

First Avenue Properties
Changing An Industrial Landscape

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1. Overview of Development Issues

The transformation of obsolete and surplus industrial property owned by Consolidated Edison Company of New York, Inc (“Con Edison”) to commercial and residential property conforming to surrounding landscape involved several regulatory and business issues:

- (1) Public Service Commission (“PSC”) approval of the sale of public utility property pursuant to the Public Service Law;
- (2) Remediation of the extensively contaminated industrial property subsequent to an agreement of sale;
- (3) Evaluation of environmental impacts of an urban project that has yet to be designed; and
- (4) Obtaining appropriate zoning from the City of New York which would reflect a transformation of industrial property to commercial and residential property.

These issues presented at least three temporal problems for Con Edison and any prospective purchaser that wished to enter into a realistic Contract of Sale: (I) the need to account for the cost of unknown of environmental remediation; (ii) the need to account for the true value of the land prior to rezoning; and (iii) the selection of one “lead agency” to analyze all environmental impacts that would flow from an approved sale prior to the creation of a final

master plan for redevelopment. With respect to the lead agency issue, it was apparent to all that the critical step was to have a PSC approved contract.

2. Description of the Development Property

The former Con Edison property consists of a nine and a half acre site located immediately south of 41st Street on either side of First Avenue. 616, 685, 700 and 708 First Avenue constitute this large “section” of the City. 708 First Avenue was occupied by a Con Edison ten-story office building and garage. 700 First Avenue is a two block area that was the site of two active steam and electrical generating plants (the “Waterside Station”). The Waterside Station Property was the center piece of this transfer, but at contract execution, was an active part of Con Edison’s steam generating capacity.

In a plan previously approved by PSC (the “Steam System Plan”), Con Edison recommended the replacement of the steam and electric outputs of Waterside Station by repowering the East River plant on 14th Street and the FDR Drive with new combined-cycle steam and electric cogeneration facilities that would match Waterside’s steam outputs. Accordingly, the Contract of Sale provided that once the repowering was completed, Waterside Station would be retired, enabling the divestiture of the Waterside site along with the three nearby non-generating station parcels as a single-asset bundle.

3. 100 Years of Industrial Waste

The Project site had been used for industrial purposes since the early 19th century. During the last 100 years it had been the site of several power production facilities. At least three of the sites had been used for the generation of gas from Col tar. Heavy metals, petroleum, volatile organic compounds and PCBs, were some of the contaminants that were anticipated to be found below and throughout buildings on the site.

The conditions precedent to the Agreement included the decommissioning of Waterside, demolition of the existing structures on 616, 700, and 708 First Avenue, and remediation of the contamination present on the Properties. Con Edison secured the services of TRC Companies, Inc. (“TRC”) to perform this work.

Con Edison entered into a contract with TRC that fixed the price for these activities at \$103.5 million (the “TRC Contract”). All work will be completed pursuant to Consent Orders issued by the Department of Environmental Conservation (“NYSDEC”) and in accordance with federal, state and local statutes, regulations, and requirements. The TRC Contract provides that TRC assumes responsibility for certain liability associated with the physical and environmental conditions of the Properties and performance by certain deadlines of all demolition and remediation work. ERRC paid a \$50 million deposit toward the cost of the contract.

Con Edison and TRC have also secured cost cap and environmental insurance policies related to TRC’s work. The cost cap policy protects Con Edison from cost overruns, TRC’s default, and indemnification claims. The environmental policies protect Con Edison and ERRC from claims related to contamination on the sites and disposal of contaminated materials removed as part of TRC’s work. The terms of the policies range from 10 to 30 years and have coverages between \$10 million and \$195 million, depending on the type of claim.

4. The Public Service Commission Proceeding

Con Edison and FSM East River Realty LLC, now the East River Realty Company, LLC (“ERRC”), entered into a Contract of Sale on November 15, 2000, which was subject to the approval of the PSC, pursuant to Section 70 of the Public Service Law (“PSL”). Section 70 of the PSL states that “[n]o gas corporation or electric corporation shall transfer or lease its franchise, works or system or any part of such franchise, works or system to any other person or

corporation or contract for the operation of its works and system, without the written consent of the commission.” Before such consent is granted PSC had to find that the transfer was in the “public interest”.

