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Funding Local Government Acquisition of Open Lands in New York State Part II

by Jeffrey P. LeJava

Editors Note: In Part I of this two-part article, the author examined the authority municipalities have to purchase title to or the development rights of open lands, i.e., lands that are sought to be preserved due to their open space character. In addition, Part I described the various sources of revenue that municipalities may utilize to fund their preservation efforts. Here, in Part II, the author discusses local government financing options and provides examples of open lands programs from around New York State.

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V. METHODS OF FINANCING

A. Capital Reserve Fund

State law permits municipalities to set aside a portion of the funds derived through taxation¹ or the issuance of debt obligations² for specific purposes established by the local legislature.³ Under Article 2, Section 6-c of the General Municipal Law, a local legislature may create a capital reserve fund⁴ and designate certain moneys for the purchase of open lands.⁵ When established for this purpose, the fund is subject to a permissive referendum (i.e. a referendum on petition).⁶ Moneys placed into this fund may then be used to purchase title to land or development rights.⁷ The importance of such a capital reserve fund is that once moneys are placed into the fund, they can only be used for the designated purpose and may not be diverted to other purposes by future local leaders with different objectives.⁸

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county, city, town and village officials; (3) outreach programs with agencies and groups active in Hudson River projects; (4) evaluation of potential swim sites and cost estimates; (5) analysis of current and future water quality issues; (6) impact of health and sanitary codes on swim sites; and (7) review of local waterfront revitalization plans. DEC Press Release (Apr. 6, 2000).

Attorney General Report Finds New York City Behind on Watershed Protection

Attorney General Spitzer has released a report which finds New York City is already two years behind schedule in a five year plan to protect the drinking water supply for residents of the City, as well as parts of Westchester and Putnam Counties. In 1997, the City agreed to pay for approximately \$75 million worth of upgrades at 102 sewage treatment plants in the area that discharge pollutants into streams that flow directly into the City's drinking water reservoirs. The 40-page report concludes that as of April 2000, over three years since the signing of the Watershed Agreement, almost no plant has submitted a conceptual upgrade plan. Further, many plants have not received approval to contract with an upgrade engineer. The reports finds that the actual design and construction is likely to take much longer than the preliminary work that is already significantly behind schedule. The report is entitled, "Falling Behind: A Report on the New York City Department of Environmental Protection's Program to Upgrade Waste Water Treatment Plants Within the New York City Watershed." Attorney General Press Release (Apr. 19, 2000).

Governor Pataki Establishes Pilot Program to Further Promote Cleanup of Brownfields

On May 15, 2000, Governor George E. Pataki announced the creation of a new pilot program to further promote the cleanup and reuse of "brownfields." The program is called "Rebuild Now-NY," and will be administered by the Empire State Development Corporation (ESD), New York's economic development organization, in conjunction with DEC and the Governor's Office of Regulatory Reform. Initially, the program will identify and develop remediation plans for up to five sites. Environmental concerns on proposed sites can range from manufacturing wastes to petroleum contamination. To be eligible for consideration, a location must have at least 25 acres of land, or 15 acres in densely populated areas, with access to transportation and municipal water and sewer systems. The project is modeled after ESD's "Build Now-NY" initiative, which is developing an inventory of commercial and industrial sites pre-approved to avoid permitting obstacles and to expedite construction time frames for companies locating or expanding in New York State. The Rebuild Now-NY program will ultimately add revitalized sites to the Build Now-NY inventory. Once sites are selected, a DEC-approved voluntary cleanup plan will be developed for each site. The pilot program hopes to put properties back to productive use, while at the same time creating job opportunities. CPEO Press Release (May 15, 2000).

(Matthew Bender & Co., Inc.)

Federal Court Imposes Largest Fine Ever Issued Under RCRA for Violation of Cleanup Order

On June 1, the Department of Justice announced the largest fine ever imposed for violating a federal cleanup order under the Resource Conservation and Recovery Act (RCRA). Oliver Hill, a New York resident, formerly owned and operated a gas station near Syracuse. The gas station was located over an aquifer used for drinking water by local residents. After complaints about the quality of water, tests showed contamination of up to 10,000 times state and federal limits. Contaminants included benzene, toluene, xylene, and ethyl benzene. In 1995, the EPA discovered that the gas station's underground storage tank had leaked the contaminants, and ordered Mr. Hill to clean up 10,000 gallons of water. When Mr. Hill failed to comply with the cleanup order, the U.S. District Court for the Northern District of New York ordered him to pay approximately \$4.7 million. *United States v. Hill*, No. 99-CV-1716 (N.D.N.Y. June 1, 2000).

