

Don't Pave Paradise: Preserving the Rural Landscape

David Haight

American Farmland Trust

Seth McKee

Scenic Hudson, Inc.

Buck Moorhead

Building Consensus for Sustainability and Buck Moorhead Architect

George A. Rodenhausen, Esq.

Rapport Meyers LLP

Moderator:

Jeffrey P. LeJava, Esq.

Land Use Law Center, Pace Law School



1 of 2 DOCUMENTS

Environmental Law in New York

April 1, 2012

*23-4 Environmental Law in New York 1 (2012)***SECTION:** Vol. 23; No. 4**LENGTH:** 3488 words**HEADLINE:** PRESERVING OPEN SPACE IN LAND USE APPROVALS : (Part 1 of 2)**AUTHOR:** George A. Rodenhausen George A. Rodenhausen is a partner at Rapport Meyers LLP in Rhinebeck and Hudson, New York. This article is based on his presentation at the 2011 CLE program he co-chaired, entitled "Representing the Landowner in a Conservation Easement Transaction."**HIGHLIGHT:****BODY:**

Since the advent of cluster subdivision, planning boards have been employing conservation easements, deed restrictions, map notes and other methods to preserve dedicated open space. n1 Conservation easements appear to be the favored mechanism because of their ability to preserve lands in perpetuity, but their use can be problematic. n2 Although conservation easements can result in projects that successfully combine the preservation of significant natural resources with economically viable development, this is not always the case.

Zoning laws requiring preservation of open space in perpetuity in a subdivision or site plan often frustrate developers, planning boards, land trusts and local communities. Typical problems include the absence of true conservation planning, the lack of a land trust willing to hold an easement on "left over" land, the difficulty in finding an entity with the resources and commitment to enforce the restriction in perpetuity, lack of standards to identify land to be protected and the appropriate balance between lot count and protected land.

The perpetuity protection offered by a conservation easement can be both a major benefit and a major stumbling block. This article attempts to develop a better understanding of the strengths and weaknesses of conservation easements in land use approvals. New provisions in zoning laws are needed, including clear standards for lands to be protected, procedures that ensure conservation planning as a first step in the land use approval process, predictability for potential developers and flexibility in the use of alternatives.

I. The Conservation Easement

The conservation easement enabling statute, adopted in 1983, authorizes easements to run in perpetuity and eliminates the rule that an easement may be enforced only by the holder of an appurtenant interest in land. n3 The purpose of the statute, among other things, is to implement the state policy of "conserving, preserving and protecting its environmental assets and natural and man-made resources, [and] the preservation of open spaces" n4

Municipalities are clearly authorized to require preservation of open space in subdivisions and site plans. The Town Law and Village Law both provide in their cluster subdivision authorizations that the purpose is "to enable and encourage flexibility of design and development of land in such a manner as to preserve the natural and scenic qualities of open lands." n5 The fit with the conservation easement enabling statute is good. Since the majority of conservation easement transactions are donations to land trusts resulting in possible tax deductions, it is not surprising that the vast

majority of litigation is in the Tax Court. Only three reported decisions address the enforceability of a conservation easement or similar deed restriction imposed in a land use approval. At this point, the restrictions are winning, two to one.

In *Smith v. Town of Mendon*,ⁿ⁶ the Court of Appeals upheld by a vote of 4-3 a mandatory conservation restriction intended to run with the land in perpetuity as a condition of site plan approval.ⁿ⁷ The property owners had applied for site plan approval to build a single family home on a 9.7 acre lot. Much of their lot lay within four environmental protection overlay districts established by the Town Code, so the owners applied for approval to build their house in a part of their property not covered by the overlay districts. The Planning Board conditioned approval on a note being placed on the site plan restricting development in the overlay districts and on the grant by the applicants of a conservation restriction to run with the land in perpetuity. Largely because of the preexisting restrictions on the land, the Court characterized some aspects of the additional restrictions as "trifling" and "subtle."ⁿ⁸

Three judges would have held that the restriction constituted an unconstitutional taking, although for separate reasons. Judge Rosenblatt, for the majority, characterized the restriction as "a marginal use restriction superimposed over a wholly legitimate, preexisting [environmental protection overlay districts]. *** In all, and in keeping with preexisting conservation policies, the restriction merely gives the Town the power to interdict harmful activities within the [environmental protection overlay districts]."ⁿ⁹

