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Abstract: State governments vest great authority in local governments to decide how and where private development shall occur, and in the alternative, where to preserve open land. The New York state legislature recognizes the importance of protecting open lands, and as such, has created several laws to facilitate local municipal action. Several methods exist that municipal government may use to accomplish this goal and this article provides several examples. For instance, the New York Court of Appeals, in the case of Bonnie Briar Syndicate, Inc. v. Town of Mamaroneck, held that a local zoning ordinance, which rezoned a large area for strict recreational use, was valid despite a challenge from a local golf course owner. This example is one of several demonstrations where communities practice smart growth to curb unfettered development in an organized and well-planned manner.

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The Smart Growth Equation

In my last column, I began a discussion about smart growth, with the observation that local action is fundamental to the concept's success in New York. This is due to the significant authority that local governments have been given to determine where and how privately-owned land is developed and where it is to be conserved. That column described a traditional neighborhood zoning district in the Village of Pawling that created a neo-traditional development zone that allowed mixed uses at an appropriate density. This represents one side of the smart growth equation, illustrating that local regulation can properly direct development to a discrete location in a cost-effective manner. This article addresses the other side of the equation – local actions that maintain some of the open lands that are threatened by land development pressures in growth areas of the state.

The preservation of open lands is one of the few land use objectives that is found in the State Constitution. It is the policy of New York State to "conserve and protect

[the] natural resources and scenic beauty [of the state] and encourage the development and improvement of . . . agricultural lands for the production of food and other agricultural products." (Article 14, § 4.) The State Legislature has enacted several statutes that delegate to local governments the authority to protect local natural resources and agricultural lands. Under Village Law § 7-704, Town Law § 263, and General City Law § 20(25) zoning regulations may be adopted with reasonable consideration of the character of the zoning district and with a view to encouraging the most appropriate use of the land. Local comprehensive plans can identify and provide for the preservation of "natural resources and sensitive environmental areas." Village Law § 7-722(3)(d), Town Law § 272-a(3)(d), and General City Law § 28-a(4)(d). The Municipal Home Rule Law § 10(1)(ii)(a)(11) authorizes each local government to adopt land use laws "for the protection and enhancement of its physical and visual environment."

Using this authority, local governments have enacted a wide variety of natural resource protection statutes that protect, *inter alia,* wetlands, habitat, trees, landscape features, soils, floodplains, ridgelines, view sheds, aquifers, and watersheds. Recently, the Town of Mamaroneck added a strategic approach to open land preservation when it rezoned nearly 450 acres for exclusive recreational use. This curious invention was challenged as a "regulatory taking" by a syndicate that owned the Bonnie Briar golf course since it prevented a residential development that it had submitted for the Town's land use approval. After several years of litigation, the Court of Appeals recently sustained the municipality's rezoning. Bonnie Briar Syndicate, Inc. v. Town of Mamaroneck, November 23, 1999.

Bonnie Briar Case

The syndicate did not demonstrate that the rezoning denied an economic use of its land. Rather, it argued that the Town's denial of its residential development proposal - which left 75% of the land open as a golf course - was a violation of its substantive due process rights. It suggested that, where a generally applicable rezoning law is contested, the proper test is that the rezoning must bear an "essential nexus" to a legitimate public objective. When this test is used in takings cases, the court more closely scrutinizes the relationship between the land use regulation and the legitimate public purpose for which it is enacted. The plaintiff argued that its proposal constituted a less restrictive, more reasonable method of accomplishing the municipality's admittedly legitimate environmental objectives.

The New York court cited the recent City of Monterey v. Del Monte Dunes at Monterey, Ltd. (119 S. St. 1624, 1999) decision of the U.S. Supreme Court for the proposition that this stricter test is applicable only to situations where the local land use action constitutes an exaction, such as requiring a public access easement over private property as a condition of a land use approval. The Court noted that the test to be used where generally applicable regulations are challenged is whether the regulation "bears a reasonable relationship" to a legitimate public objective. It had no trouble finding that restricting 428 acres of private golf courses to exclusively recreational uses was

reasonably related to the public objective of preventing flooding, maintaining a critical natural resource area, and preserving the open space character of a highly urbanized area.

The Court of Appeals reminded the plaintiffs that its role in such cases is not to question the general wisdom or desirability of land use regulations of this type, that is the prerogative of the local legislature. The unanimous court wrote "It is similarly not for this court to determine if, in regulating land use, the rezoning determination was more stringent than one might reasonably conclude was necessary to further public objectives."

Four factors existed in the Bonnie Briar case that should be carefully examined by other communities before they rezone significant acreage for recreational use. First, Mamaroneck preceded the rezoning with ten years of very careful data collection and comprehensive planning on which the rezoning was based. Second, this study documented that the lands rezoned were subject to serious environmental constraints, not the least of which was flooding. Third, the land was already dedicated to an apparently economic recreational use. Fourth, the rezoned properties are located in a heavily populated, affluent area where with a demonstrable demand for private recreational services and facilities.

