

# URBAN AGRICULTURE AND LOCAL GOVERNMENT LAW: PROMISES, REALITIES, AND SOLUTIONS

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## INTRODUCTION

Increasingly, local governments are publicly embracing urban agriculture as a tool to promote residents' health, safety, and welfare. But what if, instead of encouraging urban agriculture, local initiatives are obstructing residents' plans to grow fruits and vegetables and raise animals in the city? When city officials publicly promote urban agriculture while creating structures that make it more difficult and expensive, what should citizens believe about the government's goals?

The term urban agriculture encompasses a wide variety of activities, but for the purposes of this article, is defined broadly as the growing of fruits and vegetables and the raising of animals within city limits.<sup>1</sup> This article will use the term "urban agriculture" in its most expansive sense, to include larger-scale urban farms as well as backyard and even apartment balcony gardening. Urban agriculture can look very different depending on the infrastructure and design of the city in which it exists. In Detroit, a place with acres of contiguous empty land, urban agriculture might look a bit like traditional rural agriculture: large fields and open space.<sup>2</sup> In New York City, where space is at a premium, urban agriculture might look more like rooftop or balcony gardens and small community gardens.<sup>3</sup>

Urban agriculture is both a new and old idea in the United States. Americans in less densely populated areas have long raised their own food at home, and programs to bring agriculture to city-dwellers began in the 1890s.<sup>4</sup> More recently, urban agriculture has become a trendy topic for discussion among environmentalists, planners, community organizers, and all

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<sup>1</sup> JULIAN CONRAD JUERGENSMEYER & THOMAS E. ROBERTS, *LAND USE PLANNING AND DEVELOPMENT REGULATION LAW* § 13:16 ¶ 1 (3d ed. 2012) ("Urban agriculture encompasses a variety of farming activities involving the production of food in or near cities including home gardening, gardening on vacant land often in rundown industrial areas, and roof-top gardening. It includes the raising of chickens and, less often, goats, bees, and pigs.").

<sup>2</sup> John Gallagher, et al., *Council Oks Sale of 1,500 Lots for Urban Farming Project*, DETROIT FREE PRESS (Dec. 11, 2012), <http://www.freep.com/article/20121211/NEWS01/121211061/detroit-city-council-hantz-woodlands-land-sale>. Detroit recently sold 1,500 vacant lots to Hantz Group, which plans to turn the land into a 140-acre farm. On the 1,500 lots are 50 vacant structures that will be demolished. The city of Detroit currently owns 60,000 vacant lots through tax foreclosure, which does not take into account the number of vacant lots that are in private hands. *Id.*

<sup>3</sup> One resource for looking up New York City open space is offered by 596 Acres, at [596acres.org](http://596acres.org).

<sup>4</sup> KATHERINE L. ADAM, NATIONAL CENTER FOR APPROPRIATE TECHNOLOGY, NATIONAL SUSTAINABLE AGRICULTURE INFORMATION SERVICE, COMMUNITY GARDENING 1 (2011), available at <https://attra.ncat.org/publication.html>.

levels of government.<sup>5</sup> Spurred by writers who focus on “locavorism” and urban homesteading, like Michael Pollan<sup>6</sup> and Novella Carpenter,<sup>7</sup> American city-dwellers have been increasingly carving out food-producing pockets of land in their own neighborhoods. Even the Obama administration has planted a vegetable garden on the White House lawn, and First Lady Michelle Obama has been publicly supportive of urban agriculture initiatives around the country.<sup>8</sup>

From a legal perspective, urban agriculture interacts with the law most clearly and consistently at the local level, as urban farmers deal with their neighbors and the city government in charge of regulating local behavior. Many cities have attempted to create urban agriculture programs that are designed to encourage growing food and raising animals in the city.<sup>9</sup> Some attorneys have created surveys of urban agriculture programs, by city, for many different cities around the United States.<sup>10</sup>

State and local governments in the United States have broad powers to create laws that promote the health, safety, welfare, and morals of their citizens.<sup>11</sup> These are referred to as the “police powers” of government.<sup>12</sup> In the past, cities have used these powers to ban urban agriculture activities; now, the trend is to use these police powers to bring urban agriculture back to urban neighborhoods.<sup>13</sup> Traditional police power rationales that support urban agriculture include the mental and physical health benefits of green space, the provision of fresh vegetables to promote healthy eating habits, and the productive use of vacant land.<sup>14</sup>

But what happens when you look closely at these initiatives and programs? If municipal governments wish to encourage urban agriculture, it should show in their words, in the programmatic structures cities have created, and in how these programs actually work on the

<sup>5</sup> *Urban Agriculture: Growing Healthy, Sustainable Places*, AM. PLAN. ASS'N., <http://www.planning.org/research/urbanagriculture> (last visited May 3, 2013) (“Urban agriculture is rising steadily in popularity in the United States and Canada — there are stories in the popular press, it has an increasingly central place in the growing local food movement, and there is a palpable interest in changing urban environments to foster both healthier residents and more sustainable communities.”).

<sup>6</sup> MICHAEL POLLAN, *THE OMNIVORE’S DILEMMA: A NATURAL HISTORY OF FOUR MEALS* (Penguin Books, 2007). Pollan’s book inspires its readers to eat locally-sourced food with minimal processing.

<sup>7</sup> Novella Carpenter published a popular urban gardening memoir about her experience growing vegetables and raising chickens, bees, goats and pigs in her small Oakland side lot. NOVELLA CARPENTER, *FARM CITY: THE EDUCATION OF AN URBAN FARMER* (Penguin Books, 2010). An example from her story will appear in Part III. For other, similar memoirs, see BARBARA KINGSOLVER, *ANIMAL, VEGETABLE, MIRACLE: A YEAR OF FOOD LIFE* (Harper Perennial, 2008); SPRING WARREN, *THE QUARTER-ACRE FARM: HOW I KEPT THE PATIO, LOST THE LAWN, AND FED MY FAMILY FOR A YEAR* (Seal Press, 2011).

