

Profit for the People: Using Value Created by Development to Support LIC NYCHA developments

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Introduction: The issue

- NYCHA is operating on a \$100 million- \$200 million capital deficit
 - And this might increase if Trump's proposed cuts get passed
- NYCHA also has a \$17 billion dollar capital deficit for needed repairs
- LIC developments need repairs!
 - Can money from LIC rezoning go toward these repairs?
 - Would need a considerable amount, since local developments are large
 - Le Queensbridge N & S have over 3k units and over 7k residents
 - NYCHA replaced roofs on 26 residential buildings (including exterior brickwork, window sill replacement
 - Cost \$87 million

What does value capture mean?

- Ways to get \$\$ for the communities where private development is happening, especially where there is some public action (i.e. the government is doing something)
- Specifically, several folks asked for ideas of ways to generate funding streams to support NYCHA developments in rezoning communities (but the tools in this presentation could potentially be used to support any local needs the community has, whether preservation of affordable housing, upgrades of existing schools or creation of new ones, transportation improvements, job training programs, resiliency improvements, etc).

Caveats

- **This conversation assumes that a lot of development is happening.** How much exactly is hard to say, since DCP has not released details about their rezoning.
- **Nothing is free.** These tools rely on developers building a lot, making a lot of money, and some of that being kept in the community. They don't work unless developers and/or the City believes that there will be a lot of high-value development coming to the area. The fact that the LIC rezoning is primarily focused on commercial/manufacturing buildings may mean that there is a lower total amount that the rezoning will be generating.
- **Just because the City or developers could do any of the things we're about to describe, that obviously doesn't mean that the City will want to do even one of them.** It would require a lot of organizing to convince the City to do any of these things. But as many of you know, the City often says that things are legally impossible when the truth is that they just don't feel like doing them. We are going to give you a bunch of examples of things the City has already done, or has proposed doing, so if the City says to you, "It's impossible to get money for

NYCHA from the rezonings" you can say - "Then how were you able to get money to build the High Line in West Chelsea?"

Intro to Zoning & The Leverage It Gives

- Zoning is the set of rules that says what kinds of buildings can be built where (in terms of size, shape, and use).
- If a developer is building something that is allowed within the existing zoning rules that apply to the land, the government doesn't have to do anything; the developer has the **right** to build.
- "Rezoning" is where you're changing the zoning rules for a particular area.
 - Usually, the people who benefit most from rezoning are the people who own the land, because they get permission to use it in new and more profitable ways.
 - NYC (via DCP) is initiating many neighborhood rezonings right now, to allow for additional development, but also require that some of the new housing be "affordable." The affordable housing requirement is due to a policy called Mandatory Inclusionary Housing (MiH). All residential rezonings must include the affordable housing that MiH requires.
 - BUT, the rezoning can require **additional** commitments be made to other things the community needs, like supporting NYCHA, schools, etc.
- There are guidelines for what the City can do with zoning:
 - New York courts have said that New York City's "use of incentive zoning" - i.e. giving developers increased building rights in exchange for community benefits or amenities, such as open space or affordable housing - "is well within its broad authority" to zone.¹
 - There are some limits on zoning - for example, it's supposed to regulate the use, not the user of land, and the government can't "take" privately owned property for a public purpose without compensation.
 - This "taking" issue is much less of a concern where the City is giving developers a BONUS as opposed to trying to add a restriction on something the developer is already entitled to do - because the developer isn't in any way entitled to the bonus. So if the City wants to add a condition to the bonus - for example, the way the Voluntary Inclusionary Housing program says, "We'll give you the right to build more, but only if some of it is below-market" - that is generally okay because the developer doesn't **have** to do the thing, it's just part of the package if the developer wants the bonus.

¹ Residents for Reasonable Dev. v. City of N.Y., 128 A.D.3d 609, 611 (N.Y. App. Div. 2015) (citing Asian Ams. for Equality v. Koch, 72 N.Y.2d 121, 129 (1988)).

Value Capture Tool #1: Buying new additional development rights

Overview

- **What is it?**
 - Creating special rules where developers can buy the right to build more in exchange for paying money into a local fund (for example, a fund earmarked for Queensbridge, Ravenswood, Astoria, and Woodside Houses).

