NEW YORK
ZONING LAW
AND PRACTICE REPORT

FIVE INNOVATIVE IDEAS FOR FUNDING PARKS AND OPEN SPACE

By Christopher Rizzo[1]

I. INTRODUCTION

New York State and its municipalities are not likely to have adequate revenues to support maintenance or expansion of parks and open space in the next decade. Declining income and property taxes, a cap on property taxes, and constitutional debt limits will severely constrain state and local spending for the next ten years. These constraints come after two decades of aggressive expansion of the parks and open space system. The problem is plain: government must now do "more with less," and this will require creativity on the part of municipal and land-use lawyers. This article therefore considers five alternative revenue strategies that show promise for leveraging private dollars for public parks and protected open space. They include (1) strategic sale or lease of parkland subject state legislative approval; (2) commercial uses of parkland; (3) transfers of development rights and related zoning concepts; (4) public-private management partnerships; and (5) tax increment financing.[2] The article concludes by recommending best practices for each method.

II. PARKS IN NEW YORK STATE

State and local parks play a strong role in New York State's economy. New York State's parks and protected open spaces are, collectively, larger than some nations and U.S. states, covering approximately 325,000 acres.[3] The New York State Department of Environmental Conservation owns and operates an additional 4.6 million acres, including some land where logging and mining are permitted.[4] New York City owns 28,000 acres of parkland. Other counties and municipalities own and operate hundreds of thousands of additional acres.[5] This amounts to almost 8,000 square miles of protected open space, larger than Connecticut, Rhode Island, the Bahamas or Jamaica.

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Given their size and popularity, the economic importance of parks is tremendous. State parks had 55 million visitors in 2009 and generated $1.9 billion in revenue. Protected open spaces have an even bigger impact.[6] As Governor Cuomo stated in 2010 (while then a gubernatorial candidate):

> Open spaces support industries that generate billions of dollars in annual revenue for the State. Industries reliant on open space include the $54 billion outdoor recreation and tourism industries, the $13 billion forest products industry, and the $36 billion farming industry. Undeveloped land not only preserves and protects plants and animal species, but also provides so-called "Ecosystem Services," which foster positive environmental results[.][7]

These "Ecosystem Services" are the largest (and unquantifiable) benefit of protected open spaces, which filter air and water pollution, protect shorefronts from erosion and recharge drinking water aquifers.

Parks and protected open spaces also have a direct benefit for property owners. One 2003 study concluded that residential and commercial buildings in New York City near well-maintained parks have higher property values, more stable prices and less tenant turnover than similar properties further from parks. Central Park reportedly adds $17.7 billion in value to surrounding buildings, providing $656 million in annual real estate tax benefits to New York City.[8] The benefit is not limited to affluent neighborhoods in Manhattan; it extends to well-maintained parks in all corners of New York City. The report stated: "Single-family home prices in close proximity to well improved parks … typically exceeded sale prices further from the park, ranging from 8% to 30%."[9]

III. THE PROBLEM OF PARK FUNDING

Both New York State and New York City have aggressively expanded the size of parkland and protected open space in the past decade, while simultaneously cutting maintenance funding. In flush times, acquisition and capital funds are relatively easy to find through one-time legislative appropriations and bond issuances. As explained below, however, maintenance funds are far more difficult to secure, particularly since the recent recession. The result is a larger and less well-maintained parks system.

Beginning in 1995, former governor George Pataki undertook numerous efforts to increase the size of the state park and open space system. He succeeded, and the park and open space system expanded by 25%.[10] The State funded much of the acquisition through one-time bond issuances.[11] The State also created a new real estate transfer tax to fund an "Environmental Protection Fund" to ensure that state monies were available for stewardship of these new resources. [12] In flush times, the governor's programs worked well, but in recent years the State has repeatedly cut general funding for the Office of Parks Recreation and Historic Preservation ("OPRHP"), which has dramatically reduced maintenance of parks. For example, the State reduced OPRHP's budget by 18% between 2008 and 2011.[13] The *Alliance for New York State Parks* and *Parks and Trails New York* reported in 2010 that the state park system faced a $1 billion maintenance shortfall, which has resulted in closures and safety concerns around the park system.[14] Compounding the problem, the State Legislature has siphoned hundreds of millions of dollars from the Environmental Protection Fund to balance the state budget, leaving very little for park and open space projects in the past few years.

The State has a very limited ability to pay for parks and open space in the future through issuance of new bonds or more debt. The legislature must authorize new debt by a three-fifths vote; the state must directly allocate the debt to a specific project or purpose but not general park maintenance; and state-supported debt cannot exceed 4% of the total personal income in the state.[15] Localities face similar limits.[16] The State's comptroller estimates that state-supported debt is at or near constitutional

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limits.[17] And, of particular relevance to parks, state law *prohibits* issuance of debt for non-capital (i.e., maintenance) purposes.[18] This last restriction means that park maintenance can only come from general state revenues, which have diminished considerably since 2008.

New York City parks face the same problem as the State—a much larger and more complicated park system, but much less money for maintenance and operations. Mayor Michael Bloomberg has dramatically increased capital funding for parks since taking office in 2002, much of it being spent on new and complex parks like the High Line (built on an elevated rail line), Brooklyn Bridge Park (built on waterfront and piers)[19] and Hudson River Park (built on waterfront and piers).[20] These projects have indisputably been economic drivers for the City, increasing tourism and creating jobs. But waterfront parks are extraordinarily expensive to maintain, with bulkheads and piers requiring constant attention. HR&A Advisors, a Manhattan-based consulting firm, estimates that while maintenance of traditional parks may cost $2,800 per acre, per year, flagship parks like those cited above may cost $180,000 per acre, per year. It is simply impossible to rely on general municipal funds for these new parks at a time when the City has cut funding for overall park system maintenance and operation from $366.8 million in 2008 to $291.9 million in 2013 (a 21% decline).[21] The dilemma creates issues of equity and environmental justice; will these new flagship parks consume a disproportionate share of maintenance funds at the expense of existing parks, most of which are in middle- and lower-income communities? Building private-public partnerships can help address these disparities.

IV. SELECTIVE ALIENATION OF PARKS

Before exploring ways to involve the private sector in stewardship of parks, it is essential to understand the core law governing uses of parkland—the "public trust doctrine." The doctrine is defined by over 150 years of state court decisions explaining when municipalities must seek state legislative approval to dispose of or "alienate" public parkland. Without legislative approval the State, its agencies, counties and municipalities cannot (1) sell or lease parkland; or (2) use dedicated parkland for non-park purposes.[22] Courts have given wide leeway to park administrators to determine when an alienation is occurring.[23] Courts have also permitted a host of commercial facilities in parks so long as they genuinely serve park users, as described below, but sale or lease of parkland is *always* an alienation that requires State Legislative approval. [24]

It is tempting for municipalities to view parkland as a fiscal resource that can be (1) selectively sold or leased to raise money; or (2) used for an important municipal facility to avoid paying for a privately-owned site. From 2003 to 2011, municipalities and counties sold or leased at least 1,369 acres of parkland with state legislative approval.[25] In many instances, the State Legislature required dedication of replacement parkland, leading to no net loss of parkland or less financial benefit to the municipality. But municipalities alienated at least 300 acres without any defined mitigation or replacement parkland. Some municipalities are selling parks simply to raise money, like the City of Utica's 2005 sale of a 1.39-acre playground that was deemed "abandoned."[26] In other cases, municipalities are selling lands for privately-operated recreational facilities, like the Town of Thompson's 2007 sale of 64 acres for a ski resort.[27]

Clearly some municipalities have already made a policy decision that selective alienation can sometimes be appropriate to ensure the long-term stewardship and improvement of parkland. So long as the municipalities comply with applicable laws, like the State Environmental Quality Review Act ("SEQRA"), obtain state legislative approval, and comply with any mitigation requirements, the approach is legal.

