

Open Lands Acquisition: Local Financing Techniques Under New York State Law



**METROPOLITAN
CONSERVATION ALLIANCE**

AND

**THE HUDSON RIVER VALLEY
GREENWAY COMMUNITIES
COUNCIL/ THE GREENWAY
CONSERVANCY FOR THE
HUDSON RIVER VALLEY**

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SOCIETY**



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Open Lands Acquisition:

Local Financing Techniques Under New York Law

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INTRODUCTION

As Hudson River Valley communities grow and change, and particularly as sprawling development patterns make inroads into productive agricultural lands, critical wildlife habitat and important open space areas, there is growing interest in finding new ways to protect and preserve the open places that have special meaning to us and that contribute to the character, identity, economy and environmental integrity of our communities.

Recognizing this interest, the Hudson River Valley Greenway Communities Council, the Greenway Conservancy for the Hudson River Valley and the Wildlife Conservation Society's Metropolitan Conservation Alliance, engaged Pace University's Land Use Law Center to research and develop a working paper exploring an approach to the preservation of such areas that is being increasingly well-received by New York communities – local financing of open lands acquisition, also known as purchase of development rights (PDR) programs. It is our hope that sharing the successful experiences of other New York communities will enable interested Greenway Communities to adopt and implement similar programs.

A PDR program involves the purchase of the development rights of property from voluntary sellers by towns, counties or private land trusts. The right to develop the property is separated from the remaining property rights and permanently retired, while the property owner continues to own and use the land for agricultural, woodland or open space uses. The State of New York administers an agricultural PDR program through its Agriculture and Markets Department in which towns may participate, but limited funding restricts the number of farms that can be preserved each year through this program. Adoption of local PDR programs can complement this State program by providing significant additional revenues to preserve more extensive land areas.

As popular and effective as PDR programs are, there are rarely sufficient funds available, even at the local level, to fully implement protection plans. The most successful agricultural and open space protection programs across the country rely not on a single approach, but rather on a variety of tools and techniques not only to keep land in agricultural or open space use but also to provide marketing assistance and supplementary forms of income to farmers and land owners to enable them to stay on the land. Some of these tools and techniques include:

- Inventory of agricultural land and open space
- Identification of a critical mass of farmland
- Effective agricultural zoning
- Open space overlay zoning (floodplain, steep slopes, etc.)
- Wellhead and aquifer protection zoning
- Watershed protection programs
- Agricultural Districts
- Farm-value taxation

- Exemption from sewer and water district taxes
- Transfer of development rights
- Creation of land trusts
- Growth boundaries
- Timing of infrastructure
- Right-to-Farm laws
- Nuisance disclaimers on subdivisions
- Cluster development
- Conservation planning and design
- Subdivision sketch plan review
- Trails and linkages
- Siting standards for residences
- Setbacks for dwellings and fences from sensitive open space features
- Accessory farm uses
- Permitting of U-Pick operations and farm stands
- Farm-to-market programs
- Permitting of supplemental on-farm income sources
- Processing and marketing of local farm products
- Educational programs

The choice of tools and techniques communities choose should be based on a number of factors including type, extent and location of open space, development patterns, existing and potential conflicting uses, community support and community resources. Often communities believe that specific tools and techniques can be used interchangeably with others to protect the intended open space area. In fact, certain approaches are much more effectively used in some circumstances than others simply because the goals of various protection programs differ.

Agricultural Land – Agriculture produces approximately \$3 billion gross cash income for New York State yearly. It is the second largest sector of the Hudson River Valley’s economy and a net contributor to the local economic bases of the region’s communities. Numerous fiscal studies have demonstrated that agricultural land generates more in taxes than it costs local governments to provide services to these properties. Studies conducted by the American Farmland Trust in over 58 communities throughout the country indicate that, for every tax dollar generated, it costs \$0.37 to provide services to farms as compared to \$1.15 to residences. A similar study conducted by Scenic Hudson in the communities of Red Hook, Amenia and Fishkill revealed that for every dollar contributed in land taxes, residential uses required up to \$1.23 in services, whereas open space required only \$0.17 to \$0.74.

The preservation of agricultural land, therefore, protects not only open space and a traditional way of life that provides connections to our past, but promotes a vital part of the rural economic base of many Hudson River Valley communities. In addition,

agriculture is increasingly the basis for a growing tourism sector in the Valley, which contributes to local economies.

Yet, since 1950, New York has witnessed a 70% decline in the number of farms, and farmland acreage has decreased by 48%. Suburban sprawl, infrastructure development, conflicting adjacent uses and the decreasing profitability of farming have been primarily responsible for the conversion of agricultural land to other uses. Any successful farmland protection approach, therefore, must address all these causal factors to stem the further loss of agricultural land.

Effective preservation strategies must recognize that agricultural land is not only a visual resource, but also a functional one. Working farm landscapes are more complex and difficult to protect than other open space areas, because not only the land resources but the economic viability of the farm operations must be protected. Many communities underestimate the conflicts for agriculture that residential development amidst working farms creates, even where clustered development is used. Finally, it does little good to preserve isolated farms that are not part of a larger “critical mass” of agricultural land that can support the farm businesses that farmers rely on for seed, fertilizer, machinery, etc. For these reasons, the most successful farmland protection programs are those that embrace a variety of strategies to promote farming, minimize conflicts and protect the land base.

Wildlife Habitat – Wildlife and wildlife habitats are important components of the communities that we live in, and provide a wealth of recreational, aesthetic and ecological benefits. Landscapes that we value look as they do because of the variety of species that are found within them, and the ecological communities that they form, whether these be agricultural lands, forests or wetlands. Wildlife itself provides recreational and educational opportunities for many people with a diverse array of interests. In addition, wildlife habitats provide vital ecological services. Wetlands, for example, act as water filtering systems and recharge groundwater. The wetlands found along streams and rivers are important in flood control, storing excess water during rainstorms, and reducing the risk of flood damage in downstream areas.

Today, a primary threat to wildlife populations is the pattern of unplanned suburban development referred to as “sprawl.” Suburban sprawl and associated infrastructure such as roadways have destroyed or degraded many of the habitats important for wildlife populations. The landscape has become fragmented, reducing overall habitat area, destroying the geographic links that many species use to move between the different habitats that are critical to completing their life cycles, and causing other ecological problems that over time severely affect the viability of wildlife populations.