Mendon provides a few guidelines for planning boards. The conservation restriction was challenged by the property owners as an impermissible exaction, but because no public access was required, the court held there was no exaction.ⁿ¹⁰ The converse is presumably true. If the restriction had required public access, it would have been subjected to the exactions test and possibly been found to be an unconstitutional taking. More broadly, the Court held the restriction was not a regulatory taking under the test in *Penn Central Transportation Co. v. New York City*,ⁿ¹¹ as the restriction did not interfere with the owners' present use of the property or prevent them from realizing a reasonable rate of return on their investment.ⁿ¹²

To address the concerns of the three dissenting justices, a zoning or subdivision law requiring that open space be protected in perpetuity by a conservation easement should be backed by a comprehensive plan that sets forth the governmental interest for such a long term restriction on property rights. Although the additional restrictions in *Mendon* may have appeared trivial to the majority, many required conservation restrictions will take a significant property interest from the developer.ⁿ¹³

A municipal land use law must be clear that the purpose of the perpetuity requirement is to conserve natural or cultural resources of lasting value, such as the preservation of viewsheds, sensitive animal habitats, drinking water aquifers or other resources of real conservation value. If the purpose is merely the preservation of open space to achieve a desired residential or commercial density, one could reasonably argue protection of that density in perpetuity is not truly needed. Planning for municipalities is an evolving process as demographics, economics and natural surroundings evolve. If the goal is protection of conservation value, however defined in the local law, the support should be found in the municipality's comprehensive plan or, where appropriate, in the designation of a critical environmental area.ⁿ¹⁴

Finally, if an open space restriction is imposed on a subdivision pursuant to Town Law or Village Law, strict adherence to the authorizing cluster provisions is required. In *Matter of Fuentes v. Planning Board of the Village of Woodbury*,ⁿ¹⁵ the one somewhat negative decision, the Village of Woodbury Planning Board approved a cluster subdivision with two lots designated "open space A" and "open space B" with a map note, "not approved for building lots." No conservation easement was involved. Because the procedures for cluster development were not properly followed, the court disregarded the cluster determination. Although the minutes of the meeting indicated the intent of preserving the open space, as the minutes are not part of the chain of title available to the buyer, the court held the minutes could not be considered to determine the intent of the map notes. In a similar vein, the purchaser of a lot noted on a filed subdivision map as an open space lot was not bound by the open space notation as it was not a document "of record."ⁿ¹⁶

II. Limitations for Land Trusts

Since a conservation easement must be granted to a land trust or governmental entity, the first difficulty with mandated conservation easements in land use approvals is finding a land trust willing to accept the easement. Each land trust will or should have in its organizational papers a defined mission. *The Land Trust Standards and Practices Guidebook*, which provides the basis for accreditation of land trusts, states, "A clear mission is the cornerstone of a land trust's success." The first standard of the twelve organizational standards for land trusts is, "The land trust has a clear mission that

serves a public interest, and all programs support that mission." Often when a developer comes to a land trust to take an easement on the open space in a subdivision, the project will not fit within its mission.

For many land trusts, the prospect of monitoring and administering preserved open space in a residential subdivision or adjacent to a commercial shopping center is a daunting challenge. The grantor in a residential subdivision, *i.e.*, the developer, may quickly disappear from the scene as the lots are sold. The open space will usually be deeded to the homeowners association as soon as a sufficient number of lots are sold to establish the association. If a homeowners association does not care deeply about preserving the open space as set forth in the easement, the land trust may be faced enforcement against the homeowners association. There may be multiple violations by individual homeowners and a lack of resources in the homeowners association to keep up with their own enforcement.

Open space not deeded to a homeowners association but reserved as the rear area of numerous privately owned lots is even more susceptible to violations. Monitoring will require multiple backyard inspections, which can be difficult to schedule and difficult to avoid the appearance of an invasion of privacy. The homeowner is not the one who imposed or granted the easement, and therefore is more likely to care about the full enjoyment of his or her property than the preservation of open space or a particular natural resource. Few land trusts will accept such an easement.