UPCOMING EVENTS

October 20, 2000

"We All Live Downstream: Watershed Zoning and Other Land Use Tools to Protect Water," sponsored by the annual ANJEC Environmental Congress. Information: www.anjec.org.

October 27-28, 2000

"Statewide Greenways & Community Trails Conference," sponsored by the New York Parks & Conservation Association (NYPCA), Syracuse. Information: e-mail Robin Dropkin at rdropkin@nypca.org.

WORTH READING

Stephen L. Kass and Jean M. McCarroll, "Having it All: Trade, Development, Environmental and Human Rights," 5/5/31 *New York Law Journal*, at 3.

Rachel Zaffran, "New York's Novel Strategy for Combating Air Pollution," 11 *Fordham Envtl. L.J.* 59 (Fall 1999).

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B. Land Purchase Installment Obligations

Under a law enacted in 1996, municipalities may enter into land installment purchase obligations for the purpose of financing the acquisition of interests or rights in real property under Section 247 of the General Municipal Law.⁹ The Local Finance

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Law permits a municipality to pass a bond resolution authorizing it to purchase land or development rights on an installment sales contract basis from individuals who own such land. These individuals become creditors of the municipality similar to bond holders who purchase municipally issued bonds. The value of the land or development rights acquired can be repaid to the landowners under an installment sales contract.

The benefits of an installment contract accrue to both the municipality and the property owner. Utilizing this form of payment, a municipality may acquire either title to open land or the land's development rights in the present with a minimal initial outlay while spreading the balance of the cost of the acquisition over as many as 30 years.¹⁰ Additionally, through this type of financing, a municipality can acquire significantly more land or development rights when the cost of land is still relatively inexpensive. The landowner receives annual or semi-annual payments¹¹ of tax-exempt interest¹² with the payments of principal made annually or deferred until the end of the contract term.

The installment purchase obligation has about the same financial impact on the community as issuing long-term bonds for the purchase of interests in open lands. In fact, the process is initiated by the adoption of a bond resolution by the local government. With both the issuance of bonds and the purchase of land through the installment method, the locality is able to obtain land at present value while paying for that purchase over a longer term, usually 30 years.

The difference between the two techniques is that the installment purchase obligation approach provides different financial benefits to the landowner. Instead of receiving the entire payment for the land value sold in the first year, under the installment purchase obligation method, the owner receives payments each year over the term of the installment contract. As mentioned, all interest payments made to the landowner during the contract term are tax-exempt.¹³ Additionally, the property owner is able to bequeath the installment purchase contract to heirs or sell it to municipal bond investors for cash prior to the end of the contract's term.¹⁴

VI. LOCAL EXAMPLES

A number of communities around the state have used the authority described above to create and finance programs to purchase title to or the developments rights of open space land. The variety of programs described below demonstrates the flexibility of state law to establish programs tailored to the needs of particular communities. The remainder of this article describes and discusses several of these programs.

A. Creation of a Capital Reserve Fund Through a Multi-year Property Tax Increase

In 1997, voters in the Town of Greenburgh, in Westchester County, approved a capital reserve fund from which moneys would be used to acquire and protect the town's remaining

natural areas, wetlands, trails and greenway corridors. This fund was established pursuant to General Municipal Law Section 6-c for the purposes set forth in Section 247.