Careful consideration of the remaining areas of high quality wildlife habitat is essential when planning for future development. Other lands may also be important in protecting and maintaining wildlife populations. Agricultural land and open space protected for

reasons other than habitat protection can serve a number of important ecological functions within the landscape. They can provide essential habitat for many species, including those that are rare, endangered or otherwise vulnerable to the changes in the landscape that are now occurring. In the case of agriculture, many of these are species that live and breed in habitats that have become far less common in the region, such as grasslands, pastures and wetlands. Maintaining these habitats often requires some form of management and various agricultural practices, especially those associated with traditional family-owned farms, can sometimes accomplish this. These lands also can provide geographical and ecological connections within the landscape, allowing for processes such as dispersal and colonization, migration, seed dispersal and pollination to occur. Truly effective conservation efforts cannot take place without these connections, making an integrated approach to local and regional planning efforts essential.

Other Open Space Areas – Other open space resources may provide for visual or functional amenities or a combination of both. For instance, visual open space resources might include viewsheds and vistas, and scenic byways, trails and ridgetops. These areas provide primarily aesthetic or recreational value. Functional open space resources might include wetlands, floodplains, aquifers and watersheds, as well as steep slopes. These areas provide important natural functions that would cost communities substantial amounts of money to regenerate or replace with substitutes if lost. Combination visual/functional open space resources might include woodlands, streams and lakes. Many open space areas are geographically or topographically defined, and many are linear in nature.

Open space areas are lost primarily due to suburban sprawl and inappropriately sited rural development. The goal of many open space programs is to protect areas with visual appeal and to create linear connections, such as trails and paths, both among open space features and between open space and the places people live, work and shop. In general, the more open space resources that can be simultaneously protected, the more strategies are available to communities to accomplish this. A clear expression of the goals of any open space program will help communities select the particular combination of protective tools and techniques that will work most effectively for them.

Summary – A local purchase of development rights program could be the cornerstone for an effective open space protection program for any number of Hudson River Valley communities. However, a few considerations should be kept in mind. Permanently preserved lands can attract development at their perimeter if zoning and siting standards are inadequate. This can undermine the intent and effectiveness of the program and can be a particular problem for farmers. Also, the cost to communities of implementing a local PDR program bears a strong relationship to underlying zoning. Because the compensation offered landowners is usually the difference between the assessed value of the land for open space/agricultural use and development use under current zoning, the more permissive the zoning, the higher the costs will be.

This paper is intended to assist communities interested in PDR to decide which of several potential funding mechanisms currently in use in other New York municipalities might fit with local open space preservation goals. Any communities that are specifically interested in the appendices to the working paper, which include various legal documents and local laws, may request them of us. We hope this research is useful to you and contributes to the vision you hold for your community's future.

EXECUTIVE SUMMARY

Background

Local governments may seek to protect their remaining open lands for many purposes. Among these are to preserve a general sense of openness, to insure the continuation of farming in rural areas, to protect lands that harbor wetlands, wildlife habitats, valued species, and other natural resources, to maintain critical viewsheds, or any combination of these objectives. Means available to local governments to protect open lands owned privately include reasonable land use regulation and the purchase of title or development rights of such lands. There are a variety of county, state, or federal grant programs that make funds available for this purpose.

This paper describes and discusses the authority that local governments themselves have to raise revenues to purchase such lands or their development rights. It explores the sources of local legal authority to spend public funds to purchase interests in open lands, the types of programs that localities in New York have established using this authority, and the particular methods localities have used to raise such funds.

The term “open lands” refers to lands that communities wish to preserve to accomplish any of the listed objectives. “Open lands” is not synonymous with “undeveloped lands,” since much land that is apparently open is dedicated to an economic use such as farming or for one or more homes on a relatively large parcel. Open lands are those that have not yet been subdivided into relatively small lots and dedicated to residential, commercial, or industrial use.

Legal Authority to Acquire Interests in Open Lands

The preservation of these lands and their open character 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.”

Local governments are authorized to spend public funds to acquire and maintain open spaces and to limit the future use of open spaces under Section 247 of the General Municipal Law. 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 Section 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, 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 of Raising Revenues for the Acquisition of Interests in Open Lands - Local Examples

Annual appropriations: Localities may appropriate revenues derived from local property taxes to acquire interests in open lands as part of the local budgeting process. Such appropriations are not subject to a permissive or mandatory referendum.

Multi-year appropriations: 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 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.

Bonds: Municipal bonds may be issued and the proceeds used for the acquisition of interests in open lands. The issuance of municipal bonds by a town or village is generally subject to permissive referendum if the bonds will require in excess of five years to repay. In these cases, the local legislature, itself, may take the initiative to place the bond resolution on the ballot.

Voters in the Town of Pittsford approved a \$9.9 million bond issue to purchase 2000 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. Generally, the creation of a local real estate transfer tax program in a locality is subject to a referendum.

At the request of several towns on the east end of Long Island, the State Legislature added a section to the N.Y. Town Law and N.Y. Tax Law permitting them to impose a two percent (2%) 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. Among other requirements, the state law required each town to create a community preservation fund and an advisory board and imposed a mandatory referendum requirement on the creation of the local transfer tax program.

Capital reserve fund: When municipal bonds are issued, their proceeds must be placed in a special fund and reserved for the specific purpose for which the bonds were authorized. When annual or multi-year appropriations need to be retained until the time is right to expend them to acquire interests in open lands, a capital reserve fund would normally be created to retain and govern the expenditure of the funds. Normally, the creation of a capital reserve fund for such a purpose is subject to permissive referendum. The proceeds of a local real estate transfer tax authorized by the State Legislature can also be retained until needed in a capital reserve fund.

Southampton has established a capital reserve fund in its operating budget that will collect up to \$800,000 annually for open lands preservation.

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 for that term 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 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 the title to open lands or their development rights 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 owners' heirs or sold to municipal bond investors.

The towns of Easthampton and Southampton on the eastern end of Long Island have stated that they plan to use land purchase installment obligations as a method to acquire interests in open lands.

Checklist of Revenue Raising Techniques

- Annual appropriations
- Multi-year appropriations
- Bonds
- Real estate transfer tax
- Capital reserve fund
- Reduced tax assessment (lease of development rights)
- Land purchase installment obligations

Local Financing Techniques Under New York Law

I. Introduction

As development pressures mount,¹ local governments throughout the State of New York are searching for methods of retaining the open character of their communities. When the search is simply for “openness,” then the preservation of any open space that will retain the community’s historic open character will suffice. In most communities, however, other critical objectives motivate the search for methods of retaining open lands. In farming communities, there is often a desire to retain viable agricultural lands and the economic vitality and tax revenues that those farms generate. Maintaining the farms themselves often bears a crucial relationship to the historic nature of the community that many current residents value. In many communities, there is a profound concern for maintaining sufficient open lands to provide shelter and a hospitable environment for valued animal and plant species that are rapidly disappearing due to increased land development. Other communities combine these objectives and seek, for example, to preserve viable farmlands while protecting habitats, wetlands, and other natural resources on those lands.

