

July 2015

Alternative Funding for an Equitable Park System in New York City and State

Christopher Rizzo
Carter Ledyard & Milburn LLP

Follow this and additional works at: <https://digitalcommons.pace.edu/pelr>



Part of the [Environmental Law Commons](#), and the [Natural Resources Law Commons](#)

Recommended Citation

Christopher Rizzo, *Alternative Funding for an Equitable Park System in New York City and State*, 32 Pace Envtl. L. Rev. 635 (2015)

DOI: <https://doi.org/10.58948/0738-6206.1776>

Available at: <https://digitalcommons.pace.edu/pelr/vol32/iss3/1>

This Article is brought to you for free and open access by the School of Law at DigitalCommons@Pace. It has been accepted for inclusion in Pace Environmental Law Review by an authorized administrator of DigitalCommons@Pace. For more information, please contact dheller2@law.pace.edu.

PACE ENVIRONMENTAL LAW REVIEW

Volume 32**Summer 2015****Number 3**

ARTICLE**Alternative Funding for an Equitable Park
System in New York City and State**

CHRISTOPHER RIZZO*

I. INTRODUCTION

“Equity” is a buzz word that now pervades our national political system in debates about taxation, immigration, and healthcare reform. It was the main focus of the 2013 mayor race in New York City, arguably propelling Mayor Bill de Blasio to victory in a city that has the most inequitable distribution of income in the nation.¹ The debate has trickled down to parks, where a handful of innovative private corporations have transformed flagship parks while most neighborhood parks languish.

This paper addresses the most innovative, alternative means for funding parks in New York City and New York State. The debate is critical in light of the chronic budget shortfalls of the New York City Department of Parks and Recreation (NYC Parks)

* Christopher Rizzo is counsel at Carter Ledyard & Milburn LLP and co-director of its environmental and land-use group.

1. Norm Fruchter, *The Aftermath of the PS 2013 Campaign: Mayor de Blasio's First Hundred Days*, ANNENBERG INSTITUTE FOR SCHOOL REFORM AT BROWN UNIVERSITY (May 8, 2014), [shttp://annenberginstitute.org/?q=commentary/2014/05/aftermath-ps-2013-campaign-mayor-de-blasio's-first-hundred-day](http://annenberginstitute.org/?q=commentary/2014/05/aftermath-ps-2013-campaign-mayor-de-blasio's-first-hundred-day), archived at <http://perma.cc/8S5D-VU66>.

636 *EQUITABLE PARK SYSTEM IN NEW YORK* [Vol. 32]

and New York State Office of Parks Recreation and Historic Preservation (OPRHP).² Funding problems are likely to worsen in coming years as parks compete for funding with aging subways, bridges, water supply, and sewers. At the same time, funding needs will grow: the City and State will increasingly rely on coastal parks to serve as buffers to climate change.³ New and existing waterfront parks will, in turn, require exponentially more care and maintenance than traditional upland parks.

Private efforts have successfully transformed a select few parks,⁴ which has created allegations of park inequity at a time when many neighborhood parks are overgrown and understaffed.⁵ Public-private partnerships reflect a national debate about the proper role of the private sector in maintaining parks, highways, bridges, and other essential civic infrastructure. But for most neighborhood parks the debate is irrelevant. They completely lack access to either adequate public funding or private revenue. One-time infusions of public capital dollars into the neediest parks cannot solve the ongoing operation and maintenance problem.⁶

This paper identifies an array of alternative revenue strategies to solve this inequitable situation. It then addresses the challenge of adapting strategies developed in the highest income communities to resolving disparate park conditions in

2. The New York League of Conservation Voters and New Yorkers for Parks, led by executive directors Marcia Bystryn and Tupper Thomas (respectively), jointly commissioned this paper. The viewpoints in this paper are those of the author, not either organization.

3. PLANYC, *NEW YORK CITY WETLANDS STRATEGY* (2012), available at http://www.nyc.gov/html/planyc2030/downloads/pdf/nyc_wetlands_strategy.pdf [hereinafter N.Y.C. WETLANDS STRATEGY].

4. Some of the City's most successful private park operators include Central Park Conservancy, Bryant Park Corporation, Friends of the Highline, and Prospect Park Alliance. Some parks are successfully operated by public benefit corporations including the Battery Park City Authority, Brooklyn Bridge Park Corporation, Hudson River Park Trust, Trust for Governors Island, and Roosevelt Island Operating Corporation.

5. See Mara Gay, *Inequality Seen in City Parks*, WALL ST. J., Apr. 23, 2014, <http://online.wsj.com/articles/SB10001424052702303834304579520122652921290>, archived at <http://perma.cc/KY43-LA37>.

6. See ALLIANCE FOR NEW YORK STATE PARKS, *PROTECT THEIR FUTURE: NEW YORK'S STATE PARKS IN CRISIS* (2010), available at <http://www.ptny.org/pdfs/advocacy/parkreport2011.pdf> [hereinafter ALLIANCE FOR PARKS].

2015]

EQUITABLE PARKS FUNDING

637

other neighborhoods. While this paper focuses on examples from New York City, the practices discussed are applicable throughout the State, including state parks that have also suffered from funding shortfalls in the past decade.⁷

II. ALTERNATIVE REVENUE OPTIONS

There is no substitute for adequate funding for parks from the general budget. This paper, however, focuses on five alternative, high-revenue options: (1) zoning incentives, (2) park improvement districts, (3) partnerships with public infrastructure agencies, (4) state public benefit corporations, and (5) existing federal and state park funds that do not rely on new tax revenues. These options are readily permitted by law and are already in limited use. They therefore present the best options for getting more money into parks without wading into the political instability of Albany or Washington, D.C., or confronting the nation's antipathy to new taxes. The paper also briefly addresses eight other revenue strategies that may be useful on a more limited basis.⁸

This paper does not evaluate the legality of private management of public parks. Despite criticism about the legality of private operation of parks, the arrangement is perfectly legal so long as it serves park purposes.⁹ In fact, conservancies operating flagship parks are on the whole successful. Rather than discourage creative, private management models, park advocates

7. See generally ALLIANCE FOR PARKS, *supra* note 6.

8. This paper does not address private philanthropy, which is highly desirable, but an unlikely source of reliable maintenance funds for most parks. The exclusion of private donations from this paper should not discourage park advocates from pursuing private philanthropy in every way possible. The Central Park Conservancy and Friends of the High Line have been very successful in getting tens of millions of dollars in donations in the past few years, which have transformed these corporations and the parks they operate. *E.g.*, Lisa W. Foderaro, *New York Parks In Less Affluent Areas Lack Big Gifts*, N.Y. TIMES, Feb. 17, 2013, http://www.nytimes.com/2013/02/18/nyregion/new-york-parks-in-less-affluent-areas-lack-big-gifts.html?pagewanted=all&_r=0, archived at <http://perma.cc/7TS3-3TVE>.

9. See generally Robert M. Wolff & Mark B. Owens, *A Review of Case Law on Public-Private Cooperative Ventures*, 3 J. LEGAL ASPECTS OF SPORT 16, 18 (1993).

must embrace public-private partnerships if neighborhood parks are to flourish.

III. CITY AND STATE AUTHORITY TO PURSUE ALTERNATIVE REVENUE SOURCES

The New York City Charter provides clear authority to the Commissioner to pursue alternative revenues and public-private partnerships,¹⁰ and the State's highest court has repeatedly affirmed the City's authority to enter into private operation agreements for portions of public parks. For example, in *795 Fifth Ave. Corp. v. City of New York* (1965), the New York Court of Appeals approved a high-profile restaurant concession in Central Park.¹¹ In *Union Square Park Cmty Coal. Inc. v. NYC Dep't of Parks & Recreation* (2014), the New York Court of Appeals approved the creation of a new restaurant in Union Square's historic pavilion.¹² Courts have not yet addressed management agreements that allocate responsibility for an entire park to a private entity like the Central Park Conservancy. It is likely, however, that courts will dismiss these sorts of challenges and allow public-private partnerships so long as they genuinely enhance rather than diminish the public's overall use of a park.¹³

At the state level, the New York State Office of Parks Recreation and Historic Preservation has wide discretion to pursue public-private partnerships under state law.¹⁴ It does so and raises about \$100 million annually, providing over one half of its operating budget.¹⁵ In fact, in 2009 the agency adopted its "Policy on Public/Private Partnerships in New York State Parks

10. NEW YORK CITY, N.Y., CHARTER § 533(a)(10)-(11), (b)(4) (2013).

11. See *795 Fifth Ave. Corp. v. City of New York*, 205 N.E.2d 850, 851 (N.Y.1965).

12. See *Union Square Park Cmty. Coal., Inc. v. N.Y.C. Dep't of Parks & Recreation*, 8 N.E.3d 797, 801 (N.Y. 2014).

13. *Union Square*, 8 N.E.3d at 801 ("Commissioner is vested by law with broad powers for the maintenance and improvement of the city's parks' and that judicial interference would be 'justified only when a total lack of power is shown") (internal citations and quotations omitted).

