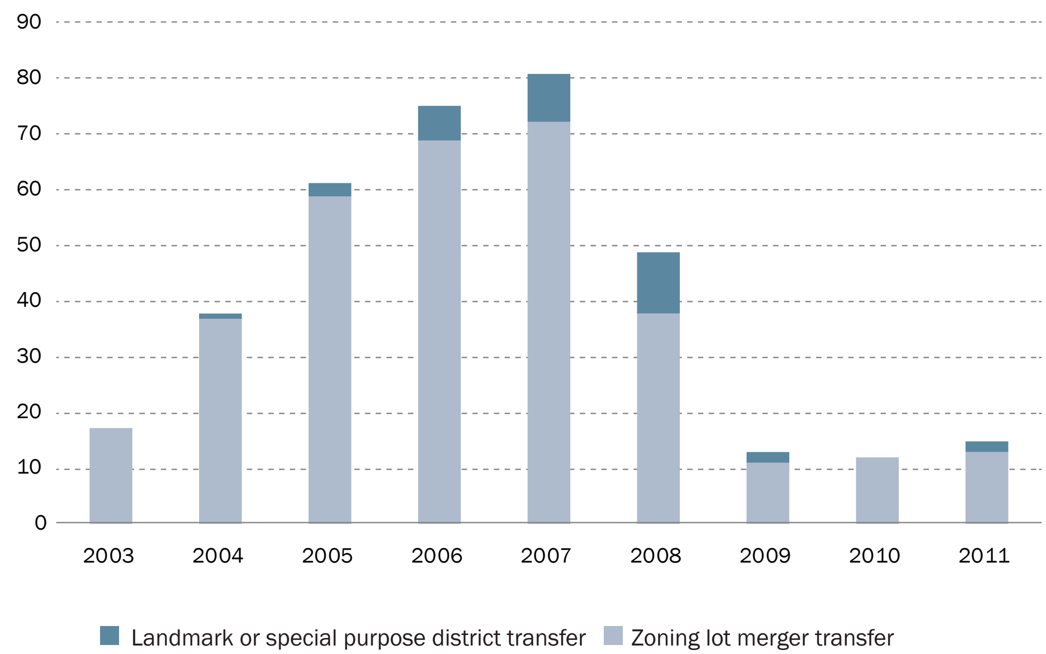
How often have property owners transferred development rights?

Development rights purchases are often part of the site assembly process for developers seeking to build large projects. The level of transfer activity accordingly ebbs and flows along with the real estate market. As Figure 2 shows, the number of transfers climbed rapidly between 2003 and 2007, but fell back sharply in the following years as the overall market stumbled and the Great Recession took hold. As of 2011 (the most recent year for which we have data), the pace of transfer activity had picked up slightly, and TDR activity likely increased further in 2012 and 2013.

3 We describe our search in greater detail in the Methodology and Notes section at the end of this brief.

4 The two landmark program transfers we identified were from the University Club (for the proposed MoMa tower) and the Tiffany Building (for the hotel/condominium tower at 400 5th Avenue). A third transfer, from the Seagram Building to a development site at 610 Lexington Avenue, was approved by the city in 2008, but the parties did not complete the transfer until 2012, taking it outside our study period.

Figure 2: Arm's Length Development Rights Transfers, by Year (2003-2011)



Sources: ACRIS, Furman Center analysis of recorded property documents

Table 2: Number of Arm's Length Development Rights Transfers by Borough, 2003-2011

	Zoning lot merger		*Landmark & special purpose district*	
	Number	*Share*	*Number*	*Share*
Bronx	5	2%	0	0%
Brooklyn	38	12%	0	0%
Manhattan	276	84%	33	100%
Queens	9	3%	0	0%
Staten Island	0	0%	0	0%

Sources: ACRIS, Furman Center analysis of recorded property documents

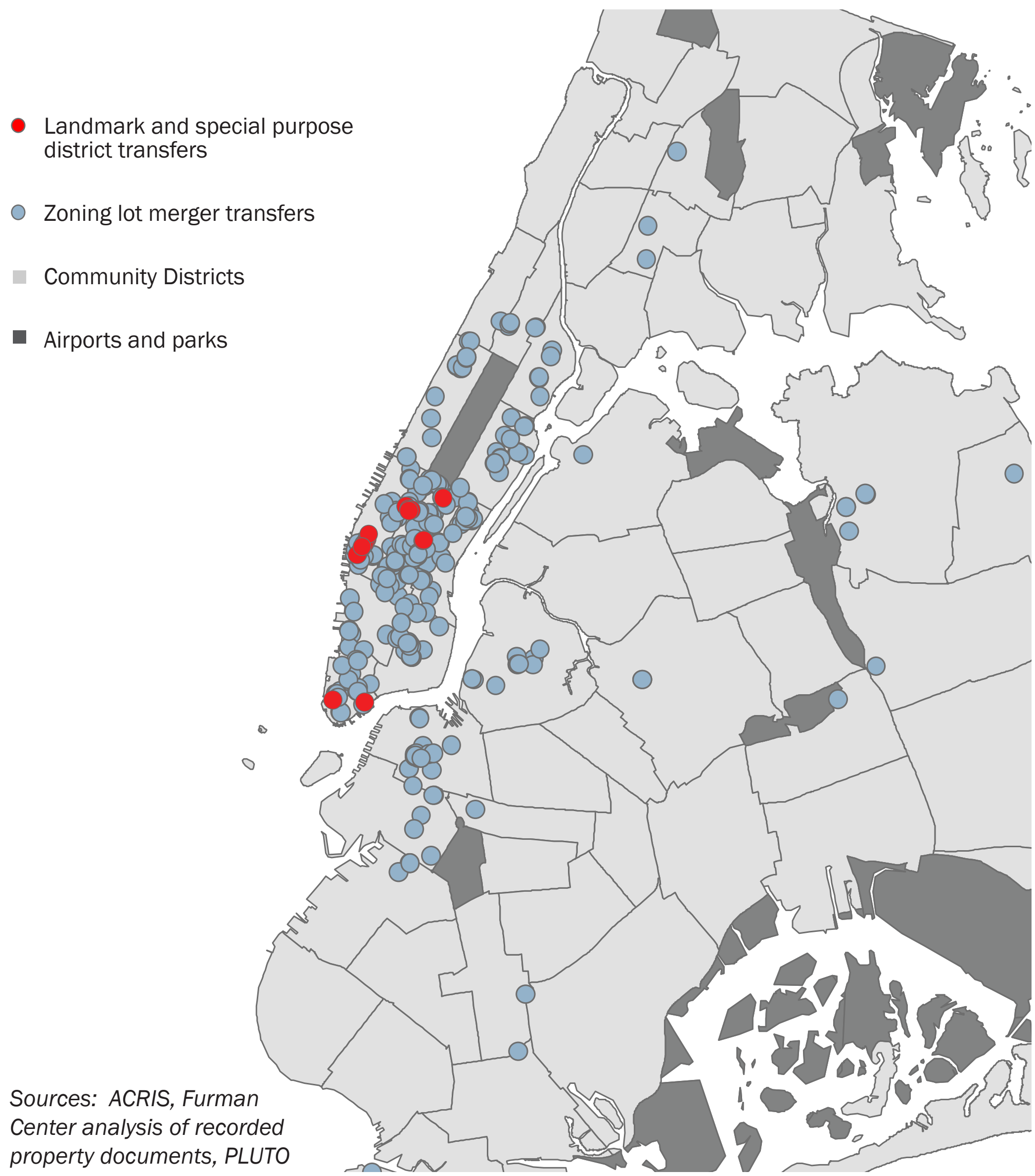
Where have development rights transfers taken place?