The term “open lands,” as used in this paper, refers to lands that communities wish to preserve for any one of these objectives. “Open lands” is not synonymous with “undeveloped lands,” since much land that is apparently open is dedicated to an economic use such as farming or for one or more homes on a relatively large parcel. Open lands are those which have not yet been subdivided into relatively small lots and dedicated to residential, commercial, or industrial use. The preservation of these lands and their open character is one of the few land use objectives 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.”²

¹ The recently released 1997 National Resources Inventory, a statistically-based survey that assesses the conditions and trends of soil, water, and land use on non-federal lands, indicates that between 1992 and 1997 nearly 16 million acres of open space lands were converted to development. This conversion is occurring at a rate of 3.2 million acres per year. See Natural Resource Conservation Service, 1997 National Resources Inventory: Highlights (visited on December 7, 1999) <http://www.nhq.nrcs.usda.gov/land/pubs/97highlights.html>.

² See N.Y. State Constitution, Art. 14, § 4 (McKinney 1998).

In most of these communities, the search for ways to preserve open lands includes an analysis of the extensive authority local governments have in New York to limit the development of privately-owned land through land use regulations.³ Recently, communities have sought grant funds from numerous state and federal programs that are available to enable them to purchase the title to these lands or a lesser interest in them such as their “development rights.”⁴ These fruitful and complicated topics are not explored in this paper. The topic addressed here is the financial authority that local governments themselves have to raise revenues to purchase such lands or their development rights. This paper explores the sources of local legal authority to spend public funds to purchase interests in open lands, the types of programs that localities in New York have established using this authority, and the particular methods localities have used to raise such funds. The details of establishing capital reserve funds and purchasing land through the installment sale method are also described. Finally, the paper illustrates these methods by discussing the programs established in several communities in New York.

II. Local Authority to Purchase Title or Development Rights in Land

Although municipalities have broad authority to acquire land for a public purpose,⁵ the state legislature has provided specific authority to municipalities purchase open lands or a lesser interest in them.⁶ Means of achieving these policy objectives include the acquisition of title to land, purchasing a lesser interest in land such as a parcel’s development rights or even leasing development rights.

³ Other important tools to preserve open space include a municipality’s zoning and planning authority (including the authority for clustering, transferring of development rights and enacting conservation overlay zones) as well as the authority to protect and enhance a municipality’s physical and visual environment under the Municipal Home Rule Law. See N.Y. MUN. HOME RULE LAW § 10(1)(ii)(a)(11) (McKinney 1994) (Utilizing this authority, communities have adopted soil conservation laws, steep slope laws, wetlands laws and other natural resource protection laws. For a discussion of local natural resource protection see Jeffrey P. LeJava, Local Natural Resource Protection, Land Use Law Center (1997)).

⁴ See, e.g. Appendix A.

⁵ See N.Y. GEN. CITY LAW § 20(2) (McKinney 1989); N.Y. TOWN LAW § 64(2) (McKinney 1987); N.Y. VILLAGE LAW § 1-102(1) (McKinney 1996). See also N.Y. MUN. HOME RULE LAW § 10(1)(ii)(a)(6).

⁶ See N.Y. GEN. MUN. LAW § 247 (McKinney 1999); see N.Y. ENVTL. CONSERV. LAW §§ 49-0301 et. seq. (McKinney 1997).

A. *General Municipal Law Section 247*

Most municipalities rely upon General Municipal Law Section 247 for authority to implement an open lands purchase program. Enacted in 1960, the legislature recognized even then that rapid development was threatening lands with significant scenic, esthetic, or physical value.⁷ As a means of conserving these important resources, the legislature declared that it is in the public interest for any county, city, town, or village to expend public funds “to acquire, maintain, improve, protect, or limit the future use of or otherwise conserve open spaces.”⁸ Under Section 247, municipalities may “acquire, by purchase, gift, grant, bequest, devise, lease or otherwise, the fee or any lesser interest, development right, easement, covenant, or other contractual right” in lands defined as “open space.”⁹ Open space includes any area that is characterized by natural scenic beauty or whose condition or quality is such that it will either enhance the present or potential value of surrounding developed lands, or enhance the conservation of natural or scenic resources.¹⁰ Open space also includes agricultural land used in bona fide agricultural production.¹¹ Given this broad definition, communities have sought to acquire title to, or the development rights of, parcels containing wetlands, habitats, forests, viewsheds, steep slopes, and valuable agricultural soils.

Where a municipality acquires a lesser interest in a parcel of land, such as its development rights, Section 247 directs municipalities to reassess the property value to reflect the limitation placed on the future use of that land.¹² This reassessment will reduce an owner’s tax burden and is required when a municipality has acquired an interest in real property, such as a conservation easement or restrictive covenant. Additionally, Section 247 provides that any such interest acquired by a municipality is enforceable not only against the original landowner, but also against successors in interest, heirs, and assigns, so long as the municipality’s interest is filed on the county land records in accordance with Section 291 of the New York Real Property Law.¹³ The

⁷ See 1960 N.Y. Laws Ch. 945.

⁸ See id.

⁹ See N.Y. GEN. MUN. LAW § 247(2) (McKinney 1999).

¹⁰ See id. § 247(1).

¹¹ See id.

¹² See id. § 247(3).

¹³ See id. § 247(4).

law also states that the municipality's interest in the open lands cannot be defeated due to adverse possession, laches, waiver, any rule of common law, or a change in the character of the surrounding neighborhood.¹⁴ These provisions demonstrate that the development rights validly purchased by a municipality may never be used by the landowner or anyone who acquires a legal interest in the land from that owner.

*B. Conservation Easements*¹⁵

Sections 49-0301 through 49-0311 of the Environmental Conservation Law provide additional authority that municipalities may use to purchase the development rights of open lands. This statute permits municipalities to acquire conservation easements for the purpose of conserving, preserving, and protecting the environmental, historical, and cultural resources of the state, including the preservation, development, and improvement of agricultural lands.¹⁶ The law defines a conservation easement as “an easement, covenant, restriction or other interest in real property . . . which limits or restricts the development, management or use of real property”¹⁷ Unless otherwise limited in the instrument creating the conservation easement, the easement is of perpetual duration and can only be extinguished pursuant to Section 49-0307.