The Contract of Sale between ERRC and Con Edison, for which approval was sought, contemplated residential and commercial construction on the disposition parcels. The Contract assumed Contract of Sale approval by the PSC, and thereafter ERRC seeking zoning approvals from the City which would provide for a Floor Area Ratio or “FAR” of up to 12, a FAR equal to the FAR permitted in zoning districts mapped over one of the disposition parcels and over virtually all of the properties surrounding the disposition parcels and the FAR actually developed in recently constructed buildings in the area. Although specific building plans were not formulated or submitted, it was necessary to begin the environmental process at that time because the State Environmental Quality Review Act (“SEQRA”) directs all agencies “[a]s early as possible” to consider the “impacts that may reasonably be expected [to] result from the Proposed Action.” (6 NYCRR § 617.6(a)(1).)

Because City Agencies would regulate zoning an early issue was which agency would take the lead in developing the environmental analysis. The PSC resolved the issue of which agency would be the lead agency for the purposes of the SEQRA opting to become the lead agency, and also insuring the New York City Department of Planning’s active cooperation as an Involved Agency, within the meaning of 6 NYCRR § 617.22(s).

The PSC, as the lead SEQRA agency for the sale, the Proposed Action, determined that the sale and disposition process would potentially create significant adverse environmental impacts and required that a Generic Environmental Impact Statement (“GEIS”) be prepared. The GEIS analyzed reasonable “worst case” environmental impacts that may arise from a series of

actions or steps that may be “triggered” from an initial action then before the PSC. Thus, the GEIS was triggered by the application to PSC to approve the sale of the disposition parcels by Con Edison to ERRC pursuant to Section 70 of the PSL. Because it was anticipated that PSC approval of the Petition would eventually result in the development of those properties, in accordance with land use and zoning reviews by the City of New York, reasonably foreseeable “worst case impacts” and ranges of the corresponding mitigation measures and alternatives that could avoid such impacts were analyzed in the GEIS. However, the reasonable worst case impacts projected in the GEIS may not be the same as the actual impacts of the development of the disposition parcels because the hypothetical development programs which are analyzed in the GEIS and which cause these impacts were designed to encompass and bracket the range of reasonable development scenarios for the disposition parcels and their resulting impacts.

Accordingly, the GEIS was designed to fulfill this obligation by considering the impacts that could be reasonably anticipated from not only the decommissioning of Waterside Station, but also from ERRC’s anticipated buildout of the First Avenue Properties subject to the disposition parcels. The repowering of the East River plant had undergone a separate environmental review pursuant to Article X of the PSL. Nevertheless, the environmental impacts of East River Repowering Project (“ERRP”), as documented in the Article X application, were presented in this GEIS, as were the cumulative impacts of the Proposed Action and ERRP.

5. Development Alternatives Considered in the GEIS

The GEIS presented three different “reasonable worst-case development scenarios” that provide a conservative assessment of the range of potentially significant adverse environmental impacts that could result from the PSC’s approval of the sale. The As-of-Right Program would

develop the disposition parcels under existing zoning with a substantial amount of commercial floor area and provide a significant number of public parking spaces. Under this program, development would occur without any further discretionary public actions subject to SEQRA or City Environmental Review (“CEQR”).

The As-of-Right Development Program was assumed to consist of approximately 658,000 zoning square feet (zsf) of office use, approximately 108,000 zsf of local retail and restaurant uses, approximately 15,000 square feet of medical office uses, approximately 225,000 square feet of below-grade destination retail uses, 900 public parking spaces, and 160 accessory parking spaces.

Although there was no specific project plan for future improvement of the disposition parcels, it was anticipated for purposes of the GEIS that future improvements of the disposition parcels would have a maximum floor area ration (FAR) of 12.0. This FAR had been assumed since it is consistent with the permitted densities of the zoning districts mapped immediately adjacent to the disposition parcels.

The GEIS evaluated the impacts of the reasonable worst case Rezoning Scenario assuming either of two Development Programs: one which maximizes residential use reasonably expected to occur on the disposition parcels (the Residential Development Program) and another which maximizes commercial use reasonably expected to occur on the disposition parcels, with most of the remaining space developed with residential uses (the Mixed-Use Development Program). For purposes of the environmental review, these two programs represent the maximum level of development that could reasonably be achieved under a rezoning application and would encompass the full range of impacts reasonably expected to occur under the eventual

project plan. The analysis of the Rezoning Scenario was based on a generic building program and site plan, as no specific project plan exists at this time.