Three considerations should guide the use of selective alienation. First, since municipalities already control parkland, it will always be tempting to view them as quick revenue fixes and cheap sites for other municipal facilities. The State Legislature should counter this temptation by consistently imposing mitigation requirements that ensure that parkland is never a cheaper alternative to other privately owned lands. Second, early compliance with SEQRA is required by law and is essential to evaluate the potential impacts on park users and the environment. For example, it may be possible to issue leases for telecommunications equipment or solar panels in parks (already under consideration in some counties) without negative impacts on park users, but that decision should be supported through the SEQRA process. Third, the preference should always be for long-term leases rather sale, to ensure that the public retains ownership of parks.

V. COMMERCIAL USES OF PARKS

States, counties and municipalities already raise hundreds of millions of dollars for parks by allowing the private sector to lease or license parkland for restaurants, sports facilities, skating rinks and, in a few cases, hotels. Because of the large income potential from these facilities, the State and its municipalities will increasingly turn to commercial uses in parks to generate revenue for maintenance.[28] But it is important to understand the legal limits on such facilities. Parks are not zoned and there is no guidebook that defines precisely what kinds of facilities may be constructed without state legislative approval. The "zoning" is essentially a small body of state court decisions that sort out appropriate commercial uses from illegal ones. [29] Each public trust doctrine case is fact-sensitive, since a restaurant might be a park use in one context (where it serves park users) but not another (where it displaces them altogether). Planning for these facilities involves six basic inquiries, which are set forth below.[30]

A. DOES THE USE SERVE A PARK PURPOSE?

Courts have been willing to grant municipalities leeway in determining what is a proper park use, including restaurants, athletic facilities and stadiums. But the courts' focus is always on whether the commercial facility serves park users. For example, in *Union Square Community Coalition v. New York City Department of Parks & Recreation*, the trial court considered a public trust doctrine challenge to the renovation of an existing pavilion and installation of a restaurant and bar with outdoor seating.31 The court considered several factors, including the small size of the facility, the historic use of the area for a restaurant, and the parks commissioner's broad regulatory authority to determine how to use structures within parks. It concluded that the restaurant would genuinely serve park users and did not violate the public trust doctrine.

Park amenities do not need to be free in order to serve the public. *Committee to Preserve Brighton Beach and Manhattan Beach, Inc. v. Planning Commission* concerned a park concession for a privately-operated recreational facility to house a golf driving range, miniature golf, skating rink and batting cages in a portion of a 77-acre park.[32] The court stated: "Charging a fee for some of the services provided by the facility does not negate the overall recreational purpose of the concession."[33] Even some *large* recreational facilities have been approved. The First Department refused to enjoin New York City's award of a concession for development of a 20,000-seat amphitheater and festival grounds that would occupy nine acres of a 341-acre park and charge, on average, $30 for admission.[34]

B. IS THE USE PRIVATE OR PUBLIC IN NATURE?

A privately-operated concession for the benefit of the public is generally permissible. But a concession for the benefit of a limited segment of the public is generally not, regardless of whether it is publicly or privately operated. In 1972, the City of Long Beach attempted to restrict use of its public beaches to residents of the city. Previously, the beaches had been open to all, subject to an entrance fee and restrictions on hours of operation. The court easily held that the new restrictions violated the public trust doctrine and stated that the town's continued use of the beaches for park purposes was not controlling, since other residents of the state would be barred.[35] Nor can public parkland be privatized even to generate funds for the future renovation of the space. In *Johnson v. Town of Brookhaven*, the Second Department ruled that the town's license to a homeowner's corporation for the construction of private summer cottages for 12 years violated the public trust doctrine.[36] The court rejected that town's defense that "the revenue from the lease will finance the eventual restoration of the public parkland."[37]

C. WILL THE USE BE GOVERNED BY A LEASE OR LICENSE?

The Court of Appeals has held that a lease of parkland violates the public trust doctrine regardless of whether it relates to a proper park use or not. In *Miller v. City of New York*, the court considered a "license" that permitted the construction of a 30-acre golf course in Queens with accessory parking, shops and offices.[38] Neighbors challenged the deal and claimed that the "license" was actually a lease that illegally conveyed the public's interest in the park to a private developer for a term of 20 years. The court agreed and stated: "Although the contract speaks of a 'license' and avoids use of the word 'lease' it contains many provisions typically of a lease and conferring rights well beyond those of a license or holder of a mere temporary privilege."[39] Municipalities should therefore limit concessions to licenses that are revocable.

D. DOES THE USE PASS A BALANCING TEST THAT WEIGHS BENEFITS TO THE PARK AGAINST IMPACTS ON OTHER PARK USES?

Commercial uses should (a) serve park users, (b) enliven parkland and (c) have very limited footprints. This balancing test accurately sums up the court's analysis in *795 Fifth Avenue Corp. v. City of New York*, a seminal case on commercial uses of parks where the court refused to enjoin a proposed 20,000-square foot pavilion and restaurant in Manhattan's Central Park. In finding that the restaurant would be a proper park use, the court considered the open air dining components, attractive landscaping, wide variety of pricing options and small footprint in comparison to the park as a whole. But the court warned that if the facility catered only to the wealthiest diners, the analysis would have been different.[40] The New York State Office of Parks Recreation and Historic Preservation recommends a similar balancing test for privately-operated recreational facilities in its park "handbook" for municipalities.[41]

E. DOES THE PARK'S DEDICATING ACT AUTHORIZE COMMERCIAL USES?

Most park dedications are undocumented, leaving it to courts to evaluate commercial uses based on the public trust doctrine. But parks created by legislative act may have more flexibility with regard to the types of uses that are permitted. This often leads to frustration among the public, who believe that such parks are dedicated exclusively to park purposes. Often they are not.

The greatest historic example in New York is Adirondack Park, which the state legislature created in 1892. The Adirondack Park Agency manages the park's six million acres according to a land-use plan developed under state law, which reserves about half the park in a wild state and allows the agency to permit other compatible residential and commercial uses in the remaining areas.[42] Downstate, both the state-controlled Hudson River Park and New York City-controlled Brooklyn Bridge Park are governed by specific documents rather than the generally applicable public trust doctrine. For example, New York State and New York City dedicated Brooklyn Bridge Park through a memorandum of understanding ("MOU") in 2002. The MOU created the Brooklyn Bridge Park Development Corporation as a subsidiary of the Empire State Development Corporation. And it called for a financially sustainable park with at least 80% of its area dedicated exclusively to park purposes and the remaining land dedicated to commercial uses.[43] Despite the clear intent of the founders of the park, in 2006 residents sued the State and City claiming that commercial uses in the park (including residential buildings, parking spaces and a marina) were violations of the public trust doctrine. Both the trial court and appellate court rejected these arguments, upholding the MOU and finding that general public trust doctrine caselaw was not applicable in these circumstances.[44]

F. IS THE PARK THE RECIPIENT OF SPECIAL STATE OR FEDERAL FUNDING THAT COULD ADD ADDITIONAL RESTRICTIONS?

Certain state and federal park funds impose greater restrictions than would normally be imposed by the public trust doctrine. For example, in 2011 the Brooklyn Bridge Park Corporation lost an important case involving a plan to relocate a nonprofit theater company into a historic ruin at the park's northern end, the "Tobacco Warehouse." Opponents of the move won a federal lawsuit claiming that special funding restrictions prohibited the move. New York State had accepted funds from the National Park Service for the park through the Land & Water Conservation Fund. Parks improved with the fund can only be used for *un-enclosed* recreational uses, unless federal approval is obtained and substitute parkland is provided.[45] The U.S. District Court for the Eastern District of New York therefore held that the relocation of a theater into the park violated the Land & Water Conservation Fund Act.[46]

The two most likely sources of state funds are the 1993 Environmental Protection Fund[47] and the 1996 Clean Water/Clean Air Bond Act ("CW/CA").[48] Both specifically prohibit non-park uses of parkland improved or acquired with these state funds, unless state legislative approval is obtained and substitute parkland is provided.[49] Both also require the municipality to file a map showing improved or acquired parkland. If a project sponsor desires to discontinue park uses on EPF-improved or acquired lands, it must submit a proposal to the OPRHP and then seek legislative approval.[50] A key requirement of this process is OPRHP's assessment of the adequacy of the substitute parkland being provided.