By entering into a conservation easement, a landowner receives two primary benefits. First, the landowner is paid for the development restriction. The landowner receives the difference between the value of the land with the development restriction and the value of the land without the development restriction.¹⁸ Second, the landowner can receive tax benefits in the form of reduced property taxes and reduced estate taxes.¹⁹ There may be additional income tax advantages when the landowner has donated some or all of the land's development rights to the municipality or a qualified land trust.

¹⁴ See *id.*

¹⁵ For a thorough discussion of conservation easements and land trusts, see Joseph Stinson and Liane Wilson, Preserving Open Space with Land Trusts and Conservation Easements, Land Use Law Center (1996), available on L.U.C.A.S. at www.law.pace.edu/landuse/library/Indtrs.html.

¹⁶ See N.Y. ENVTL. CONSERV. LAW § 49-0301 (McKinney 1997).

¹⁷ See *id.* § 49-0303(1).

¹⁸ See Sean F. Nolon and Cozata Solloway, Preserving Our Heritage: Tools to Cultivate Agricultural Preservation in New York State, 17 PACE L. REV. 591, 598 (1997) (hereinafter Heritage).

¹⁹ For discussions of the tax implications of entering into a conservation easement see the following articles: Henry E. Rodegerdts, Land Trusts and Agricultural Conservation Easements, 13 NAT. RESOURCES & ENV'T 336, 337 (1998) (hereinafter Land Trusts); Brenda J. Brown, Land Preservation Provides Estate Tax Benefits: section 2031(c), 17 UCLA J. ENVTL. L. & POL'Y 117 (1999); Karen M. White, “Extra” Tax Benefits for Conservation Easements: A Response to Urban Sprawl, 18 VA. ENVTL. L.J. 103 (1999).

There are two differences between acquisitions made under the conservation easement provisions of the Environmental Conservation Law and lesser interests in land acquired under Section 247 of the General Municipal Law. A conservation easement can be enforced by a third party named in the instrument creating the easement.²⁰ This allows a municipality to delegate monitoring and enforcement responsibilities under the conservation easement to a land trust or other not-for-profit corporation with the legal authority and capacity to do so.²¹ No such flexibility exists under Section 247. Also, under the conservation easement statute, not-for-profit land trusts and conservation organizations may purchase easements directly.²²

III. Local Open Space Programs

Utilizing the authority discussed above, municipalities are able to develop specific programs to acquire open lands. Programs vary from locality to locality, but generally fall into one of four categories: purchase of title to land, purchase of development rights, lease of development rights, or a combination of these approaches.

A. Purchase of Title

Municipalities may acquire full legal title to a parcel of open land.²³ To do so, of course, they must pay the landowner the full market value of the property and make this payment at the time of acquisition. The municipality also assumes full legal responsibility for, and all costs of maintaining, the property. Such acquired open lands are an asset on the books of the local government and are removed fully from the property tax rolls. Because of these direct and indirect costs, municipalities often establish purchase of development rights programs which leave title to open lands in the hands of private owners, allow current land uses to continue, and earn property tax revenues for those uses.

²⁰ See N.Y. ENVTL. CONSERV. LAW §§ 49-0305(5) and (6).

²¹ See *id.*

²² See *id.* § 49-0303(a).

²³ See N.Y. GEN. MUN. LAW § 247 (McKinney 1999). Municipalities cannot purchase title to land under the conservation easement law. See N.Y. ENVTL. CONSERV. LAW § 49-0303 (McKinney 1997).

B. Purchase of Development Rights

Under a purchase of developments rights (“PDR”) program, a municipality pays a landowner for restricting the future use of the land.²⁴ The restriction usually takes the form of a conservation easement under which the landowner retains title to the land²⁵ and the municipality gains the right to enforce the restriction that the easement imposes on the land’s development. The cost of the development rights is the difference between the value of the land with the development restriction on it and the value of the land for its “highest and best use,” which is usually commercial or residential development.²⁶ In exchange for placing the development restriction on the property, the owner receives a number of tax benefits including reduced property taxes and estate taxes.

A PDR program benefits the locality in a number of ways. By purchasing a parcel’s development rights, a municipality pays less to preserve open space than it would if it purchased the parcel outright. This permits the municipality to preserve significantly more open land than it could by acquiring full title. Also, the municipality does not take on the responsibility and cost of maintaining the property. Most importantly, by only purchasing a parcel’s development rights, the property remains on the municipal tax rolls although at a reduced assessed value.

Although a PDR program involves lower costs to the community, this is not to say that it is inexpensive, particularly in communities facing significant development pressure.²⁷ For example, in Suffolk County, agricultural easements can cost up to

²⁴ See American Farmland Trust, Purchase of Agricultural Easements Fact Sheet (September 1998).

²⁵ Because the landowner retains title to the land, he or she has the ability to sell the land at some future time, although it remains subject to the easement for its duration. See Heritage at 597.

²⁶ See American Farmland Trust, The Farmland Protection Toolbox Fact Sheet (September 1998).

²⁷ See American Farmland Trust, Purchase of Agricultural Easements Fact Sheet (September 1998).

\$20,000 an acre.²⁸ Additionally, PDR programs are often unable to keep pace with the demand to sell development rights.²⁹ PDR programs may also result in a fragmented preservation pattern, since many of the lands preserved may be “too small and too disconnected to function in the long term as an ecosystem for plant and animal life.”³⁰ These observations suggest the use of locally-financed PDR programs to leverage county, state, and federal funds and responsible land use regulation of open lands to preserve significant landscapes in meaningful ways.

C. *Lease of Development Rights*

A lease of development rights (“LDR”) program is one in which a municipality acquires the development rights of a parcel for a period of years rather than perpetually. In exchange for restricting development on his or her property, the landowner receives preferential tax treatment in the form of reduced property taxes, and a yearly rental payment.³¹ The benefit to the municipality of such a program is that it is able to spread the cost of the easement out over a number of years as opposed to paying for the development rights completely in the first year.³² An additional benefit to the landowner is that he or she retains the possibility of developing the land in the future and thus maintains the property’s long-term equity value.³³ The most significant problem with an LDR program, however, is that the land still has the potential to be developed at some future date. The financial benefit of the LDR program to the community can also be achieved by using municipal authority to issue installment sale obligations which is discussed further below.

To date, no community in the state has enacted an LDR program where lease payments are made to the landowner for not developing his or her land. However, at least two communities have created LDR programs where, in exchange for preferential tax treatment, a landowner agrees to restrict development on his or her property for a specified period.³⁴ Like an LDR program where the property owner receives a lease payment, under this type of program, the property owner restricts development by entering into a conservation easement for a period of years with the municipality.