- **Where can you use it?**
 - Anywhere, as long as the City puts it into the zoning text that applies to that area. The City has generally done this through “special districts,” which are designated areas where special zoning rules apply.
 - A neighborhood where developers are going to want to build more than the zoning allows them to build
 - So it's important not to give away too many building rights for free, with “as-of-right” zoning. The City can limit the amount of floor area developers can have, so developers have more of an incentive to pay for added building rights.

- **What would it take?**
 - A lot of negotiation with DCP to create a special district, designate a fund, and identify an agency/organization to manage the fund (HPD manages the West Chelsea affordable housing fund). Also, negotiation with DCP to limit the upzoning to leave space for the tool to be used.

Example: West Chelsea Affordable Housing Fund

- One tool used in the West Chelsea rezoning allowed² **developers to buy the right to build more. The money they pay is put aside in a special local fund for affordable housing.**

² “West Chelsea - Points of Agreement,”
http://www.nyc.gov/html/mancb4/downloads/pdf/WC_Points_of_Agreement.pdf.

- HPD administers the fund, and funds are set aside for “the development, acquisition or rehabilitation of low, moderate or middle income housing located in Community District 4 in the Borough of Manhattan.”³
- The City must certify a developer’s contribution to the affordable housing fund before granting any building permit for construction using the newly-acquired air rights.⁴
- The zoning text says that the City sets the price of these air rights annually. The City Council’s Points of Agreement on the rezoning say that the price of the air rights will be comparable to the going price for air rights in the area at the time.⁵
This is potentially a lot of money - as of November 2016, air rights in the area were going for \$800 a square foot.⁶

Value Capture Tool #2: Buying someone else’s existing development rights

- **What is it?**
 - Transferring development rights, or TDR. TDR involves moving unused air rights from one building to a different building.
- **Where can you use it?**
 - Anywhere, as long as the City puts it into the zoning text that applies to that area. The City has generally done this through “special districts,” which are designated areas where special zoning rules apply.
 - Generally, you can only transfer air rights from lots that are right next to each other.⁷ But in certain special districts (areas that the City creates to put special zoning rules in place), the City allows these rights to be transferred anywhere within the district.
- **What would it take?**
 - A lot of negotiation with DCP to create a special district, and unused development rights, that could be transferred.

³ Special West Chelsea District, ZR 98-262(c).

⁴ The zoning text requires that “instruments in a form acceptable to the City are executed ensuring that a contribution be deposited in the West Chelsea Affordable Housing Fund,” and “execution of such instruments shall be a precondition to the filing for or issuing of any building permit for any development or enlargement utilizing such floor area increase.” Id.

⁵ “West Chelsea - Points of Agreement” at 1(f),

http://www.nyc.gov/html/mancb4/downloads/pdf/WC_Points_of_Agreement.pdf.

⁶ Steve Cuozzo, “Air Rights on the High Line are Selling at Huge Prices,” *New York Post*, Nov. 29, 2016, <http://nypost.com/2016/11/29/air-rights-on-the-high-line-are-selling-at-huge-prices/>.

⁷ Need to add citations for how TDRs work and restrictions on them.

- You could also try to get the city itself to sell air rights it owns. This would be a bigger lift, but most of the (approximately) 575 community garden lots in the Parks Department inventory have residential zoning, meaning that despite their use as public open space, they have development rights. These development rights are property of the City of New York and can be sold by the City of New York. There's also city-owned land by the Queensboro Bridge...
 - If the City of New York could sell the rights to develop that run with each of the garden lots, it could generate a lot of \$\$\$.
 - The City owns many properties, many of which it doesn't plan to use for residential purposes. But theoretically, the City could create residential air rights for itself on these properties, then sell them. Why not??