VI. INNOVATIVE ZONING TO FUND PARKS AND OPEN SPACE

State law permits (and even encourages) municipalities to create innovative zoning programs to allow the private sector to fund public improvements,

including transfer of development rights ("TDR"), clustering of development, and incentive zoning. These techniques are promising for parks because they would enable municipalities to leverage private dollars to fund park and open space improvements. Because they do not invite development *on* dedicated parkland, they can be used without raising the public trust doctrine concerns discussed above.

A. TDRS

TDR programs typically allow a property owner to sell development rights from a site the municipality wants to protect for open space, historic or other reasons ("sending site") to the owner of a site where more dense development is appropriate ("receiving site"). These transfers are permitted even if the receiving site is far from the sending site.[51] The New York State Village Law, Town Law, and General City Law authorize municipalities to enact the following zoning programs:

> [T]he legislative body of any city is hereby empowered to provide for transfer of development rights. … The purpose of providing for transfer of development rights shall be to protect the natural, scenic or agricultural qualities of open lands, to enhance sites and areas of special character or special historical, cultural, aesthetic or economic interest or value and to enable and encourage flexibility of design and careful management of land in recognition of land as a basic and valuable natural resource.[52]

Despite the broad authority granted to municipalities under state law, few TDR programs to create parks and protected open space are in use today.

A TDR program is subject to the usual requirements for any zoning scheme. Most importantly, it must be adopted as part of a "well-considered plan" that ensures that the receiving sites contain adequate resources, schools, transportation and other amenities to serve the increased density.[53] Such an analysis, including impacts on affordable housing, should be documented through the State Environmental Quality Review Act.[54] The municipality must also document the transfer by burdening the sending site with a conservation easement or other protection from future development.[55]

Despite the broad authority to create TDR programs, there are some limitations that focus on the balance between private property rights and the public interest. Municipalities should consider two factors that are based in the U.S. Constitution's prohibition on government "takings" of private property without just compensation.

- Coercive TDR programs are problematic. In *Fred F. French Investing Co. v. City of New York*, the New York Court of Appeals struck down a city ordinance that zoned private open space in a residential building complex (Tudor City in Manhattan) as public parkland, in exchange for providing the owner with the ability to sell development rights within Midtown Manhattan. The court found that the zoning violated the due process clause of the U.S. Constitution's Fourteenth Amendment and was an invalid exercise of local police powers.[56] The court disliked the coercive nature of the program and found that the owner's ability to sell development rights was highly speculative, thus violating the owner's rights to due process. Similarly, in *Golden v. Town of Ramapo*, the same court distinguished between zoning designed to phase growth and exclusionary zoning intended to prevent growth altogether. The court stated: "What we will not countenance, then, under any guise, is community efforts at immunization or exclusion [of growth]. But far from being exclusionary, the present amendments merely seek, by implementation of sequential development and timed growth, to provide a balanced cohesive community dedicated to the efficient utilization of land."[57] The court suggested that a zoning scheme that permanently prohibited development of privately owned open space might be unconstitutional.
- If the TDR program is coercive, it must continue to allow the sending site to meet reasonable owner expectations. The Supreme Court's 1978 decision in *Penn Central Transportation Co. v. City of New York* remains the seminal case on point.[58] There, New York City's newly enacted landmarks law prohibited the owner of Grand Central Terminal, a designated landmark, from demolishing the structure to make way for a commercial high-rise that was permitted by zoning. Rather, the Landmarks Preservation Commission allowed the owner to continue using the structure for its current uses (train station with extensive retail space) and sell unused "air rights" from the terminal to surrounding structures (effectively a TDR program for landmarks). The Court found that the status quo provided the owner a reasonable return on its investment. *Penn Central*, which did involve a

> coercive TDR program, suggests that any New York court will analyze such programs carefully to ensure that the programs reasonably compensate the owner of the sending parcel and allow continued, reasonable uses of it.

Voluntary TDR programs that encourage, but do not force, owners of open space to protect their land do not raise the constitutional concerns discussed above. TDR programs therefore are a natural fit for creating new parks and protected open spaces when public funds are not available.

The most significant use of a TDR program to protect open space is in the Long Island Central Pine Barrens, a 100,000-acre region in Suffolk County. The State's 1993 Long Island Pine Barrens Protection Act created this region in the Towns of Brookhaven, Riverhead and Southampton, and created the Central Pine Barrens Joint Planning and Policy Commission to oversee the act's implementation.[59] The core of the act is the use of a TDR program that allows certain properties designated for permanent preservation ("core preservation area") to generate "credits" that developers can utilize in designated growth zones ("compatible growth area"). According to the Commission, at least 1,843 acres have been protected through the TDR program.[60]

The Central Pine Barrens TDR program does not apply to existing parkland, presumably because it is already adequately protected and has no zoned development rights to sell. But TDR programs can be designed to fund existing parkland. New York City has created such a program for the new High Line Park. The High Line is an elevated freight rail line that ceased to operate in 1980, leaving the structure to rust and the surface to develop into a wild landscape. In 1999 neighbors organized the "Friends of the High Line" to encourage New York City to negotiate a purchase of the line from the rail companies, including CSX Transportation Inc., and construct an elevated park. The City carried out the purchase and began working with Friends to raise almost $100 million for a renovation of the rail line into a park.

In 2005 the City developed a zoning scheme that includes two mechanisms to transfer development rights off the Highline. The first component is a true TDR-zoning tool that allows nearby property owners to transfer development rights to immediately adjacent parcels. The zoning resolution states:

> The High Line Transfer Corridor, established within the Special West Chelsea District, is intended to enable the transfer of development rights from properties over which and immediately to the west of where the High Line passes and thereby permit light and air to penetrate to the High Line and preserve and create view corridors from the High Line bed.[61]

The second component allows property owners to contribute funds to the "Highline Improvement Fund" and thereby acquire additional floor area. At present, the cost is $50.00 per square foot of additional floor area, with a maximum of 2.5 floor area ratio ("FAR") increase.[62] The TDR program unfortunately coincided with the 2008-2009 recession, reducing the funds raised by the second component. But this year, a major commercial property owner negotiated an FAR increase of 330,000 square feet in exchange for a $19 million contribution to the Highline Improvement Fund.

B. INCENTIVE ZONING

Incentive zoning is a worthwhile tool for creating funding streams for existing parks, which (except for the High Line) are generally not "zoned" and therefore not endowed with any development rights to sell. State law permits municipalities to create incentive or bonus zoning schemes to "advance the city's specific physical, cultural and social policies in accordance with the city's comprehensive plan."[63] An incentive zoning program could allow developers to voluntarily acquire additional development rights by paying into a fund for a nearby park, or making capital improvements to a park.[64]

Other than the High Line Improvement Fund described above, there has been little use of this scheme in New York State for parks. But New York City has routinely created such zones for affordable housing, where developers can exceed the base FAR in exchange for constructing onsite affordable housing.[65] The commitment to build affordable housing creates FAR where it would otherwise not exist (i.e., there is no transfer involved from other sites). The same could, conceivably, be created for areas around parks.