14. N.Y. PARKS REC. & HIST. PRESERV. LAW § 3.09(6) (McKinney 2014).

15. See ALLIANCE FOR PARKS, *supra* note 6, at 5.

2015]

EQUITABLE PARKS FUNDING

639

and Historic Sites” to promote public-private revenue streams.¹⁶ New York City lacks a similar policy, but should develop one.

IV. ZONING INCENTIVES

Zoning incentives provide the most promise for raising significant funds for parks by allowing municipalities to tap directly into the real estate industry for capital and maintenance funds. State law authorizes municipalities to craft a variety of zoning incentives to preserve open space, and two are worth discussing in the context of maintaining existing parks.¹⁷ The first would involve transfers of development rights (TDR), whereby a municipality zones parks and sells the resulting development rights in exchange for payments into an endowment for a particular park.¹⁸ The second would involve incentive zoning whereby developers would pay into endowments for particular parks in exchange for the right to build bigger buildings nearby.¹⁹ Both tools are already in limited use in the New York City for preservation of landmarks and creation of affordable housing.

A. TDR

New York law allows municipalities to create zoning programs to transfer development rights from one site to another to advance a wide range of public purposes.²⁰ They include efforts 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

16. See NEW YORK STATE OFFICE OF PARKS, RECREATION AND HISTORIC PRESERVATION, POLICY ON PUBLIC/PRIVATE PARTNERSHIPS IN NEW YORK STATE PARKS AND HISTORIC SITES (2009) (signed by Commissioner Carol Ash on March 12, 2009).

17. N.Y. GEN. CITY LAW § 81-d (McKinney 2014); N.Y. TOWN LAW § 261-b (McKinney 2014).

18. See *infra* Part IV.A.

19. See *infra* Part IV.B.

20. N.Y. GEN. CITY LAW § 20-f.

640 *EQUITABLE PARK SYSTEM IN NEW YORK* [Vol. 32]

valuable natural resources.”²¹ The programs are simple: developers can acquire development rights from one site and use them on another. The sending site loses those development rights forever, but the site’s owner receives market-rate compensation.²² State law requires municipalities to implement TDR programs in accordance with a “well-considered plan” and subject them to environmental review under the State Environmental Quality Review Act—requirements that apply to all zoning.²³ A successful TDR program must therefore designate suitable receiving sites that (1) can accommodate additional bulk and (2) that are likely to attract the interest of developers.²⁴

TDR programs are unquestionably suitable for preserving unprotected land in private hands. For example, Suffolk County has a very successful program whereby developers can “buy” development rights from owners of sensitive Pine Barren habitat and use the rights in designated receiving zones.²⁵ The owners receive compensation for giving up development rights on their land, and growth is directed to locations near existing transit, schools and other amenities. Developers can build denser developments in receiving zones than would otherwise be allowed.²⁶

21. *Id.* § 20-f(2).

22. *Id.* § 20-f(2)(e).

23. *Id.* § 20-f(2)(a).

24. N.Y. GEN. CITY LAW § 20-f(2)(a). The law adds one additional environmental review requirement beyond that normally required by SEQRA—evaluation of the impact of TDR on potential development of low and moderate income housing in sending districts. *Id.* § 20-f(2)(f). The law’s concern is that by reducing the allowable density in preservation zones, future construction of low and moderate income housing will end. *See id.*

25. CENTRAL PINE BARRENS JOINT PLANNING & POLICY COMM’N, THE PINE BARRENS CREDIT: TRANSFERABLE DEVELOPMENT RIGHTS IN SUFFOLK COUNTY, NY (2010), available at http://pb.state.ny.us/pbc/pbc_overview.pdf.

26. New York State created the Central Pine Barrens Joint Planning and Policy Commission in 1993 to oversee the creation of the TDR program aimed at protecting the sensitive Pine Barrens region of Suffolk County, New York. *See* N.Y. ENVTL. CONSERVATION LAW § 57-0119 (McKinney 2014). Amendments followed to the zoning codes of the towns of Brookhaven, Riverhead, and Southampton to implement the restrictions and TDR program. Information about the Commission’s work can be found at New York State’s Central Pine Barrens, <http://www.pb.state.ny.us/>, archived at <http://perma.cc/6JQQ-2TJV>.

There is a limited track record for using TDR programs to fund existing parks. New York City has a limited TDR program intended to benefit an existing open space, the High Line, a 1.45 mile-long park constructed on an elevated former freight rail line.²⁷ Under the 2005 Special West Chelsea District regulations, owners of development sites under the High Line can buy 1.0 FAR (floor area ratio) of development rights by making a fifty dollar per square foot contribution to the High Line Improvement Fund.²⁸ The hybrid TDR/incentive scheme is limited: the transferred floor area is restricted to commercial development and can only be used after the site owner has sold its existing development rights to eligible receiving lots in the Special West Chelsea District.²⁹ Developers have seldom used the program to date.³⁰ The Hudson River Park Trust is also exploring a more traditional TDR program to sell development rights from its decaying Pier 40 to potential development sites on the other side of an adjacent highway.³¹

Except for the limited TDR program for the High Line, New York municipalities have not used the programs to generate funds for existing parks or protected open spaces. Admittedly, there are two complications to be overcome. First, state law requires sending zones to thereafter be protected through a conservation easement, which is a preservation tool generally

27. CITY PLANNING COMM'N, CITY OF NEW YORK, ZONING RESOLUTION § 98-30, 31 (2015), available at <http://www.nyc.gov/html/dcp/pdf/zone/art09c08.pdf>, archived at <http://perma.cc/P42K-EXVS>.

28. *Id.* § 98-35.

29. *Id.* § 98-33.

30. See, e.g., Eliot Brown, *Developers Want Easier Access to High Line Air Rights; But Should City Fix Something that Doesn't Look Broken?*, N.Y. OBSERVER, Feb. 13, 2008, <http://observer.com/2008/02/developers-want-easier-access-to-high-line-air-rights-but-should-city-fix-something-that-doesnt-look-broken/>, archived at <http://perma.cc/DNZ6-2FDU> (developers' desire for easier access may be a factor leading to the infrequent use of the fund).

31. Charles V. Bagli, *Possible Deal May Bring Money to Repair Pier 40 in Manhattan*, N.Y. TIMES, May 15, 2014, http://www.nytimes.com/2014/05/16/nyregion/possible-deal-may-bring-money-to-repair-pier-40-in-manhattan.html?_r=0, archived at <http://perma.cc/3NBC-MDPM>.

642 *EQUITABLE PARK SYSTEM IN NEW YORK* [Vol. 32]

used on privately owned land.³² Second, most city parks are not zoned and thus do not have any development rights to sell.³³

The first problem is resolvable because parks are already protected under various state and city laws, which provide far stronger protections than a conservation easement.³⁴ Moreover, there appears to be no bar to creating a conservation easement to protect existing parkland, supplementing the protections of the public trust doctrine.³⁵ Municipalities regularly give or sell easements to utility companies for gas and electric lines through parks.³⁶

The second problem is resolvable because the municipalities can zone parks. In fact, some New York City parks are zoned. For example:

- Governors Island is zoned R3-2 (0.5 FAR))
- Forthcoming Pier 42 Park is zoned M1-4 (2.0 FAR)
- Portions of Lemon Creek Park are zoned C3 (0.5 FAR)
- Mount Loretto State Preserve is zoned R1-1 (0.5 FAR)
- Shooters Island is zoned M3-1 (2.0 FAR)
- Brooklyn Bridge Park is zoned M2-1 (2.0 FAR)

32. N.Y. ENVTL. CONSERV. LAW § 49-0303 (McKinney 2014) (defining conservation easements allowable by law).

33. New York City zones land as residential, commercial or manufacturing, which provides the land with development rights and restrictions. Most parks, especially those that were parks before the 1961 zoning resolution, have no zoning designation.

34. *See* Friends of Van Cortlandt Park v. City of New York, 750 N.E.2d 1050, 1055 (N.Y. 2001) (Public Trust Doctrine, reflected in case law and statutes, requires parks' use for non-parks-related purposes to have approval of the state legislature); N.Y. GEN. CITY LAW § 20(2) (McKinney 2014).