Development rights transfers typically occur only in areas that are both zoned for high density and have high levels of market demand. The maximum FAR is only one way that the Zoning Resolution limits building size. All developments, even if they use TDRs, must also fit within the spatial "zoning envelope" that the Zoning Resolution defines for each lot through tools such as height limits, yard, street-wall and set-back requirements, maximum lot coverage limits and, indirectly, minimum parking requirements.[5] In lower density areas of the city these various mechanisms limit the ability of lots to receive additional FAR. Moreover, TDR transactions only make financial sense when the demand for new building space on a lot exceeds the basic capacity the Zoning Resolution allows.

For these reasons, as Table 2 and Figure 3 show, a vast majority of zoning lot merger transfers have taken place in Manhattan, with its high rents and sales prices and, in many areas, relatively generous zoning envelope. Both landmark transfers in our data were also in Manhattan. Because the special purpose districts with active transfer programs are located in Manhattan, all of the other transfers in our data took place there as well. Even within

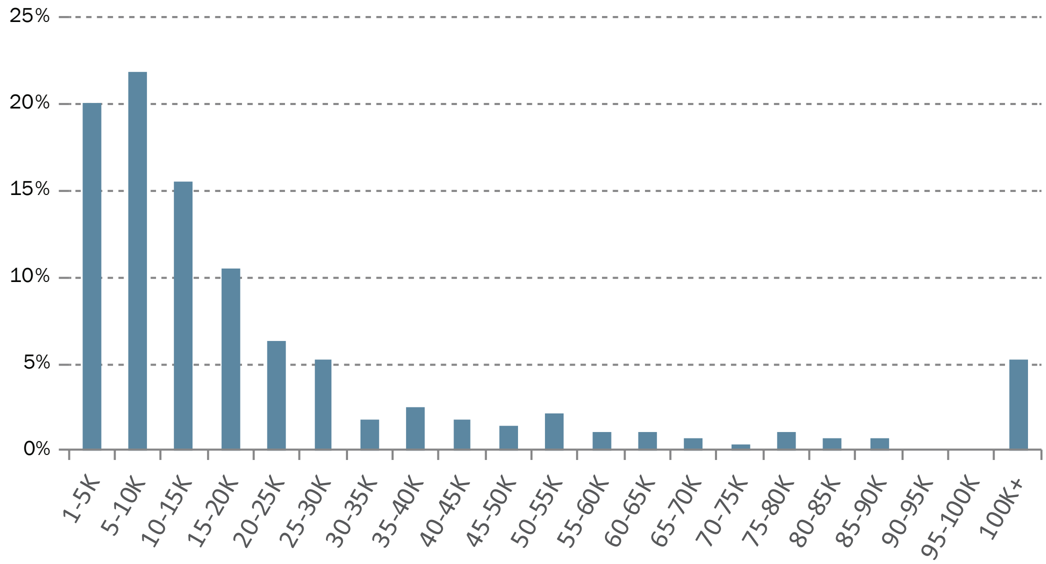
5 Owners of development sites acquiring TDRs through the landmark transfer program can apply for variances or waivers from the “zoning envelope” constraints, but variances are difficult to obtain and a waiver, along with the TDR transfer, requires a special permit.

Figure 3: **Location of Lots Transferring Development Rights, 2003-2011**



Sources: ACRIS, Furman Center analysis of recorded property documents, PLUTO

Figure 4: Percentage of All Arm's Length Development Rights Transfers by Size of Transferred Floor Area (SF), 2003-2011



Sources: ACRIS, Furman Center analysis of recorded property documents

Manhattan, the transfers were heavily concentrated in Community Districts 1 (Financial District), 3 (Lower East Side/ Chinatown), 4 (Clinton/Chelsea), and 5 (Midtown), which together accounted for 65 percent of the city's development rights transactions between 2003 and 2011.

How large have development rights transfers been?