C. CLUSTER ZONING

Cluster zoning is also a worthy tool for the creation of new parks and open space and avoids many of the "takings" issues related to TDR zoning, because it allows an owner to realize the full development potential of a parcel. State law permits municipalities to create zoning laws to "provide an alternative permitted method for the layout, configuration and design of lots, buildings and structures

… in order to preserve natural and scenic qualities of open lands."[66] Cluster zoning can be used to (1) ensure that residents of new homes have access to open space where parks do not otherwise exist; (2) preserve agricultural lands by allowing farmers to consolidate development on one portion of the land; and (3) protect scenic districts by clustering development away from public streets to maintain a scenic atmosphere without reducing the overall density of the zoning district. Because it allows an owner to achieve the full development potential of a parcel, it avoids many of the takings issues addressed in *Fred F. French*, *Golden* and *Penn Central*.

VII. PRIVATE OPERATION OF PUBLIC PARKS

A handful of parks in New York State and New York City are completely or partially managed by private and quasi-private corporations. They include a few flagship parks in Manhattan (like Central Park, Bryant Park, Union Square and the High Line) and various state-owned golf courses and recreational facilities.[67] The success of these public-private ventures is undeniable—the spaces they manage look great, attract tremendous crowds, have low crime rates, and create billions of dollars in new economic activity. The public-private model certainly has critics who complain about the privatization of public spaces, equity with poorer communities, bypassing government contracting and employment rules and the failure of municipalities to carry out their duty to steward parks. But these criticisms are generally policy-related, not legal. Public-private partnerships for parks in fact do not raise major legal concerns if structured properly. The following are four basic models for non-municipal management of parks that focus on allowing independent corporations (both public and private) to manage a park subject to strict controls to protect public access.

A. PARK IMPROVEMENT DISTRICTS

The State's business improvement district law can be used to create "business improvement districts" ("BIDs"), where surrounding property owners agree to pay a property tax surcharge that is allocated exclusively for public improvements in a certain geographic area, including security, street cleaning, landscaping, streetscape repairs and other duties typically carried out by municipalities. A management corporation is typically created to spend the funds and oversee the district. There are hundreds of BIDs around the nation, some of which fund and manage parks where they are referred to as "park improvement districts."

In New York State, BIDs function as quasi-municipal governments. The local legislature can create the BID without voter approval.[68] A BID is governed by a board of directors that is partly composed of both property owners and appointees of the municipal government.[69] The most famous example in New York is Bryant Park, located in midtown Manhattan. The Bryant Park Restoration Corporation has had a management agreement with New York City since 1985 that provides BPRC with an "exclusive license and privilege to operate and manage the Park."[70] The management agreement explicitly states that it is not a "license." And it requires BPRC to maintain the park in a condition that is, arguably, better than most city-operated parks. It states: "BPRC shall maintain the Park in good, clean and orderly condition … and shall make all repairs … necessary to place or maintain the same in such condition."[71] It must also provide security patrols, which most public parks utterly lack. The chief criticism of this model is the concern that BPRC has created a distinct corporate character to the park, closing substantial portions of the park to raise money from restaurants, food vendors, and corporate events.

B. FRIENDS

The second model is the creation of a "friends" group to raise funds and manage the park, typically as a nonprofit and tax-exempt corporation. This is the model used for Central Park in Manhattan. The management agreement between the Central Park Conservancy and New York City requires, essentially, the Conservancy to perform all maintenance in the park.[72] Moreover, the Conservancy commits to raise at least $5 million annually to support its efforts. In return, the Conservancy is permitted to use the park for fundraising purposes and retain those revenues to support its mission. Similar to the BPRC, discussed above, there is a concern that the Conservancy must raise so much money to maintain the park that some corners of the park are now operated by commercial entities (like Donald Trump's skating rink and summer amusement park) which dull the park's strong public character. And it is unlikely that this model can work as well in less affluent communities where neighbors are unlikely to voluntarily make such large donations for nearby park maintenance.

C. STATE PUBLIC BENEFIT CORPORATIONS

State-created public benefit corporations operate hundreds of acres of parkland and public open

space, mainly in New York City. These corporations include the Hudson River Park Trust, Battery Park City Authority, and Roosevelt Island Operating Corporation. Each operates dozens of acres of public open space, funded by payments from surrounding commercial and residential development. As state entities, they are subject to the laws applicable to other agencies, including the State Environmental Quality Review Act. They are not subject to New York City property taxes, however, and are therefore able to use funds from private development *directly* for local park and infrastructure improvements.[73]

But these corporations are not always free from financial worries. The Hudson River Park Act of 1998 created the Hudson River Park Trust as a state public-benefit corporation that builds and maintains the park, receives all revenues from concessions and has the authority to determine compatible commercial use.[74] Substantial areas of the park are zoned for park/commercial uses,[75] which are defined to include recreational and entertainment facilities, but exclude residential and office uses.[76] This limitation distinguishes Hudson River Park from Battery Park City and Roosevelt Island, where residential and commercial uses are integral parts of those corporations' funding streams. Although the State intended for the park to be self-funding,[77] the statutory restrictions have made that goal impossible and the Trust is currently seeking alternative revenue sources.

D. PRIVATE OPERATORS

Purely private ventures operate many park and recreational facilities throughout the state. They include innumerable golf courses, sports facilities and amusement parks. Courts have in many instances held that it is permissible for municipalities to license parks to private operators. As one court stated, the legality of a park use depends on the nature of the use and not the nature of the operator.[78] This purely private model is, however, useful only in limited locations where (1) private operation will benefit the park experience; (2) park users have a reasonable expectation that there will be substantial fees for services, like ski resorts, golf courses and skating rinks; and (3) private entities see a profit potential.

E. LEGAL CONCERNS

Municipalities seeking to engage private or quasi-private operators of parks must structure the arrangements to ensure that they retain ultimate control over the park and decision-making about the park. A few key concerns include the following:

First Amendment. Whether operated by public or private entities, parks are traditional public forums where only very limited restraints on free speech can be imposed.[79] BIDs, park conservancies and other operators of parks are very likely to be subject to the same limits imposed on municipalities in managing parkland.[80]

Delegation. New York courts have held that governmental entities cannot delegate their legislative authority to nongovernmental entities.[81] The nondelegation theory almost certainly does not extend to performance of day-to-day government duties such as sanitation and security, which municipalities delegate all the time. Rather, it is probably limited to decision-making authority about policies and legislation. For this reason, the New York City Department of Parks & Recreation maintains oversight and executive control of the private managers of its parks (like the Central Park Conservancy).

One Person, One Vote. In 1998, residents of the Grand Central Business Improvement District sued the management association and New York City for violation of the U.S. Constitution's Equal Protection Clause. Like other BIDs, Grand Central is governed by an appointed board of owners and residents. The complaint alleged violation of the "one person, one vote" requirement of the Equal Protection Clause, which dictates that governing bodies be elected based on proportional representation of citizens. But the U.S. Court of Appeals for the Second Circuit ruled that BIDs are not governmental or sovereign bodies and therefore are not subject to the one person, one vote requirement. This litigation thereby resolved critical questions about the power of BIDs and permissible governance structures. (This author is aware of no BIDs that rely on elected boards.) BID managers that exercise true police powers, however, might violate this constitutional principle.