35. To date, this type of easement is not precluded by legislation or case law. *See* N.Y. ENVTL. CONSERV. LAW § 49-0303 (McKinney 2014).

36. *See* N.Y. STATE OFFICE OF PARKS, RECREATION & HISTORIC PRES., HANDBOOK ON THE ALIENATION AND CONVERSION OF MUNICIPAL PARKLAND IN NEW YORK 28-29 (2012), available at <http://parks.ny.gov/publications/documents/AlienationHandbook.pdf> [hereinafter HANDBOOK]. Unless it qualifies as de minimis and thus exempt from the public trust doctrine, the State Legislature must authorize the grant of an easement over parkland for nonpark purposes, including utilities. *See id.* at 7.

2015]

EQUITABLE PARKS FUNDING

643

- Hudson River Park is zoned M2-3 (2.0 FAR)³⁷

These zoning classifications are relics of the prior uses of these parks. But an innovative TDR zoning scheme could place zoning classifications on existing parkland in order to create development rights. There are potentially billions of dollars in development rights at stake.

B. Incentive Zoning in New York City

Incentive zoning schemes avoid the awkwardness of the TDR option described above. New York State law allows municipalities to create zoning “incentives or bonuses” to advance physical, cultural or social policies.³⁸ Developers that agree to pay into a public improvement fund or construct public amenities may earn the right to bypass various zoning limitations. For example, New York City has an “inclusionary housing” bonus that allows 20% more floor area in exchange for constructing affordable housing in certain high-density residential zoning districts.³⁹ There is no bar to creating a similar scheme for a developer’s making financing contributions to the maintenance of nearby parkland in return for added bulk on their buildings.⁴⁰

As with any zoning scheme, incentive zoning must be developed in accordance with a well-considered plan and subject to an environmental review.⁴¹ The municipality must also consider the impact of incentive zoning on affordable housing, as it would with TDR.⁴² Structured properly, zoning incentives for park funding should increase the amount of affordable housing while simultaneously benefitting parks, thus advancing Mayor

37. To find zoning maps for each park listed above, see CITY OF NEW YORK, DEP’T OF CITY PLANNING, *Zoning Maps* (Jan. 22, 2015), http://www.nyc.gov/html/dcp/html/zone/zh_zmactable.shtml, *archived at* <http://perma.cc/DMJ6-GRTG>.

38. N.Y. GEN. CITY LAW § 81-d(1)(c) (McKinney 2014).

39. See *generally* CITY PLANNING COMM’N, CITY OF NEW YORK, ZONING RESOLUTION art. II ch. 3 §§ 23-90, 23-952 (2013).

40. An incentive zoning scheme can require developers to provide specific capital improvements for the public (e.g., transit improvements) or provide payments for specific civic purposes. N.Y. GEN. CITY LAW § 81-d(3)(h).

41. *Id.* § 81-d(3)(d).

42. *Id.* § 81-d(3)(g).

644 *EQUITABLE PARK SYSTEM IN NEW YORK* [Vol. 32]

Bill de Blasio's goal of creating or preserving 200,000 units of affordable housing.⁴³

V. INFRASTRUCTURE AND PUBLIC-PUBLIC PARTNERSHIPS

Direct state and federal funding for parks is likely to be very constrained over the next decade.⁴⁴ It appears likely, however, that there will be money available for (1) stormwater control and climate resiliency, (2) transportation, (3) affordable housing, and (4) public health.⁴⁵ NYC Parks and OPRHP need to strategize about creating partnerships with public agencies receiving these funds to benefit parks. Barring these public-public partnerships, there is little federal and state funding available directly for parks.

A. Climate Change and Stormwater Management

Hurricane Sandy had a devastating impact on coastal parks. The City is using federal funds to create more resilient coastlines, particularly on the Rockaway Peninsula and Staten Island.⁴⁶ Congress allocated over \$60 billion to Hurricane Sandy relief in the tri-state region including New York City.⁴⁷ HUD, which received \$16 billion in Community Development Block Grants (CDBGs), has already allocated \$3.2 billion directly to New York

43. BILL DE BLASIO & ALICIA GLEN, CITY OF NEW YORK, HOUSING NEW YORK, A FIVE-BOROUGH TEN-YEAR PLAN 5 (2014), *available at* http://www.nyc.gov/html/housing/assets/downloads/pdf/housing_plan.pdf.

44. *See infra* Part VIII.

45. *See generally infra* Part VIII.

46. The Mayor's Office of Recovery and Resiliency allows resiliency projects to be tracked by location. *See* OFFICE OF RECOVERY AND RESILIENCY, CITY OF NEW YORK, PLANYC PROGRESS REPORT 2014 (2014), *available at* http://www.nyc.gov/html/planyc/downloads/pdf/140422_PlaNYCP-Report_FINAL_Web.pdf.

47. Disaster Relief Appropriations Act, 2013, Pub. L. No. 113-2, 127 Stat. 4, 36 (2013) (allocating billions to various agencies, including \$16 billion to the U.S. Department of Housing and Urban Development for Community Development Block Grants); *see also* Raymond Hernandez, *\$51 Billion in Aid for Hurricane Victims*, N.Y. TIMES (Jan. 28, 2013), http://www.nytimes.com/2013/01/29/nyregion/congress-gives-final-approval-to-hurricane-sandy-aid.html?_r=0, *archived at* <http://perma.cc/P9ZW-PTVE>.

2015]

EQUITABLE PARKS FUNDING

645

City.⁴⁸ The State received even more monies from the federal government to be used through areas impacted by Sandy, including the City.

The City and State are vigorously planning to use these funds for rebuilding and improving its coastal parks.⁴⁹ They are up against a clock: Congress requires the relief funds to be expended by September 30, 2017,⁵⁰ and HUD requires its funds to be expended within two years of allocation.⁵¹ The very complicated coastal barriers, dunes, reefs, rehabilitated wetlands and other ecosystem infrastructure created with these disaster relief funds can be built quickly, but will require maintenance throughout their usable life. HUD regulations generally limit use of CDBG funds to initial improvements, not long-term maintenance.⁵² However, it is possible that a fund or endowment could be established with CDBG monies for future capital improvements to storm-related infrastructure in parks.⁵³ There are compelling policy reasons to do so, as long-term maintenance

48. Allocations, Common Application, Waivers, and Alternative Requirements for Grantees Receiving Community Development Block Grant (CDBG) Disaster Recovery Funds in Response to Hurricane Sandy, 78 Fed. Reg. 14,329, (Mar. 5, 2013); Second Allocation, Waivers, and Alternative Requirements for Grantees Receiving Community Development Block Grant (CDBG) Disaster Recovery Funds in Response to Hurricane Sandy, 78 Fed. Reg. 69,104, (Nov. 18, 2013).

49. See generally CITY OF NEW YORK, A STRONGER, MORE RESILIENT NEW YORK ch. 21, at 426-27 (2013), available at http://www.nyc.gov/html/sirr/downloads/pdf/final_report/Ch21_Appendix_Initiatives_FINAL_singles.pdf.

50. 127 Stat. at 36; Allocations, Common Application, Waivers, and Alternative Requirements for Grantees Receiving Community Development Block Grant (CDBG) Disaster Recovery Funds in Response to Hurricane Sandy, 78 Fed. Reg. 14,329, 14,332.

51. Allocations, Common Application, Waivers, and Alternative Requirements for Grantees Receiving Community Development Block Grant (CDBG) Disaster Recovery Funds in Response to Hurricane Sandy, 78 Fed. Reg. 14,329, 14,332.

52. See generally 24 CFR § 570.201 (2014) (lists eligible activities); *Categories of Eligible Activities*, in COMMUNITY DEVELOPMENT BLOCK GRANT PROGRAM (2001), available at http://portal.hud.gov/hudportal/documents/huddoc?id=DOC_17133.pdf, archived at <http://perma.cc/JTP7-EEQS>. HUD guidance explains that operation and maintenance is generally not permitted, but further explains that certain operating and maintenance-type activities necessary to arrest imminent dangers are allowed. *Id.* at 2-30, 2-88; see also 24 C.F.R. § 570.207(b)(2).

53. See generally *Categories of Eligible Activities*, *supra* note 52.

646 *EQUITABLE PARK SYSTEM IN NEW YORK* [Vol. 32]

would reduce or eliminate the need for more federal funding after future disasters. A specific determination should be sought from HUD on this topic.