The Acquisition Alternative

An alternative to taking the regulatory approach to the conservation side of the smart growth equation is to use local authority to purchase open lands. Local governments are authorized to spend public funds to acquire and maintain open spaces and to limit the future use of open spaces under the General Municipal Law § 247. Open space is defined by this section as land characterized by natural scenic beauty, lands whose condition enhances surrounding developed lands, lands containing valuable natural resources, and lands used for agricultural production. Local governments using public funds to acquire such lands may either purchase the lands outright or purchase some or all of their development rights. To purchase a lesser interest of this type, the local government typically purchases a restrictive covenant or "conservation easement" from the landowner which limits the parcel's development and then pays the landowner the value of the development rights that have been conveyed to the municipality. When public funds are used under § 247 to purchase development rights, the local government must reassess the property's value for property tax purposes to reflect the reduced use and value of the land as restricted.

Under the Environmental Conservation Law (§§ 49-0301 – 49-0311), municipalities and not-for-profit conservation organizations are empowered to purchase conservation easements for the purpose of protecting property containing environmental, historical, or cultural assets or agricultural soils. If conservation easements are acquired by local governments under the Environmental Conservation Law, a land conservation organization, or land trust, can be assigned the responsibility of monitoring and enforcing the development restrictions placed on the land.

Using this authority local governments have established programs that combine the purchase of full title to open lands, the purchase of all development rights not currently used by the landowner, and the lease or purchase of less than all of the development rights, allowing landowners the option of developing part of the land presently or in the future. A variety of local programs can be created to meet the public interests of the locality and the financial needs of particular landowners.

Methods and Examples of Acquiring Interests in Open Lands

Direct appropriations: Localities may appropriate revenues derived from local property taxes to acquire interests in open lands as part of the local budgeting process. Municipalities may ask their voters to approve a multi-year appropriation of a specified increase in the local property tax rate for the purpose of acquiring interests in open lands. In 1997, for example, voters in Greenburgh approved the creation of a multi-year property tax increase of ½ of one percent to be deposited in a capital reserve fund and used for the acquisition of interests in open lands. The Town projects that this tax increase will raise up to $750,000 over its six year life. The Town Supervisor's plan is to use this resource as a means of leveraging additional county, state, and federal funds for open land acquisition.

Issuance of municipal bonds: Municipal bonds may be issued and the proceeds used for the acquisition of interests in open lands. Voters in the Town of Pittsford approved a $9.9 million bond issue to purchase development rights to 2,000 acres of mostly agricultural land located so that a wildlife habitat corridor was created linking important ecological resources with the town's remaining historic farms. Since 1974, Suffolk County has issued bonds on three separate occasions that have raised over $60 million that is being used to purchase development rights in farm lands.

Real estate transfer tax: A local government may pass a local law requesting the State Legislature to adopt a bill authorizing it to impose a tax on the transfer of title to real property within its jurisdiction. At the request of several towns on the east end of Long Island, the State Legislature added a section to the local finance law permitting them to impose a two percent real estate transfer tax to purchase interests in open lands and subjecting them to a variety of requirements regarding the use of the proceeds of the tax. These proceeds supplement funds raised by the communities by other means, including the issuance of municipal bonds.

Reduced tax assessment: Local governments may lease development rights from the owners of open lands in exchange for a reduction in property tax assessments during the lease's term. The landowner agrees to a limited-term lease of the land's development rights, a conservation easement is imposed on the land for that term, and during that term a reduced tax assessment is applied lowering the taxes that must be paid by the owner. The Town of Perinton in Monroe County uses a tax assessment table which establishes various percentages of tax reduction that are applied in exchange for the Town's lease of development rights. The amount of reduction

increases when the owner agrees to a longer lease term. A 25 year lease term, for example, earns a 90% tax reduction. Penalties must be paid by owners who default on their lease obligations. These revenues are placed in a capital reserve fund which is used to purchase development rights on other open lands.

Land purchase installment obligations: Local governments may adopt a resolution that authorizes them to incur debt by purchasing interests in open lands directly from landowners on an installment basis. The landowner becomes the creditor of the municipality which now owns the land or its development rights. The value of the interest acquired by the municipality may be paid to the landowner over a period of up to 30 years. All interest payments to the landowner are tax exempt. The payment of principal payments may be deferred until the end of the installment period which defers the payment of any capital gains tax due. Installment purchase obligations owned by landowners can be devised to the owner's heirs or sold to municipal bond investors. The towns of Easthampton and Southhampton on the eastern end of Long Island have stated that they plan to use the land purchase installment obligation method in spending the dollars in their capital reserve funds to acquire interests in open lands.

Smart Growth Applications

What is intelligent about the concept of smart growth is that it marshals growth pressures into cost effective settlement patterns and it leaves large, unfragmented areas of the natural environment open. Local regulation and acquisition of open lands can accomplish this goal, but only if significant landscapes are protected by these initiatives. In both Mamaroneck, a developed town, and Pittsford, a developing town, this happened. Mamaroneck cleverly preserved nearly 450 contiguous acres of open lands in a mature suburban community. In Pittsford, local leaders studied the 3,600 acres of open lands left in the community and identified 2,000 of them that constituted a preserve containing significant wildlife corridors that link important ecological resources with the most significant remaining historic farms.

These examples illustrate that existing authority is capable of accomplishing significant smart growth objectives in the hands of capable and thoughtful local officials and their professional advisors.