

# New York Law Journal

## THIS WEEK LONG ISLAND

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ALM

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The old saying that “they’re not making any more land” highlights an issue of growing interest to Long Island, which is, of course, first and foremost an island. Long Island is seeing more and more efforts and increasing government funding being advanced with the goal of keeping land as open and undeveloped space. It seems evident that the approximately 50,000 acres of undeveloped land now preserved on Long Island<sup>1</sup> will increase; in Suffolk County, environmental groups have set a goal of preserving half of that county’s remaining 70,000 acres.<sup>2</sup>

Quite simply, preservation of open space, and the related concept of “smart growth,” is now on the forefront of land use decisions and should be considered by property owners, developers and local government officials when deciding whether, or how, to redevelop a site. Indeed, factoring that into the equation may result in less civic opposition and a smoother and faster permitting path.

One way of preserving sensitive or unique open space in New York is through the enactment of Community Preservation Funds, which find their roots on Long Island. In 1998, five East End towns, including Riverhead, Southold, Southampton, East Hampton and Shelter Island, became the first towns in New York state to adopt Community Preservation Funds. Since then, these funds have preserved about 7,500 acres of open space and raised \$400 million in



### ZONING & LAND USE

#### *Preserving Open Spaces*

taxes that has been used to acquire land or development rights.<sup>3</sup>

In 2003, state law was amended to add §64-f to the Town Law, enabling the Town of Brookhaven to establish a Community Preservation Fund.<sup>4</sup> Section 64-f allows the town to incorporate a wide range of strategies, including fee simple acquisition, purchase of development rights, transfer of development rights, scenic and conservation easements, private conservation options, and regulations and zoning, in its arsenal of land preservation tools. The statute also permits the town to impose a real estate transfer tax and to use the revenues to fund the acquisition of open space and farmland. Brookhaven’s Community Preservation Fund is on the ballot this November and it will be interesting to see if it garners the support of voters.

Brookhaven’s program, if approved, takes an interesting approach to land preservation by incorporating mechanisms to identify, prioritize and acquire parcels for preservation, mechanisms to fund the purchases of these parcels and mechanisms that permit certain development rights

to be transferred from the property to be preserved to other properties located in Brookhaven.

As noted in the enabling statute, the overall purpose of this plan is to establish parks, nature preserves and recreational areas; preserve open space, particularly agricultural land; preserve land with exceptional scenic value; preserve fresh water and salt water marshes and other wetlands; preserve aquifer recharge areas; preserve undeveloped beaches and shorelines; establish wildlife areas; preserve pine barrens; preserve rivers; preserve forestland; and preserve historic areas.<sup>5</sup>

Brookhaven’s program will be comprised of two different components: the acquisition of open space and farmland to preserve community character and the creation and redemption of development rights under a Preservation Fund Development Rights Program.<sup>6</sup> A real estate transfer tax would be imposed on each conveyance of improved real property at a rate of 2 percent of the purchase price over \$250,000 and for unimproved real property at a rate of 2 percent of the purchase price over \$150,000; there is an exemption for qualified first-time homebuyers. The monies collected will be placed into the Community Preservation Fund and will be made available for the purchase and management of open space and farmland.

Brookhaven’s plan specifies the types of properties that can be acquired under this program. Nineteen different zoning districts, including residential, commercial and industrial, are eligible for the program and 15 separate conservation areas are included in Brookhaven’s plan. These conservation areas include some of the region’s most critical environmentally sensitive resources, such as the Pine Barrens, Patchogue Bay Watershed, Bellport Bay Watershed, Fire Island, North Shore Bluffs, Rare/Unique Habitats and Freshwater Wetlands, Hamlet

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Greens/Community Parks/Pocket Parks, Farmland and Recreational Areas.

Brookhaven's plan contains several strategies to protect community characteristics. These include purchasing the property outright; purchasing the development rights of these parcels, transferring development rights to other less sensitive parcels and the use of scenic or conservation easements.

### Preservation Priorities

Brookhaven has identified the 10 highest priority properties it wishes to preserve in the Generic Environmental Impact Statement and accompanied Findings Statement its town board adopted in September 2007.