Example: High Line Improvement Fund

- One condition for the use of bonus building rights through the High Line Improvement Bonus is that the the developer must make a contribution into an escrow account or similar fund established by the City, the High Line Improvement Fund.⁸⁹
- Initially, the contribution amount was \$50.00 per square foot of floor area. The zoning text provided that the amount should be adjusted annually and keyed to inflation.¹⁰

Example: the East Midtown Public Realm Improvement Fund

- "Projects that use landmarked buildings' TDRs will be required to make a contribution to Public Realm Improvement Fund. The contribution will equal 20 percent of the sale value, or a minimum contribution of \$78.60, whichever is greater. The minimum contribution was informed by a [market study](#) of the value of development rights in midtown."¹¹

Issues to Consider in Implementation

- ***Interaction with Mandatory Inclusionary Housing:***

⁸ ZR 98-35.

⁹ For another day: it seems that in Subarea J, the contribution for the first 80k sq ft actually went to the affordable housing fund and not into the High Line Improvement Fund. But need to read this more thoroughly. See ZR 98-25(a)(1).

¹⁰ The zoning text provides that the amount of change be based on the percentage change in the Consumer Price Index for all urban consumers as defined by the U.S. Bureau of Labor Statistics. ZR 98-35.

¹¹ [id.](#) [correct, no longer refers to right source because other FNs were added in between]

- It might be harder to profit from air rights or TDRs in these ways now that MIH is in place (which it was not when the West Chelsea zoning was passed) because developers are **already** required to “give” some amount of housing that is permanently below market-rate when they make use of an upzoning or purchase and use air rights.¹²
 - The City might fear being sued if they demand from developers both inclusionary housing units **and** payments into a fund. Although zoning ordinances benefit from a strong presumption of constitutionality, the City frequently referred to the possibility of a takings challenge to rebuff calls to achieve more deeply affordable units through MIH, stating that they could not go “too far” without risk to the whole program being challenged.
- One way to address this potential trade-off between affordable housing and payments to the fund would be to use a TDR program for non-housing uses, as has been proposed in the Greater East Midtown district for office uses.
- **How can the community know how much money is produced and control how it's used?**
 - **Require the City to publish the data you need to know if the tool is working!**
 - In West Chelsea, it is hard to know what exactly happened to the money since the zoning resolution did not require disclosure of the amount of money generated. CDP is not even sure whether the affordable housing fund ever actually came into existence, since developers could purchase air rights via contributions to this fund only **after** 90% of the air rights in the High Line Transfer Corridor were already used up and there is no readily available public information that shows the total amount of air rights that were available to begin with and how of this pot has been used up.
 - The affordable housing fund was supposed to be used for, among other projects, the construction of new affordable housing on NYCHA property; as part of the Council negotiations over this rezoning, the then-mayor agreed to pursue such developments at the Chelsea-Eliot NYCHA site

¹² The de Blasio administration has affirmed, for example, that Mandatory Inclusionary Housing will apply to any sale of development rights from Stuyvesant Town and Peter Cooper Village. Sabina Mollot, “More About Those Air Rights,” Town and Village, January 26, 2016. <https://town-village.com/2016/01/26/more-about-those-air-rights/>.

and Fulton Houses.¹³ But the Fulton Houses project stalled for years after the economic crisis and a **second** upzoning, this time of the Chelsea Market, was justified in part to create a second affordable housing fund to help fund the affordable NYCHA infill project.¹⁴ The Fulton Houses project did not get underway for ten years after the rezoning¹⁵ and it is not clear how much if any of the project was funded from the local fund.¹⁶

- **Create a governance group!** In East Midtown, the City has proposed creating a 9-member Governance Group to administer the Public Realm Improvement Fund.¹⁷ It will include “5 mayoral appointees, and representatives from the Manhattan Borough President’s Office, the Council Member for District 4, Community Board 5 and Community Board 6. The Governing Group will select street and transit projects identified by DOT and MTA as funds become available.”¹⁸ Such a group could be made more accessible to community members by having guaranteed seats for, for instance, NYCHA TA presidents or certain specified community organizations.
- **How can you make sure the developer actually does what the developer is supposed to do? Hold up developers’ permits and certificates of occupancy!**
 - In West Chelsea, bonuses for improvements to the Highline were subject to a lot of conditions:

¹³ “West Chelsea - Improvements at the City Council,” http://www.nyc.gov/html/mancb4/downloads/pdf/WC_Points_of_Agreement.pdf.