<sup>8</sup> See Marian Burros, *Obamas to Plant Vegetable Garden at White House*, N.Y. TIMES, Mar. 20, 2009, at A1.

<sup>9</sup> JUERGENSMEYER & ROBERTS, *supra* note 1, § 13:16 ¶ 5.

<sup>10</sup> See MINDY GOLDSTEIN, ET AL., TURNER ENVTL. L. CLINIC, *URBAN AGRICULTURE: A SIXTEEN CITY SURVEY OF URBAN AGRICULTURE PRACTICES ACROSS THE COUNTRY* (2011) available at [http:// georgiaorganics.org/wp-content/themes/GeorgiaOrganics/Downloads/SiteMoveOver/urbanagreport.pdf](http://georgiaorganics.org/wp-content/themes/GeorgiaOrganics/Downloads/SiteMoveOver/urbanagreport.pdf).

<sup>11</sup> This power comes from the 10th amendment of the United States Constitution, which states that the powers prohibited from or not delegated to the Federal Government are reserved to the states, respectively, or to the people. See ARDEN H. RATHKOPF ET AL., *RATHKOPF’S THE LAW OF ZONING AND PLANNING* § 1.2 (4th ed. 2009).

<sup>12</sup> RATHKOPF, *supra* note 11, § 1.2.

<sup>13</sup> JUERGENSMEYER & ROBERTS, *supra* note 1, § 13:16 ¶¶ 4,5.

<sup>14</sup> *Id.* at ¶¶ 5,6.

ground for citizens. Unfortunately, there are many ways in which city governments say one thing and do the opposite. Some cities that promote urban agriculture with words have regulations that are counter-productive to the goal of encouraging city residents to grow their own food or source it locally.<sup>15</sup>

This paper will illustrate three ways in which city initiatives and regulations actually get in the way of urban farmers and gardeners. Part I discusses the crucial and fundamental issue of land tenure and sovereignty. Part II looks at urban animal husbandry and the ways in which some cities have put heavy burdens on urban residents who want to raise animals in the city. Finally, Part III examines land use law and how many current zoning codes discourage urban greeners from taking on urban agriculture projects. Throughout, this paper will address objections from those who are wary of local government support of urban agriculture. For each section, this paper will suggest a solution that will attempt to help cities' promises line up more closely with their realities. Where helpful, the paper will provide examples of cities whose programs are consistent with stated pro-urban agriculture priorities.

## I. LAND TENURE

### A. *The Promise*

Cities such as Baltimore, Maryland, Newark, New Jersey and Detroit, Michigan have allowed community groups and individuals to “adopt” city-owned vacant lots, taking advantage of the increased amounts of vacant land.<sup>16</sup> Cities benefit from reduced maintenance costs from these vacant lots, and they promote the programs as a way for city residents to get access to gardening land for a very low cost.<sup>17</sup>

### B. *The Reality*

Adopt-A-Lot programs do provide benefits to neighborhoods, but they push all of the legal burdens onto the lot adopters while providing a shared benefit for the whole community and the city. In Baltimore City, neighbors have used the program to create pocket parks, to clean and green lots that had otherwise become de facto landfills, and even to create urban gardens and farms.<sup>18</sup> Signatories to these Adopt-a-Lot agreements, however, rarely realize the amount of

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<sup>15</sup> See discussion *infra* Parts I.A-B, II.A-B, III.A-B.

<sup>16</sup> See, *Adopt-A-Lot Program*, BALT. HOUSING, [http://www.baltimorehousing.org/vtov\\_adopt](http://www.baltimorehousing.org/vtov_adopt) (last visited May 3, 2013); *Adopt-A-Lot*, City of Newark, New Jersey, [http://www.ci.newark.nj.us/government/city\\_departments/economic\\_housing\\_development/adoptalot.php](http://www.ci.newark.nj.us/government/city_departments/economic_housing_development/adoptalot.php) (last visited May 3, 2013); *Garden Permit/Adopt-A-Lot Permit*, CITY OF DETROIT, <http://www.ci.detroit.mi.us/DepartmentsandAgencies/PlanningDevelopmentDepartment/RealEstateDevelopment/GardenPermitAdoptALotPermit.aspx> (last visited May 3, 2013).

<sup>17</sup> See, e.g., CITIZENS PLANNING AND HOUSING ASSOCIATION, RESOURCE CENTER FOR NEIGHBORHOODS, HOW TO TURN A VACANT LOT INTO A GARDEN OR POCKET PARK (2011) available at [http://static.baltimorehousing.org/pdf/adopt\\_gardens.pdf](http://static.baltimorehousing.org/pdf/adopt_gardens.pdf) (describing how Baltimore residents can turn vacant lots into gardens and emphasizing ways community gardeners can receive funds for their projects).

<sup>18</sup> See, *What Others Are Doing*, POWER IN DIRT, <http://www.powerindirt.com/others.html> (last visited May 3, 2013) (describing the Barclay Youth Safe Haven, the Dr. Raynor Browne Elementary School Chess Garden, the Pen Lucy Pocket Park, and Exeter Gardens, among others, as examples of how vacant lots in Baltimore have been transformed). One community association in particular, C.A.R.E. Community Association, Inc., has adopted over eighty vacant lots in Baltimore through the Adopt-A-Lot Program. Becky Lundberg Witt, *Spotlight on CLC Client C.A.R.E. Community*

liability they are taking on or the extreme fragility of their legal rights to the land that they lovingly tend for years and even decades.