B. Transportation

The U.S. Department of Transportation is another viable source of funding for transportation projects involving parks. Federal transportation funds have been available to parks through multi-year funding bills like the Intermodal Surface Transportation and Efficiency Act (ISTEA) of 1991, the Transportation Enhancement Act for the 21st Century (TEA 21) of 1998, and the Moving Ahead for Progress in the 21st Century Act (MAP-21) of 2012.⁵⁴ Eligible projects have included biking, hiking, and pedestrian improvement projects in parks.⁵⁵ New York State received at least \$67 million in 2014 for these sorts of projects.⁵⁶

These funds are dwarfed by the federal monies made available for traditional highway work. New York State, for example, received \$1.3 billion from the Federal Transportation Administration for fiscal year 2014.⁵⁷ It could be possible to tap traditional transportation funds for maintenance and restoration of parks immediately adjacent to highways. Many flagship parks are adjacent to or bisected by highways (sometimes by design) that damage the nearby open space and increase the costs of their maintenance, cause polluted run-off to water bodies, and create pedestrian and wildlife barriers. Conversely, those parks serve

54. Moving Ahead for Progress in the 21st Century Act, Pub. L. No. 112-141, 126 Stat. 405 (2012); Transportation Equity Act for the 21st Century, Pub. L. No. 105-178, 112 Stat. 107 (1998); Intermodal Surface Transportation Efficiency Act of 1991, Pub. L. No. 102-240, 105 Stat. 1914 (1991).

55. 23 U.S.C. § 101(a)(30)(B)(ii) (2012).

56. Press Release, Andrew Cuomo, N.Y.S. Governor, Governor Cuomo Announces \$67 Million in Funding for Bicycle, Pedestrian and Multi-Use Path Enhancement Projects (January 15, 2014), *available at* <http://www.governor.ny.gov/news/governor-cuomo-announces-67-million-funding-bicycle-pedestrian-and-multi-use-path-enhancement>, *archived at* <http://perma.cc/85HX-48MH>.

57. *Funding by State*, U.S. DEPT OF TRANSP., http://www.fta.dot.gov/12853_88.html (last visited Apr. 30, 2015), *archived at* <http://perma.cc/V4ZY-9Q4Z> (providing detailed analysis of FTA's annual appropriations to states by program).

essential transportation purposes by serving as a buffer between highways and residential communities. Joint parks-transportation planning should recognize this relationship and tap into federal funds for regular restoration of parkland adjacent to highways.

C. Ecosystem Services

Many of the ecosystem services that parks provide are hard to quantify and monetize. For example, parks filter air pollution, cool temperatures in the urban heat island, and provide wildlife habitat. But at least one habitat providing ecosystem services—wetlands on NYC Parks property—can be monetized to the benefit of parks through the creation of wetlands mitigation banks.⁵⁸

Under the U.S. Clean Water Act and New York Tidal Wetlands Act, the destruction of tidal wetlands requires a permit from the U.S. Army Corps of Engineers and N.Y. State Department of Environmental Conservation.⁵⁹ Although not required by the statutes, these agencies generally require mitigation as a condition for issuing a permit that allows destruction of wetlands.⁶⁰ Mitigation usually takes the form of permanent protection of wetlands or restoration of degraded wetlands. Developers and some government agencies, such as the Port Authority of New York and New Jersey, often seek to buy mitigation credits, but there are few such banks supplying credits in the New York metropolitan area.

58. JOSH FOSTER ET AL., CTR FOR CLEAN AIR POL'Y, THE VALUE OF GREEN INFRASTRUCTURE FOR URBAN CLIMATE ADAPTATION 3 (2011), available at http://ccap.org/assets/The-Value-of-Green-Infrastructure-for-Urban-Climate-Adaptation_CCAP-Feb-2011.pdf, archived at <http://perma.cc/NQR4-RVLW>.

59. 33 U.S.C. § 1344 (2012) (requiring section 404 for permits for discharges of dredge or fill material into navigable waters). See generally N.Y. ENVTL. CONSERV. LAW § 25-0401 (McKinney 2014) (broadly regulating activities impacting tidal wetlands).

60. 33 C.F.R. § 332.1 (a)(1) (2014) (“The purpose of this part is to establish standards and criteria for the use of all types of compensatory mitigation, including on-site and off-site permittee-responsible mitigation, mitigation banks, and in-lieu fee mitigation to offset unavoidable impacts to waters of the United States authorized through the issuance of Department of the Army (DA) permits pursuant to section 404 of the Clean Water Act.”).

648 *EQUITABLE PARK SYSTEM IN NEW YORK* [Vol. 32]

Restoring degraded wetlands is incredibly expensive. A 2012 City wetlands report therefore recommended creating a privately-operated wetlands mitigation bank operated on city property. It states:

The City will develop a mitigation banking or in-lieu fee mechanism for public projects. These are strategies for undertaking restoration projects that can then provide “credits” to multiple projects that require mitigation, at one or more locations carefully chosen and approved in advance by regulators. Both mechanisms provide numerous benefits over the current system by consolidating funding into larger projects that produce economies and ecologies of scale.⁶¹

In late 2013, the New York City Economic Development issued a request for expressions of interest (RFEI) for a private partner to develop a wetlands mitigation bank on sixty-eight acres near Saw Mill Creek on Staten Island.⁶² The creek flows into the Arthur Kill and has been degraded by highways, landfills, and pollution. The private partner would, presumably, fund all or most of the cost of restoring the wetlands in return for the right to sell those credits to developers and agencies that need Clean Water Act section 404 permits from the U.S. Army Corp of Engineers. The City reportedly received a poor response to the RFEI. It should try again in light of the successful wetlands mitigation banks being developed in other states.

Given the costs that a private partner would incur to restore wetlands in order to create saleable credits, it is very unlikely that the City or State would profit from these programs. It would, however, find a private source of revenue for restoring the hundreds of degraded wetlands in parks. The City and State may also be able to cooperate with the National Park Service for the creation of such a program in Gateway National Recreation Area, which includes almost 10,000 acres of federally owned wetlands

61. N.Y.C. WETLANDS STRATEGY, *supra* note 3.

62. Press Release, N.Y.C. Econ. Dev. Corp., NYCEDC Releases Request for Expressions of Interest to Establish First Wetlands Bank in New York City (Dec. 20, 2013), *available at* <http://www.nycedc.com/press-release/nycedc-releases-request-expressions-interest-establish-first-wetlands-bank-new-york>, *archived at* <http://perma.cc/MR9R-8RVQ>.

2015]

EQUITABLE PARKS FUNDING

649

that are vitally important to buffering Brooklyn, Queens, and Staten Island from coastal storms and sea level rise.

VI. STATE AUTHORITIES AND PUBLIC BENEFIT CORPORATIONS

New state-created entities might be used to restore existing parks. State entities already play a major role in the City's most important parks. They include state-controlled public benefit corporations like the Battery Park City Authority, Hudson River Park Trust, and Roosevelt Island Operating Corporation and city-controlled (but state-created) public benefit corporations like the Brooklyn Bridge Park Development Corporation. Another major park on Governors Island was originally overseen by the state-created Governors Island Planning and Education Corporation, which was replaced by the city-created Trust for Governors Island.⁶³

Because the state corporations can override local land-use controls,⁶⁴ do not pay local property taxes,⁶⁵ and are not subject to local politics, they can be nimble tools for turning around deteriorated neighborhoods and their parks. As noted above, these state-city partnerships are already in use for parks in New York City. The state parks mentioned above face daunting and unresolved capital costs, yet they are generally well maintained with a steady revenue stream from adjacent real estate.⁶⁶

63. The Urban Development Corporation (d/b/a Empire State Development Corporation) has the authority to create subsidiaries and is the likely entity to oversee the creation of new state public benefit corporations to address the goals outlined in this paper. For example, the Urban Development Corporation created the Moynihan Station Development Corporation in 1995 to oversee the conversion of the U.S. Post Office's Farley Building in Manhattan into a new commuter rail station. Phase 1 of the project, which will create commuter access to Amtrak and other improvements, is underway. *Moynihan Station Dev. Corp.: About the Project*, EMPIRE STATE DEVELOPMENT (Mar. 4, 2015, 11:27 AM), http://esd.ny.gov/Subsidiaries_Projects/MSDC/MSDC.html, archived at <http://perma.cc/K2C5-SEAF>.