¹⁴ “Tenant and Affordable Housing Advocates, Chelsea and Village Community Leaders Call Upon City Council to Reject Chelsea Market Upzoning Plan, Call Affordable Housing Component a ‘Sham’,” September 28, 2012, http://www.gvshp.org/gvshp/preservation/chelsea_market/doc/press-09-28-12.pdf. See also “Chelsea Market Takes a Second Bite at Affordable Housing,” *The New York World*, Nov. 14, 2012 (describing how 100 affordable housing units at Fulton Houses were promised in the West Chelsea rezoning but never delivered, then made the subject of a separate deal), <http://www.thenewyorkworld.com/2012/11/14/chelsea-market/>.

¹⁵ Maya Rajamani, “City Moving Forward With Plans for 18-Story Residence at Fulton Houses,” DNAinfo, June 21, 2016, <https://www.dnainfo.com/new-york/20160621/chelsea/city-moving-forward-with-plans-for-18-story-residence-at-fulton-houses>.

¹⁶ Scott Stiffler, “Work Begins on Long-Awaited Affordable Housing Project at Fulton,” May 10, 2017 (describing a total project cost of about \$78M, primarily split between HPD and HDC).

¹⁷ “Recommendation on ULURP Application Nos. N 170186A ZRM and N 170187 ZMM - Greater East Midtown by The New York City Department of City Planning,” Office of Manhattan Borough President Gale Brewer, April 12, 2017, <https://www1.nyc.gov/assets/planning/download/pdf/plans-studies/greater-east-midtown/borough-president-recommendation.pdf>.

¹⁸ *Id.*

- The zoning text set forth specific **timeframes** for owners to complete the work to match up with when the City aimed to open the park
- It even provided that if the owner committed to performing the work but failed to do so within the specified timeframe, the City could pay to do the work, and the owner could no longer receive the air rights bonus
- Owners' performance of the required **work had to be certified by City Planning, which in turn had to notify the Department of Buildings** before building permits for work to develop or increase the size of a building based on the bonus would be issued. City Planning also had to certify to DOB before DOB could issue temporary or permanent certificates of occupancy for such buildings.¹⁹
- In East Midtown, they've proposed some similar controls for bonuses attached to providing public improvements:
 - For bonuses based on transit improvements, the applicant has to
 - “[I]f appropriate ... sign a legally enforceable instrument running with the land, setting forth the obligations of the owner and developer, their successors.”²⁰
 - Any easement on privately owned property has to be recorded with the City
 - No temporary C of O for any portion of the development or enlargement on a receiving lot can be granted by DOB until Chair of the City Planning Commission determines that all required improvements have been substantially completed
 - MTA must certify that all improvements are complete before a permanent C of O can be issued
 - For bonuses based on public realm improvements, similar conditions in terms of enforceability apply.²¹

[8] N.Y. Gen. Mun. Law § 970-c (McKinney)

[9] N.Y. Gen. Mun. Law § 970-o(i) (McKinney)

[10] N.Y. Local Fin. Law § 11.00(12-a) (McKinney)

¹⁹ Special West Chelsea District, ZR 98-25 and Appendices D, E and F (describing special regulations for zoning lots in different subareas using the improvement bonuses).

²⁰ Proposed East Midtown Text Amendment, ZR 81-632(d).

²¹ Proposed East Midtown Text Amendment, ZR 81-633.

[11]

http://www.icsc.org/uploads/event_documents/TIF%20Webinar%20PowerPoint,%206-13-12.pdf

Value Capture Idea #3: Payment in Lieu of Taxes (PILOT) Fund-Backed Financing

- **What is it?**
 - A payment made into a dedicated fund identified when the PILOT is set up.
 - Most City PILOTs go into the City's general fund
 - NYCHA PILOTs go to NYCHA's general fund
 - The money could be directed somewhere else
 - Usually, where some government agency or authority that isn't subject to taxation of the land it owns induces private developers to build there by offering to let the developer build on land held by the agency/authority, and then pay into a PILOT fund.
 - Developers want to do this because the amount of the PILOT payment is generally less than property taxes would have been²² if the developer chose to build on private land instead.
 - The agency/authority wants to do it because the payments the developers make go into the dedicated fund and can be used however the agency/authority wants
- **Where can you use it?**
 - Anywhere the city or a tax-exempt entity owns land.
 - A city agency (like the EDC and/or the IDA) can have private developers sell them the land for the duration of the PILOT, if it is not currently city-owned.
- **What would it take?**
 - Organizing to get the EDC/IDA/some other tax-exempt entity to negotiate a PILOT with a developer

Example: Hudson Yards (Private land)

- Private developers planning to develop in the Hudson Yards will have the option of owning land and paying regular property taxes, OR entering into PILOT contracts with the City's Industrial Development Agency ("IDA").