Enforcement by the Public. To this author's knowledge, no citizen has attempted to enforce the terms of the various park management agreements and concession agreements that exist around the state. It would likely be very difficult for a private citizen to do so. Courts apply a well-established test to such circumstances: "The test for determining who is a third-party beneficiary in New York is whether the two principal parties entered into the contract with the intention, either express or implied, of directly and primarily benefitting a third party."[82] No individual park user is likely to be able to meet this test.

VIII. TAX INCREMENT FINANCE TO FUND PARKS AND OPEN SPACE

At least 48 states, including New York, allow municipalities to raise money to pay for public improvements by selling "tax increment finance" or TIF bonds.[83] Municipalities sell the bonds, use the funds for important public improvements and then dedicate the incremental increase in property taxes from areas near the improvements to paying back the TIF bondholders. Typically the municipality pairs the public improvements with changes to nearby zoning to help eliminate any impediments to substantial new development, like eliminating restrictions on residential uses or building heights. Cities in California and Illinois have issued billions of dollars in TIF bonds over the past 30 years to fund transportation, school and open space improvements. The mechanism has not been used in New York more than a handful of times. But it should be, particularly for park improvements.

In New York, municipalities must issue TIF bonds as part of a public project that is developed and approved in compliance with the New York State Municipal Redevelopment Law (Article 18-C of the General Municipal Law), which sets forth specific requirements for a public review process. The project area must be declared "blighted," which means little more than "a predominance of buildings and structures [in the area] are deteriorated or unfit or unsafe for use or occupancy," or "[the area contains] a predominance of economically unproductive" properties.[84] If these findings can be made, a municipality can issue TIF bonds in connection with a redevelopment project for property acquisition, construction of transportation, utility and maritime facilities and park improvements.[85] Like most bonds in New York State, the funding is used only for capital purposes, not maintenance. And municipalities are barred from backing the bonds with general revenues.[86] In other words, prospective bond purchasers must be confident that the redevelopment project will spur enough new development that the municipality will have enough new property tax revenues to pay back bonds.

In 2002, the New York City Independent Budget Office issued a comprehensive report on TIF in New York State, including the benefits and pitfalls. It highlighted the long and successful history of TIF in Chicago, Los Angeles and Washington, D.C. And it highlighted the risks, mostly focused on having enough funding to pay back TIF bonds.

The report stated:

> Actual TIF revenues may fall short of the projections made when the TIF bonds were sold. Unlike a municipality with a variety of revenue sources to draw upon for debt service obligations, a TIF district generally has only one source: incremental property taxes. A shortfall risks default or a bailout using other municipal revenues, undermining the reason for using TIF in the first place. A revenue shortfall can occur for a variety of reasons. The projected level of development might not be reached—or might be reached with significant delay.

These concerns have haunted each proposal to use TIF in New York State.

In 2004, New York City proposed the nation's most ambitious proposal for TIF to fund the Hudson Yards Project. The project involved a massive rezoning of portions of the West Side of Manhattan from manufacturing to mixed commercial and residential zones. To facilitate redevelopment of the neighborhood, the City intended to issue $1.5 billion in bonds to finance the extension of the number 7 subway line, a new central boulevard, a new park and other improvements. This represented the largest proposal for TIF bonds in the United States, in a state that has virtually never used them.

The City quickly dropped the plan in 2005 due to concerns that development would occur too slowly and unpredictably to pay back the bonds. The City is still issuing bonds for the improvements, but at least three sources will support their repayment. First, owners of new buildings within the Hudson Yards Special District will make payments in lieu of property taxes, which are to be used for paying back the bonds. Second, developers can achieve higher densities by paying for a zoning density improvement bonus, which will allow some buildings to achieve over a 30 FAR (three times what is normally permitted under New York City zoning). Finally, New York City is backing the bonds from its general revenues.[87]

Notwithstanding New York City's experience with TIF, there are various ways to structure a redevelopment project to ensure that improvements genuinely provide enough new property tax revenue to pay back bonds. They include (1) purposely underestimating expected tax revenues; (2) limiting TIF programs to areas that are underdeveloped because of a lack of critical infrastructure (thus increasing the likelihood that improvements will spur develop-

ment); (3) carefully studying nearby zoning to remove unnecessary restrictions on bulk and use; and (4) drawing a large enough project area to generate sufficient funds. In New York State, these measures are particularly important because municipalities typically must share a portion of property tax revenues with school districts, fire districts and other special taxing entities.[88] They will therefore have access to only a fraction of the new property tax revenues generated by TIF-funded improvements.

There are numerous opportunities for TIF to be used to support park and open space projects in New York. The key criterion for their use should be the presence around the park of undeveloped lands that are likely to be redeveloped due to park and other infrastructure improvements. This excludes many existing parks like Central Park in Manhattan, which are not surrounded by much developable land. But it would include (1) many formerly industrial waterfront locations; and (2) blighted urban communities that are likely to see a residential or commercial boom with the right kinds of targeted municipal *investments and zoning changes*.

IX. CONCLUSION

Public-private partnerships have been responsible for the most innovative and important open spaces in New York State in the past decade. But the State and its municipalities have barely begun to tap into the financing models that state law allows, such as business improvement districts, innovative zoning and tax increment financing. Four key considerations should drive the debate over these alternative financing mechanisms.

First, the fundamental conclusion of this article is that there is a legal role for the private sector in creating and maintaining parks. As noted throughout this article, courts have long accepted private operation and management of park facilities. The core judicial inquiry is whether the proposed use is consistent with park purposes and genuinely serves park users. These criteria should drive any private involvement in financing parks and open space.

Second, capitalizing on real estate development is likely to produce the biggest source of income. In response to criticism about allowing residential and hotel development in Brooklyn Bridge Park, the Brooklyn Bridge Park Corporation in 2011 studied alternatives for generating funds for the long-term maintenance of that park. The options included concessions and special events. The Corporation concluded that these alternatives would not come close to creating the income stream that would be derived from building residential and commercial buildings within the park and collecting fees from the development, which the State and City always intended when they created the park.[89]

Third, financing models need to be considered early in the process of creating new parks and open space. Hudson River Park, a vast waterfront park that has spurred the development of billions of dollars in new real estate development along Manhattan's West Side, is a cautionary tale. There is no legal mechanism in place for the Hudson River Park Trust to recapture the benefit of this development and the state entity is now struggling with its maintenance obligations. After-the-fact efforts do not always succeed.[90]

Finally, most of the successful public-private partnerships have succeeded in the wealthiest and most touristic corners of the State. The Central Park Conservancy succeeds because the park's neighbors are affluent and the demand for event space in the park is large. And the Central Pine Barrens Joint Commission's TDR zoning scheme succeeds by capitalizing on the tremendous development pressures on the east-end of Long Island. Creativity and vision are required if we are to utilize public-private partnerships in other parts of the state, including urban areas struggling with middle-class flight and disinvestment. While the challenge may be greater in less affluent locations, the studies discussed above show that well-maintained parks and open space have profound economic and environmental benefits for all types of communities. It is therefore worth the struggle to adapt the models discussed in this paper to all types of communities around New York State.

NOTES

1. Christopher Rizzo is counsel to Carter Ledyard & Milburn LLP (www.Rizzo@clm.com). His practice focuses on litigation, environmental law and land-use matters, with a particular focus on parks and open space. Elizabeth Black assisted in the preparation of this article.
2. Omitted are the usual sources of park funding, which include general municipal funds and bond issuances (i.e., debt). The article also omits financing methods that are not likely to raise many legal issues, including sponsorships and naming rights; temporary special events; and earned income from fees.
3. Parks & Trails New York, "Parks at a Turning Point, Restoring and Enhancing New York State's Park System," November 2006, at 6.
4. See New York State Department of Environmental Conservation, www.dec.ny.gov/lands/49875.html.

