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BY JEFFREY D. FRIEDLANDER

Innovations in City Land-Use Transactions

The City of New York seeks to encourage economic development by moving unused or underused city real estate holdings into private ownership to be put to more productive use, thereby generating jobs and increasing tax revenues. This purpose may be accomplished through traditional means, such as land sales and long-term leasing, but also by employing newer and less conventional real estate transactions to foster development. Among the tools employed are transferring unused development rights, making use of legislative initiatives and restrictive declarations, and selling or purchasing condominium units in which the city participates, a practice common in private development, but a new technique for the city.

These transactions, whether undertaken directly by the city or on behalf of the city by the New York City Economic Development Corporation (EDC), require the expertise of the 13 attorneys of the Law Department's Economic Development Division, working with their colleagues at EDC, to draft and negotiate documents, develop strategies and propose solutions in complex transactions. This article will consider several of the city's recent development transactions, and discuss the legal framework employed.

Transfer of Rights

New York City's Zoning Resolution prescribes the number of square feet of floor area that can be built on a parcel of land according to the zoning district where the parcel is located. The rights to build the prescribed number of square feet are referred to as "development rights" (sometimes, inaccurately, as "air rights"). The Zoning Resolution also provides a mechanism for the transfer of unused development rights from one parcel of land to another. The city, as property owner, at times has the opportunity to capitalize on unused development rights adhering to its property by selling, subject to compliance with land use and environmental review requirements, excess development rights to the owner of an adjacent parcel. A firehouse, police precinct house or school that does not utilize all the development rights available to the land on which it sits may be adjacent to a site that is being developed by a private owner that wants to build a larger building on its property. The private owner can purchase the unused development rights from the city for use on the privately owned property.



An interesting use of the transfer of development rights to further the city's policy objectives involved an unused firehouse located on West 47th Street between Eighth and Ninth avenues, on the edge of the theater district. The building consists of four stories with an area of 5,500 square feet. It is leased by the city to a community theater group, the Puerto Rican Travelling Theatre Company, for a nominal rent. Although the city may have been able to use the property in more lucrative ways, it was important not to displace the theater group, which makes an important contribution to the community, from its home.

However, the city-owned land on which the building is located had approximately 14,250 square feet of excess development rights. Those rights found a willing purchaser in an adjacent private owner who planned a mixed-use hotel, residential and commercial building totaling 230,000 square feet, more than otherwise allowed by the Zoning Resolution for that property.

In June 2010, the city, with the assistance of EDC, sold most of the unused development right of its property to the adjacent owner for approximately \$3 million, or \$210 per square foot. In this way, the city was able to realize the excess value of its property, preserve the community theater group in its present location, and foster private development which will add jobs to the economy and amenities to the theater district.

United Nations Expansion

A site just south of the existing United Nations campus has been identified for the construction of a new building that would enable the United Nations to upgrade and consolidate offices that are currently located on city-owned properties that are scattered around Midtown, as well as to provide for enhanced security. The site would be leased by the city to the United Nations Development Corporation (UNDC), an instrumentality of the State of New York, and subleased to the United Nations. Space vacated by the UN in the move could be sold by the city and placed back on the tax rolls.

The site, bounded by East 42nd Street on the north, East 41st Street on the south, First Avenue on the west and the FDR Drive on the east, is dedicated city parkland, Robert Moses Park, which, under the public trust doctrine, cannot be used for other than park purposes without state legislation. *Williams v.*

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Gallatin, 229 N.Y. 248 (1920); *Angiolillo v. Town of Greenburgh*, 290 A.D.2d 1, 11 (2d Dept. 2001); *Ackerman v. Steisel*, 104 A.D.2d 940 (1st Dept. 1984), *aff'd* 66 N.Y.2d 833 (1985). While not expressly required by law, it is the general practice for the Legislature to require a municipality to provide replacement parkland as a condition of approving the alienation of an existing park. See New York State Office of Parks, Recreation and Historic Preservation Handbook on the Alienation and Conversion of Municipal Parkland in New York, (revised March 2012) p. 27.