Citywide, landowners transferred at least seven million square feet of development rights between 2003 and 2011 through arm's length transactions. The recorded documentation for 284 of the 361 arm's length transfers in our data specifies the exact size of the transfer.[6] Figure 4 shows the percentage of those 284 transactions transferring different amounts of development rights. Most of these individual TDR transactions conveyed only small amounts of floor area. Indeed, 20 percent were less than 5,000 square feet and almost 70 percent were less than 20,000 square feet. Only five percent of the transfers (including both landmark transfers in our data) were 100,000 square feet or larger.

Zoning lot merger transfers were typically smaller than other types of transfers, with a median floor area of just under 13,000 square feet, compared to 21,000 square feet for special district and landmark transfers. Within zoning lot merger transfers, there was no significant difference in typical size between those that occurred in Manhattan and those in the other boroughs.

6 For the others, the parties used general terms, such as "all unused rights," making it more difficult to discern the size of the transfer.

Table 3: Average Price per Square Foot for Arm's Length Development Rights Transfers, by Manhattan Community District, 2003-2011

*Community District of Recipient Lot**	*Average Price Per Square Foot (2013 dollars)*	*Number of Transfers***
Financial District (MN01)	$162	17
Greenwich Village/Soho (MN02)	$244	2
Lower East Side/Chinatown (MN03)	$162	27
Clinton/Chelsea (MN04)	$219	45
Midtown (MN05)	$203	81
Stuyvesant Town/Turtle Bay (MN06)	$189	13
Upper West Side (MN07)	$187	10
Upper East Side (MN08)	$223	15
Central Harlem (MN10)	$74	4
East Harlem (MN11)	$51	2

*Community districts with no development rights transactions are omitted.

**Transactions with price and square footage information.

Sources: ACRIS, Furman Center analysis of recorded property documents

Although individual transfers were usually relatively small, many development projects aggregate rights acquired through two, three, or even more separate purchases. For example, "One57," the new residential tower Extell is developing on West 57th Street uses more than 200,000 square feet of development rights purchased through 12 separate arm's length zoning lot merger transactions (as well as other rights transferred from a lot the developer controlled).

How much have buyers paid for development rights?

Of the 361 arm's length transactions in our data, 242 specified the square footage of the transfer and had payment amounts shown in the city's recorded property documents. The average price that a purchaser paid for development rights conveyed in these transactions was $181 per square foot (in 2013 dollars[7]), but prices paid in individual transactions varied widely, from less than $50 to more than $500 per square foot.[8] Unsurprisingly the price for development rights was highest in Manhattan, where developers paid on average $194 per square foot, compared to $80 in Brooklyn and less than $40 in Queens and the Bronx.

7 We adjust all TDR sales prices using a standard consumer price index (see Methodology and Notes), which allows us to compare prices paid in different years in constant dollars. Because our purpose is to describe the TDR market in recent years, not to estimate the value of TDRs that may be traded in the future, we use that index, rather than the adjustments to past transaction prices that appraisers make based upon changes in local real estate values to appraise the current value of development rights.

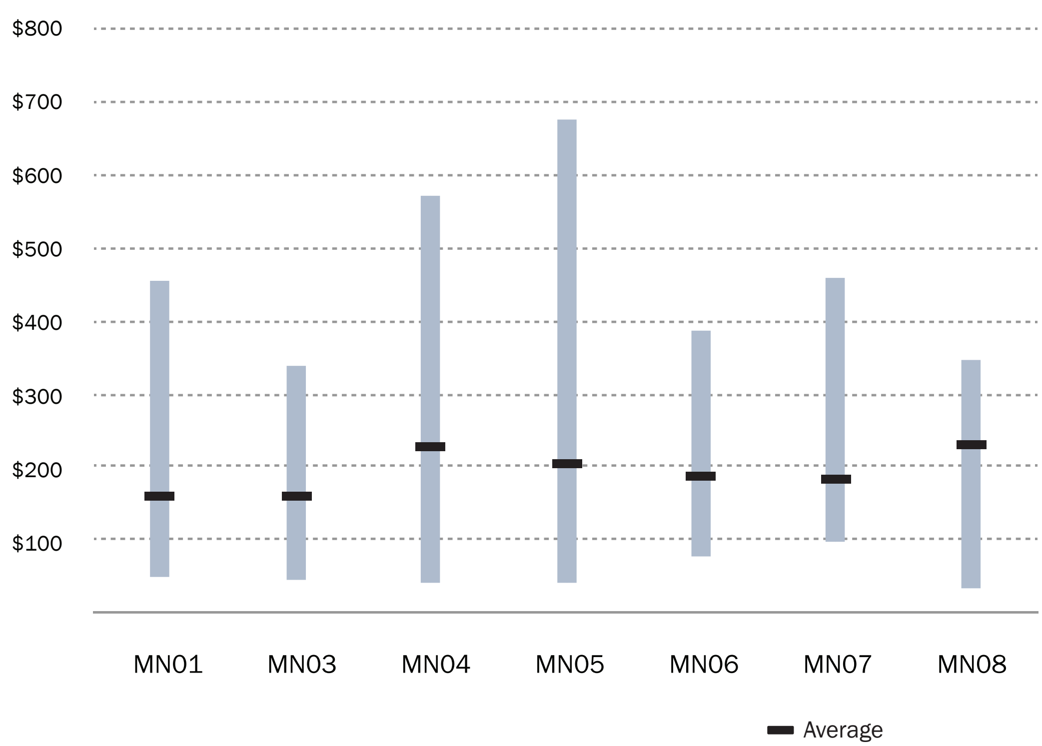
8 Throughout this analysis we report unweighted averages, counting each development rights transaction equally, regardless of the amount of square footage that it conveyed. Unless otherwise stated, all prices are reported in 2013 dollars (see Methodology and Notes for more information).