5. For example, Nassau County has 6,000 acres; Orange County has 3,000 acres; Westchester County has 18,000 acres; and Erie County has 10,000 acres. For more information, visit the respective counties' parks department websites.
6. This article distinguishes between parks and protected open space. Formally or informally dedicated parkland is subject to heighted protections under various state laws, including the common law public trust doctrine. In contrast, open space may be in private or public hands and protected from development through means other than dedication as parkland. Examples include open space owned by the New York State Department of Environmental Conservation, which is protected from development but often open to mining and logging. Another example is privately owned farmland that is protected from future development by a conservation easement, an increasingly common tool for protecting farmland in fast-growing regions of New York State like Suffolk County.
7. Andrew Cuomo, "The New NY Agenda: A Plan for Action" (2010), available at http://www.andrewcuomo.com/system/storage/6/89/e/798/andrew_cuomo_power_ny.pdf, at 81. The Cuomo campaign material cites to the New York State comptroller's March 2010 report, "Economic Benefits of Open Space Preservation," available at www.osc.state.ny.us/reports/environmental/openspacepreserv10.pdf.
8. Central Park Conservancy, "Valuing Central Park's Contributions to New York City's Economy" (2009), available at www.appleseed.org, at 9-13.
9. New Yorkers for Parks and Ernst & Young, "How Smart Park Investment Pays Its Way" (2003), at 3.
10. Alliance for New York State Parks, "Protect Their Future: New York State's Parks in Crisis" (November 2010), available at http://www.ptny.org/pdfs/advocacy/parkreport2011.pdf, at 9.
11. Many of the park acquisitions and improvements in the past two decades have been carried out with state-supported debt, including the Environmental Quality Bond Act of 1986 and the Clean Air/Clean Water Bond Act of 1996.
12. A smaller source of state funding, the Environmental Protection Fund ("EPF"), is also effectively dry for now. Like the funds from the 1986 and 1996 bond issuances, the EPF was available to state agencies, counties and local governments. The State funded it largely through the state real estate transfer tax. Tax Law § 1421.
13. Alliance for New York State Parks, "Protect Their Future: New York State's Parks in Crisis" (November 2010), available at http://www.ptny.org/pdfs/advocacy/parkreport2011.pdf, at 9.
14. Alliance for New York State Parks, supra n. 13.
15. N.Y. State Constitution Article III, §§11, 23; Finance L. § 67-b.
16. The City of New York, for example, cannot issue debt equal to more than 10% of the value of taxable real estate. N.Y. Constitution Article VII, § 4.
17. The state debt limit is applicable only to "state-supported debt," which is a critical factor for New York State's parks. This State has the national distinction of having hundreds of state-created public benefit corporations that are legally independent of state government but effectively controlled by the Governor. These corporations (sometimes referred to as "authorities") carry out much of the fundamental infrastructure work in the State, including the N.Y.S. Thruway Authority, Port Authority of New York and New Jersey and Metropolitan Transportation Authority. And they can often issue debt without regard for the State's constitutional debt limit. A whopping 94% of the State's debt has been issued by these corporations. (See N.Y.S. State Comptroller, "Debt Impact Study" (March 2010), available at http://www.osc.state.ny.us/reports/debt/debtimpact2010.pdf). These corporations and authorities are able to finance critical open space improvements that OPRHP no longer can.
18. Finance Law § 67-b.
19. Brooklyn Bridge Park is being constructed on several decaying industrial piers in the East River. It is an extraordinarily expensive project with a $355 million capital budget. Operational costs are expected to be about $12 million annually, far higher than any traditional parks that lack the major security, infrastructure and programming challenges that Brooklyn Bridge Park Presents. See Diane Cardwell, "When Parks Must Rely on Private Money," N.Y. Times (February 5, 2010).
20. The Trust faced a $10 million budget deficit in 2011. See Sara Trefethen, "Bottom Line: Finding Park Funding No Child's Play," Real Estate Weekly (March 21, 2012).
21. See New Yorkers for Parks, at www.ny4p.org.
22. See Williams v. Gallatin, 229 N.Y. 248, 128 N.E. 121, 18 A.L.R. 1238 (1920); Friends of Van Cortlandt Park v. City of New York, 95 N.Y.2d 623, 630, 727 N.Y.S.2d 2, 750 N.E.2d 1050 (2001) ("parkland is impressed with a public trust, requiring legislative approval before it can be alienated or used for an extended period for nonpark purposes").
23. See *Williams*, supra n 22, 229 N.Y. at 252-53 ("park commissioner may control and manage parks for park purposes"); 795 Fifth Ave. Corp. v. City of New York, 40 Misc. 2d 183, 187, 242 N.Y.S.2d 961 (Sup 1963), aff'd, 20 A.D.2d 850, 247 N.Y.S.2d 851 (1st Dep't 1964), order aff'd, 15 N.Y.2d 221, 257 N.Y.S.2d 921, 205 N.E.2d 850 (1965) (park commissioner is empowered to allow facilities with a reasonable relation to park uses).
24. Port Chester Yacht Club, Inc. v. Village of Port Chester, 123 A.D.2d 852, 853, 507 N.Y.S.2d 465 (2d Dep't 1986) ("Absent legislative sanction, the validity of a lease by a municipality of park land and other property entrusted for public use turns on the nature of the use rather than the nature of the user.").
25. The author and his colleagues reviewed all State Legislative session laws during this period.
26. N.Y. Session Law, Ch. 638 (2005).
27. N.Y. Session Law, Ch. 565 (2007).
28. Sumathi Reddy, "Audit: Parks Miss Millions in Concession Fees," Wall Street Journal (December 5, 2011).
29. This article does not address in detail special restrictions imposed on parks that receive state or federal funding. See Envtl. Conserv. Law § 54-0909 (parks improved with 1993 Environmental Quality Bond Act funds may not be disposed of in any way for other than public park purposes); 16 U.S.C.A. § 4601-8(f)(3) (parks improved with federal Land and Water Conservation Fund monies may only be used for public outdoor recreation uses).