In this case, members of the state Legislature and City Council representing the area in which the park was located, whose support was necessary in the enactment of state alienation legislation, were willing to support it if they could be assured that construction of the new UN facility would be accompanied by the improvement of nearby properties and their use for public recreation. However, details as to what properties would be improved and the schedule, scope and financing of improvements would take time to finalize. Before this could occur, and before undertaking the costly and time-consuming environmental and other public review processes necessary for the UN consolidation project, it was necessary to secure the needed alienation legislation. In order for the project to proceed in a timely manner, such legislation had to be enacted in the 2011 regular legislative session.

The problem was resolved in a novel fashion by the enactment of legislation (chapter 137 of the Laws of 2011) authorizing the city to discontinue and alienate the park, but only upon the execution, by Oct. 10, 2011, of a memorandum of understanding (MOU) by the mayor, the Speaker of the Assembly and the temporary president of the Senate, with the consultation and agreement of the members of the state Legislature and City Council in whose districts the site is located.

The MOU, dated Oct. 4, 2011 (shortly before the deadline imposed by the legislation), provides for the creation or improvement of several public recreation areas, including: (1) the expansion of Asser Levy Park by the remapping as parkland of Asser Levy Place, a two-block street located adjacent to the park between East 23rd and East 25th streets, replacing Robert Moses Park; (2) the structural rehabilitation and adaptation for recreational use of the Waterside Pier, a city-owned facility between East 38th and East 41st streets that borders on an existing waterside esplanade to the south; and (3) the creation of two new waterside esplanades between East 41st Street and East 60th Street that will connect the Waterside Pier with an existing esplanade to the north. The goal of the three waterfront projects is to create a continuous East River greenway from 125th Street in the north to Peter Minuit Plaza in the south, connecting through Battery Park with the Hudson River greenway.

The MOU also provides for the establishment of the Eastside Greenway and Park Fund, a special purpose fund to be held and administered by the city with the assistance of an advisory board, which will support the above-mentioned projects. The fund will consist primarily of a direct contribution by UNDC, proceeds from bonds to be issued by UNDC, payments to the city and UNDC by purchasers of the properties that will be vacated by the UN, and payments made by Consolidated Edison for its past use of the Waterside Pier. Pursuant to the MOU, the city will dispose of the properties to be vacated by the UN by issuing one or more requests for proposals, responses to which will be evaluated in accordance with the city's land use and environmental review procedures.

Manhattanville Expansion

The city, through EDC and the Department of City Planning (DCP), has worked with Columbia University and the New York State Urban Development Corporation or Empire State Development Corporation (ESDC) to facilitate the redevelopment of the Manhattanville section of West Harlem, bounded by Broadway on the east, Riverside Drive on the west, 125th Street on the south and 134th Street on the north. Over the next 25 years, Columbia will construct a state-of-the-art academic and research campus, including 16 new buildings, which will be located partly underground, so that the existing street grid will be retained.

Columbia will also restore and adapt for its use several historic buildings, including the Studebaker Building, a former auto finishing facility, the Nash Building, a former servicing station and showroom for the Warren-Nash Motor Corporation, Prentiss Hall, a former milk bottling plant, and the West Market Diner, a former restaurant known to railroad buffs for its innovative design incorporating two historically significant railroad dining cars. The Nash Building, located on Broadway at West 133rd Street, was rented by Columbia during World War II for research connected with the development of the atomic bomb.

Columbia's proposed expansion was set forth in a General Project Plan, issued in 2008, which found that the project area is underutilized and dominated by aging, vacant or deteriorating buildings. Implementation of this plan required state and city actions and approvals. DCP acted as the city's lead agency to rezone Manhattanville from manufacturing zoning districts to a primarily commercial zoning district, and to amend the city's Zoning Resolution to create a new Special Manhattanville Mixed-Use District. In compliance with the requirements of state and local law, DCP also performed an environmental review of the proposed development, ending in a Final Environmental Impact Statement which prescribed

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actions to mitigate the negative environmental impacts to the community.