The town "Greenways Fund" is financed by an increase of one half of one percent (0.5%) of the prevailing tax rate levied on the assessed value of property in the town.¹⁵ At the time of passage, it was estimated that the increase of 0.5% would cost the average homeowner about \$10 a year.¹⁶ This increase of 0.5% will be in place until 2004 at which time the capital reserve fund can be continued.¹⁷ If, however, no properties are acquired by that time, the money in the fund will revert to the town's general fund.¹⁸

B. Lease of Development Rights

In 1976, the Town of Perinton, in Monroe County, enacted a conservation easement law to acquire interests in land for the preservation of open space. These conservation easements must restrict development for a minimum of five years.¹⁹ The law also establishes conservation easements for farming purposes where, in addition to agreeing not to develop the land for the easement period, the landowner agrees that the lands under easement will be used for agricultural purposes.²⁰

Unlike other communities, the town does not pay for the conservation easements it acquires. Instead, the town simply reduces the property taxes on landowners who agree to restrict development on their parcel as directed by General Municipal Law Section 247(3).²¹ The Town Assessor's office uses a Tax Assessment Table which establishes the percent of property's pre-assessment value that remains taxable.²² For instance, where a landowner agrees to a five-year conservation easement, 75 percent of the pre-assessment value of the property remains taxable. If a landowner agrees to a conservation easement for a period of 25 years, only 10 percent of the property's pre-assessment value remains taxable.²³

The process to create a conservation easement begins with a property owner submitting an application to the town's Conservation Board. The Conservation Board then determines whether the proposal to grant the town a conservation easement would benefit the town. If the Conservation Board finds that the easement will be beneficial, it recommends that the Town Board hold a public hearing to determine whether the town should acquire the easement. After the hearing, the Town Board makes its decision. If it agrees to accept the easement, the easement is then recorded in the Monroe County Clerk's office.

Perinton presently has over 4,000 acres of land under easement—approximately 19 percent of its total land.²⁴ Of this total, over 3000 acres are farm lands. Additionally, 88 of the 130 easements run for a period of 10 years or more.

The town's conservation easement law also provides Perinton with a means to raise funds for the purchase of open space lands. A provision of the law requires landowners who cancel their easement before its period has expired, or who substantially violate the easement, to pay a penalty and back taxes on the land under easement.²⁵ This money is then placed into a capital

reserve fund established by the Town Board called the "Open Space Retention Reserve Fund." Moneys placed into this fund are used to acquire interests in open lands. Recent acquisitions with fund money have totaled nearly 400 acres.²⁶

C. Municipal Bonds to Purchase Development Rights²⁷

1. Town of Pittsford

By 1990, only 12 family farms remained in the Town of Pittsford, in Monroe County.²⁸ Recognizing the importance of farmland and open space to the community, the town commissioned a Fiscal Impact Study in 1993.²⁹ The study illustrated that it would cost Pittsford less to issue bonds to purchase the town's remaining open space than if the land were developed for single-family housing as permitted under the town's zoning code.³⁰ With this in mind, Pittsford inventoried the town's open space based on criteria established by the Town Board. Open space lands were prioritized, and in 1996, Pittsford identified 2,000 acres for preservation in town's "Greenprint for the Future."³¹ Lands to be preserved include wildlife habitat corridors that link important ecological resources and the town's remaining historic farms.³²

Using its bonding authority, the Town Board approved the issuance of \$9.9 million in municipal bonds to purchase the development rights to seven farms totaling 1,100 acres.³³ Each landowner entered into a conservation easement with the town. These easements divide each farm into three areas—homestead, farmstead, and farm area—and set forth permissible activities in each area.³⁴ The easements also provide the town with the right to visual access to the property in its scenic and open state, and permit public access in certain designated areas of each farm.³⁵

2. Suffolk County

Use of bonds to acquire open space lands or development rights can also be undertaken on a regional level. In 1974, Suffolk County established the first purchase of development rights program in the country.³⁶ Its purpose was to preserve the county's remaining farmland by keeping those farms in agricultural production and also on the tax rolls.³⁷ The program was initially funded by issuing \$21 million in bonds to pay for the development rights to 3,883 acres of farmland.³⁸ Subsequent bond resolutions were enacted by the County Legislature in the early and late 1980s which authorized another \$20 million in county bonds to finance the acquisition of additional farmland.³⁹