Sometimes a land trust is asked to accept an easement after the developer has reached agreement with the Planning Board on how to achieve the maximum lot count. Although the planning board may have identified the areas it wants to preserve, those areas may not have sufficient value to satisfy the purposes of Article 49, Title 3, of the Environmental Conservation Law (ECL) or the standards of the land trust. Such land is often fragmented or separated as "left over" land like the dough left behind after cookies have been cut out. When the zoning law requires a set percentage of land be preserved, developers will often count up left over edges to preserve a lot count not knowing what will happen to the adjacent lands and whether protected areas will be linked.

The solution to this problem is to make the land trust a "partner" in the development of the layout of the project. If the developer knows that the municipality will require an easement to protect land of conservation value, whether it be a fixed percentage or a more flexible formula, the first step should be to interview land trusts. The land trust can be helpful in identifying land of conservation value long before the project goes to the planning board or town board for a possible rezoning. And the land trust can identify issues in the layout that make enforcement of an easement less needed and more efficient when needed.

III. Limitations for Municipalities

Most municipal codes requiring conservation easements as a condition of approval of land use projects provide for acceptance of the easement by a qualified land trust or the municipality itself. General Municipal Law § 247 provides that "the 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 or advanced, and any county, city, town or village after due notice and a public hearing 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 necessary to achieve the purposes of this chapter, to land within such municipality."

However, many municipalities are not willing to accept the responsibility and ongoing expense of holding and monitoring a conservation easement in perpetuity. An interesting dynamic is established between the planning board imposing the condition and the town board which must decide whether to accept the conservation easement. Although the boards may have the same goal, their separate responsibilities may result in opposition positions.

Although many municipalities have provided in their land use laws that the municipality may accept the easement, they have not seriously studied the implications of that option until faced with a subdivision that cannot be approved because no land trust will accept an easement. Some municipalities have adopted local laws that expressly give the municipality the power to acquire easements and other interests in land for land preservation purposes pursuant to General Municipal Law § 247. Most have not.

An Article 49 conservation easement is an interest in land. Therefore it is arguable that the town's acceptance of an easement is subject to permissive referendum.¹⁷ Other problems for a municipality include allocation of staff and finding room in the budget for monitoring. A municipality cannot establish a reserve for monitoring fees and thus will have to face the budget challenge every year. If the municipality has not resolved these issues in advance in a comprehensive policy assessment, it is understandably unlikely to step into the breach on a particular project. The town board and planning board may feel forced to accept an easement to avoid appearing anti-development in hard economic times or to avoid a regulatory taking.

PRESERVING OPEN SPACE IN LAND USE APPROVALS : (Part 1 of 2) Environmental Law in New York April 1, 2012

Municipalities must also be sensitive to the fine line between use of municipal resources to help a particular developer get his project approved and the appropriate use of municipal resources for a defined public purpose. At this point the municipality faces the same challenge as a land trust--is the land to be preserved to be of sufficient value to justify making a commitment of municipal resources in perpetuity? In the absence of a well-defined conservation plan for the municipality, the acceptance of an easement may in fact be reactive to a developer's choice of projects rather than proactive in support of policy objectives.

Perpetual administration of a conservation easement raises challenging administrative issues. How many additional staff will be required? Will future boards be willing to spend the necessary funds for monitoring and enforcement actions? In the press of other enforcement issues, such as property maintenance and significant zoning violations, periodic monitoring and enforcement of conservation easement areas may receive low priority or receive no funding at all.

Creation of an intermunicipal land trust to hold and administer easements raises issues of mission and public purpose for the municipalities, but more importantly issues of municipal law. General Municipal Law § 247 authorizes the acquisition of easements, but it does not authorize a municipality to own along with other municipalities a not-for-profit corporation for such purposes. A local development corporation formed under § 1411 of the Not-for-Profit Corporation Law would seem a poor fit, as preservation of open space would not directly support development of jobs and new business. If a coalition of municipalities could be formed under Article 5 of the General Municipal Law, there would be possibly insurmountable problems with allocation of expenses, joint decision-making and authority over local land use issues.

The option of contracting with a land trust to acquire or monitor easements raises significant mission issues for the land trust. Agreeing to perform monitoring functions for a fee from the municipality may fit within an amended mission statement and the IRS rules for 501(c)(3) corporations. However, even under contract, a land trust must be free to make its own decision whether the land to be preserved has sufficient conservation value and can be administered in perpetuity in a reasonable manner. The land trust would have to have a major hand in negotiation of the easement.