²² Bridget Fisher, "The Myth of Self-Financing: The Trade-Offs Behind the Hudson Yards Redevelopment Project," Schwartz Center for Economic Policy Analysis, the New School for Social Research (July 2015),

http://www.economicpolicyresearch.org/images/Bridget_Fisher_WP_2015-4_final.pdf

- Under these agreements, the IDA will purchase the land from the developers for \$1. This removes the land from the property tax rolls, because the IDA is a tax-exempt entity.
- The developers will then lease the land from IDA and make rent payments in lieu of regular property taxes for the duration of the agreement.
- These payments are generally less than the amount of real property taxes that would otherwise be due.
- IDA will funnel these payments into a special fund overseen by the HYIC.
- At the end of the PILOT contract period, the IDA will return the land to the developers and the developers thereafter will pay taxes to the City rather than making payments to the IDA.²³

Example: NYCHA (Public Land)

- PART 1: NYCHA Paying into a PILOT
 - State Law authorizes Cities that host public housing authorities to enter into agreements for annual payments for hosting public housing, or to skip it.
 - In 1949, NYCHA + City of New York agreed to NYCHA making an annual PILOT payment²⁴, a payment that contributed to NYCHA's deficit and general budget difficulties.
 - Contract between NYC and NYCHA set the payments like this: calculated once each fiscal year based upon 10% of shelter rents (a) collected or (b) permitted to be paid (charged) for NYCHA's portfolio, whichever is lower. "Shelter rent" is defined in the New York Private Housing Finance Law § 33 (2015) as "the total rents received from the occupants of a project less the cost of providing to the occupants electricity, gas, heat and other utilities."
 - Many people felt that PILOT payments did not make sense because NYCHA provides a vital public service, and many other affordable housing developments are exempt from taxes.²⁵ City Council introduced a resolution in 2010 calling on the State to change the law to disallow cities to charge PAs a PILOT²⁶ but neither the reso or the law itself were adopted
 - Mayor de Blasio used the option to accept no payment that is in the State law to put an end to NYCHA's PILOT payments in 2015 because of

²³ Amy F. Cerciello, THE USE OF PILOT FINANCING TO DEVELOP MANHATTAN'S FAR WEST SIDE, 32 *Fordham Urb. L.J.* 795 (2005).

²⁴ "NYC to Waive \$30M Public Housing Payment," *Associated Press*, May 6, 2015, <http://www.wnyc.org/story/nyc-waive-30m-public-housing-payment/>.

²⁵ Manny Fernandez, "City Criticized by Fees Paid by Its Agency for Housing," *The New York Times*, July 7, 2008, <http://www.nytimes.com/2008/07/07/nyregion/07housing.html>.

²⁶

<http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=648851&GUID=AC1EFEC0-7B94-4FC2-9788-CE9E5D020B5>

NYCHA's fiscal difficulties.²⁷

- PART II: NYCHA Requiring Developers to pay into a PILOT
 - NYCHA, like the IDA, is a tax exempt entity that can hold land
 - NYCHA plans to allow developers to build on its land via a ground lease through the NextGen program
 - In the NextGen NYCHA RFP for Wyckoff & Holmes, NYCHA says that “Beginning in year 26, NYCHA will charge [developers] a PILOT equal to 10% of shelter rents” - the same amount NYCHA paid to the City all those years

²⁷ Greg B. Smith, “De Blasio to End \$30M Annual Housing Fee to Save Cash-Strapped NYCHA,” **Daily News**, May 7, 2015, <http://www.nydailynews.com/news/politics/de-blasio-30m-annual-housing-fee-save-nycha-article-1.2213510>.