Within Manhattan, the average price varied a great deal between neighborhoods. As Table 3 shows, developers paid more than $200 per square foot, on average, in four of the 10 community districts that had transfers between 2003 and 2011, but paid substantially less than that in transfers north of Central Park, and only slightly less in the Financial District, on the Lower East Side/Chinatown, in Stuyvesant Town/Turtle Bay, and on the Upper West Side.[9]

However, even the average price at the community district level conceals tremendous variation. As Figures 5 and 6 show, TDRs sold for a wide range of prices in the Manhattan community districts with high numbers of transactions between 2003 and 2011. The range was widest in the greater Midtown area, including Clinton/Chelsea (CD MN04) and Midtown (CD MN05). In Midtown, for example, where the average price was $203 per square foot (in 2013 dollars), 14 percent of the transfers were priced at less than $100 per square foot, and seven percent were priced at more than $300. In Clinton/Chelsea, 42 percent of the transfers were in these outer ranges. Even in Stuyvesant Town/Turtle Bay (CD MN06), where the range was narrower, 23 percent of the transactions were priced at less than $100 or more than $300.

9 Five of the Special Midtown District transfers were from theaters to development sites that were in different community districts. Recalculating Table 3 based on the location of the grantor site instead of the recipient site changes the average price per square foot in Clinton/Chelsea and Midtown only slightly, by less than four dollars in both.

Figure 5: Range of Prices per Square Foot (2013 dollars) for Arm's Length Development Rights Transfers by Manhattan Community District, 2003-2011



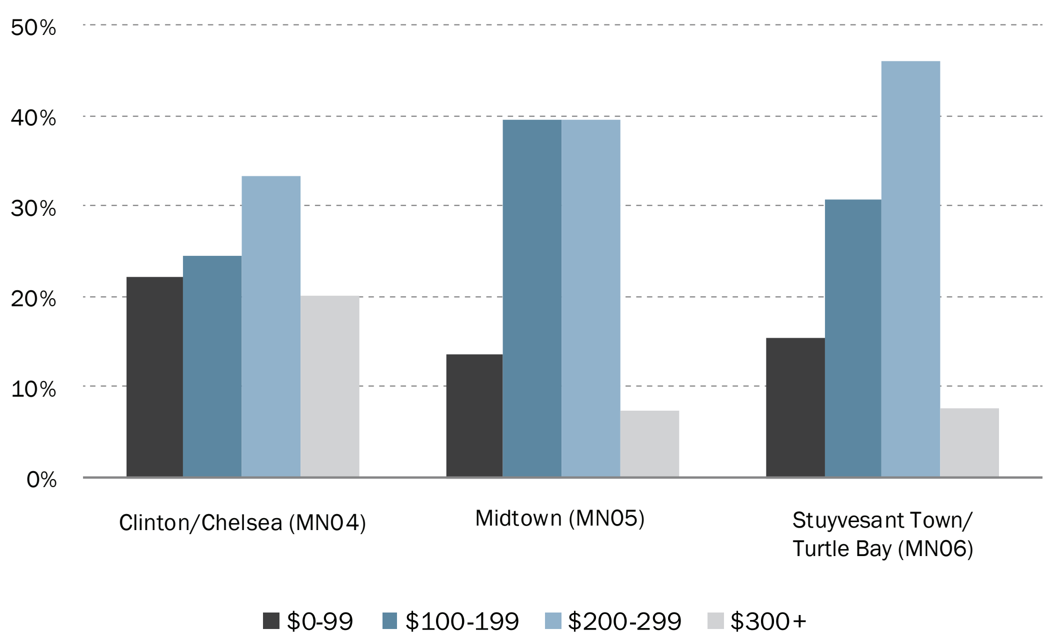
Sources: ACRIS, Furman Center analysis of recorded property documents

Some of the variation in pricing within neighborhoods may be due to transaction timing. As Figure 7 shows, the average price per square foot for development rights in Manhattan in constant 2013 dollars steadily rose, along with the real estate market, from 2004 to 2007, before falling back slightly in 2008. Although the averages for 2009 to 2011 are based on small numbers of transactions, so are a less reliable barometer of market-wide trends, they show a sharp dip in average TDR prices in 2009 but a significant rebound at the end of our study period.

Other factors that could affect TDR pricing include the size of transfers, the legal mechanism by which the transfer occurred, and the type of zoning district in which the grantor or recipient lots were located or the uses to which the development rights will be devoted.

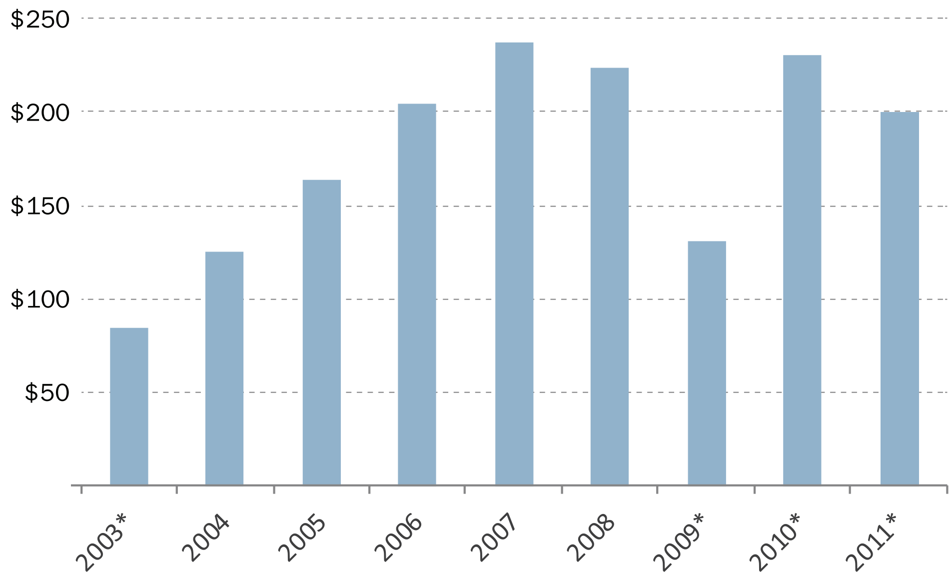
Figure 8 shows the average price per square foot for small (less than 10,000 square feet) and large (10,000 square feet and more) transfers by year for transactions in the greater Midtown area (including Clinton/Chelsea (CD MN04), Midtown (CD MN05), and Stuyvesant Town/Turtle Bay (CD MN06)) between 2005 and 2011. No clear pattern is evident, and there were very few transfers of either type from 2009 to 2011. In 2008, 2009, and 2011, smaller transfers commanded significantly higher prices per square foot, on average, but this did not hold true in 2010. In earlier years, when there were more transactions, the average prices were very similar for transfers of different sizes. Any role transaction size plays in prices appears to be more complex than this simple comparison can reveal, or is obscured by other factors.