The assessment of the Rezoning Scenario was provided to disclose the conditions that could potentially result should BSA, the City Planning Commission (“CPC”), and the City Council approve a rezoning and the other public actions to permit high-density residential and commercial uses on the disposition parcels. However, the GEIS noted that any use of the disposition parcels at densities greater than permitted under the current zoning controls applicable to the disposition parcels will require further discretionary actions by the CPC and City Council pursuant to New York City’s Uniform Land Use Review Procedure (“ULURP”), and the procedures applicable to actions by the BSA. Such actions would be the subject of CEQR subsequent to this action.

Several Development Programs were considered within the Rezoning Scenario. All alternatives were compared to the “no action alternative” and evaluated for benefits, and impacts upon (i) land use, zoning and public policy; (ii) socioeconomic conditions; (iii) community facilities; (iv) open space; (v) shadows; (vi) urban design and visual resources; (vii) neighborhood character; (viii) infrastructure, solid waste and energy; (ix) traffic and parking; (x) transit and pedestrians; (xi) air quality; (xii) noise; and (xiii) construction impacts.

6. The PSC Decision

As in many real estate transfers, the environmental tail waged the transactional dog. SEQRA documents were first submitted in the spring of 2001, and the final GEIS was published in the spring of 2004 after several lengthy public hearings, comment periods, and submissions. In May 2004, the PSC issued its decision approving the Contract of Sale.

A. The Public Interest

The PSC found that the Contract of Sale and the alienation of public utility property was in the public interest:

In determining whether to approve this sale, we have considered many factors, including Con Edison's continued need for the property, the manner in which the property was auctioned, the price and terms of sale, potential environmental impacts arising from the proposed transaction, and the interests of Con Edison's ratepayers, the State, New York City and the local community. While we acknowledge that there could be some localized impacts resulting from approval of this transaction, on balance, we find that the benefits outweigh the impacts. Therefore, we conclude that, subject to certain conditions, the sale is in the public interest. However, because the total transaction costs and sale price are not known at this time, we are deferring consideration of the majority of the accounting and rate treatment issues until the transaction is consummated.

Order Approving Transfer, May 20, 2004 ("PSC Order") at p. 2.

B. SEQRA Mitigation

The PSC Order provided specific mitigation measures. The decision included mitigation for an "as of right" development examined in the GEIS. These mitigation measures were imposed because there would be no further government review for this hypothetical scenario. However, for the other alternatives, all of which would require further action by city agencies, the PSC imposed a range of mitigation measures, some of which would have to be imposed in subsequent agency review:

Because ERRC has not formulated a specific development plan for the Properties, the FGEIS identified and analyzed the effects of the categories of mitigation measures. When ERRC prepares and files its specific plan and rezoning application with NYCDCP and other City agencies, additional environmental review will be required, with NYCDCP or another agency assuming the role of Lead Agency. That future Lead Agency must examine the potential impacts of the specific plan, within the context of the FGEIS. It is required to adopt, and direct ERRC to implement, specific

mitigation measures from the alternatives set forth in the FGEIS and summarized below, or such other or additional measures it deem appropriate, to avoid or minimize adverse impacts to the extent practicable. It should select appropriate mitigation measures based on the details of the ERRC's development proposal for the Properties, including, but not limited to, the mix of residential and commercial floor area, the site plan and design of the buildings, and the timing of construction. In addition, the background conditions that exist at the time ERRC seeks rezoning and other local approvals will be relevant to those determinations.

(PSC Order at p. 30.) The mitigation included measures to mitigate traffic and other impacts arising from future development.

i. Density

Issues relating to the appropriate FAR or density were reviewed by the PSC, inter alia, by comparing a 6 FAR development to the 12 FAR Rezoning Scenario. The PSC concluded “[t]he 6 FAR Alternative would not, on balance, significantly reduce predicted impacts below for [the] Rezoning Scenario.” (PSC Order at p. 49.)

The PSC reasoned:

“with the exception of unmitigable impacts to traffic...which persist even under the 6 FAR Alternatives, all significant impacts related to the Development Scenarios or avoided, so a reduction in density is unnecessary.”