64. See *In re Cnty. of Monroe*, 530 N.E.2d 202, 204-05 (N.Y. 1988).

65. N.Y. REAL PROP. TAX LAW § 404 (West 2014).

66. N.Y. UNCONSOL. LAW § 6388 (McKinney 2014); N.Y. PUB. AUTH. LAW § 1974 (McKinney 2014) (powers); *id.* § 1974-b. These laws provide the Roosevelt Island Operating Corporation and the Battery Park City Authority with the power to collect rents on the land they control in NYC. N.Y. UNCONSOL. LAW §

650 *EQUITABLE PARK SYSTEM IN NEW YORK* [Vol. 32]

Moreover, the state entities are held directly accountable for the conditions of the public amenities they operate. The result is a higher level of care and maintenance than is provided to most city-run parks.

The creation of a new state entity to operate parks in a distressed community might work as follows. The city would identify a park or group of nearby parks that are 1) in need and 2) near substantial development sites that are under public control or could be acquired through eminent domain. The Urban Development Corporation, doing business as the Empire State Development Corporation, is the state agency responsible with the most logical role to play because of its economic development mission and ability to create subsidiaries with all of its statutory powers.⁶⁷ It would create a new subsidiary with the mission to acquire and develop the land, carry out public improvements and maintain existing parks.⁶⁸ To attract developers, the state entity would fund some initial public improvements with state and city appropriations and bond issuances. It would then offer publicly owned or controlled land to developers at a reduced cost. Rather than pay property taxes, developers of this public land would make “payments in lieu of taxes” directly to the state entity to be used exclusively for repaying bonds, maintaining public improvements and restoring parks.⁶⁹ This method of development and revenue generation is already used by the state entities mentioned above.

The technique could be paired with affordable housing requirements. For example, the City and Urban Development Corporation partnered in 1968 to develop Roosevelt Island with parks, streets, new schools, and thousands of units of affordable

6388; N.Y. PUB. AUTH. LAW § 1974. In the case of BPCA, the statute is specific in saying that property owners do not pay real estate taxes to NYC but rather give those revenues to the BPCA. N.Y. PUB. AUTH. LAW § 1974. Roosevelt Island Operating Corporation and BPCA are thus able to generate their own revenues and use them to maintain streets, sidewalks, and parks.

67. Urban Development Corporation Act, N.Y. UNCONSOL. LAW §§ 6255(8), 6262 (McKinney 2014).

68. *See generally* N.Y. UNCONSOL. LAW §§ 6255(8), 6262 (the Urban Development Corporation is empowered to create subsidiaries that have all of the parent corporation’s powers).

69. To bypass local property taxes, the state entity must own or control the land.

housing.⁷⁰ The Roosevelt Island Operating Corporation (RIOCC) enforces affordable housing requirements through its ground leases with private developers, and has thus created thousands of affordable housing units.⁷¹ With the revenue from the leases, the corporation maintains various public services on the Island, including parks.⁷² Without this state-city partnership, Roosevelt Island's excellent parks would otherwise not exist. Besides having greater budget authority, the state public benefit corporations like RIOCC also have greater planning autonomy, eminent domain authority, and the ability to override local land-use controls.⁷³

VII. BIDS AND PIDS

New York State law allows any municipality to establish a business improvement district (hereinafter BID) to restore or promote business activity by building and maintaining improvements, including parks, landscaping, and transportation.⁷⁴ Under the BID law, municipalities can create nonprofit corporations to receive a supplement property tax, sometimes called an "assessment," that is exclusively used for the public services outlined above.⁷⁵ New York City has over sixty BIDs that largely focus on maintenance of streets, sidewalks, and public plazas.⁷⁶

70. See N.Y. UNCONSOL. LAW § 6292 (McKinney 2014). The Urban Development Corporation and New York City entered into a 99 year lease for Roosevelt Island that required the Urban Development Corporation to carry out a "general development plan" for affordable housing, transit, parks, and other improvements. In 1984, the Urban Development Corporation created a subsidiary, the Roosevelt Island Operating Corporation (RIOCC), to continue its duties on the Island. See N.Y. UNCONSOL. LAW § 6385 (McKinney 2014).

71. Alan Finder, *Roosevelt Island: A 'Wonderful' Experiment Still Building*, N.Y. TIMES, Apr. 26, 1990, <http://www.nytimes.com/1990/04/26/nyregion/roosevelt-island-a-wonderful-experiment-still-building.html>, archived at <http://perma.cc/7TWD-WTNE>.

72. See N.Y. UNCONSOL. LAW § 6388 (McKinney 2014); N.Y. PUB. AUTH. LAW § 1974 (McKinney 2014) (powers); see also *id.* § 1974-b.

73. N.Y. UNCONSOL. LAW § 6389(3) (McKinney 2014).

74. N.Y. GEN. MUN. LAW § 980-c (McKinney 2014).

75. *Id.* § 980-c(a).

76. N.Y.C. SMALL BUS. SERVS., STARTING A BUSINESS IMPROVEMENT DISTRICT A STEP-BY-STEP GUIDE 2 (2015), available at http://www.nyc.gov/html/sbs/downloads/pdf/bid_guide_complete.pdf, archived at <http://perma.cc/8GNX-T4X3>.

652 *EQUITABLE PARK SYSTEM IN NEW YORK* [Vol. 32]

BIDs have the potential to raise millions of dollars for the maintenance of parks with few adverse effects on nearby property owners. In fact, BIDs are specifically geared towards maintenance and are, therefore, uniquely suited to addressing the maintenance shortfall plaguing urban parks.⁷⁷ In New York City there are two BIDs operating as Park Improvement Districts (PIDs). The Bryant Park Corporation collects about \$1 million annually from nearby property owners; this \$1 million makes up only a small portion of the Bryant Park Corporation's annual \$12 million budget for Bryant Park.⁷⁸ The Union Square Partnership raises about \$1.5 million annually.⁷⁹ Both districts are narrowly drawn to include only large commercial properties very close to the parks.

There is nothing in New York State law, however, that prohibits the creation of much larger districts that can raise millions annually for the parks they surround. Four misconceptions have probably limited their use for parks to date.

- **Misconception 1:** Residents must approve the creation of the district.

Partially incorrect: In New York State, the law requires approval of a majority of the owners in the proposed district. In New York City, the City Council votes on the creation of a district subject to review and recommendations by community boards and the City Planning Commission. Only if at least fifty-one percent of property owners file petitions in opposition does state or city law prohibit the council from establishing the district.⁸⁰ In practice, the Council seeks community consensus.

77. N.Y. GEN. MUN. LAW § 980-a(4).

78. BRYANT PARK CORP. & BRYANT PARK MGMT. CORP. & KPMG LLP, CONSOLIDATED FINANCIAL STATEMENTS 3-4 (2013), *available at* http://www.bryantpark.org/static/pdfs/reports/Bryant_Park_FY_2013.pdf, *archived at* <http://perma.cc/2R5J-FQJQ>.

79. N.Y.C. DEP'T OF SMALL BUS. SERVS., NYC BUSINESS IMPROVEMENT DISTRICT PROFILES 2008-2009 11, *available at* <http://www.nyc.gov/html/sbs/downloads/pdf/BID%20book%20final.pdf>, *archived at* <http://perma.cc/E24F-8GLJ> (listing income from the assessment of \$1,439,000).

80. NEW YORK CITY, N.Y., CODE § 25-406(b) (2014) (enacted pursuant to N.Y. GEN. MUN. LAW § 980-d(a)).

2015]

EQUITABLE PARKS FUNDING

653

- **Misconception 2:** Residential properties cannot be taxed.

Incorrect: The BID law anticipates that both commercial and residential property owners will be taxed.⁸¹

- **Misconception 3:** BIDs cannot primarily benefit parks.

Partially incorrect: The law calls for the creation and maintenance of improvements to “restore or promote business activity in the district.”⁸² Given the clear link between well-maintained parks and property values, this link is easy to establish. Moreover, park concessions already generate tens of millions of dollars for the city and state.

- **Misconception 4:** BIDs cannot raise enough money to meaningfully maintain parks.

Incorrect: BIDS can raise money to completely transform the maintenance of large parks. For example, at least 40,000 people live within census tracts immediately bordering Van Cortlandt Park.⁸³ Assuming an average household size of 2.6 persons, there are about 15,000 housing units near the park. With an average supplemental property tax per household of \$100, a PID for Van Cortlandt Park would raise \$1.5 million annually. This is enough to hire two dozen new staff members dedicated solely to maintenance of this park.

Remarkably, BIDs can also include cooperation by two municipalities. The law would allow, for example, New York City and Yonkers to jointly fund and operate Van Cortlandt Park for

81. *Id.* § 25-414(b) (enacted pursuant to N.Y. GEN. MUN. LAW § 980-n(d)). Neither the state nor city laws contain any provision limiting taxation to commercial properties. In fact, the laws require the board of directors of the district management association to include residents.