Most recently, the electorate of Suffolk County approved the "Community Greenways Fund."⁴⁰ This fund authorizes the issuance of \$60 million in bonds for three open space initiatives.⁴¹ First, \$20 million will be used for the acquisition of land that contains wetlands, woodlands, pine barrens or other lands which are suitable for passive, non-recreational uses.⁴² Lands acquired with this portion of the fund will be dedicated to the Suffolk County Nature Preserve and will be forever wild.⁴³ Second, \$20 million is authorized for the acquisition of

land to be used as active parklands, except golf courses.⁴⁴ Third, \$20 million will be appropriated to acquire additional development rights on farmland.⁴⁵ To finance the obligations incurred under the fund, Suffolk County increased real property taxes⁴⁶ which are expected to cost the average taxpayer \$10.93 per year.⁴⁷

D. Real Estate Transfer Tax

In 1998, the state legislature authorized as a group the towns of East Hampton, Riverhead, Shelter Island, Southampton, and Southold (the "East End Towns") to impose a real estate transfer tax for the purpose of raising needed funds for open space acquisition.⁴⁸ The legislature recognized that the significant financial commitments made by the East End Towns to preserve open space were insufficient to stem the rapid development that was quickly engulfing the eastern end of Long Island.⁴⁹ Revenue derived from the transfer tax will be used to preserve community character, including the preservation of agricultural land and lands of significant ecological and scenic value.⁵⁰

The transfer tax is a local tax that is imposed on the conveyance of real property or an interest therein where consideration for the sale price of a parcel exceeds \$500.⁵¹ The tax is two percent of the price paid for the property,⁵² and is payable by the parcel's purchaser⁵³ at the time that state transfer taxes are due.⁵⁴ Although numerous types of conveyances are subject to the tax, there are a number of exceptions.⁵⁵ For example, conveyances which are used to secure a debt or conveyances of property where the entire property is under a conservation easement are not subject to the transfer tax. Also, certain exemptions are applicable. In the towns of East Hampton, Shelter Island and Southampton, the first \$250,000 paid for the developed property is exempt from the tax. In the towns of Riverhead and Southold, the first \$150,000 paid is tax exempt.⁵⁶ It is important to note that before the local transfer tax program can be implemented in any of these towns, the special state law passed by the legislature requires that there be a mandatory referendum of the town's voters.⁵⁷

Although the East End Towns have the authority to implement a transfer tax, the tax must be enacted on the local level and a number of requirements must be met. These requirements are established by the special legislation passed by the state legislature for these towns.⁵⁸ First, a town must establish a community preservation fund.⁵⁹ This fund holds all revenues derived from the local transfer tax, as well as revenues derived from other local sources.⁶⁰ Once deposits are made to the fund, those moneys cannot be transferred to any other municipal account.⁶¹ Second, a town must create an advisory board that reviews and makes recommendations to the Town Board on proposed acquisitions of interest in real property.⁶² Third, a town must also adopt a community preservation project plan.⁶³ This plan sets forth every project which the town plans to undertake and includes every parcel which is necessary to be acquired in the town in order to protect community character. It must evaluate all land use techniques available to the town to achieve the plan's objectives, and it must also establish priorities for preservation including the preservation of farmland as its highest priority.⁶⁴

Finally, before a town can enact a transfer tax, it is required to study and consider the implementation of a transfer of development rights program.⁶⁵

Lands or interests in land acquired under a town's community preservation fund are subject to certain restrictions. For example, unless the Town Board substitutes property of equal environmental value, reasonably equivalent usefulness, and location, lands acquired with community preservation fund money cannot be sold, leased, exchanged, or otherwise disposed of for any purpose.⁶⁶ Additionally, lands acquired under the program must permit public use in a manner consistent with the natural, scenic, historical and open space character of the property as well as preserve the property's native biological diversity.⁶⁷

Utilizing the authority granted under Town Law Section 64-e and Tax Law Sections 1449-aa through 1449-oo, the Towns of

Riverhead and Southampton enacted local real estate transfer taxes in 1998. Both communities followed the provisions of state law and began imposing the transfer tax in the spring of 1999. Each community's transfer tax is effective until December 31, 2010.

VII. Conclusion

As is evident from the above discussion, New York law provides flexibility to meet the funding needs of communities for open space preservation. This flexibility is particularly important in a state such as New York where local needs vary greatly given the location and financial wherewithal of its communities.