²⁸ See Land Trusts at 336.

²⁹ See American Farmland Trust, Purchase of Agricultural Easements Fact Sheet (September 1998).

³⁰ See Heritage at 608.

³¹ See id. at 609.

³² See id.

³³ See id.

³⁴ See TOWN CODE OF THE TOWN OF PERINTON § 130 (as amended 1998); see TOWN CODE OF THE TOWN OF SOUTHAMPTON § 247-16 (as amended 1987).

D. *Combination Programs*

A municipality may decide to create an open lands program that combines one or more of the above techniques. For example, in addition to leasing development rights in exchange for preferential tax treatment, the Town of Perinton purchases title to open lands with funds derived from penalties and back taxes assessed against landowners who break their conservation easement before the end of the agreed easement period.³⁵

IV. **Local Revenue Sources for Open Land Acquisition**

Having provided that municipalities may expend public funds for the acquisition of open lands³⁶ and allowed them to establish various methods of expending these funds, state law provides several methods that municipalities can use to raise funds for this purpose.³⁷

A. *Real Property Taxes*

Municipalities have been delegated the authority to assess and collect real property taxes under the Real Property Tax Law.³⁸ Property taxes are levies on the value of real estate. Local real property tax revenues may be expended for any valid local purpose under any of the many state statutes that delegate programmatic authority to municipalities, such as the General Municipal Law.

³⁵ See TOWN CODE OF THE TOWN OF PERINTON § 103-8 (as amended 1978).

³⁶ See, e.g. N.Y. GEN. MUN. LAW § 247(2). This subsection states that “[t]he acquisition of interests or rights in real property for the preservation of open spaces and areas shall constitute a public purpose for which public funds may be expended”

³⁷ It is important to note that various actions taken by a municipality to raise and secure funds for open space preservation may be subject to mandatory or permissive referendum. For example, the authorization of the sale of municipal bonds to raise moneys for the purchase of land or interests in land is subject to a permissive referendum where the maturity on the bonds is greater than five years. See N.Y. LOCAL FIN. LAW § 35.00 (McKinney 1968 and Supp. 1999). Similarly, the establishment of a capital reserve fund is subject to a permissive referendum if the underlying method used to raise moneys for the fund is subject to a permissive referendum. See N.Y. GEN. MUN. LAW § 6-c(4) (McKinney 1999). A complete discussion of which municipal actions are subject to a mandatory or permissive referendum is beyond the scope of this paper. Where such referenda are discussed below, it is based on what actual communities have done as they have raised funds for open land preservation.

³⁸ See N.Y. REAL PROP. TAX LAW §§ 101 - 2016 (McKinney 1989). See also *Crystal v. Syracuse, Dept. of Assessment*, 47 A.D.2d 29, 364 N.Y.S.2d 618 (4th Dep’t 1975), *aff’d* 38 N.Y.2d 883, 346 N.E.2d 546, 382 N.Y.S.2d 745 (1975) (the taxation of real property is authorized solely by statute).

1. Appropriations

Funds collected from property taxes may be used for any public purpose which includes the acquisition of land or development rights as discussed in Section 247 of the General Municipal Law or Sections 49-0301 to 49-0311 of the Environmental Conservation Law. Under their budget authority, municipalities can allocate a fixed amount in a given year to purchase title to land or development rights. No referendum is required for the local legislature to allocate the current year's property and other tax revenues for public purposes such as this. Southampton has established a capital reserve fund in its annual operating budget that will raise up to \$800,000 annually for open lands preservation.

2. Bonds

Municipalities are authorized to contract indebtedness for public purposes under Local Finance Law Section 10.00.³⁹ One such public purpose is the acquisition of land or development rights in land as specified by Local Finance Law Section 11.00(21)(a). Indebtedness incurred for land acquisition must be repaid within 30 years.⁴⁰ Under the Local Finance Law indebtedness may take the form of bonds or notes.⁴¹ When bonds or notes are sold, their proceeds are required to be held in a special fund and to be used for the exact purpose for which the bonds were issued. The issuance of municipal bonds may be subject to a voter referendum, depending on the amount of the bond issue, the length of the repayment period, and the purpose for which they are used.

To pay the principal and interest on the sums borrowed from the bond holders, a steady stream of revenue over the bonds' repayment period is necessary. Normally, municipalities use the revenues derived from property taxes to pay the principal and interest due on municipal bonds that were issued for the purchase of open lands or their development rights.⁴²

³⁹ See N.Y. LOCAL FIN. LAW § 10.00 (McKinney 1968 and Supp. 1999).

⁴⁰ See *id.* § 11(a)(21)(a).

⁴¹ See *id.* § 10.00.

⁴² See American Farmland Trust, Purchase of Agricultural Easements: Sources of Funding Fact Sheet (January 1999).

Municipal bonds are an attractive means of raising needed funds for land acquisition because the municipality receives the capital needed for land acquisition up-front. With this money, a municipality can acquire land or development rights in the present that may become prohibitively expensive in the future if real estate prices escalate dramatically in the community. The municipality then has up to thirty years to repay its obligations under the bonds.

After extensive study of the costs of servicing the residential development permitted on 3600 acres of open lands under local zoning, the Town of Pittsford in 1996 issued a \$9.9 million bond under Section 247 of the General Municipal Law.⁴³ The proceeds were used to finance the purchase of development rights on 2,000 critically-located acres of undeveloped lands in the community. Most of these acres contain viable agricultural soils and sustain active farming operations.⁴⁴

B. Real Estate Transfer Tax

Funding may also be procured by levying a tax on the sale of real estate in the community. Because there is no general state enabling legislation that permits municipalities to impose such a tax, a municipality must first seek passage of specific enabling legislation from the state legislature pursuant to Municipal Home Rule Law Section 40. Under this provision, the chief executive officer of a municipality⁴⁵ with the concurrence of a majority of the local legislature, or the local legislature itself by a two-thirds vote, may request that the state legislature pass a bill authorizing the imposition of a real estate transfer tax in that specific municipality.⁴⁶ The request must state that a necessity exists for the revenues to be derived by the transfer tax and must recite the facts demonstrating that necessity.⁴⁷ Once approved by the state legislature, the transfer tax must then be approved by local voters through a local referendum. The towns of East Hampton, Riverhead, Shelter Island, Southampton and Southold (the “East End Towns”) successfully solicited a state bill to impose a real estate transfer tax that funds the acquisition of open space on the eastern end of Long Island.⁴⁸

⁴³ See American Farmland Trust, Call to Action: Farmland Protection Success Stories in the Empire State, at 21-22 (1998).