1. Liability

Signatories to Adopt-A-Lot agreements not only agree to take on liability for any of their actions on the land, they also agree to indemnify the city for any harm that occurs on the site or in the site’s immediate surroundings.<sup>19</sup> The Baltimore City Adopt-A-Lot contract requires that:

The Licensee agrees to save and hold harmless the City against any and all liability in any way connected with or arising from the activities carried on at the above captioned property (hereinafter the “Property”) or the use of the Property, including the maintenance of sidewalks abutting the Property.<sup>20</sup>

Not only is the signatory fully liable for any injury that happens on the lot, but if a neighbor trips on a poorly maintained sidewalk *in front of* an Adopt-A-Lot site and then successfully sues the city, the city could collect from the Adopt-A-Lot signatory for the damages.

Many gardeners don’t realize the potential costs of a lawsuit, or they don’t believe that their fellow neighbors would sue them for any damage that occurred. While this may be true in many cases, when there is a serious injury that requires the involvement of insurance companies, the legal principle of subrogation *requires* the injured party to participate in a lawsuit against the negligent party (in this case, the garden itself).<sup>21</sup> Under the law of insurance, the insurance company is entitled to be reimbursed by the third party who caused the damage, usually by her negligence or wrongful act.<sup>22</sup> This entitlement doesn’t have to be written into the insurance contract; it arises as a matter of law when the insurance company pays to remedy the insured person’s injury.<sup>23</sup>

Injuries at urban farms and gardens have so far been uncommon. In fact, it is difficult to find any examples of lawsuits filed against an urban farm or garden based on an injury sustained there, either in legal databases or in less formal searches.<sup>24</sup> Under normal circumstances, when an event is very unlikely, but would be very expensive if it were to occur, liability insurance would cover that circumstance, as the purpose of insurance is to pool and spread risk.<sup>25</sup> However, in

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*Association, Inc.*, THE URBAN AGRICULTURE LAW PROJECT (Oct. 26, 2012), <http://urbanagriculturelawproject.org/?p=433>.

<sup>19</sup> COMMUNITY LAW CENTER, “ADOPT A LOT” LICENSE AGREEMENTS: BREAKING THROUGH THE LEGALESE 2 (2012), available at <http://communitylaw.org/adopt-a-lot-handout/>.

<sup>20</sup> *Id.*

<sup>21</sup> 2 ALLAN D. WINDT, INSURANCE CLAIMS AND DISPUTES § 10:5 (5th ed. West 2007).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> Searches on legal databases Westlaw and LexisNexis returned no matching, relevant results as of May 3, 2013. A similar search of Google also returned no matching, relevant results as of May 3, 2013.

<sup>25</sup> 43 AM. JUR. 2D *Insurance* § 2 (2013) (“A characteristic of insurance is that a number of risks are accepted, some of which involve losses, and that such losses are spread over all the risks so as to enable the insurer to accept each risk at a slight fraction of the possible liability upon it. Insurance, therefore, is a means of distributing the risks of loss. An insurer expects losses and undertakes the obligation based on an evaluation of the market’s risks and losses. Thus, the primary elements of an insurance contract are the spreading and underwriting of a policyholder’s risk. The parties wager

Maryland, urban gardeners have found it impossible to purchase liability insurance to cover activities on land to which they have minimal property rights.<sup>26</sup> In other states, like New York, greeners have found it fairly simple to either buy insurance privately for privately-owned lots or to obtain it through the city government if they are gardening on city-owned land.<sup>27</sup>

Garden organizations are almost all volunteer-run and do not produce any income (as opposed to for-profit urban farming which still comprises a small proportion of urban agriculture activity), and so concerns over liability would not necessarily occur to lay volunteers. In avoiding the topic, urban greeners are exposing their projects and themselves to fiscal vulnerability. In cases where garden groups are informal and unincorporated, they may be exposing their leaders to personal liability for injuries that occur in their garden.<sup>28</sup>

## 2. Lease versus License

Another aspect of the Adopt-a-Lot agreements that many gardener signatories do not understand is that many cities write them to be license agreements, not leases. A license is an agreement that gives permission for a non-owner to do what would otherwise be a trespass.<sup>29</sup> Trespass to land is the wrongful interference with a landowner's possessory right to his real property.<sup>30</sup> If the neighbors were to enter property owned by a private party or by the city without a license agreement and grow a garden there, they could be liable for both civil and criminal trespass.<sup>31</sup> The extent of the property rights given by the license agreement is that the neighbors are not committing trespass by entering the lot and growing trees or plants and maintaining the space.

Since written real property license agreements are not common for most people, signatories are likely to believe they are receiving leases, which would provide more rights in the land than they have under a license. Even legal professionals may be confused by this process – continuing legal education materials provided by the American Law Institute in 2011 stated, “Baltimore offers one-year renewable leases through its Adopt-[A]-Lot program.”<sup>32</sup>

Under a license agreement, if the landowner wants the land back at any time, for any or

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against the occurrence or nonoccurrence of a specified event and the carrier insures against the risk, not a certainty.”)

<sup>26</sup> Email from Vu Dang, Power in Dirt, City of Balt., to Maya Kosok, Farm Alliance of Balt. (Sep. 6, 2012, 11:52 AM) (on file with author).

<sup>27</sup> *Frequently Asked Questions*, 596 ACRES, <http://596acres.org/en/frequently-asked-questions/> (last visited May 4, 2013).

<sup>28</sup> 6 AM. JUR. PROOF OF FACTS 3D 679 § 3 (1989).

<sup>29</sup> A license is “an authority to do a lawful act, which, without it, would be unlawful, and while it remains unrevoked is a justification for the acts which it authorizes to be done.” *De Haro v. United States*, 72 U.S. 599, 627 (1866).

<sup>30</sup> RESTATEMENT (SECOND) OF TORTS § 158 (1965) (“One is subject to liability to another for trespass, irrespective of whether he thereby causes harm to any legally protected interest of the other, if he intentionally (a) enters land in the possession of the other, or causes a thing or a third person to do so, or (b) remains on the land, or (c) fails to remove from the land a thing which he is under a duty to remove.”).