Figure 6: **Percentage of Arm's Length Development Rights Transfers in Greater Midtown Community Districts by Price per Square Foot (2013 dollars), 2003-2011**



Sources: ACRIS, Furman Center analysis of recorded property documents

Figure 7: Average Price per Square Foot (2013 dollars) of Arm's Length Development Rights Transfers in Manhattan by Year, 2003-2011



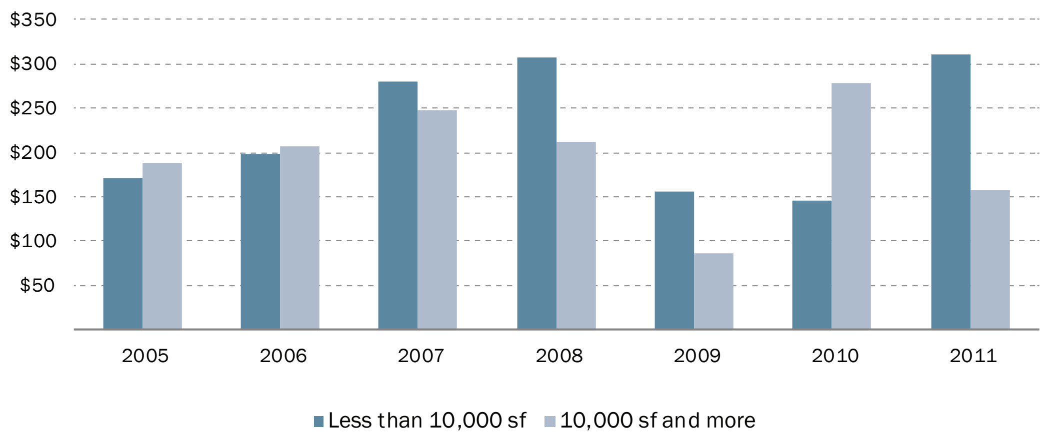
*Based on fewer than 10 transactions.

Sources: ACRIS, Furman Center analysis of recorded property documents

Similarly, as Figure 9 shows, there does not appear to be an obvious relationship between price and whether the TDRs were floating rights or transferred through a zoning lot merger (although there were only small numbers of floating rights transfers in each individual year, and none in 2010). In 2005 and 2006, the average price per square foot for the two types of transfers in greater Midtown was roughly the same for both groups. In 2007, the average price for zoning lot merger transactions was higher. In more recent years, the few floating rights transfers commanded a much higher average price per square foot.

Even if there is no clear connection between price and transfer type, we might expect transfers made through the special district programs to have less variation in their prices than zoning lot mergers, because they occur in the same neighborhood and because the looser transfer restrictions mean that the market for TDRs can be more robust. In contrast to parties negotiating a zoning lot merger, who are forced to deal with the few lots that are adjacent to theirs, developers who own sites in special purpose district receiving zones typically can, in theory, negotiate with a wider set of eligible TDR sellers, and sellers can negotiate with multiple possible purchasers. However, we find a fair amount of variation in pricing even among these floating rights transfers. Figure 10 shows, for example, that of the nine special district transfers in the greater Midtown area (Clinton/Chelsea (CD MN04), Midtown (CD MN05), and Stuyvesant Town/Turtle Bay (CD MN06)) in 2008,

Figure 8: Average Price per Square Foot (2013 dollars) of Arm's Length Development Rights Transfers in Manhattan by Year, 2003-2011



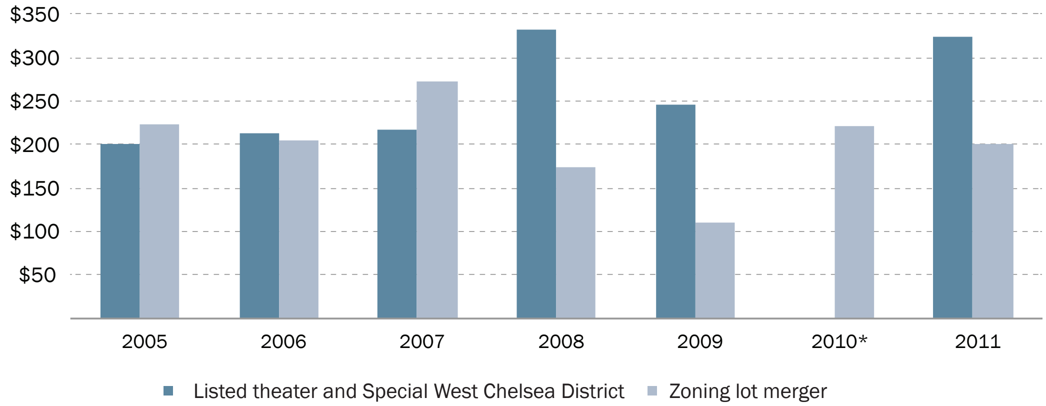
Sources: ACRIS, Furman Center analysis of recorded property documents

four were priced below $300 and three were priced above $400. Specifically, transfers made through the Special West Chelsea District in 2008 ranged from $248 to $435 per square foot (in 2013 dollars). Moreover, both of those extremes were purchases by the same developer for the same project, suggesting that even in the special purpose districts, competition is limited or the market is opaque.