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¹ See N.Y. Gen. Mun. Law § 6-c(5).

² See N.Y. Gen. Mun. Law § 6-c(9-a).

³ See N.Y. Gen. Mun. Law § 6-c.

⁴ See N.Y. Gen. Mun. Law § 6-c(2).

⁵ Under Section 6-c(1)(b)(2) the term "capital improvement" includes land or rights in land. Thus, a capital reserve fund may be created to finance the purchase of open lands.

⁶ See 1986 N.Y. St. Compt. 21 (State Comptroller's Opinion that the establishment of a capital reserve fund by a town for the specific purpose of acquiring and developing park land is subject to a permissive referendum).

⁷ See N.Y. Gen. Mun. Law § 6-c. An interesting State Comptroller's Opinion has stated that proceeds from parking meters which have not been estimated as revenues in the current budget may be appropriated by a village board of trustees to augment or establish a capital reserve fund. See 7 Op. State Compt. 76 (1951).

⁸ See 1981 N.Y. St. Compt. 128 (where a town has established a capital reserve fund for the acquisition of park lands, moneys in that fund may only be expended for that purpose, transferred to another capital reserve fund under the procedures set forth by General Municipal Law § 6-c(9), or appropriated for a purpose specified in § 6-c(9-a) of the General Municipal Law). See also N.Y. Gen. Mun. Law § 6-c(9). Where a fund has been established for the purpose of acquiring land or interests in land, and there remains an unexpended balance in that fund, the balance may not be transferred to another capital reserve fund without having first been subject to a permissive referendum. See N.Y. Gen. Mun. Law § 6-c(9)(b).

⁹ See N.Y. Local Fin. Law § 29.10. It should be noted that the obligation incurred under this provision is a full faith and credit obligation. See N.Y. Local Fin. Law § 29.10(4). N.Y. Local Finance Law § 29.10 remains in effect until July 31, 2001.

¹⁰ See N.Y. Local Fin. Law § 11.00(a)(21)(a).

¹¹ See N.Y. Local Fin. Law § 29.10(3).

¹² See N.Y. Local Fin. Law § 29.10(7).

¹³ See N.Y. Local Fin. Law § 29.10(7).

¹⁴ See N.Y. Local Fin. Law § 29.10(7).

¹⁵ See Town of Greenburgh, Ballot Proposition No. 1 (1997).

¹⁶ See Town of Greenburgh, Ballot Proposition No. 1 (1997).

¹⁷ See Town of Greenburgh, Ballot Proposition No. 1 (1997).

¹⁸ See Town of Greenburgh, Ballot Proposition No. 1 (1997).

¹⁹ See Town Code of the Town of Perinton § 130.

²⁰ See Town Code of the Town of Perinton § 130.

²¹ See Town Code of the Town of Perinton § 130.

²² See Town Code of the Town of Perinton § 130.

²³ See Town Code of the Town of Perinton § 130.

²⁴ See Town of Perinton, *Conservation Easement Fact Sheet* (1999).

²⁵ See Town Code of the Town of Perinton § 130.

²⁶ See Town Code of the Town of Perinton § 130.

²⁷ Other communities have recently approved the authorization of bonds to finance the acquisition of open space land or development rights. In 1998, voters in the Town of Huntington approved a \$15 million bond proposition that authorized \$10 million to preserve undeveloped town lands and \$5 million to improve and expand town parks. Also in 1998, voters in the Town of Southold approved \$2 million in bonds for open space preservation efforts. See Land Trust Alliance, *November 1998 Open Space Acquisition Ballot Measures*, <<http://www.lta.org/refernda.html>> (visited on Aug. 8, 1999).