<sup>31</sup> Criminal trespass differs from civil trespass in that criminal trespass requires that the state prove that the defendant *knew* that the property was not his own. 75 AM. JUR. 2D *Trespass* § 151 (2013). Civil trespass, on the other hand, applies even when the defendant mistakenly thought that the property belonged to him. 75 AM. JUR. 2D *Trespass* § 52 (2013).

<sup>32</sup> Patricia E. Salkin, *Trends in Urban Agriculture*, ST020 ALI-ABA 621, 631 (Aug. 2011).

no reason, the owner may cancel the agreement.<sup>33</sup> The default for license agreements is that they are revocable at will, but the Baltimore Adopt-A-Lot license agreement contains a thirty-day notice provision, stating:

The Licensee further understands and agrees that should the City require the property for any purpose, the City may, at its sole discretion, terminate this Agreement on thirty (30) days written notice. However, if the community space is being used as a garden, discretion will be used to ensure that said termination will not take place during the growing season to allow the Licensee time to harvest.<sup>34</sup>

The second sentence is rather ambiguous; it uses some strong language (“ensure”) and some weaker language (“discretion”) that implies that the city will try to consider harvest schedules, but is not bound to do so.

Under a private lease agreement, the University of Chicago allowed neighbors in the nearby Woodlawn neighborhood to use a plot of University-owned land for a community garden.<sup>35</sup> The neighbors used the plot as a community garden for ten years, building up the fertility of the soil year after year.<sup>36</sup> In the spring of 2009, the University informed the gardeners that the school wanted the land back; it wanted to use the site as parking for a construction trailer for a nearby building project.<sup>37</sup> University officials told the gardeners that the institution would be willing to move the topsoil to an alternative garden site,<sup>38</sup> failing to understand that healthy soil is built up into carefully structured layers over time, with the careful addition of organic matter such as compost.<sup>39</sup> Good gardeners are careful not to disturb the soil too frequently—by over-digging or rototilling—so as not to destroy the soil structure.<sup>40</sup> As the Chicago gardeners replied, “[T]he University’s offer to relocate the Garden, while appreciated, entirely misunderstands both the physical and social nature of the Garden. Extracting and then transporting the existing garden soil might have symbolic value, but it would not be useful for gardening.”<sup>41</sup>

Gardeners make a serious investment of time and money when they commit to a neighborhood gardening project. For city-owned license agreements, if a city truly values the hard work and positive benefits that gardeners bring to urban spaces, the city should provide some legal assurances that the plot of land will not be seized from the greeners just when they have

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<sup>33</sup> 51 AM. JUR. 2D *Licenses and Permits* § 56 (2013) (“In the absence of constitutional limitations, the ultimate authority from which a license to carry on a particular activity derives has inherent power to withdraw the license.”)

<sup>34</sup> COMMUNITY LAW PROJECT, *supra* note 19, at 4.

<sup>35</sup> Martha Bayne, *Expelled from the Garden*, CHICAGO READER (Mar. 4, 2010), <http://www.chicagoreader.com/chicago/hyde-park-woodlawn-community-garden/Content?oid=1490232>.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> Dawn Gifford, *Healthy Soil for Community Gardens*, 14 AM. CMTY. GARDENING ASS’N. CMTY. GREENING REV. 100, 100 (2004-2005).

<sup>40</sup> *Id.* at 101 (“Turning the soil over disrupts the habitat of soil fauna.”)

<sup>41</sup> Jack Spicer, *Letter to 61<sup>st</sup> Street Community Gardeners and Friends*, 61ST STREET CMTY. GARDEN (Nov. 16, 2009), [http://www.hydepark.org/gardens\\_of\\_HP-K/61st%20Community%20Garden.htm](http://www.hydepark.org/gardens_of_HP-K/61st%20Community%20Garden.htm).

built the soil on the land to its optimal fertility.

Because the gardeners do not have any legal rights to the land—aside from the permission to be there, which can be withdrawn at any time—it may be difficult for them to purchase liability insurance. Without liability insurance, many urban agriculture supporters may choose not to begin a project. Some gardeners may be scared off altogether from beginning a project when they know that the land can be taken back from them at any time. In cities like New York, where land is extremely valuable and investors are relatively easy to find, municipal governments may be inclined to cancel license agreements when a more profitable use comes along.<sup>42</sup> However, in cities like Baltimore, Detroit, or Harrisburg, in which land is plentiful and investors are relatively few, the government can currently afford to set aside land for community use. If local economies improve and investors move in, any city will jump at the chance to bring in property tax revenue and will cancel any license agreements that stand in the way of development. Ironically, sometimes a community garden can be precisely the catalyst that revives a struggling neighborhood, which then elevates property values to the point that the garden is ejected.

### C. Challenges

Cities may argue that allowing the community to use land for free is generous enough, and that having these one-sided license agreements in place with indemnification clauses is necessary to protect the city's interests. Especially in populated, economically prosperous cities where land is at a premium, this may be a fair point. The city should examine its stated values: if cities genuinely value urban agriculture, they need to create a system that protects land for this purpose. If they value other uses of land above urban gardens, then they should be explicit about those values.

Another argument cities may make in favor of revocable license agreement is that they want to attract people back into the shrinking city, and so the land needs to be available to sell to developers who want to build new houses and pay property taxes on the property. However, municipalities should recognize that gardens cement communities together and make them into places where people want to live. If cities want to attract new residents—especially families—creating green space and empowering residents to improve their communities through empowering land policies is a good way to begin.

### D. The Solution: Leases, Not Licenses

One step that would help both the issue of vulnerability to liability and the lack of control over land would be for cities to lease land to the gardeners instead of creating revocable license agreements. Leaseholders hold property rights, whereas license holders have essentially no property interest in land that could be successfully upheld in court.<sup>43</sup> Cities wouldn't be able to unilaterally cancel a lease without paying damages to the signatory.<sup>44</sup> Leases, as opposed to licenses, provide an additional level of stability and continuity; they may make it easier for community groups to purchase liability insurance for their property, thereby protecting the

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<sup>42</sup> See, e.g., Dan Barry, *Giuliani Seeks Deal to Sell 63 Gardens to Land Group and End Suits*, N.Y. TIMES, May 12, 1999, at B1.