Finally, because additional development rights might be more valuable to some types of development than others and there are restrictions on transferring rights between different types of districts, the price of TDRs might vary by the zoning district in which the receiving site falls.[10] All of the development sites that acquired TDRs through the landmark program or a special purpose district program were located in a commercial zoning district (which permits commercial or residential development) or a manufacturing district (which permits manufacturing or commercial development). Most of the arm's length zoning lot merger transfers in Manhattan also occurred in commercial or manufacturing zoning districts, but 17 percent occurred within residential zoning districts, which only allow development that is primarily residential. In the greater Midtown area, the average price for arm's length zoning lot merger transfers between 2003 and 2011 in commercial or manufacturing zones ($201, in 2013 dollars) was significantly higher than the average price for the much smaller number of transfers in residential zoning districts ($129, in 2013 dollars). Within other neighborhoods, however, including the Upper East and West Sides (CDs MN07 and MN08), the average price of TDRs in residential zones was higher than commercial zones. Because our data do not include the actual building type that used the TDRs (and for many transfers, the recipient project has not yet been developed), it's not clear how much of this price difference is due to

10 In general, except by special permit or variance, TDRs cannot be transferred from one zoning district to another with differing maximum FAR and permitted uses. However, even within zoning district types, there may be systematic price differences. For example, additional FAR within a commercial district (which allows both commercial and residential uses) may have different value for office projects than for condo or apartment projects.

Figure 9: Average Price per Square Foot (2013 dollars) for Development Rights Transfers in Manhattan CDs 4-6, by Transfer Type and Year

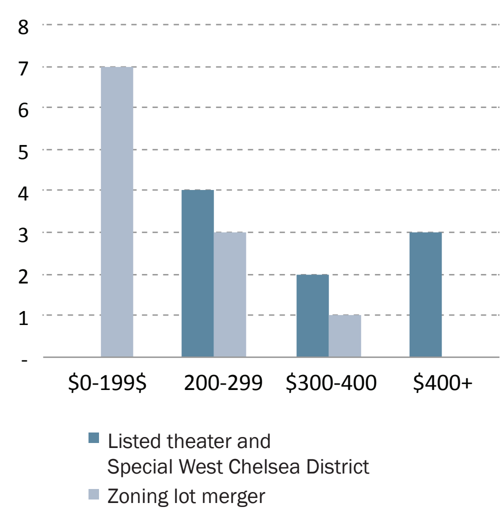


*No listed theater or Special West Chelsea District transfers were completed in 2009.
Sources: ACRIS, Furman Center analysis of recorded property documents

the value of rights to different kinds of projects, the specific locations of residential and commercial zoning districts within these neighborhoods, or other factors.

The above calculations suggest that TDR prices shift on average over time, likely as part of overall real estate value trends, and that they vary between neighborhoods, but the effects of the size of the transfer, the specific transfer mechanism, and the type of zoning district in which the receiving site is located are less clear. The Furman Center is currently analyzing the data in further detail to better isolate the effects of these individual factors, and to better understand some of the context-specific factors (including the number of possible TDR buyers and sellers on a block, the type of project the purchaser is developing, and where on a block a development site is located) that might also affect TDR prices. These factors, as well as others that are more difficult to capture (for example, the quality

Figure 10: Number of Arm's Length Development Rights Transfers in Greater Midtown Community Districts by Transfer Type and Price per Square Foot (2013 dollars), 2008



Sources: ACRIS, Furman Center analysis of recorded property documents

of views from the buildings using the TDRs) likely explain some of the wide variation in prices we observe even within years and within neighborhoods.

3. Policy Implications

The evidence presented above about the market for development rights has a number of implications for city policy. First, given the difficulty of identifying and decoding the documents that parties typically execute to transfer development rights, the city should consider ways to make the TDR market more transparent. For example, the City's Department of Finance could more uniformly apply document type codes when adding recorded instruments to ACRIS, or require parties to provide more explicit information about TDR transactions (including square footage) when submitting documents for recording. This would make clearer to property owners, community boards, planners, and others how development rights are used, and how much they are worth. In general, greater transparency increases the efficiency of a market by reducing differences in the information available to the potential buyers and sellers.

Second, the fact that our dataset shows that only two properties transferred TDRs through the landmark transfer program between 2003 and 2008 (while approximately 19 other landmarks used zoning lot mergers during the same period) suggests that the landmark transfer program, which requires a special permit, is just too cumbersome to be of much of a benefit. Anecdotally, many landmark owners find that there is no interest in their TDRs if a zoning lot merger is not possible, because developers do not want to spend the time and other resources needed to use the special permit procedure required for the landmark transfer program (especially without the certainty of approval), nor do they want to incur the risk that the special permit procedure will lead to public opposition to their project. The Furman Center is currently researching possible changes to the landmark program that could help make it more effective for landmarks and unlock the value of unused development rights in ways that further other policy goals as well.

Finally, our data can inform the design of new flexible zoning programs, including expanded TDR transfer opportunities. The city has relied on such programs for various development goals in the Special Midtown District, the Special West Chelsea district, Hudson Yards, and other parts of the city.

Most immediately, our findings have implications for the proposed East Midtown rezoning currently being considered by City Council.[11] The proposed rezoning would allow the owners of sites in the affected area that meet certain size and location criteria to use several new mechanisms to build above the maximum FAR otherwise permitted (either 15 or 12, depending upon the location of the site):

First, owners of lots meeting specified criteria would be able to secure between 1.2 and 3 additional permitted FAR (depending on the lot's location) by making a contribution to a "District Improvement Fund" (DIF), which would be used to finance improvements to the area's transit and pedestrian networks.