- ²⁸ See American Farmland Trust, *Call to Action: Farmland Protection Success Stories in the Empire State*, at 17 (1998).
- ²⁹ See American Farmland Trust, *Call to Action: Farmland Protection Success Stories in the Empire State*, at 21 (1998).
- ³⁰ See American Farmland Trust, *Call to Action: Farmland Protection Success Stories in the Empire State*, at 17 (1998). This is known as a "build-out" scenario.
- ³¹ See American Farmland Trust, *Call to Action: Farmland Protection Success Stories in the Empire State*, at 17 (1998).
- ³² See American Farmland Trust, *Call to Action: Farmland Protection Success Stories in the Empire State*, at 17 (1998).
- ³³ See Town of Pittsford, *Bond Resolution* (July 16, 1996).
- ³⁴ See Town of Pittsford, *Conservation Easement for the Purchase of Development Rights, entered into between the Town of Pittsford and Mary Kay, Timothy J. and James M. Manno*, dated Sept. 23, 1998.
- ³⁵ See *id.*
- ³⁶ See American Farmland Trust, *Call to Action: Farmland Protection Success Stories in the Empire State*, at 12 (1998).
- ³⁷ See American Farmland Trust, *Call to Action: Farmland Protection Success Stories in the Empire State*, at 12 (1998).
- ³⁸ See American Farmland Trust, *Call to Action: Farmland Protection Success Stories in the Empire State*, at 14 (1998).
- ³⁹ See American Farmland Trust, *Call to Action: Farmland Protection Success Stories in the Empire State*, at 12 (1998).
- ⁴⁰ See Suffolk County, New York, Resolution No. 559-1998 (1998) (adding a new Article XII-A to the Suffolk County Charter).
- ⁴¹ See *id.* The county bond resolution actually authorized the issuance of \$62 million in bonds, but \$2 million of that amount will be used for the construction of an educational and interpretative center. See Suffolk County, New York, Resolution No. 559-1998, at p. 3 (1998).
- ⁴² See Suffolk County, New York, Resolution No. 559-1998, § 12-A(A)(1) (1998).
- ⁴³ See Suffolk County, New York, Resolution No. 559-1998, § 12-A(A)(1) (1998).
- ⁴⁴ See Suffolk County, New York, Resolution No. 559-1998, § 12-A(A)(2) (1998).
- ⁴⁵ See Suffolk County, New York, Resolution No. 559-1998, § 12-A(A)(3) (1998). Moneys expended under this portion of the fund are conditioned upon the county receiving thirty percent of the actual cost of acquisition from federal, state or local governments. See Suffolk County, New York, Resolution No. 559-1998, § 12-A(A)(3)(a) (1998).
- ⁴⁶ See *id.*
- ⁴⁷ See Jerry Markon and Bill Bleyer, *Environmental Issues Win in Suffolk County Referenda*, *Newsday*, Nov. 4, 1998, at A60.
- ⁴⁸ See N.Y. Town Law § 64-e (establishing the Peconic Bay Region Community Preservation Funds); see also N.Y. Tax Law § 1449-aa *et seq.*
- ⁴⁹ See N.Y. Town Law § 64-e (Historical and Statutory Notes).
- ⁵⁰ See N.Y. Town Law § 64-e(4).
- ⁵¹ See N.Y. Tax Law § 1449-bb.
- ⁵² See N.Y. Tax Law § 1449-bb.
- ⁵³ See N.Y. Tax Law § 1449-dd(1).
- ⁵⁴ See N.Y. Tax Law § 1449-cc(1).
- ⁵⁵ See N.Y. Tax Law § 1449-ee.
- ⁵⁶ See N.Y. Tax Law § 1449-ee.
- ⁵⁷ See N.Y. Tax Law § 1449-bb.
- ⁵⁸ See N.Y. Town Law § 64-e.
- ⁵⁹ See N.Y. Town Law § 64-e(2).
- ⁶⁰ See N.Y. Town Law § 64-e(2). At a minimum, revenues from the transfer tax are deposited into the fund.
- ⁶¹ See N.Y. Town Law § 64-e(2). Before the fund can be established, each town must have incurred or authorized indebtedness since 1980 for open space preservation equal to or greater than \$200 per town resident.
- ⁶² See N.Y. Town Law § 64-e(5).
- ⁶³ See N.Y. Town Law § 64-e(6). This plan is to be updated every five years.
- ⁶⁴ See N.Y. Town Law § 64-e(6).
- ⁶⁵ See N.Y. Town Law § 64-e(7).
- ⁶⁶ See N.Y. Town Law § 64-e(10).
- ⁶⁷ See N.Y. Town Law § 64-e(9).