Finally, the PSC declined to limit density as a mitigation measure: “[t]herefore, limiting the total density of development on the properties, as some parties have requested, is not appropriate.” (Id.) However, the PSC did not preclude such limitation in a future rezoning action:

[W]e note that when ERRC prepares and submits its specific development plan to the appropriate city agencies, the future Lead Agency will be required to review the potential environmental impacts related to the detailed plan and balance them with plan's social and economic factors. If as a result of the Lead Agency's

review and balancing, it finds that a reduction in FAR from 12 is appropriate, it has the ability to reduce the scale of development.

(Id.) As indicated below, a Lead Agency will have that opportunity to “balance” the development issues in the immediate future.

ii. Historical and Archeological Issues

During the PSC proceedings several parties, including the Municipal Art Society raised issues relating to the preservation of the Waterside Station. Several suggestions were made for the preservation of the generating plants because of their claimed historic and architectural value. Additionally, an argument was advanced that a generating station could be used as a public space; this alternative was characterized as “Adaptive Reuse”. Opposition to these suggestions was advanced by numerous parties, including members of the surrounding community.

PSC made the following SEQRA findings with respect to the preservation issue:

In comments dated June 18, 2001, the Historic Preservation Field Services Bureau of the New York State Office of Parks Recreation and Historic Resources (OPRHP) provided an opinion that Waterside does not meet the criteria for listing on the State and National Registers of Historic Places. OPRHP also determined that there are no further historic preservation issues that warranted the Commission’s review, pursuant to the New York State Parks, Recreation and Historic Preservation Law §14.09. Waterside lacks the uniqueness, integrity and importance required to render its worthy of preservation as an historic or architectural resource. Accordingly, as noted below, its demolition would not constitute a significant impact on historical, architectural or archeological resources. Nevertheless, we find that, consistent with the recommendations of the OPRHP, some of the Waterside buildings contain important historical and architectural elements. Therefore, ERRC shall consider incorporating some portion of those elements into the design of its development. Additionally, Con Edison or ERRC shall photo-document the Waterside buildings and their historic elements pursuant to Historic American Engineering

Record standards and keep such photos in a location available for public viewing. Further, in consultation with OPRHP, ERRC shall prepare and implement, prior to construction, a construction protection plan that avoids potential physical impacts to historic resources including Windsor Tower of Tudor City and the Kips Bay Brewery.

(PSC Order at p. 36.) Accordingly, this mitigation measure is limited to a direction to ERRC to consider incorporating “some portion of those [historical and architectural] elements into the design of [future] development.” (Id.)

7. Adaptive Waterside Reuse Alternative

The Adaptive Waterside Reuse Alternative examined the potential for retaining and reusing the power plant structures located on the Waterside site. Options considered include using the structures for residential, commercial, retail, and community (e.g., museum) purposes.

The PSC found that some of the impacts of the Adaptive Waterside Reuse Alternative would not differ materially from, or be similar to, those of the Development Scenarios in certain areas. (PSC Order at p. 56.) Thus, the PSC found that “[t]he Adaptive Waterside Reuse Alternative would result in greater impacts than the Rezoning Scenario because retaining the existing structures would preclude the development of significant open space on the Waterside property.” (Id.) The PSC reasoned:

open spaces would be limited to two east-west view corridors and a narrow north-south strip along the eastern edge overlooking the East River. Only the eastern end of those corridors and the north-south strip along the eastern edge of the property, totaling approximately 1.13 acres in the Alternative’s residential program, and approximately 0.90 acre in its mixed-use program, would be available to serve as usable public open space. This limitation in available space would reduce the amount and quality of open space benefits to the public, and by 2011, the impacts would be greater than those under the Rezoning Scenario.

(Id.)

The PSC also found that they “do not reflect a zoning district characteristic of the area and would not provide the 3.3 acres of public open space, tax revenues, or economic development benefits that would be provided by the Development Scenario.” (Id.) (PSC Order at p. 50.) The PSC concluded that Re-adaptive Reuse of the Waterside generating plants would severely limit open space provided for in the rezoning alternatives and lacked sufficient benefits to recommend its utilization. (“PSC Order at p. 58.)

8. Further Government Action

All of the First Avenue Properties have been transferred to ERRC. Voluntary Consent Orders, administered by the DEC, are being implemented. It is anticipated that all four parcels will be “cleaned” to a level suitable for unrestricted residential use within the next 18 months.

ERRC will seek rezoning of the First Avenue Property, and is currently engaged in preliminary discussions with the City. It is anticipated that scoping and a supplemental draft environmental impact statement will initiate this process during the next year.