⁴⁴ See id.

⁴⁵ For a county, the county executive; city and village, the mayor; town, supervisor.

⁴⁶ See N.Y. MUN. HOME RULE LAW § 40 (McKinney 1994). Importantly, this provision provides that such a request may be made separately by two or more local governments affected by the same bill. See id.

⁴⁷ See id.

⁴⁸ See N.Y. GEN. MUN. LAW § 64-e (McKinney Supp. 1999).

C. *Sale or Use Tax*

Counties may assess and collect local sales and use taxes pursuant to Article 29 of the Tax Law.⁴⁹ Taxes may be placed on a number of items including the sale of tangible personal property, utility services, food and drink, hotel room occupancy, and amusement charges.⁵⁰ The net revenues from these taxes may be used for the acquisition of open lands under certain circumstances.⁵¹ All of the net revenues derived from a county sales or use tax may be set aside for county purposes or distributed to constituent municipalities.⁵² Since a county is permitted to expend county funds for the acquisition of open lands,⁵³ a county can set aside a portion of the net tax proceeds from sales taxes for the acquisition of such land. For example, Suffolk County has used this authority to levy a ¼ of a cent sales tax to raise funds for the County Pine Barrens Protection/Clean Drinking Water Protection program.⁵⁴

V. **Methods of Financing**

A. *Capital Reserve Fund*

State law permits municipalities to set aside a portion of the funds derived through taxation⁵⁵ or the issuance of debt obligations⁵⁶ for specific purposes established by the local legislature.⁵⁷ Under Article 2, Section 6-c of the General Municipal Law, a local legislature may create a capital reserve fund⁵⁸ and designate certain moneys for

⁴⁹ See N.Y. TAX LAW §§ 1201- 1263 (McKinney 1988 and Supp. 1999).

⁵⁰ See *id.* § 1210(a) and (b).

⁵¹ For a detailed discussion of how net revenue derived from city or county sale or use taxes may be distributed to municipalities and how these revenues may be used, consult Section 1262(c) and 1262(d) of the Tax Law.

⁵² See N.Y. TAX LAW § 1262(a).

⁵³ See N.Y. GEN. MUN. LAW § 247(2).

⁵⁴ See Preserving the East End: The Case for the East End Community Preservation Fund in the Towns of East Hampton, Southampton, Shelter Island, Southold and Riverhead, at 9 (1998).

⁵⁵ See N.Y. GEN. MUN. LAW § 6-c(5)

⁵⁶ See *id.* § 6-c(9-a).

⁵⁷ See *id.* § 6-c.

⁵⁸ See *id.* § 6-c(2).

the purchase of open lands.⁵⁹ When established for this purpose, the fund is subject to a permissive referendum.⁶⁰ Moneys placed into this fund may then be used to purchase title to land or development rights.⁶¹ The importance of such a capital reserve fund is that once moneys are placed into the fund, they can only be used for the designated purpose and may not be diverted to other purposes by future local leaders with different objectives.⁶²

B. Land Purchase Installment Obligations

Under a law enacted in 1996, municipalities may enter into land installment purchase obligations for the purpose of financing the acquisition of interests or rights in real property under Section 247 of the General Municipal Law.⁶³ The Local Finance Law permits a municipality to pass a bond resolution authorizing it to purchase land or development rights on an installment sales contract basis from individuals who own such land. These individuals become creditors of the municipality similar to bond holders who purchase municipally issued bonds. The value of the land or development rights acquired can be repaid to the landowners under an installment sales contract lasting up to 30 years. Utilizing this authority, a municipality may acquire either title to land or the land's development rights in the present while spreading the cost of the acquisition over as many as thirty years.⁶⁴ The landowner receives annual or semi-annual payments⁶⁵ of tax-exempt interest⁶⁶ with the principal payments made annually or deferred until the end of the contract term.

⁵⁹ Under Section 6-c(1)(b)(2) the term "capital improvement" includes land or rights in land. Thus, a capital reserve fund may be created to finance the purchase of open space.

⁶⁰ See 1986 WL 31711 (N.Y.St.Cptr.) (the establishment of a capital reserve fund by a town for the specific purpose of acquiring and developing park land is subject to permissive referendum).

⁶¹ See N.Y. GEN. MUN. LAW § 6-c (McKinney Supp. 1999). An interesting State Comptroller's Opinion has stated that proceeds from parking meters which have not been estimated as revenues in the current budget may be appropriated by a village board of trustees to augment or establish a capital reserve fund. See 7 Op.State Compt. 76 (1951).

⁶² See 1981 N.Y. ST. COMP. 128 (where a town has established a capital reserve fund for the acquisition of park lands, moneys in that fund may only be expended for that purpose, transferred to another capital reserve fund under the procedures set forth by General Municipal Law § 6-c(9), or appropriated for a purpose specified in § 6-c(9-a) of the General Municipal Law.); see also N.Y. GEN. MUN. LAW § 6-c(9). Where a fund has been established for the purpose of acquiring land or interests in land, and there remains an unexpended balance in that fund, the balance may not be transferred to another capital reserve fund without having first been subject to a permissive referendum. See N.Y. GEN. MUN. Law § 6-c(9)(b).

⁶³ See N.Y. LOCAL FIN. LAW § 29.10 (McKinney Supp. 1999). It should be noted that the obligation incurred under this provision is a full faith and credit obligation. See id. § 29.10(4). Also, this section of Local Finance Law remains in effect until July 31, 2001.

⁶⁴ See id. § 29.10(3)

⁶⁵ See id.

The benefits of this form of payment accrue to both the municipality and the property owner. The installment purchase contract permits the municipality to purchase open lands with a minimal initial outlay while giving the municipal government up to thirty years to pay the balance.⁶⁷ Additionally, through this type of financing, a municipality can acquire significantly more land or development rights when the cost of land is still relatively inexpensive.

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

The difference between the two techniques is that the installment purchase obligation approach provides different financial benefits to the landowner. Instead of receiving the entire payment for the land value sold in the first year, under the installment purchase obligation method, the owner receives payments each year over the term of the installment contract. All interest payments made to the landowner are tax exempt.⁶⁸ An additional benefit to the property owner is the ability to devise the installment purchase contract to heirs or sell it to municipal bond investors for cash prior to the end of the contract's term.⁶⁹

⁶⁶ See id. § 29.10(7).

⁶⁷ See id. § 11(a)(21)(a).

⁶⁸ See N.Y. LOCAL FIN. LAW § 29.10(7).