Second, for certain sites, once a landowner has obtained this additional permitted FAR by making a contribution to the DIF, the owner would be able to acquire another increase in permitted FAR of between 1.2 and 6.6 (depending upon the lot's location) by making additional contributions to the DIF, purchasing unused development rights from landmarks located within a designated area, or, in some cases, making certain improvements to the area's pedestrian or transit infrastructure. Unlike current landmark transfer rules, these transfers would not require a special permit review.[12]

Finally, owners of certain sites would be able to secure a third increase in permitted FAR of up to 2.4 or 6 (depending on the lot's location) through a discretionary special permit process for "superior" buildings that the city finds offer a particularly significant public benefit.

The rezoning would require that any development that uses these mechanisms for increased FAR be at least 80 percent office, retail, or other supporting commercial space, and no more than 20 percent residential or hotel space, unless the developer obtains a special permit. The environmental impact statement the city prepared for the proposed rezoning estimated that these mechanisms could together result in as much as 4 million square feet of net new office, retail and hotel space in the affected area.[13]

One of the thorny challenges of crafting the proposed rezoning plan is setting the amount of the contribution developers must make to the DIF in order to receive bonus FAR. This amount will not only determine how much money the DIF will raise to fund area improvements, but will also likely shape the market for unused development rights owned by the landmarks allowed to sell under the plan, including Grand Central Terminal, St. Bartholomew's Church, Central Synagogue, Lever House, and St. Patrick's Cathedral. Because developers will always have the option of securing development rights from the DIF for the set contribution amount,

11 More information about the proposed East Midtown Rezoning is available at the Department of City Planning's website, at http://www.nyc.gov/html/dcp/html/east_midtown/index.shtml.

12 Certain other development sites not meeting the location and size criteria for the above provisions would also be able to purchase a limited amount of development rights from certain landmarks (an expansion of existing transfer rights in the current Grand Central Subdistrict of the Special Midtown District), but would not be eligible for the FAR bonus from DIF contributions.

13 The final environmental impact statement is available at http://www.nyc.gov/html/dcp/html/env_review/east_midtown.shtml.

owners of the landmarks should be unable to sell their rights for a higher price. Further, even if landmark owners are willing to sell unused development rights at substantially lower prices, developers must first make a minimum DIF contribution at the fixed rate before they are permitted to acquire TDRs, so the DIF contribution rate is not only a ceiling for TDR prices, but a floor for the cost of initial FAR increases.

The proposed rezoning sets the DIF contribution rate at $250 per square foot for commercial space, and $360 for residential space, which are the average expected values of the bonus FAR the developer would receive in exchange for the contribution, according to analyses prepared for the city by experienced appraisers based on prior TDR transactions and land sales.[14] Beginning in 2014, these rates would automatically adjust annually based on year-to-year changes to the "Midtown Asking Rent" and "Manhattan Condo Average Price Per Square Foot" published by the Office of Management and Budget, and the city would recalibrate the rates by commissioning new appraisals every three to five years. For mixed-use projects, the DIF contribution rate per square foot would be based on a weighted average of the commercial and residential contribution rates. According to the Independent Budget Office, the city estimates that the DIF would raise between $605 and $750 million (in current dollars) over the next 20 years with these DIF contribution rates[15] (although Mayor Bloomberg has indicated that the city would advance funding to finance some area improvements up-front[16]).

Our research does not appraise the current value of the development rights that the East Midtown rezoning proposal would make available through the DIF density bonus or through permitted transfers from landmarks in the affected area. Instead, our research describes, historically, how the market has priced TDRs in recent years. The contribution the proposed rezoning requires developers to make to the DIF in exchange for commercial bonus FAR is roughly in line with the average price (in 2013 dollars) for all TDR transactions in greater Midtown between 2003 and 2011. Those prices (some as much as 10 years old) may need to be adjusted, however, for subsequent market trends and other factors in order to provide an accurate prediction of the value of the bonus FAR when and if that FAR becomes available.

Crucially, as our overview of the TDR market shows, the average sales prices for TDRs in recent years conceal wide variation, even within neighborhoods, which does not appear to be easily explained by market trends. We observed variation even among prices for "floating rights," which some have suggested are the most analogous to DIF bonus rights. Some of this variation may be due to the opacity of the market,

14 The valuation studies, prepared by Landauer Valuation & Advisory, are available at http://www.nyc.gov/html/dcp/pdf/east_midtown/market_study_report.pdf and http://www.nyc.gov/html/dcp/pdf/east_midtown/residential_dib_appraisal_report.pdf?635152225538900000.

15 New York City Independent Budget Office (2013, September). Is the City Making Way for More Office Space Than Needed Over the Next 30 Years? Retrieved from http://www.ibo.nyc.ny.us/iboreports/2013midtowneast.pdf.

16 Bloomberg, M. R. (2013, July 31). The shot in the arm East Midtown needs. The Daily News. Retrieved from http://www.nydailynews.com/opinion/shot-arm-east-midtown-article-1.1413219#ixzz2hI7wXm3h.

but very likely it is also because the value of extra density varies from site to site, based on several context-specific factors. Just as land prices are likely to vary in an area as large as the proposed East Midtown rezoning area, the value of development rights may vary widely as well.