30. Many purely private events and fundraisers take place in parks from time to time. But New York courts have recognized temporary and de minimis exceptions to the public trust doctrine, although they remain poorly defined.
31. Union Square Community Coalition v. New York City Dept. of Parks and Recreation, 23 Misc. 3d 1109(A), 886 N.Y.S.2d 69 (Sup 2009).
32. Committee to Preserve Brighton Beach and Manhattan Beach, Inc. v. Planning Com'n of City of New York, 259 A.D.2d 26, 695 N.Y.S.2d 7 (1st Dep't 1999).
33. *Committee to Preserve Brighton Beach*, supra n. 32, 695 N.Y.S.2d at 14.
34. SFX Entertainment, Inc. v. City of New York, 297 A.D.2d 555, 747 N.Y.S.2d 91 (1st Dep't 2002) (the court did find, however, that the environmental review was defective).
35. Gewirtz v. City of Long Beach, 69 Misc. 2d 763, 330 N.Y.S.2d 495 (Sup 1972), judgment aff'd, 45 A.D.2d 841, 358 N.Y.S.2d 957 (2d Dep't 1974).
36. Johnson v. Town of Brookhaven, 230 A.D.2d 774, 646 N.Y.S.2d 180 (2d Dep't 1996).
37. *Johnson*, supra n. 36, 646 N.Y.S.2d. at 181.
38. Miller v. City of New York, 15 N.Y.2d 34, 37 255 N.Y.S.2d 78, 203 N.E.2d 478 (1964).
39. *Miller*, supra n. 38 15 N.Y.2d at 37; see also Lake George Steamboat Co. v. Blais, 30 N.Y.2d 48, 330 N.Y.S.2d 336, 281 N.E.2d 147 (1972) (lease of publicly-owned lakefront for construction of marina for sight-seeing company was illegal); Ott v. Doyle, 171 Misc. 2d 491, 654 N.Y.S.2d 975 (Sup 1997) (agreement with company to operate public golf courses in city parks was a license and legal); cf. Port Chester Yacht Club, Inc. v. Village of Port Chester, 123 A.D.2d 852, 507 N.Y.S.2d 465 (2d Dep't 1986) (lease of public shorefront to operator of recreational marina did not violate the public trust doctrine). Although *Port Chester* is on its face at odds with *Miller* and *Lake George*, it involved somewhat more sympathetic facts. The boat club at issue had been in use since 1928 and was generally open to the public.
40. 795 Fifth Ave. Corp. v. City of New York, 40 Misc. 2d 183, 242 N.Y.S.2d 961 (Sup 1963), aff'd, 20 A.D.2d 850, 247 N.Y.S.2d 851 (1st Dep't 1964), order aff'd, 15 N.Y.2d 221, 257 N.Y.S.2d 921, 205 N.E.2d 850 (1965).
41. New York State Office of Parks, Recreation and Historic Preservation, "Handbook on the Alienation and Conversion of Municipal Parkland in New York," (revised June 2011) at 15.
42. See, generally, Exec. Law § 805.
43. The MOU is available from the Brooklyn Bridge Park Corporation at www.brooklynbridgepark.org. That general project plan now calls for only 10% of the park to be dedicated to revenue-producing commercial uses.
44. Brooklyn Bridge Park Legal Defense Fund, Inc. v. New York State Urban Development Corp., 14 Misc. 3d 515, 825 N.Y.S.2d 347 (Sup 2006), aff'd, 50 A.D.3d 1029, 856 N.Y.S.2d 235 (2d Dep't 2008).
45. Land and Water Conservation Fund Manual (October 1, 2008), p. 8-1.
46. Brooklyn Heights Ass'n v. National Park Service, 818 F. Supp. 2d 564 (E.D. N.Y. 2011) (NPS illegally revised map showing areas of Brooklyn Bridge Park improved with federal funds); Brooklyn Heights Association v. New York State Office of Parks, Recreation and Historic Preservation, No. 1120/11, slip op. (Sup. Ct. Kings County November 10, 2011) (proposal also violated New York's public trust doctrine).
47. Envtl. Conserv. Law §§54-0901 et seq.
48. Envtl. Conserv. Law §§56-0301 et seq.
49. Envtl. Conserv. Law § 54-0909, Envtl. Conserv. Law § 56-0309(12).
50. 9 NYCRR § 441.5(f).
51. General City Law § 20-f(1)(a).
52. General City Law § 20-f. Similar enabling provisions exist in the State's town and village laws. See Town Law § 261-a and Village Law § 7-703.
53. N.Y. General City L. § 20-f(1)(a).
54. N.Y. General City L. § 20-f(1)(a) and (2)(f); see also 6 NYCRR Part 617.
55. N.Y. General City L. § 20-f(1)(c).
56. Fred F. French Investing Co., Inc. v. City of New York, 39 N.Y.2d 587, 591, 385 N.Y.S.2d 5, 350 N.E.2d 381 (1976). The court also found that the program did not constitute a regulatory taking.
57. Golden v. Planning Bd. of Town of Ramapo, 30 N.Y.2d 359, 378, 334 N.Y.S.2d 138, 285 N.E.2d 291, 63 A.L.R.3d 1157 (1972).
58. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978).
59. Envtl. Conserv. Law §§57-0101 et seq. Municipalities do not need state legislation to create a joint program, however. See General Municipal Law § 119-o (allowing municipalities to create joint programs addressing any subject matter that they could address individually, such as joint sewage projects).
60. Central Pine Barrens Joint Planning & Policy Commission, "The Pine Barrens Credit Program: Transferable Development Rights in Suffolk County, NY" (2010), available at http://pb.state.ny.us/pbc/pbc_overview.pdf.
61. New York City Zoning Resolution § 98-31.
62. New York City Zoning Resolution § 98-22.
63. General City Law § 81-d; see also Town Law § 261-b, Village Law § 7-703.
64. Zoning incentives can also be granted on a project-by-project basis when, for example, a developer seeks a zoning variance, special permit, or zoning change to allow a specific project. Municipalities should be wary, however, of court decisions that require land-use conditions and demands to be rationally related to the project at hand. See, e.g., St. Onge v. Donovan, 71 N.Y.2d 507, 527 N.Y.S.2d 721, 522 N.E.2d 1019 (1988) (conditions on special permit related to concerns about person operating facility rather than valid concerns about the proposed land use and were therefore prohibited); Municipal Art Soc. of New York v. City of New York, 137 Misc. 2d 832, 522 N.Y.S.2d 800 (Sup 1987) (zoning change in exchange for cash payment to city for unspecified purpose was illegal).
65. The program is called the "inclusionary housing bonus" and is permitted only in certain high-density residential zones, thus ensuring that the program does not have a negative impact on a character of low-density and suburban neighborhoods. For more information about the

program, visit the website of the New York City Department of City planning at http://www.nyc.gov/html/dcp/html/zone/zh_inclu_housing.shtml.