⁶⁹ See Raymond F. Servary, Jr. and Dale B. Neubert, An Agricultural Land Preservation Program that Developers Can't Match, GOVERNMENT FINANCE REVIEW, at 17 (February 1991).

VI. Local Examples

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

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

In 1997, voters in the Town of Greenburgh, in Westchester County, approved a capital reserve fund from which moneys would be used to acquire and protect the town's remaining natural areas, wetlands, trails and greenway corridors. This fund was established pursuant to General Municipal Law Section 6-c for the purposes set forth in Section 247.

The town "Greenways Fund" is financed by an increase of one half of one percent (0.5%) of the prevailing tax rate levied on the assessed value of property in the town.⁷⁰ At the time of passage, it was estimated that the increase of 0.5% would cost the average homeowner about \$10 a year.⁷¹ This increase of 0.5% will be in place until 2004 at which time the fund can be continued.⁷² If, however, no properties are acquired by that time, the money in the fund will revert to town's general fund.⁷³

B. *Lease of Development Rights*

In 1976, the Town of Perinton, in Monroe County, enacted a conservation easement law to acquire interests in land for preservation of open space. These conservation easements must restrict development for a minimum of five years.⁷⁴ The conservation easement law also establishes conservation easements for farming purposes where, in addition to agreeing not to develop the land for the period of the easement, the landowner agrees that the lands under the easement will be used for agricultural purposes.⁷⁵

Unlike other communities, the town does not pay for the conservation easements it acquires. Instead, the town simply provides reduced tax treatment to landowners in exchange for

⁷⁰ See TOWN OF GREENBURGH, BALLOT PROPOSITION NO. 1 (1997).

⁷¹ See *id.*

⁷² See *id.*

⁷³ See *id.*

⁷⁴ See TOWN CODE OF THE TOWN OF PERINTON § 130.

⁷⁵ See *id.*

restricting development on their property as directed by General Municipal Law Section 247(3).⁷⁶ The Town Assessor's office utilizes a Tax Assessment Table which establishes the percent of property's pre-assessment value that remains taxable.⁷⁷ For instance, where a landowner agrees to a five-year conservation easement, seventy-five percent of the pre-assessment value of the property remains taxable. If a landowner agrees to a conservation easement for a period of twenty-five years, only ten percent of the property's pre-assessment value remains taxable.⁷⁸

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

Perinton presently has over 4,000 acres of land under easement – approximately nineteen percent of its total land.⁷⁹ Of this total, over 3000 acres are farm lands. Additionally, 88 of the 130 easements run for a period of ten years or more.

The town's conservation easement law also provides Perinton with a means to raise funds for the purchase of open space lands. A provision of the law requires landowners who cancel their easement before its period has expired, or who substantially violate the easement, to pay a penalty and back taxes on the land under easement.⁸⁰ This money is then placed into a capital reserve fund established by the Town Board called the "Open Space Retention Reserve Fund." Moneys placed into this fund are used to acquire interests in open lands. Recent acquisitions with fund money have totaled nearly 400 acres.⁸¹

⁷⁶ See id.

⁷⁷ See id.

⁷⁸ See id.

⁷⁹ See Town of Perinton, Conservation Easement Fact Sheet (1999).

⁸⁰ See TOWN CODE OF THE TOWN OF PERINTON § 130.

⁸¹ See id.

C. *Municipal Bonds to Purchase Development Rights*⁸²

1. Town of Pittsford

By 1990 only 12 family farms remained in the Town of Pittsford, in Monroe County.⁸³ Recognizing the importance of farmland and open space to the community, the Town commissioned a Fiscal Impact Study in 1993.⁸⁴ The study illustrated that it would cost Pittsford less to issue bonds to purchase the town's remaining open space than it the land were developed for single-family housing as permitted under the town's zoning code.⁸⁵ With this in mind, Pittsford inventoried the town's open space based on criteria established by the Town Board. Open space lands were prioritized, and in 1996, Pittsford identified 2,000 acres for preservation in town's "Greenprint for the Future."⁸⁶ Lands to be preserved included wildlife habitat corridors that linked important ecological resources and the town's remaining historic farms.⁸⁷

Using its bonding authority, the Town Board approved the issuance of \$9.9 million in municipal bonds to purchase the development rights to seven farms totaling 1,100 acres.⁸⁸ Each landowner entered into a conservation easement with the Town. These easements divide each farm into three areas – homestead, farmstead, and farm area – and set forth permissible activities in each area.⁸⁹ The easements also provide the Town with the right to visual access to the

⁸² Other communities have recently approved the authorization of bonds to finance the acquisition of open space land or development rights. In 1998, voters in the Town of Huntington approved a \$15 million bond proposition that authorized \$ 10 million to preserve undeveloped town lands and \$5 million to improve and expand town parks. Also in 1998, voters in the Town of Southold approved \$2 million in bonds for open space preservation efforts. See Land Trust Alliance, November 1998 Open Space Acquisition Ballot Measures, <<http://www.lta.org/refernda.html>> (visited on August 8, 1999).

⁸³ See American Farmland Trust, Call to Action: Farmland Protection Success Stories in the Empire State, at 17 (1998).

⁸⁴ See id. at 21.

⁸⁵ See id. This is known as a "build-out" scenario.

⁸⁶ See id.

⁸⁷ See id.

⁸⁸ See, Town of Pittsford, Bond Resolution (July 16, 1996).

⁸⁹ See, Town of Pittsford, Conservation Easement for the Purchase of Development Rights, entered into between the Town of Pittsford and Mary Kay, Tomothy J. and James M. Manno, dated September 23, 1998.

property in its scenic and open state, and permit public access in certain designated areas of each farm.⁹⁰

2. Suffolk County

Use of bonds to acquire open space lands or development rights can also be undertaken on a regional level. In 1974, Suffolk County established the first purchase of development rights program in the country.⁹¹ Its purpose was to preserve the county's remaining farmland by keeping those farms in agricultural production and also on the tax roles.⁹² The program was initially funded by issuing \$21 million in bonds to pay for the development rights to 3,883 acres of farmland.⁹³ Subsequent bond resolutions were enacted by the County Legislature in the early and late 1980s which authorized another \$20 million in county bonds to finance the acquisition of additional farmland.⁹⁴

Most recently, the electorate of Suffolk County approved the "Community Greenways Fund."⁹⁵ This fund authorizes the issuance of \$60 million in bonds for three open space initiatives.⁹⁶ First, \$20 million will be used for the acquisition of land that contains wetlands, woodlands, pine barren or other lands which are suitable for passive, non-recreational uses.⁹⁷ Lands acquired with this portion of the fund will be dedicated to the Suffolk County Nature Preserve and will be forever wild.⁹⁸ Second, \$20 million is authorized for the acquisition of land to be used as active parklands, except golf courses.⁹⁹ Third, \$20 million will be appropriated to acquire additional development

⁹⁰ See id.