The city's stated goal is to set a DIF contribution rate that "reflects the market for commercial development rights in the area."[17] There are likely administrative efficiencies to setting a uniform rate for contributions to the DIF, and predictability in rates has many advantages. The variation we observe, however, suggests that any one rate is unlikely to reflect the actual market value of the bonus FAR to many of the individual development sites in the rezoned area. This inflexibility may have unintended consequences for development in East Midtown. If the DIF contribution is higher than some development sites can bear, it could impede the goal of encouraging the construction of large, new commercial buildings in the area. On the other hand, if the DIF contribution is lower than the value of the bonus FAR for some development sites, the uniform rate would diminish the DIF's capacity to fund area infrastructure improvements.[18]

Alternatives to a uniform, inflexible contribution rate could be based on mechanisms the government has used for reflecting the market value of regulated assets in other contexts, such as the pricing of oil and gas rights and publicly owned telecommunication spectrum. For example, various auction schemes might allow for the same basic density bonus framework, but also allow the DIF contributions to better reflect the market value of bonus FAR to specific sites, in particular market conditions, and over time. The private market for TDRs would likely track auction prices in order to compete with the DIF bonus if, as is currently proposed, any additional FAR developers of eligible sites could purchase as TDRs from landmarks could instead be obtained through contributions to the DIF.

As density bonuses and TDRs are increasingly discussed and used as mechanisms to help finance needed infrastructure improvements, compensate constrained land owners, and shape urban design, it is imperative for the city to develop the best mechanisms for valuing development rights accurately. Further, the new challenges the city faces in funding the infrastructure and other investments needed to maintain neighborhood quality while accommodating growth make this an opportune time for a more robust public discussion about the fairest and most efficient ways to secure that funding and distribute additional permitted density, and specifically about the possible roles of expanded TDR transfer opportunities. The important role that TDRs have had in the proposed East Midtown rezoning, along with the Hudson Yards and West Chelsea rezonings, raises many questions about the advantages

17 New York City Department of City Planning (accessed 2013, October 14). East Midtown Proposal: The District Improvement Fund. Retrieved from http://www.nyc.gov/html/dcp/html/east_midtown/east_midtown3.shtml.

18 Some critics have argued that setting the DIF contribution rate based on market value amounts to an unconstitutional sale of zoning. The City Club of New York (2013, August 19). Report of the City Club of New York Concerning East Midtown Rezoning Proposal. Retrieved from http://cityclubny.org/wp-content/uploads/2013/08/Position-statement-8-19-19-FNL.pdf. Other critics have argued that the DIF rate shortchanges the city or landmark owners because it is set too low. See The Real Deal (2013, August 13). Grand Central landlord, city clash over Midtown East air rights. Retrieved from http://therealdeal.com/blog/2013/08/13/city-clashes-with-pensons-argent-ventures-over-midtown-east-air-rights/.

and risks of using TDRs and density bonuses versus other mechanisms for providing flexibility and financing the improvements needed to support new development. That discussion likely will be more productive outside the specific context and deadlines of a particular proposed rezoning, and should be a priority for the City Planning Commission in the coming months.

4. Methodology and Notes

We compiled our dataset by systematically searching the city's recorded property documents using the Department of Finance's Automated City Register Information System (ACRIS) and reviewing the terms of the TDR-related documents we identified. ACRIS allows users to search by 30-day date ranges for specific "document types," which the Department of Finance assigns to documents when submitted for recording. We searched date ranges encompassing the entire period from 2003 through 2011 for document types that our research showed have been associated with development rights transfers. These included the document types "development rights," "certificate," and "zoning lot description." As we identified possible zoning lot mergers, we then searched other document types, including "agreement" and "sundry agreement" for transfer instruments pertaining to other lots that our research suggested were involved.

We also searched ACRIS more broadly for transfer documentation recorded for each "listed theater" identified by the Zoning Resolution as eligible to transfer unused development rights

as part of the Special Midtown District. Similarly, we searched for transfer documentation for every lot in the High Line Transfer Corridor defined by the Special West Chelsea District over our study period. Finally, we searched in ACRIS all landmarked lots that news coverage suggested had transferred development rights in recent years.

For all types of transfer instruments, our price information is from the "doc amount" field in ACRIS. This represents the payment made at or near closing (reported for transfer tax purposes), generally at the time the transaction documents are dated. However, in many cases, the price was likely agreed to by the parties several months prior to the closing when they went into contract, so our analysis of time trends may not accurately arrange all prices chronologically.

Through our search method, we identified 421 development rights transfers. Of these, 61 appeared to be between affiliates and were not analyzed further. Of the remaining 361 transfers, 77 did not specify the amount of square feet that were transferred, instead using general language, like "all unused." Another 42 transactions specified the size of the transfer, but ACRIS provided no "doc amount" for the instrument we reviewed or any related instrument. We base our year and neighborhood price per square foot estimates on the remaining 242 transfers in our data that have both price and square footage terms.

In some cases, TDR purchasers may have separately bargained for a light and air easement to protect the views from their projects, but the additional cost of the easement is included in the overall purchase price. We did not review the transfer documentation for easements and do not account for them in our price per square foot calculations.

We adjust all prices to 2013 (first half) dollars using the Bureau of Labor Statistics Consumer Price Index - All Urban Consumers, all items, not seasonally adjusted, for the New York-Northern New Jersey-Long Island, NY-NJ-CT-PA area.

To identify the type of zoning district of each receiving lot involved in a TDR transaction, we use the first zoning district variable for each recipient lot in the Primary Land Use Tax Lot Output (PLUTO) data set produced by the New York City Department of City Planning.

This brief has been prepared by a center affiliated with New York University School of Law and Wagner Graduate School of Public Service, does not purport to present the institutional views (if any) of NYU, NYU School of Law, or the Wagner Graduate School of Public Service.

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About the Furman Center for Real Estate and Urban Policy

The Furman Center for Real Estate and Urban Policy is a joint center of the New York University School of Law and the Robert F. Wagner Graduate School of Public Service. The Furman Center is the leading academic research center in New York City devoted to the public policy aspects of land use, real estate, and housing development, and is dedicated to providing objective academic and empirical research. More information on the Furman Center can be found at www.furmancenter.org and @FurmanCenterNYU.

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