66. General City Law § 37.
67. According to the New York State Office of Parks Recreation and Historic Preservation, "State Parks has roughly 100 concession contracts with private-sector partners-including the golf course operation at Bonavista State Park in Seneca County-that generate nearly $90 million in gross receipts annually, of which almost $10 million is returned directly to support park operations." See http://nysparks.com/newsroom/press-release/release.aspx?r=852.
68. In New York City, a petition in opposition signed by 51% of property owners will prevent the district from becoming established. General Municipal L. § 980-e. Outside New York City, a petition signed by 51% of property owners must accompany the BID proposal. General Municipal Law § 980-d.
69. General Municipal Law § 980-m.
70. See "Management Agreement for Bryant Park between City of New York and Bryant Park Restoration Corporation" (July 29, 1985), at § 3 (renewed most recently on June 8, 2007 for five-year term beginning on July 1, 2008). The BID is governed by a related corporation, the Bryant Park Management Corporation.
71. Management Agreement, supra n. 70 at § 7.
72. Agreement, City of New York and Central Park Conservancy, Inc., April 28, 2006, Section 3. Certain city facilities are excluded from the Conservancy's obligations.
73. The Brooklyn Bridge Park Corporation, originally a subsidiary of the Empire State Development Corporation, is now a public benefit corporation under the control of the Mayor of the City of New York.
74. Hudson River Park Act, N.Y. Session Law, Ch. 592 (1998).
75. Hudson River Park Act, Section 9, Art. 9.
76. Hudson River Park Act, Section 3(g), (h).
77. Hudson River Park Act, Section 1(e) ("It is intended that to the extent practicable and consistent with the intent of [the act], the costs and the operation and maintenance of the park be paid by revenues generated within the Hudson river park and that those revenues be used only for park purposes.").
78. Port Chester Yacht Club, Inc. v. Village of Port Chester, 123 A.D.2d 852, 853, 507 N.Y.S.2d 465 (2d Dep't 1986) ("Absent legislative sanction, the validity of a lease by a municipality of park land and other property entrusted for public use turns on the nature of the use rather than the nature of the user.").
79. Limits include content-neutral, time, place and manner restrictions. Police can also, of course, restrict public disorder. "In places which by long tradition or by government fiat have been devoted to assembly and debate, the rights of the state to limit expressive activity are sharply circumscribed. *At one end of the spectrum are streets and parks* which have immemorially been held in trust for the use of the public, and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45, 103 S. Ct. 948, 74 L. Ed. 2d 794, 9 Ed. Law Rep. 23 (1983) (emphasis added; internal quote omitted).
80. Forbes v. City of New York, 2008 WL 3539936 (S.D. N.Y. 2008) (court refused to dismiss First Amendment law suit against Lincoln Center in the operation of Damrosch Park). An exception may exist, however, for private park concessions like restaurants, recreational facilities, special concerts and the like. They can limit speech that would be disruptive or incompatible with the concession's purposes. People for Ethical Treatment of Animals v. Giuliani, 105 F. Supp. 2d 294 (S.D. N.Y. 2000), adopted, 2000 WL 1639423 (S.D. N.Y. 2000), judgment aff'd, 18 Fed. Appx. 35 (2d Cir. 2001) (operator of special event in parks could exclude speech that did not meet purposes of the event); Hobbs v. County of Westchester, 2003 WL 21919882 (S.D. N.Y. 2003), aff'd, 397 F.3d 133 (2d Cir. 2005) (operator of Rye Playland, building on county parkland, was not obligated to accommodate speech activities that would otherwise be allowed in parks).
81. See, e.g., People v. Mobil Oil Corp., 101 Misc. 2d 882, 422 N.Y.S.2d 589, 591 (Dist. Ct. 1979).
82. Branch v. Riverside Park Community LLC, 24 Misc. 3d 1226(A), 899 N.Y.S.2d 57 (Sup 2009), aff'd, 74 A.D.3d 634, 903 N.Y.S.2d 390 (1st Dep't 2010), leave to appeal denied, 15 N.Y.3d 710, 910 N.Y.S.2d 36, 936 N.E.2d 917 (2010) (tenants cannot enforce lease agreement between private housing company and New York City that required the company to provide low and moderate-income housing).
83. New York City Independent Budget Office, "Learning from Experience: A Primer on Tax Increment Financing" (September 2002), available at http://www.ibo.nyc.ny.us/iboreports/TIF-Sept2002.pdf.
84. General Municipal Law § 970-c.
85. General Municipal Law § 970-o.
86. General Municipal Law § 970-o.
87. For a description of the bond offering, see http://www.businesswire.com/news/home/20110927006811/en/Fitch-Rates-Hudson-Yards-Infrastructure-Corp.-NY.
88. This is not a problem in New York City, which is the sole taxing authority in the City.
89. BAE Urban Economics, "Study of Alternatives to Housing for the Funding of Brooklyn Bridge Park Operations" (June 9, 2011), available at www.brooklynbridgepark.org.
90. The Friends of the High Line recently dropped its plans to create a BID. In doing so, it made the following statement: "The Steering Committee reached out to the larger High Line community, so that their responses would help determine whether to move forward [with the BID]. Following these public outreach efforts, it was decided to put the proposal on hold." See www.thehighline.org/district.

OF RELATED INTEREST

Discussion of matters related to the subject of the above article can be found in:

- Salkin, New York Zoning Law and Practice §§14:4, 14:5, 14:8

- Constitutionality of Restricting Public Speech in Street, Sidewalk, Park, or Other Public Forum—Manner of Restriction, 71 A.L.R.6th 471
- Constitutionality of Restricting Public Speech in Street, Sidewalk, Park, or Other Public Forum—Characteristics of Forum, 70 A.L.R.6th 513
- Construction of Highway Through Park as Violation of Use to which Park Property May Be Devoted, 60 A.L.R.3d 581
- To What Uses May Park Property Be Devoted, 63 A.L.R. 484 (supplemented by Uses to Which Park Property May Be Devoted, 144 A.L.R. 486)
- Use of Streets or Parks for Religious Purposes, 133 A.L.R. 1402
- Diversion of Park Property to Other Uses as Taking or Damaging Neighboring Property Without Compensation, 83 A.L.R. 1435
- Right of Abutting Owner to Complain of Misuse of Public Park or Violation of Rights or Easements Appurtenant thereto, 60 A.L.R. 770
- Validity of Building Regulation Requiring Areas or Open Spaces for Light and Air, 59 A.L.R. 518

RECENT CASES

COURT OF APPEALS REJECTS VERIZON'S CHARACTERIZATION OF ITS ALLEGED INVERSE CONDEMNATION AS A MERE TRESPASS.

The New York Telephone Company, the predecessor of Verizon New York Inc., attached a "terminal box" to an apartment building in Brooklyn. The box allowed Verizon to furnish telephone service to that building and a number of others.

Claiming that Verizon was in essence using the building as a telephone pole without paying them, the building's owners sued Verizon, alleging, inter alia, inverse condemnation on its part. Verizon moved to dismiss. Supreme Court upheld the inverse condemnation claim and two others. The Appellate Division, inter alia, affirmed Supreme Court's order upholding the inverse condemnation claim, but dismissed it as barred by the statute of limitations.

On appeal, the Court of Appeals held, inter alia, that the building owners had stated a claim for inverse condemnation and that the claim was not time-barred. Verizon, while conceding that it had the power to take the building by eminent domain for the purpose of attaching cables and wires, argued that inverse condemnation was not a remedy available to the owners because Verizon had not chosen to exercise its eminent domain power. At most, said Verizon, the owners had alleged a trespass.

The Court of Appeals acknowledged that past New York cases have offered a trespasser with eminent domain power the choice between taking the property in question and paying for the taking, or ceasing to trespass. But the "more modern" view of inverse condemnation, continued the court, did not afford Verizon this choice. The owners' complaint alleged facts from which a continuous and permanent occupation of their property by Verizon could be found, and therefore stated a legally sufficient claim for inverse condemnation. The claim was not time-barred, said the court, because § 261 of the Real Property Law was clearly intended not to allow any claim by the owners for inverse condemnation to fail due to lapse of time. *Corsello v. Verizon New York, Inc.*, 18 N.Y.3d 777, 944 N.Y.S.2d 732, 967 N.E.2d 1177 (2012), reargument denied, 2012 WL 2401306 (N.Y. 2012).

APPELLATE DIVISION, THIRD DEPARTMENT, UPHOLDS GRANTING OF VARIANCE FOR CHURCH SIGN.

Preble Congregational Church replaced its old unlit sign, which measured two feet, eight inches wide by five feet high, with a new sign that had lights and was eight feet wide by four feet, one inch high. A local zoning ordinance limited signs to 20 square feet. The church's new sign was about 32 square feet, so the church applied to the Town of Preble's Zoning Board of Appeals for an area variance, which was granted. A resident who lived about 200 feet from the church brought an Article 78 proceeding to challenge the grant. Supreme Court dismissed the proceeding.

On appeal, the Appellate Division, Third Department, affirmed. The court noted that the ZBA had considered the factors set forth in Town Law § 267-b(3)(b), and had balanced the benefits to the church against the impact on the neighborhood. The ZBA had noted, inter alia, that the requested increase in the sign's area from that allowed by the zoning ordinance was not substantial, the lighted portion of the sign generally turned off an hour and a half after sunset, the new sign was not significantly larger than the one it replaced, and the new sign would not

have an adverse effect on the neighborhood. The court concluded that the ZBA did not act arbitrarily nor abuse its discretion in granting the variance.

The court also rejected the contention that the ZBA violated the State Environmental Quality Review Act by granting the variance. The court noted that replacing a structure of this nature on the same site with a similar structure generally is a Type II action not requiring SEQRA review. And in any event, the ZBA had conducted a public hearing and completed a short environmental assessment form in which it concluded that the proposed action would have no significant adverse environmental impact. *Sarat v. Town of Preble Zoning Bd. of Appeals*, 93 A.D.3d 921, 939 N.Y.S.2d 202 (3d Dep't 2012).