82. NEW YORK CITY, N.Y., CODE § 25-404(a) (2014) (enacted pursuant to N.Y. GEN. MUN. LAW § 980-c(a)).

83. *N.Y.C. Census FactFinder*, N.Y.C. DEPT OF CITY PLANNING, <http://maps.nyc.gov/census/#>, archived at <http://perma.cc/CH8C-KBJC>.

654 *EQUITABLE PARK SYSTEM IN NEW YORK* [Vol. 32]

the benefit of both municipalities.⁸⁴ The creation of BIDs for existing parks will not be easy, as shown by the failed proposals from the Hudson River Park Trust and Friends of the High Line.⁸⁵ For large, flagship parks, however, these districts are the best alternative revenue source for maintenance that does not require new legislation.

Some park advocates propose a citywide park tax as an alternative to park-specific PIDs. Chicago has had a Chicago Park Tax District since 1934.⁸⁶ It is operated by a distinct municipal corporation that imposes property taxes separately from the city, the city's school district, and the county.⁸⁷ It is entirely responsible for funding the city's parks, comprising 8,000 acres in 585 parks.⁸⁸ Most of its revenues come from the property tax with the rest coming from bonds, permit fees, and concession fees.⁸⁹ The system works well and is commended by independent authorities. For example, the Trust for Public Land gives Chicago a decent rating in its online "Park Score" system.⁹⁰

Seattle voters approved the creation of a city-wide park district in the August 2014 elections.⁹¹ The system will work a little differently from Chicago's district, as the City of Seattle will

84. N.Y. GEN. MUN. LAW § 980, 980-n(a) (McKinney 2014).

85. See generally Annie Karni, *Advocates Eye Levy to Save Hudson River Park*, CRAIN'S N.Y. BUS., June 2, 2013, http://www.craainsnewyork.com/article/20130602/HOSPITALITY_TOURISM/306029987/advocates-eye-levy-to-save-hudson-river-park, archived at <http://perma.cc/E462-64LB>; Dana Rubenstein, *Special Tax Sought to Fund Hudson River Park*, WALL ST. J., Mar. 14, 2011, <http://online.wsj.com/articles/SB10001424052748703555404576195520506542928#livefyre-comment>, archived at <http://perma.cc/T4H7-LJ3N>.

86. *History*, CHICAGO PARK DIST., <http://www.chicagoparkdistrict.com/about-us/history/>, archived at <http://perma.cc/4YFU-4L93>.

87. See CHICAGO PARK DIST., 2015 BUDGET SUMMARY 28-29 (2015), available at http://www.chicagoparkdistrict.com/assets/1/23/2015_Budget_Summary_-_Adopted_Budget_12.12.14_-_Web1.pdf, archived at <https://perma.cc/E34C-DPHH?type=pdf> [hereinafter 2015 BUDGET SUMMARY].

88. CHICAGO PARK DIST., *supra* note 86.

89. 2015 BUDGET SUMMARY, *supra* note 87, at 5.

90. *City Profiles*, PARKSCORE, <http://parkscore.tpl.org/city.php?city=Chicago> (last visited Mar. 4, 2015), archived at <http://perma.cc/G8M5-6EFF>.

91. *City of Seattle Proposition No. 1 Seattle Park District*, KING COUNTY ELECTIONS, <https://electionsdata.kingcounty.gov/2014/election-results-aug/two/Ballot%20measures/City%20of%20Seattle%20Proposition%20No.%201%20Seattle%20Park%20District> (last updated Feb. 24, 2014), archived at <https://perma.cc/ZT7B-FC7H>.

2015]

EQUITABLE PARKS FUNDING

655

continue to fund parks at pre-existing levels from the general budget. The Seattle Park District will provide supplemental revenue through a new property tax of \$0.33 per \$1,000 of assessed value, which translates to about \$149 annually for a \$450,000 home.⁹² It is expected to raise \$47.9 million per year.⁹³

A city-wide park tax district would be challenging in New York. First, like any new tax, the municipality would require approval of the New York State Legislature, which is currently hostile to the creation of any new tax. Second, to actually have net benefit for parks, the municipality would need to commit to maintain current levels of budget support. Third, community support for a new general tax is likely to be very weak. The existing BID law is preferable because it has the potential to create real community buy-in: it would be a small new tax structured to directly benefit those paying it.

VIII. DEDICATED PARK FUNDS

One of the biggest lost opportunities for park funding is the State's annual failure to finance the Environmental Protection Fund (EPF).⁹⁴ The State Legislature created the fund in 1993 to pay for solid waste management, parks, historic preservation and open space.⁹⁵ It is funded almost entirely through the State's real estate transfer tax, which generates over \$700 million per year.⁹⁶

92. SEATTLE, WASH., ORDINANCE 124467 (2014), *available at* <http://clerk.ci.seattle.wa.us/~scripts/nph-brs.exe?s3=&s4=124467&s5=&s1=&s2=&S6=&Sect4=AND&l=0&Sect2=THESON&Sect3=PLURON&Sect5=CBORY&Sect6=HITOFF&d=ORDF&p=1&u=%2F~public%2Fcbor1.htm&r=1&f=G#hb>, *archived at* <http://perma.cc/6ZT4-LKEJ>.

93. *Id.* For more information about the Seattle Park District, visit the King County board of elections webpage. KING COUNTY ELECTIONS, <http://kingcounty.gov/elections/election-info/2015/201502.aspx>, *archived at* <http://perma.cc/589A-XH2V> (last visited Mar. 4, 2015).

94. *See generally* WE LOVE NEW YORK, <http://www.keepprotectingny.com>, *archived at* <http://perma.cc/595H-3J4L> (last visited Mar. 4, 2014) (stating that a statewide coalition of environmental organizations, is advocating for greater EPF funding).

95. N.Y. STATE FIN. LAW § 92-s (McKinney 2013).

96. *See generally* N.Y. TAX LAW § 1402 (McKinney 2014). *See also* N.Y. STATE DEP'T OF TAXATION AND FINANCE, 2013-2014 NEW YORK STATE TAX COLLECTIONS: STATISTICAL SUMMARIES AND HISTORICAL TABLES 8 (2014), *available at* http://www.tax.ny.gov/pdf/stats/stat_fy/2013_14_annual_statistical_report_of_ny_state_tax_collections.pdf, *archived at* <https://perma.cc/XT5M-BF9Q?type=pdf>.

656 *EQUITABLE PARK SYSTEM IN NEW YORK* [Vol. 32]

The fund is dependent, however, on legislative appropriations: the State's governors and legislators have traditionally allocated less than \$200 million to the fund, using the remainder to balance the state budget.⁹⁷

Although the state real estate transfer tax is well known to home-owning New York State residents, the public is largely unaware that the tax was intended to directly benefit parks and the environment. Park advocates have so far been unable to tell the story. Based on its share of the state's population, New York City could secure \$200 million from the fund each year.⁹⁸ The city should therefore mount an extensive public relations campaign to end Albany's practice of raiding the EPF to balance the state budget. Some states like New Jersey have amended their constitutions to prohibit the legislatures from using dedicated environmental taxes for other purposes.⁹⁹ Advocates for the EPF should consider the same for New York.

Congress has similarly used the U.S. Land and Water Conservation Fund (LWCF) to balance the federal budget since its creation in 1964. The federal government funds the LWCF primarily through fees for mineral, oil and gas extraction licenses on the outer continental shelf.¹⁰⁰ All license fees are deposited in the fund. The law allows Congress to allocate up to \$900 million to federal, state and local park projects each year until the fund's expiration in 2015.¹⁰¹

Revenues from offshore oil and gas drilling have risen sharply in the past decade and now generate almost \$10 billion annually.¹⁰² Congress, however, has appropriated an average of

97. N.Y. STATE FIN. LAW § 92-s; *see also* OFFICE OF BUDGET & POLICY ANALYSIS, ENVIRONMENTAL FUNDING IN NEW YORK STATE 19 (2014), *available at* http://www.osc.state.ny.us/reports/environmental/environmental_funding_nys_2014.pdf, *archived at* <https://perma.cc/3JSP-JHDQ?type=pdf>.

98. *Id.*

99. N.J. CONST. art. VIII, § 2, *available at* <http://www.njleg.state.nj.us/lawsconstitution/constitution.asp>, *archived at* <http://perma.cc/Y78Y-YDD9>.

100. Land and Water Conservation Fund, 16 U.S.C. § 460l-5 (2014) (Congress passed the Land and Water Conservation Fund act in 1964).