<sup>43</sup> 51 AM. JUR. 2D *Licenses and Permits* § 2 (2013).

<sup>44</sup> RESTATEMENT (SECOND) OF PROP.: LANDLORD & TENANT § 7.1 (2012).

individuals who work in the garden from legal vulnerability.

Some cities already provide leases for Adopt-A-Lot agreements. Harrisburg, Pennsylvania, for example, runs an Adopt-A-Lot program that allows residents to lease vacant lots.<sup>45</sup> The city council of Harrisburg, however, recently violated an Adopt-A-Lot lease by bulldozing an entire garden, without notice to the gardeners, after receiving a complaint from a vocal neighbor.<sup>46</sup> In the Harrisburg case, having a lease instead of a license did not protect the garden from being destroyed. However, if the garden wanted to assert their legal rights in court, it would be more likely to recover in court under a lease than under a license agreement because lease agreements generally provide much more legal protection than license agreements.

## II. ANIMAL HUSBANDRY

### A. *The Promise*

In many parts of the world, city residents keep animals that Americans tend to view as farm animals, including chickens, goats, bees, and even larger animals like cows. In the U.S., many twentieth-century zoning laws banned urban residents from keeping such animals.<sup>47</sup> In the past decade, however, urban animal husbandry within the United States has nonetheless become much more popular, and city residents around the country have clamored for permission to raise chickens, goats, bees and other animals in their urban backyards.<sup>48</sup>

In Baltimore, previous animal husbandry regulations allowed up to four chickens and allowed for bees under certain circumstances.<sup>49</sup> In 2012, the Baltimore Office of Animal Control revamped the animal husbandry regulations,<sup>50</sup> ostensibly to allow city residents to keep more kinds and numbers of animals.

### B. *The Reality*

However, the new regulations, intended to make it easier to keep animals in the city, has actually made it much more confusing, while the expense for keeping such animals remains extreme. The confusion engendered by the new regulations means that community gardeners in Baltimore are probably *less* likely to keep animals.

One of the problems with the regulations is that the city charges an eighty-dollar,<sup>51</sup> “one-

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<sup>45</sup> Al Gnoza, *Controversy Erupts Over Bulldozed Community Garden in Harrisburg*, ABC 27 WHTM (Sept. 21, 2012, 11:18 AM), <http://www.abc27.com/story/19601488/controversy-erupts-over-community-garden-in-harrisburg>.

<sup>46</sup> *Id.*

<sup>47</sup> JUERGENSMEYER & ROBERTS, *supra* note 1, at § 13:16 ¶ 4.

<sup>48</sup> Salkin, *supra* note 32, at 634.

<sup>49</sup> BALT. CITY HEALTH DEP'T., FOWL: ACCEPTABLE STANDARDS FOR RAISING, § A(2) (2007), available at [http://www.baltimorehealth.org/info/animals.ExoticPetRegs\(Final\).pdf](http://www.baltimorehealth.org/info/animals.ExoticPetRegs(Final).pdf); BALT. CITY HEALTH DEP'T., BEES: ACCEPTABLE STANDARDS FOR KEEPING, §§ 2,3 (2007), available at [http://www.baltimorehealth.org/info/animals.ExoticPetRegs\(Final\).pdf](http://www.baltimorehealth.org/info/animals.ExoticPetRegs(Final).pdf).

<sup>50</sup> See BALT. CITY HEALTH DEP'T., REGS. FOR WILD, EXOTIC, OR HYBRID ANIMALS (2012), available at <http://www.scribd.com/doc/87982503/NEWACexoticregs>.

<sup>51</sup> BALT. CITY HEALTH DEP'T., ANIMAL PERMITS: FEE SCHEDULE (2007), available at [http://www.baltimorehealth.org/info/animals.ExoticPetRegs\(Final\).pdf](http://www.baltimorehealth.org/info/animals.ExoticPetRegs(Final).pdf).

time” permit fee per category of animal.<sup>52</sup> The high permit fee immediately erases any financial incentive toward urban homesteading, and city chicken owners who wish to keep chickens in order to collect healthy, fresh eggs are likely deciding to either not apply for licenses or to not keep chickens.

Baltimore’s city government is saying two things at once. As a stated policy, Baltimore City encourages responsible urban animal husbandry. However, when an urban farmer reads the city regulations and tries to follow them, it becomes clear that either (1) the regulatory scheme has unintended implications, or (2) the city actually wants to limit animals in the city, an objective reached through strict regulation. The unreasonable expense and difficulty of playing by the rules of animal husbandry may lead to an underground system of unregistered, unlicensed chickens, bees and goats in Baltimore City. There may also be many community gardeners who would like to have chickens or bees, but who cannot afford the fees or who are scared off by the dense tangle of confusing, sometimes contradictory, regulations.

### C. Challenges

An important challenge that urban agriculture advocates must address with animal husbandry involves the rights of the other property owners in the area. Animals can be loud, smelly, and messy. It makes sense to regulate these animals because inappropriate animal husbandry in urban areas can cause real problems for neighbors. For instance, few, if any, cities in the United States allow roosters within the city limits: roosters do not provide the benefit of eggs like hens do, and they can be extremely noisy, creating a nuisance for neighbors.<sup>53</sup>

If cities want to encourage residents to keep animals such as chickens, bees, and goats, while still protecting the property rights of other residents, their animal husbandry regulations should be simple and clear, and the fees required should not be cost-prohibitive.