Following the submission of three studies by architectural consultants, ESDC, acting in accordance with the Urban Development Corporation Act (Unconsolidated Laws §6260), adopted the General Project Plan. This allowed it to acquire privately owned property through the exercise of its power of eminent domain under the Eminent Domain Procedure Law (EDPL §206) and city-owned property pursuant to Unconsolidated Laws §6264, creating the assemblage of property required for the project and permitting construction of below-street facilities. The acquisition of privately owned property for the project was challenged on constitutional and statutory grounds in *Kaur v. New York State Urban Development Corp.*, 15 N.Y.3d 235 (2010), in which the Court of Appeals affirmed ESDC's determination to condemn.

ESDC and the city have also negotiated with Columbia a Declaration of Covenants and Restrictions, dated Dec. 14, 2011, to ensure that the university's expansion is consistent with the analysis and findings of the city's environmental review, includes measures to mitigate adverse environmental impacts and conforms in all respects to the General Project Plan. Columbia executed and recorded the declaration against the properties that it owns within the project area, and it will also be recorded against additional properties that Columbia acquires from ESDC during the expansion. Included among the amenities provided in the plan, and guaranteed by the declaration, are street-level retail space, improved pedestrian access to the Hudson River waterfront, public open space and a university-assisted public secondary school for students interested in mathematics, science and engineering.

Condominium Ventures

Commercial condominiums are a common form of property ownership, but only recently has the city begun to participate, taking advantage of the flexibility of partial ownership both as buyer and seller.

The city has sponsored a small number of commercial condominiums, each of which has presented unique issues. Most recently, in April of this year, the city closed on the sale of a 47,401-square-foot commercial condominium unit located in 210 Joralemon St., between Court Street and Boerum Place in downtown Brooklyn, a city office building known as the Brooklyn Municipal Building. As at 345 Adams St., another building largely owned by the city but "condominiumized" to permit the sale of the lower two floors for retail use, recent improvements to 210 Joralemon St. were financed by city-issued bonds, triggering provisions of federal tax law which prevent the city from leasing the space.

The purchaser of the 210 Joralemon St. commercial unit is a retail developer that responded to a request for proposals released in 2011 by EDC on behalf of the city, soliciting proposals to redevelop portions of the basement, and first and second floors for retail tenants. The project is part of a city initiative to relocate some of its offices from certain prime locations in downtown Brooklyn, spur retail development in the area and free underutilized city property for more productive use. The space, purchased by the developer for \$10 million, will likely be leased to specialty fashion retailers and at least one restaurant.

Since the 210 Joralemon St. commercial unit occupies only 10 percent of the building, the city and the purchaser spent many hours analyzing practical issues such as whether to include the façade and roof in the common elements of the condominium. Other issues included the division of responsibility for maintaining sidewalks adjacent to the building, and provisions for insuring the building against property damage and liability.

Another example of the use of a condominium is the city's purchase from United Parcel Service (UPS) of a to-be-constructed condominium unit for use by the Department of Sanitation as a parking garage. The parcel of vacant land owned by UPS, located on Spring Street between Washington and West streets, was previously used as an open air parking lot for UPS employees working at the company's distribution facility across the street.

Rather than exercising its right of eminent domain to acquire the parcel, the city entered into a negotiated transaction with UPS pursuant to which UPS and the Sanitation Department will share the premises. As both parties wanted fee ownership of their portion of the premises, it was agreed that UPS would create a condominium regime and sell the city a to-be-constructed condominium unit. Since there was no existing building, the condominium documents had to delineate the individual units and common elements based on construction drawings, and as was the case at 210 Joralemon St., it was necessary for the lawyers to negotiate over the ownership of elements such as exterior walls and roof.

Jeffrey D. Friedlander is first assistant corporation counsel of the City of New York. Betty Woo, deputy chief of the economic development division of the law department, and other attorneys of the economic development division assisted in the preparation of this article.