101. *Id.*

102. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-13-283, HIGH RISK SERIES, AN UPDATE 76 (2013).

2015]

EQUITABLE PARKS FUNDING

657

only \$300 million to the LWCF annually.¹⁰³ The rest of the money is swept into the nation's \$3.6 trillion budget.¹⁰⁴ Nationwide park advocates like the City Parks Alliance and the Land & Water Conservation Fund Coalition are lobbying Congress to provide the full \$900 million to park projects each year and permanently reauthorize the LWCF.¹⁰⁵ New York City and State should join this advocacy campaign as they are positioned to receive tens of millions each year from the LWCF.¹⁰⁶ The \$900 million cap should be annually raised, the law should be permanently reauthorized and Congressional appropriations to the fund should be mandatory.

IX. OTHER FUNDING SOURCES IN BRIEF AND THEIR POLITICAL OBSTACLES

The purpose of this paper is to identify the most promising alternative revenue options for parks. However, there are several other promising revenue options that may work for some parks.

A. Concessions

Despite some high-profile citizen lawsuits challenging revenue-generating concessions in parks, there is little doubt about their legality, so long as they serve park users. New York

103. Land and Water Conservation Fund, 16 U.S.C. § 4601-5; *Land and Water Conservation Fund, Our land, our water, our heritage: America Depends on the land and water conservation fund*, LAND AND WATER CONSERVATION FUND COALITION, available at http://lwcfc coalition.org/files/LWCFInfo/LWCF_general_factsheet.pdf (last visited Mar. 4, 2015), archived at <http://perma.cc/483L-LN3D>.

104. See generally OFFICE OF MGMT. & BUDGET, FISCAL YEAR 2015: HISTORICAL TABLES: BUDGET OF THE U.S. GOVERNMENT 25 (2015), available at <http://www.whitehouse.gov/sites/default/files/omb/budget/fy2015/assets/hist.pdf>, archived at <http://perma.cc/H9E6-EHQQR> (demonstrating that the Federal Government's total budget for the year 2014 is approximately \$3.6 trillion).

105. LAND & WATER CONSERVATION FUND COAL., LAND AND WATER CONSERVATION FUND: 50 YEARS OF CONSERVING AMERICA THE BEAUTIFUL 2, 3 (2014), available at http://www.lwcfc coalition.org/files/LWCF_50thAnniversaryReport_FINAL.pdf, archived at <http://perma.cc/YA5L-NLQJ>.

106. This is a rough estimation based upon New York City and New York State's proportion of the general population, or approximately 19 million out of 318 million. *U.S. and World Population Clock*, CENSUS.GOV (Feb. 25, 2015), <http://www.census.gov/popclock/>, archived at <http://perma.cc/L3ZZ-B5D8>.

658 *EQUITABLE PARK SYSTEM IN NEW YORK* [Vol. 32]

City, in the 2009 fiscal year, generated about \$110 million from park concessions.¹⁰⁷ OPRHP raises a similar amount in state parks.¹⁰⁸ There is room for growth in many flagship parks that lack restaurants and other amusements. The problem for NYC Parks is that the New York City Charter requires it to surrender any revenue it generates to the general city fund.¹⁰⁹ OPRHP faces the same problem. NYC Parks and OPRHP must rely on the City Council and State Legislature to return the monies in the annual budget.¹¹⁰

There are two ways around the “general fund” problem. First, for parks maintained by conservancies, the city and state can authorize the conservancy to directly collect concession revenues and use them to maintain the park.¹¹¹ Second, the city and state can require concessionaires to be responsible for maintenance and improvements to designated areas.

B. Sponsorships

In 2012, New York City unsuccessfully issued an RFP for corporate sponsorships of certain park amenities like dog runs and basketball courts. The RFP failed to generate substantial interest in part because the sponsorship opportunities were so modest. Sponsorships can work, however, if the arrangement provides adequate publicity in return. In 2004, NYC Parks won \$10 million from Carl Icahn for the construction of Icahn Stadium on Randalls Island (Manhattan).¹¹² In 2013, the Prospect Park Alliance won \$10 million from the Lefrak family to build the

107. *Concessions*, NYC PARKS, <http://www.nycgovparks.org/opportunities/concessions>, archived at <http://perma.cc/E5DG-2Y5Y> (last visited Mar. 4, 2014).

108. *Tables*, N.Y. STATE OFFICE OF PARKS, RECREATION & HISTORIC PRES., https://www.budget.ny.gov/pubs/archive/fy1314archive/eBudget1314/agencyPresentations/appropData/tables_ParksRecreationandHistoricPreservationOfficeof.html, archived at <https://perma.cc/FBA8-WDVM> (last updated Jan. 22, 2013).

109. NEW YORK CITY, N.Y., CHARTER § 109 (2012).

110. NEW YORK CITY, N.Y., CHARTER § 109.

111. *See Concessions*, *supra* note 107.

112. Press Release, N.Y.C. Mayor Michael R. Bloomberg, Mayor Michael R. Bloomberg, Parks & Recreation Commission Adrian Benepe & the Randall’s Island Sports Foundation Name New York City’s Newest Athletic Facility Icahn Stadium (Jan. 28, 2004), <http://www1.nyc.gov/office-of-the-mayor/news/021-04/mayor-michael-bloomberg-parks-recreation-commissioner-adrian-benepe-the-randall-s-island>, archived at <http://perma.cc/YXF4-UWW3>.

2015]

EQUITABLE PARKS FUNDING

659

Lefrak Center at Lakeside (Brooklyn).¹¹³ High-profile capital projects such as these are likely to attract sponsors. Although some park advocates will claim that corporate sponsorships and naming contribute to the over-commercialization of parks, sponsorships and naming rights raise no legal issues.

C. Community Benefit Agreements (CBAs)

CBAs are usually private agreements between developers and community groups to provide support for schools, parks, jobs, and social services. They have no legal status in local land-use review processes.¹¹⁴ But developers often use them to win support for a project, and elected officials sometimes unofficially link their support for a project to a developer's willingness to enter into a CBA. While legal experts have raised some objections to CBAs because they create a shadow land-use process, CBAs can provide large, once-in-a-lifetime park funds. Their use for creation of operating endowments for parks is particularly promising since long-term park maintenance is in any developer's best interest.

D. "Capitalizing" Maintenance Costs

State law prohibits the issuance of state bonds to cover general government operating expenses.¹¹⁵ It is possible, however, that NYC Parks or OPRHP could build future costs to renovate capital improvements into a legislative appropriation or bond issuance as a "capital" rather than a "maintenance" expense. The money would be set aside in an endowment to cover future maintenance costs. The City and State should consult with

113. Press Release, Prospect Park Alliance, Lakeside Receives \$10 Million Gift from LeFrak Family (Nov. 11, 2013), http://prospectpark.org/media/filer_public/2d/59/2d59a7e6-f698-4e8f-8472-8fa0b887d238/111113-lakeside-receives-10-million-gift-from-lefrak-family-final.pdf, *archived at* <http://perma.cc/6R89-TYER>.

114. See generally N.Y.C. BAR ASSOC., THE ROLE OF COMMUNITY BENEFIT AGREEMENTS IN N.Y.C.'S LAND USE PROCESS (Mar 8, 2010), *available at* <http://www.nycbar.org/pdf/report/uploads/20071844-TheRoleofCommunityBenefitAgreementsinNYCLandUseProcess.pdf>, *archived at* <http://perma.cc/W26F-56NE> (The New York City Bar Association released a comprehensive and highly critical report on CBAs).

115. N.Y. STATE FIN. LAW § 67-b(3) (McKinney 2004).

660 *EQUITABLE PARK SYSTEM IN NEW YORK* [Vol. 32]

their respective comptrollers' offices, which would need to sign off on any approach of this type.

E. Selective Alienation

The public trust doctrine prohibits the sale or lease of parkland for any purpose without state legislative approval.¹¹⁶ The practice of selling, leasing or otherwise using parkland for nonpark purposes (referred to as "alienation") is highly controversial and often litigated.¹¹⁷ Nonetheless, New York's municipalities have occasionally sought legislative approval for the creation of public infrastructure in a park, like New York City's controversial water filtration plant in Van Cortland Park.¹¹⁸ The State Legislature traditionally requires replacement parkland or financial mitigation in return for parkland alienation.¹¹⁹

A few large parks with inaccessible areas, especially former solid waste landfills, may be suitable for revenue generation from non-park uses like solar panel arrays, wind turbines or stormwater management infrastructure. Moreover, long-term leases for certain private, revenue-generating uses like catering halls or golf courses may be appropriate in some locations. The test for any such alienation action should be whether it would directly contribute to the long-term maintenance of the impacted park and have minimal impacts on public recreation and the environment.