### D. The Solution

Seattle, Washington, recently updated its code to be friendlier to urban agriculture,<sup>54</sup> and its new code can serve as a model for local governments who wish to promote reasonable urban animal husbandry. Seattle’s regulations do not require any additional permits, city registrations or fees;<sup>55</sup> the code lays out the acceptable number of each type of animal within certain lot sizes,<sup>56</sup>

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<sup>52</sup> BALT. CITY HEALTH DEP’T., REGS. FOR WILD, EXOTIC, OR HYBRID ANIMALS pt. V § I (2012), available at <http://www.scribd.com/doc/87982503/NEWACexoticregs>.

<sup>53</sup> One 1945 case to the contrary, however, found that “[t]he rooster and his crow, besides being the symbol of good cheer and happiness, have been made use of for many purposes as far back as centuries go. The Indonesian seafarers made use of them on their ships to keep the man-eating sharks away. When the rooster crowed aboard ship-and every ship carried one or more-the sharks thought they were near land and, through fear of being washed ashore to lie there and die, swam away from the ship thereby relieving the seamen from their menace. Without further proclaiming the cheerful and gallant qualities of the big red rooster, *we are convinced beyond a reasonable doubt that the cheery outbursts at the break of day cannot be so disturbing as to become a nuisance to a normal person of ordinary sensibilities and of normal habits and tastes, and that to continue to allow the rooster to crow is not in derogation of the rights of the plaintiffs.*”) *Myer v. Minard*, 21 So. 2d 72, 76-77 (La. Ct. App. 1945) (emphasis added).

<sup>54</sup> See Seattle, Wash., Ordinance 123378 (Aug. 16, 2010), available at [http://www.seattle.gov/dpd/cms/groups/pan/@pan/@plan/@urbanagriculture/documents/web\\_informational/dpd020184.pdf](http://www.seattle.gov/dpd/cms/groups/pan/@pan/@plan/@urbanagriculture/documents/web_informational/dpd020184.pdf).

<sup>55</sup> See *id.*

and defers to state regulation where applicable.<sup>57</sup> This deference to state regulation helps simplify the levels of regulation to which urban animal owners are subjected.<sup>58</sup>

### III. ZONING

#### A. *The Promise*

Land use law emerged when city governments decided that they wanted control over the way in which cities were evolving and growing. Euclidean zoning separated supposedly incompatible uses from each other; cities created separate residential, commercial and industrial zones to keep these uses segregated. These separations were beneficial in some ways, as it can be unhealthy and unpleasant for people to live right next to factories or other messy, dirty enterprises. However, to the extent that zones created urban sprawl, the zones did perhaps a too-thorough job of separating uses. Because of some zoning schemes, people find it difficult to live near their jobs—commercial districts are far from residential zones—and this separation requires automobiles to drive from one zone to the next in order to conduct daily activities.

Under traditional principles of land use law, cities were no place for commercial growing of food or raising of animals.<sup>59</sup> In some cities, however, there have recently been fights between cities and homeowners over growing food in front yards. In Orlando, a city cited a homeowner for failure to maintain ground cover on his front yard after he installed raised beds filled with vegetables.<sup>60</sup> Similar conflicts have arisen in other cities, including Oak Park, Michigan.<sup>61</sup>

As cities plan their futures, urban agriculture is becoming an increasingly popular land use, and cities are trying to find appropriate ways to include urban agriculture in their city plan. The city of Baltimore has put out promotional materials advertising this new project, and in the handouts and leaflets, the city shares that urban agriculture will be a “conditional use” in residential neighborhoods.<sup>62</sup> While this is often presented as being a step that will encourage urban agriculture, it may actually make the process of growing on urban land more burdensome.

#### B. *The Reality*

In Oakland, California, a resident named Novella Carpenter began gardening on a vacant lot that she did not own, adjacent to her home.<sup>63</sup> The vacant lot changed hands several times, each

<sup>56</sup> SEATTLE, WASH. CODE § 23.42.052 (2010).

<sup>57</sup> SEATTLE, WASH. CODE § 23.42.052(E) (2010).

<sup>58</sup> For example, Baltimore beekeepers must register with both the State of Maryland and Baltimore City. See BALT. CITY HEALTH DEP’T., REGS. FOR WILD, EXOTIC, OR HYBRID ANIMALS pt. IV §§ D(1)(a-b), D(4) (2012), available at <http://www.scribd.com/doc/87982503/NEWACexoticregs>. This double registration serves no clear purpose and gets in the way of new beekeepers.

<sup>59</sup> JUERGENSBERG & ROBERTS, *supra* note 1, § 13:16 ¶ 3.

<sup>60</sup> Steven Kurutz, *The Battlefront in the Front Yard*, N.Y. TIMES, Dec. 20, 2012, at D1.

<sup>61</sup> *Internet Buzz: Concept of Jail Time for Growing a Vegetable Garden*, MYFOXDETROIT.COM (Jul. 12, 2011, 5:27 PM), <http://www.myfoxdetroit.com/story/18456719/internet-buzz-concept-of-jail-time-for-growing-a-vegetable-garden>.

<sup>62</sup> CITY OF BALT., DEP’T. OF PLANNING, ONE PAGE TOPIC SUMMARY: SUSTAINABILITY ¶ 5 (2013), available at <http://www.rewritebaltimore.org/pdf/sustainability.pdf>.