These priority properties include the Manorville Farm Protection Area, composed of over 500 acres of farmland located south of Exit 69 of the Long Island Expressway; the Eastport Farm Protection Area, which is a 690-acre agricultural area composed of several different farms in the southeast part of the town; the Keyspan/Shoreham Properties, composed of 893 acres with a mile of frontage on Long Island Sound and 2,000 feet in the Wading River Marsh; the Overton Preserve, composed of 560 acres of field, wetlands and woodlands in the Central Pine Barrens; the Pine Ridge Preserve, composed of 800 acres in the Central Pine Barrens; the Mount Sinai Highlands, composed of 115 acres of hardwood in a watershed area; the Mastic Shirley Conservation Area, an assemblage of properties within a 500-acre wetland complex on the Great South Bay; the Mastic Wood Property, 154 acres at the headwaters of the Forge River; the Glacial Ridge Trail, composed of 260 acres to be used for hiking trails; and the Pine-to-Bay Trail, composed of 100 acres to be used for hiking trails.

Properties that are acquired through Brookhaven's plan would be eligible for the transfer of development rights program. Different formula and criteria are used to establish the development rights that can be sold to property owners in eligible receiving areas.

Basically, Brookhaven's plan allows for 25 percent of the development rights of a site to be transferred; the remaining 75 percent would be permanently extinguished.

Brookhaven estimates that 1,250 Community Preservation Fund Development Rights would be created in the first phase of its program, with another 400 to be created in the second phase. In addition, 4,950 development rights would be extinguished under the program. The development rights that are created would be sold through a clearinghouse, with the money going to the Community Preservation Fund.

Brookhaven also estimates that there are 8,271 acres in the town eligible to receive these development rights.<sup>7</sup>

Under the plan, eligible sites in A, A1 and A2 residential districts that purchase Community Preservation Fund Development Rights would be able to build one additional building. PRC, PRCHC and MF zoning districts would get an additional 300 gallons of sanitary flow and/or 1,500 square feet of gross floor area for each development right purchased.

### Other Methods

Suffolk County voters will be able to decide next month whether to extend the existing Quarter Cent Drinking Water Protection Program until 2030. That one-quarter cent portion of the county's sales tax is scheduled to expire in 2013.

The program was first approved two decades ago and, to date, has raised \$600 million; the county has used those funds to preserve open space and farmland, for water quality protection and land preservation initiatives, and to lower property taxes and sewer assessments.<sup>8</sup>

If voters approve the referendum, it is expected that the program will generate some \$350 million to preserve open space and farmland, and that it will provide \$125 million to fund various environmental protection programs, including protecting threatened wildlife habitats and critical ecosystems, reducing toxic storm water runoff and ensuring clean drinking water.

A variety of other steps have been taken

by Long Island municipalities to preserve open space. For example, in August, the Suffolk County Legislature authorized the purchase of 205 acres of property for open space or farmland preservation within the Towns of Brookhaven, East Hampton, Shelter Island, Southold, and Smithtown.

Over the past several years, Suffolk County has preserved nearly 4,000 acres, including 32 farms. For the past year, the county has had a \$50 million Environmental Legacy Fund in its capital budget that is earmarked for acquisitions in which other municipalities or private interests apply matching funds.

### Conclusion

Preservation of open space is not synonymous with "no growth." In fact, a well-thought-out land preservation program that couples preservation of open space with transfer of certain development rights allows communities to engage in "smart growth"—protecting critical areas while at the same time providing incentives for development in less environmentally sensitive areas.



1. See [http://www.bnl.gov/bnlweb/pubaf/pr/PR\\_display.asp?prID=07-63](http://www.bnl.gov/bnlweb/pubaf/pr/PR_display.asp?prID=07-63).

2. See [http://www.legislatorcooper.com/pressrelease\\_246.html](http://www.legislatorcooper.com/pressrelease_246.html).

3. New York Times, Nov. 9, 2006.

4. Town Law §64-f.

5. Town Law §64-f (4).

6. The transfer of development rights program must comply with Town Law §261-a, which requires, among other things, that "a generic environmental impact statement pursuant to the provisions of article eight of the environmental conservation law [State Environmental Quality Review Act] shall be prepared by the town board for the receiving district before any such district or sending district, is designated." Section 261-a(2)(a) also specifies that the effects of the potential increased development from the transfer of development on the receiving areas are to be examined.

7. See Generic Environmental Impact Statement Findings Statement, adopted by the Town Board of Brookhaven, Sept. 4, 2007.

8. See, e.g., [http://www.zwire.com/site/index.cfm?newsid=18676805&BRD=1776&PAG=461&dept\\_id=6365&rfi=8](http://www.zwire.com/site/index.cfm?newsid=18676805&BRD=1776&PAG=461&dept_id=6365&rfi=8).