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Money Grows on Trees in New York City (or at Least in Some of Its Parks)

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On June 28, 2018, the board of the Hudson River Park Trust approved two real estate deals that highlight special aspects of the Trust and the state law under which it operates—the 1998 Hudson River Park Act. The Trust approved the sale of 158,000 square feet of unused development rights (aka "air rights") to two developers for $52,000,000. In recent years the Trust has also used its statutory authority to issue long-term leases for park facilities constructed by private partners, collectively valued at hundreds of millions of dollars. Virtually no other park operator in the state has the ability to raise revenue in this fashion—sale of air rights and issuance of leases. And the Trust is using those powers to great effect—nearing completion of the four-mile-long park at a cost of almost a billion dollars. This article focuses on some of the ways that disparate laws and policies governing parks are creating open space winners and losers and how a few changes might level the playing field.

Hudson River Park Trust

The Trust's unique ability to sell air rights is based on the State Legislature's 2013 amendment to the Hudson River Park Act, which now allows private developers, the Trust and the City to cooperate in the creation of granting sites (within the Park) and receiving sites (outside the park). The Trust may "transfer … any unused development rights as may be available for transfer to properties located up to one block east of the boundaries of the park along the west side of Manhattan, if and to the extent designated and permitted under local zoning ordinances … ." N.Y. Unconsol. L. §1647 (emphasis added). The Trust can now sell air rights at considerable value—$300 per square foot in the case of the 2018 deals.

The Act also allows long-term leases. The law thus creates a valuable exception to the New York's public trust doctrine, a common law that generally prohibits the lease or sale of parkland without state legislative approval. Miller v. City of New York, 15 N.Y.2d 34 (1964). In 2018, the Trust used that authority to amend a lease to Pier55, Inc. for a new park, pier and performance space constructed entirely through a private donation. Moreover, the Hudson River Park Act permits the Trust to issue leases for a variety of non-park uses including entertainment, retail and schools.

Taken as a whole, the ability to sell air rights, issue leases and install certain non-park uses has allowed the Trust to capitalize on soaring real estate values to nearly complete the park. In fact, at this point, one might say the Park is driving values in Manhattan. The link between high-quality green space and rising property values is well established.

Other Operators

While the vast majority of parks are operated solely by the New York City Department of Parks and Recreation (NYC Parks), there is much to be learned from the independent entities operating a handful of flagship parks. (This article does not include the State, which operates about 1343 acres of parkland, and National Park Service, which operates the sprawling 7,138-acre Gateway National Recreation Area. This acreage is not included in the City's 29,000 acres of parkland.) There are city-controlled nonprofit corporations like the Brooklyn Bridge Park Corporation and Trust for Governors Island, which have the ability to lease property and raise revenue. There are state-controlled, public benefit corporations (usually created by state law) that also have the ability to issue ground leases for development sites to fund an array of public services. They include the Battery Park City Authority, Roosevelt Island Operating Corporation and Hudson River Park Trust. Finally, there are about three dozen nonprofit, charitable corporations—often referred to as conservancies—that operate parks through formal agreements with NYC Parks. Those agreements take various forms. But they always allow the operator to keep the revenue they raise within a park. The money these three types of entities are raising annually is huge—at least $250,000,000—rivaling the NYC Parks' $500,000,000 operating budget. (NYC Parks also has very significant budget allocations for capital projects.) Most of the independent revenue is spent on a handful of flagship parks totaling less than 5,000 acres. The City, conversely, must spread its operating budget over at least 29,000 acres of city parkland.

Targeted Changes to Law and Policy

Allowing NYC Parks and its public-private partners to capitalize on soaring real estate values and keep the revenue that is generated within parks are obvious solutions to park funding shortfalls. Here's how:

Amend state law to permit leases. The public trust doctrine prohibits leases of parkland for good reason—to protect the public's ownership interest in parks. But it forces municipalities into awkward, revocable "licenses" with operators of vital park concessions, including restaurants, golf courses and historic homes. Because the licenses are by definition revocable by the City at will, potential operators of these facilities rarely make major capital investments and the burden falls upon the City. A law permitting such leases would need to be carefully limited to specific types of parks, facilities, uses and durations. But it would be an invaluable tool in turning around underutilized and dilapidated park facilities with private dollars.

Amend New York City's Zoning Resolution to allow parks to start benefiting from neighboring development and soaring property values. State law already creates three tools for the City to capture real estate value for parks. The timing and locations of the next real estate booms cannot be predicted. But the tools can be put in place now to capture some of that value for nearby parks.

- State law permits municipalities to allow "transfers of development rights" (TDRs) even when the granting site and receiving site are not contiguous. Suffolk County has a heralded law that permits sales of development rights from land designated as "Pine Barrens" to receiving zones in urban centers many miles away. New York City has a very limited system for owners of tax lots under the High Line Park to sell air rights to receiving sites within the narrow confines of the West Chelsea Special District. Through extensions of the Hudson River Park Special District, the Zoning Resolution allows sales of air rights one block away. The City should expand use of the tool by creating a special park TDR district that can be mapped around appropriate parks citywide (after careful public review).

- State law permits municipalities to create incentive zoning systems where bulk zoning controls (i.e., floor area limits, height limits, etc.) can be loosened in exchange for payments for parks, schools, transportation and affordable housing. The City has not used this tool for parks; it has for affordable housing. Create special districts that can be mapped around certain parks and allow modest floor area bonuses (i.e., 20 percent) in exchange for park funding.

- State law permits municipalities to create business improvement districts (aka "BIDs") that impose supplemental property taxes on a designated area to be used for supplemental city services. There are 76 BIDs in the City. As a matter of tradition, the BIDs have not focused solely on park maintenance and have never taxed residential property owners. There is nothing in the law with those limits. Both the Hudson River Park Trust and Friends of the Highline attempted to launch BIDs but stopped in the face of public opposition. There is reason to try again. If a district were drawn correctly, even a small annual assessment could raise transformative amounts of revenue for parks.

Amend the City Charter to allow NYC Parks (and its public-private partnerships) to keep all or most of the revenue that is raised in Parks. The City Charter contains a vague term that is interpreted to require NYC Parks to turn over all concession revenue to the general budget. It states: "All revenues of the city, of every ... department ... from whatsoever source except taxes on real estate, not required by law to be paid into any other fund or account shall be paid into a fund to be termed the 'general fund.'" New York City Charter §109. This means that parks that host restaurants and golf courses generally receive no direct benefit from the facilities. NYC Parks should collect and keep that revenue and direct and distribute it equitably.

These changes would put NYC Parks and its private partners on more equal footing with the wildly successful city corporations, state corporations and private conservancies operating a handful of flagship parks. The goal is not to eliminate a robust City budget for parks. Parks should always be viewed as primarily the responsibility of government. But it is not a coincidence that parks operated by special-purpose entities are vastly better maintained than all other parks; the law has given these entities special tools to succeed.

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