116. *Friends of Van Cortlandt Park v. City of New York*, 750 N.E.2d 1050, 1053 (N.Y. 2001) (defining the public trust doctrine as follows: "no objects, however worthy, . . . which have no connection with park purposes, should be permitted to encroach upon [parkland] without legislative authority plainly conferred." (citing *Williams v. Gallatin*, 128 N.E. 121 (N.Y. 1920))).

117. *Friends of Van Cortlandt Park v. City of New York*, 750 N.E.2d 1050, 1053.

118. Legislative Memorandum relating to Ch. 175: PARKS—DISCONTINUANCE—NEW YORK CITY, 2003 N.Y. Sess. Laws Ch. 175 Legis. Memo Ch. 175 (McKinney 2003).

119. HANDBOOK, *supra* note 36.

2015]

EQUITABLE PARKS FUNDING

661

F. General Obligation Bonds

Some states make good use of state-wide, voter-approved bond acts to provide open space funding. New York State, by contrast, has a limited ability to issue new bonds. The State Comptroller reported in 2013 that the State can only borrow another \$509 million before reaching its constitutional debt limit.¹²⁰ State-wide bond initiatives that have previously funded parks and open space, like the highly successful Clean Water/Clean Air Bond Act of 1996, will therefore be difficult to implement.

New York City is in slightly better standing with regard to bonds. Its overall debt is quite high, at about \$52 billion out of a total debt limit of close to \$76 billion. It can thus borrow another \$24 billion.¹²¹ New York City has not traditionally issued bonds to pay for parks and it may be unwise to do so in light of looming capital needs for transit, bridges, schools, and coastal climate resiliency. The issuance of bonds to pay for joint park and infrastructure projects would, however, be a smart idea.¹²²

G. Capital Budget Reform

For the 2013 to 2014 fiscal year, the City's budget gave NYC Parks a discretionary capital fund of about \$80 million dollars in addition to its operating budget of \$300 million dollars for the first time.¹²³ This discretionary fund is essential to allowing the

120. Press Release, Thomas P. DiNapoli, Office of the N.Y. State Comptroller, DiNapoli: State's High Debt Limiting Options (Jan. 7, 2013), www.osc.state.ny.us/press/releases/jan13/010713.htm, *archived at* <http://perma.cc/L2RY-5EZR>. (Bonds issued by some state authorities (e.g., Battery Park City Authority) are not subject to the debt limit so long as the bonds are not payable by the State.). *See id.* Moreover, tax-increment finance bonds are not subject to the debt limit. *See infra*, notes 124-30 and accompanying text.

121. N.Y.C. COMPTROLLER, BUREAU OF FISCAL AND BUDGET STUDIES, FISCAL YEAR 2013 ANNUAL REPORT ON CAPITAL DEBT AND OBLIGATIONS vii (Dec. 2012). *See also* N.Y. CONST. art. VII, § 4 (defining municipal debt limits).

122. Capital budget reform is important in New York City where for the first time, NYC Parks has its own, small discretionary capital budget. This practice should be continued.

123. Dana Rubenstein, *Mayor Continues City Parks Funding Policies, For Now*, CAPITAL N.Y. (May 9, 2014), <http://www.capitalnewyork.com/article/city->

662 *EQUITABLE PARK SYSTEM IN NEW YORK* [Vol. 32]

department to address capital projects without being beholden to specific appropriations from elected officials.

H. Tax Increment Finance (TIF)

Tax increment finance is a method of financing public improvements based on projected future property tax revenues. A government entity identifies public street, sidewalk, utility, or open space improvements that it believes will encourage nearby real estate development. It sells bonds to fund those improvements and commits to using new property tax revenues to repaying bondholders.¹²⁴ The technique requires a certain faith on the part of bondholders, who will only be repaid to the extent that the public improvements actually increase property tax revenue.¹²⁵ Outside New York State, the technique works: other states have issued billions in TIF bonds to fund public improvements.¹²⁶

New York State law allows state or local agencies to issue TIF bonds too,¹²⁷ but they have almost never done so.¹²⁸ In 2005, New York City considered selling TIF bonds to fund the Hudson Yards project, which involved large public investments in a deck above rail yards that would facilitate new development, parks and roads.¹²⁹ Concerns about revenue led to a hybrid approach wherein the City remains responsible for paying back bondholders from general city revenues.

A 2002 report by the New York City Independent Budget Office summed up the City's concerns about TIF bonds as follows:

hall/2014/05/8545118/mayor-continues-city-parks-funding-policies-now, *archived at* <http://perma.cc/477L-CUUS>.

124. N.Y. GEN. MUN. LAW § 970-o (McKinney 2014). *See generally* Amy F. Cerciello, *The Use of Pilot Financing to Develop Manhattan's Far West Side*, 32 *FORDHAM URB. L.J.* 795, 796-801 (2005).

125. N.Y. GEN. MUN. LAW § 970-o.

126. Richard Briffault, *The Most Popular Tool: Tax Increment Financing and the Political Economy of Local Government*, 77 *U. CHI. L. REV.* 65, 65 (2010).

127. N.Y. GEN. MUN. LAW § 970-o.

128. Cerciello, *supra* note 124, at 816.

129. *See generally* N.Y.C. INDEP. BUDGET OFFICE, *WEST SIDE FINANCING'S COMPLEX, \$1.3 BILLION STORY* (2004), *available at* <http://www.ibo.nyc.ny.us/iboreports/WestsidefinanceFB.pdf>, *archived at* <http://perma.cc/8C7M-TPYW>.

2015]

EQUITABLE PARKS FUNDING

663

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.¹³⁰

These concerns can be addressed by issuing TIF bonds only where nearby development is likely. Moreover, revenue calculations must remain conservative. If these two issues are addressed, TIF can become a vital tool for generating major capital funds for parks where they otherwise do not exist.

I. Other Federal Funds

Congress created the Urban Park and Recreation Recovery Act (UPARR) in 1978 to provide matching grants to distressed cities for park projects.¹³¹ Unlike the EPF and the LWCF, it is funded out of the general budget rather than specific taxes. The argument for full funding of UPARR is therefore slightly less compelling. Congress has not funded the program at all since 2002. Nonetheless, because of its focus on distressed communities, any funding would help New York's urban parks.

X. SUMMARY OF BEST PRACTICES

This paper has identified five core ways to raise park funding for both maintenance and capital improvements without new federal, state, or city legislation. They include the following: 1) Tapping into real estate dollars using existing zoning tools (e.g., TDRs, zoning incentives); 2) Using the existing Business Improvement District law to maintain parks; 3) Demanding full

130. Theresa J. Devine, *Learning from Experience: A Primer on Tax Increment Financing*, N.Y.C. INDEP. BUDGET OFFICE (Sept. 2002), <http://www.ibo.nyc.ny.us/iboreports/TIF-Sept2002.pdf>, archived at <http://perma.cc/S5B7-VD6Y>.

131. 16 U.S.C. §§ 2501-2514 (2012); see also NATIONAL PARK SERVICE, www.nps.gov/uparr (last visited Dec. 1, 2014), archived at <http://perma.cc/UZ9U-KHZD>.

664 *EQUITABLE PARK SYSTEM IN NEW YORK* [Vol. 32]

state and federal funding for existing park funds; 4) Creating public-public partnerships to tap into existing infrastructure funds for capital and maintenance work in parks; and 5) Pursuing proven management models using state agencies and private conservancies. These approaches have the most promise for creating new and reliable sources of both capital and maintenance funds. There is no one-size-fits-all solution, however, given the variety of parks, income levels, and neighborhoods. Most important, community support will be essential to the success of any park funding venture. Residents are likely to react poorly to financing schemes that diminish the public's use of a park or are simply viewed as new citywide taxes. Public support depends on keeping new revenues and their benefits local, visible, and accounted for.

**Appendix: List of Alternative Revenue Options
Addressed Above**

1. Transfers of Development Rights and Zoning Incentives.
2. Public-Public Partnerships for Climate Change, Transportation, Affordable Housing and Public Health.
3. Park Improvement Districts
4. State-Created Public Benefit Corporations
5. Full Funding for the U.S. Land and Water Conservation Fund and N.Y. State Environmental Protection Fund
6. Concessions
7. Sponsorships and Naming Rights
8. Capitalizing Maintenance Costs
9. Selective Alienation of Parks
10. General Obligation Bonds
11. Capital Budget Reform
12. Tax Increment Finance
13. Urban Park and Recreation Recovery Program