⁹¹ See American Farmland Trust, Call to Action: Farmland Protection Success Stories in the Empire State, at 12 (1998).

⁹² See id.

⁹³ See id. at 14.

⁹⁴ See id.

⁹⁵ See Suffolk County, New York, Resolution No. 559-1998 (1998) (adding a new Article XII-A to the Suffolk County Charter).

⁹⁶ See id. The county bond resolution actually authorized the issuance of \$62 million in bonds, but \$2 million of that amount will be used for the construction of an educational and interpretative center. See id. at 3.

⁹⁷ See id. § 12-A(A)(1).

⁹⁸ See id.

⁹⁹ See Suffolk County, New York, Resolution No. 559-1998, § 12-A(A)(2).

rights on farmland.¹⁰⁰ To finance the obligations incurred under the fund, Suffolk County increased real property taxes¹⁰¹ which are expected to cost the average taxpayer \$10.93 per year.¹⁰²

D. Real Estate Transfer Tax.

In 1998, the state legislature authorized as a group the towns of East Hampton, Riverhead, Shelter Island, Southampton, and Southold (the “East End Towns”) to impose a real estate transfer tax for the purpose of raising needed funds for open space acquisition.¹⁰³ The legislature recognized that the significant financial commitments made by the East End Towns to preserve open space were insufficient to stem the rapid development that was quickly engulfing the eastern end of Long Island.¹⁰⁴ Revenue derived from the transfer tax will be used to preserve community character, including the preservation of agricultural land and lands of significant ecological and scenic value.¹⁰⁵

The transfer tax is a local tax that is imposed on the conveyance of real property or an interest therein where consideration for the sale price of a parcel exceeds \$500.¹⁰⁶ The tax is two percent (2%) of the price paid for the property,¹⁰⁷ is paid by the parcel’s purchaser,¹⁰⁸ and is payable at the time that state transfer taxes are due.¹⁰⁹ Although numerous types of conveyances are subject to the tax, there are a number of exceptions.¹¹⁰ For example, conveyances which are used to secure a debt or conveyances of property where the entire property is under a conservation easement, are not subject to the transfer tax. Also, certain exemptions are applicable. In the towns of East Hampton, Shelter Island and Southampton, the first \$250,000

¹⁰⁰ See id. § 12-A(A)(3). Moneys expended under this portion of the fund are conditioned upon the county receiving thirty percent of the actual cost of acquisition from federal, state or local governments. See id. § 12-A(A)(3)(a).

¹⁰¹ See id.

¹⁰² See Jerry Markon and Bill Bleyer, Environmental Issues Win in Suffolk County Referenda, *Newsday*, 1998 WL 2692493 at 1.

¹⁰³ See N.Y. TOWN LAW § 64-e (McKinney Supp. 1999) (establishing the Peconic Bay Region Community Preservation Funds); see N.Y. TAX LAW § 1449-aa et. seq. (McKinney Supp. 1999).

¹⁰⁴ See N.Y. TOWN LAW § 64-e (Historical and Statutory Notes).

¹⁰⁵ See id. § 64-e(4).

¹⁰⁶ See N.Y. TAX LAW § 1449-bb (McKinney Supp. 1999).

¹⁰⁷ See id.

¹⁰⁸ See id. § 1449-dd(1).

¹⁰⁹ See id. § 1449-cc(1).

¹¹⁰ See id. § 1449-ee.

paid for the developed property is exempt from the tax. In the towns of Riverhead and Southold, the first \$150,000 paid is tax exempt.¹¹¹ It is important to note that before the local transfer tax program can be implemented in any of these communities, the special state law passed by the Legislature requires that there be a mandatory referendum of the voters.¹¹²

Although the East End Towns have the authority to implement a transfer tax, the tax must be enacted on the local level and a number of requirements must be met. These requirements are established by the special legislation passed by the State Legislature for these towns in the east end of Long Island.¹¹³ First, a town must establish a community preservation fund.¹¹⁴ This fund holds all revenues derived from the local transfer tax, as well as revenues derived from other local sources.¹¹⁵ Once deposits are made to the fund, those moneys cannot be transferred to any other municipal account.¹¹⁶ Second, a town must create an advisory board that reviews and makes recommendations to the Town Board on proposed acquisitions of interest in real property.¹¹⁷ Third, a town must also adopt a community preservation project plan.¹¹⁸ This plan sets forth every project which the town plans to undertake and includes every parcel which is necessary to be acquired in the town in order to protect community character. It must evaluate all land use techniques available to the town to achieve the plan's objectives, and it must also establish priorities for preservation including the preservation of farmland as its highest priority.¹¹⁹ Finally, before a town can enact a transfer tax, it is required to study and consider the implementation of a transfer of development rights program.¹²⁰

Lands or interests in land acquired under a town's community preservation fund are subject to certain restrictions. For example, unless the Town Board substitutes property of equal environmental value, reasonably equivalent usefulness, and location, lands acquired with community preservation fund money cannot be sold, leased, exchanged, or otherwise disposed of for any purpose.¹²¹ Additionally, lands acquired under the program must permit public use in a

¹¹¹ See id.

¹¹² See N.Y. TAX LAW § 1449-bb.

¹¹³ See N.Y. TOWN LAW § 64-e.

¹¹⁴ See id. § 64-e(2).

¹¹⁵ See id. At a minimum, revenues from the transfer tax are deposited into the fund.

¹¹⁶ See id. Before the fund can be established, each town must have incurred or authorized indebtedness since 1980 for open space preservation equal to or greater than \$200 per town resident.

¹¹⁷ See id. § 64-e(5).

¹¹⁸ See id. § 64-e(6). This plan is to be updated every five years.

¹¹⁹ See N.Y. TOWN LAW § 64-e(6).

¹²⁰ See id. § 64-e(7).

¹²¹ See id. § 64-e(10).

manner consistent with the natural, scenic, historical and open space character of the property as well as preserve the property's native biological diversity.¹²²

Utilizing the authority granted under Town Law Section 64-e and Tax Law Sections 1449-aa through oo, the Towns of Riverhead and Southampton enacted local real estate transfer taxes in 1998. Both communities followed the provisions of state law and began imposing the transfer tax in the spring of 1999. Each communities' transfer tax is effective until December 31, 2010.

¹²² See id. § 64-e(9).