<sup>63</sup> CARPENTER, *FARM CITY*, *supra* note 7, at 19.

owner hoping to flip the land or to sell it to a condominium developer, even though the neighborhood surrounding the lot was relatively economically depressed and had a significant drug and crime problem.<sup>64</sup> After months of gardening without permission, Carpenter asked for and received permission from the site's owner at the time.<sup>65</sup> A few years later, she bought the lot from the owner, who had given up on building condominiums on the lot after the housing market bubble burst in 2008.<sup>66</sup> At long last, Carpenter thought she was legally entitled to garden on this lot.<sup>67</sup>

But she was wrong. In 2011, Carpenter was advised that using her residential-zoned lot for agricultural purposes was illegal in the City of Oakland.<sup>68</sup> Carpenter's lot was zoned Mixed Housing Type Residential Zone – 2 (RM-2).<sup>69</sup> According to the Code, “[t]he intent of the RM-2 zone is to create, maintain, and enhance residential areas characterized by a mix of single family homes, duplexes, townhouses, small multi-unit buildings, and neighborhood businesses where appropriate.”<sup>70</sup> Table 17.17.01 of the code lays out the permitted and conditional uses for zone RM-2. Crop and animal raising agricultural activities are listed as conditional uses for RM-2,<sup>71</sup> and are defined as follows:

Crop and Animal Raising Agricultural Activities include the raising of tree, vine, field, forage, and other plant crops, intended to provide food or fibers, as well as keeping, grazing, or feeding of animals for animal products, animal increase, or value increase.<sup>72</sup>

Agriculture, under the Oakland Code, is a conditional use in the particular residential zone that covered Carpenter's lot. The lot could be used for residential purposes as a matter of right (without applying for a permit), but in order to use the lot for any of the conditional purposes listed in the statute, the owner must have applied for permission from the city's zoning board by

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* The permission Carpenter received to garden on the vacant lot presents a good example of trespass as the owner of the lot explicitly gave her permission *just* to garden and she proceeded to use the lot to also house bees, chickens, turkeys, and two pigs. See Becky Lundberg Witt, *Licenses and Easements*, THE URBAN AGRICULTURE LAW PROJECT (May 2, 2012), <http://urbanagriculturelawproject.org/?p=65>.

<sup>66</sup> Novella Carpenter, *Miracle on 28th Street*, GHOST TOWN FARM (Dec. 2, 2010), <http://ghosttownfarm.wordpress.com>.

<sup>67</sup> Carpenter's blog post on the day that she purchased the lot illustrates her big plans: “So now, the question is: what to do? Build a greenhouse? An outdoor kitchen for classes? A tree house for the goats? I want to finally crack through the concrete and plant espaliered fruit trees along the property line. Luckily we have 100 fruit tree rootstock from an overambitious Rain Tree order last year. I can finally start hosting field trips from the local schools without worry! Those are the fun ideas. In reality I need to: hook up the water meter, get insurance, and have the property surveyed. I might even go legit and register Ghosttown Farm as a real farm business as soon as the City Council makes urban ag legal (supposedly happening next spring).” *Id.*

<sup>68</sup> Novella Carpenter, *April Fool's Day*, GHOST TOWN FARM, (Apr. 1, 2011), <http://ghosttownfarm.wordpress.com>.

<sup>69</sup> CITY OF OAKLAND, CAL., ZONING & PLANNING, CITYWIDE ZONING MAP (2011), available at <http://www2.oaklandnet.com/oakca1/groups/ceda/documents/report/oak028431.pdf>.

<sup>70</sup> OAKLAND, CAL., CODE OF ORDINANCES § 17.17.010(B)(2) (2012).

<sup>71</sup> OAKLAND, CAL. CODE OF ORDINANCES, Table 17.17.10 (2012).

<sup>72</sup> OAKLAND, CAL. CODE OF ORDINANCES § 17.10.610 (2012).

filing an application for a Conditional Use Permit (CUP).<sup>73</sup> Novella Carpenter was required to submit a minor CUP application<sup>74</sup> and was able to pay the high fee<sup>75</sup> through donations from her blog readers.<sup>76</sup>

A CUP application requires the landowner to justify her activities under the following requirements:

A. That the location, size, design, and operating characteristics of the proposed development will be compatible with and will not adversely affect the livability or appropriate development of abutting properties and the surrounding neighborhood, with consideration to be given to harmony in scale, bulk, coverage, and density; to the availability of civic facilities and utilities; to harmful effect, if any, upon desirable neighborhood character; to the generation of traffic and the capacity of surrounding streets; . . .

B. That the location, design, and site planning of the proposed development will provide a convenient and functional living, working, shopping, or civic environment, and will be as attractive as the nature of the use and its location and setting warrant;

C. That the proposed development will enhance the successful operation of the surrounding area in its basic community functions, or will provide an essential service to the community or region;

D. That the proposal conforms to all applicable regular design review criteria set forth in the regular design review procedure at Section 17.136.050;

E. That the proposal conforms in all significant respects with the Oakland General Plan and with any other applicable guidelines or criteria, district plan or development control map which has been adopted by the Planning Commission or City Council.<sup>77</sup>

Agricultural activities (crop and animal raising) are required to provide evidence on three additional matters:

1. The proposal will not adversely affect the livability or appropriate development of abutting properties and the surrounding neighborhood in terms

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<sup>73</sup> OAKLAND, CAL., CODE OF ORDINANCES, Table 17.17.01(L8) (2012).

<sup>74</sup> A minor conditional use permit is required for any project that does not meet the criteria for a major conditional use permit. OAKLAND, CAL., CODE OF ORDINANCES § 17.134.020(B) (2012).

<sup>75</sup> Minor conditional use permits in Oakland for the fiscal year 2012-2013 require a \$1,310 report fee and a \$917 notification fee. FY 2012-2013 MASTER FEE SCHEDULE, CITY OF OAKLAND, CAL. M-25 (2012).

<sup>76</sup> Novella Carpenter, *Turned in the CUP*, GHOST TOWN FARM, (May 4, 2011), <http://ghosttownfarm.wordpress.com>. Carpenter reported on her blog that the total cost of her conditional use permit was \$2,858.13. *Id.*

<sup>77</sup> OAKLAND, CAL., CODE OF ORDINANCES §17.134.050 (2012).

of noise, water and pesticide runoff, farming equipment operation, hours of operation, odor, security, and vehicular traffic;

2. Agricultural chemicals or pesticides will not impact abutting properties or the surrounding neighborhood; and

3. The soil used in growing does not contain any harmful contaminants and the activity will not create contaminated soil.<sup>78</sup>

After reviewing the CUP application, the Director of City Planning and the City Planning Commission can give a simple yes or no answer, or they can choose to attach certain conditions to their approval,<sup>79</sup> which will depend on the specific piece of property and its circumstances.

It is important to distinguish between “gardening” and “agriculture” in the zoning code, because zoning laws treat them differently. Land use law allows accessory uses by right.<sup>80</sup> In residential zones, accessory uses are those activities that constitute a natural part of living in and enjoying one’s residential property.<sup>81</sup> For example, courts have held the following to be accessory uses: “the construction and use of recreational facilities, such as a swimming pool for the owner’s private recreation [or] a tennis court, as well as the pursuit of hobbies, including the erection of towers and wires for use as an antenna for an amateur radio set.”<sup>82</sup> Gardening would be considered a residential hobby and the maintenance of a garden easily falls into the accessory use category.

However, this “accessory use” designation only applies so long as the activity does not affect the “residential character” of the neighborhood.<sup>83</sup> This is a thin line: those who want their activity to qualify as an accessory use should make sure that they do not create additional pedestrian and car traffic; that they keep noise, dust, and other nuisances to a minimum; and that they do not conduct commercial activity, such as selling vegetables, on site.<sup>84</sup>

Oakland’s zoning code definition of crop and animal-raising could include gardening and raising animals for one’s own personal use, which would fall under an acceptable use for residential property. If the garden attracts a significant amount of automobile or pedestrian traffic, or if, like Carpenter, one sets up a farm stand on her property, the city may find her activity to be commercial, rather than residential. If the city does consider the home-owner’s activity to be commercial in a residential zone, she will have to apply for and receive a conditional use permit in order to continue her activities.<sup>85</sup>

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<sup>78</sup> OAKLAND, CAL., CODE OF ORDINANCES, Table 17.17.01(L8) (2012).

<sup>79</sup> OAKLAND, CAL., CODE OF ORDINANCES § 17.134.040(B)(1) (2012).

<sup>80</sup> JUERGENSMEYER & ROBERTS, *supra* note 1, § 4:4 ¶ 2.

<sup>81</sup> 101A C.J.S. ZONING & LAND PLANNING § 146 (2013).

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> JANELLE ORSI, IN MY BACKYARD 12-14 (2007), available at <http://selc-urban-agriculture.wikispaces.com/file/view/In+My+Backyard+-+by+Janelle+Orsi+2008.doc>.

<sup>85</sup> See OAKLAND, CAL., CODE OF ORDINANCES, Table 17.17.01 (2012).

### C. Challenges

Critics may argue that the conditional use permit zoning process is beneficial for cities. It provides a way for cities to monitor the land use within its borders. Zoning hearings can also be a time for a city administrative body to hear testimony *against* urban agricultural projects from the neighbors surrounding the lot (or lots) in question. As the Harrisburg case makes clear, neighbors do not always unequivocally welcome urban greening projects.<sup>86</sup> Community members' input on the land-use plans within their neighborhoods is important. However, there is a way for land use to be involved in larger urban farms without scaring away people like Novella Carpenter, who are doing small-scale projects. Seattle's zoning code provides a useful example of a zoning code that encourages small projects while appropriately regulating larger ones that might have negative impacts on their neighbors.<sup>87</sup>

### D. The Solution

If cities want to encourage urban agriculture, they should formulate their zoning codes to allow many kinds of urban growing by right, not as a matter of conditional use, in any land use category in the city. The only category of urban growing that might truly benefit from a conditional use permit application process is the category of larger-scale urban farms, like the ones that are being created in Detroit, Baltimore, and other places with significant amounts of vacant land. The city can make a distinction in terms of acreage or output between the resident-run community gardens and the for-profit businesses that might actually have a negative impact on their neighbors.

Seattle's zoning code is "one of the [c]ountry's most progressive zoning ordinances in terms of facilitating urban agriculture."<sup>88</sup> Community gardens are permitted in residential zones without a conditional use permit.<sup>89</sup> Urban farms are also permitted uses—requiring no conditional use permit—if they have less than four-thousand square feet of planting area.<sup>90</sup> Urban farms with more than four-thousand square feet of planting area still require a conditional use permit.<sup>91</sup> This distinction by size of urban farms makes sense; larger urban farms are more likely to disturb neighbors, and to disrupt the residential feel of a neighborhood. Therefore, it is logical that zoning boards would want an administrative process by which to review these projects.

## IV. CONCLUSION

Cities hold a great deal of regulatory power, and they can use that power to either empower or disempower neighborhoods. Sometimes regulations put in place for ostensibly good reasons, such as to protect the property rights of adjacent landowners, can end up being too constricting and may completely stall some extremely valuable activity. Cities should cross-

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<sup>86</sup> See Gnoza, *supra* note 45.

<sup>87</sup> See SEATTLE, WASH., CODE §§ 23.42.051-23.42.053 (2010).

<sup>88</sup> Jim Smith, *Encouraging the Growth of Urban Agriculture in Trenton and Newark Through Amendments to the Zoning Codes: A Proven Approach to Addressing the Persistence of Food Deserts*, 14 VT. J. ENVTL. L. 71, 85 (2012).

<sup>89</sup> SEATTLE, WASH., CODE § 23.42.053 (2010).

<sup>90</sup> SEATTLE, WASH., CODE § 23.43.040(E) (2010).

<sup>91</sup> *Id.*

check their statements regarding their values with their actions to make sure that they are being internally consistent. In the case of urban agriculture, some cities proclaim their support of greening efforts, but their programs stifle genuine community expression. Cities should look to each other for new ideas and ways in which to better line up their ideals with their actions. They should also respond promptly and fully to their residents' concerns and ideas.

It is exciting to witness the birth of the modern urban agriculture movement. With the support of local governments, the level at which government is most likely to respond to what residents really need, the movement can provide myriad benefits, including increased beauty, decreased crime, and access to healthy food. City governments should examine both their slogans and their programs and regulations and commit to not only talking the talk, but walking the walk.