In summary, municipal acquisition of a conservation easement to allow a subdivision or site plan to proceed is rife with legal, financial and practical problems. Municipalities requiring a conservation easement be granted to either a land trust or the municipality must ensure that the zoning law or subdivision law provides a consultative process that will make the ultimate easement acceptable to a land trust. Otherwise it may face a regulatory takings challenge if the municipality is unwilling or unable to accept the easement.

FOOTNOTES:

Footnote 1. N.Y. Town Law § 278 and N.Y. Village Law § 7-738 define "cluster development" as "an alternative permitted method for the layout, configuration and design of lots, buildings and structures, roads, utility lines and other infrastructure, parks, and landscaping in order to preserve the natural and scenic qualities of open lands."

Footnote 2. A survey by the author of municipal zoning laws in New York published on the internet by General Code Publishers, November 2011, indicated over eighty municipalities require a conservation easement to preserve open space in cluster subdivision and certain site plan approvals or identify it as one of two or three options to use in the discretion of the planning board.

Footnote 3. N.Y. Env'tl. Conserv. Law § 49-0305.

Footnote 4. N.Y. Env'tl. Conserv. Law § 49-0301.

Footnote 5. N.Y. Town Law § 278(2)(b); N.Y. Village Law § 7-738(2)(b).

Footnote 6. *Smith v. Town of Mendon*, 4 N.Y.3d 1, 789 N.Y.S.2d 696 (2004). An earlier discussion of this case can be found in Samuel Brown, "Conservation Easements & Land Trusts: Overview, Examples and their Role in the Development Process," Environmental Law in New York 157, 159 (Aug. 2007).

Footnote 7. The practitioner cannot assume the authority for mandatory conservation easements is a dead issue. *Mendon* was a 4-3 decision, highly fact specific and with strongly worded dissenting opinions. In *Girard v. Town of East Hampton*, 63 A.D.3d 835, 880 N.Y.S.2d 502 (2d Dept. 2009), the court struck down as arbitrary and capricious a requirement by the Town Zoning Board of Appeals that the property owner grant a scenic and conservation easement to the Town as a condition of the issuance of a natural resources special permit.

Footnote 8. *Smith v. Town of Mendon*, 4 N.Y.3d at 12.

Footnote 9. *Smith v. Town of Mendon*, 4 N.Y.3d at 14 n.10.

Footnote 10. The plaintiffs relied on *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), to argue that the restrictions did not have an "essential nexus" or "rough proportionality" to the proposed project. However, the Court of Appeals held that in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999), the Supreme Court limited the exaction line of authority to those land use approvals mandating a right of public access.

Footnote 11. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978).

Footnote 12. Although the Court relied in part on the substantial advancement of a governmental interest test in *Agins v. City of Tiburon*, 447 U.S. 255 (1980), subsequently discredited in *Lingle v. Chevron*, 544 U.S. 528 (2005), the decision fits squarely within the *Penn Central* rationale.

Footnote 13. For example, the Town of Stanford subdivision law requires the dedication of 75% permanent open space for a major subdivision in the 5-acre district, and 55% in all other districts, in both cases protected by a conservation easement. *See* Town of Stanford Code § 140-24(C)(1).

Footnote 14. *See* N.Y. Comp. Codes R. & Regs. tit. 6, § 617.14(g) for designation of critical environmental areas.

Footnote 15. *Matter of Fuentes v. Planning Bd. of the Vil. of Woodbury*, 82 A.D.3d 883, 918 N.Y.S.2d 213 (2d Dept. 2011).

Footnote 16. *O'Mara v. Town of Wappinger*, 400 F. Supp. 2d 634 (S.D.N.Y. 2005), *aff'd in part, rev'd in part, question cert'd*, 485 F.3d 693 (2d Cir.), *cert'd question answered*, 9 N.Y.3d 303, 849 N.Y.S.2d 9, *answer to certified question conformed to* 518 F.3d 151, *on remand* 2009 U.S. Dist. LEXIS 3775 (S.D.N.Y. Jan. 6, 2009).

Footnote 17. N.Y. Town Law § 64(2).

LANGUAGE: ENGLISH



1 of 2 DOCUMENTS

Environmental Law in New York

May 1, 2012

*23-5 Environmental Law in New York 1 (2012)***SECTION:** Vol. 23; No. 5**LENGTH:** 3068 words**HEADLINE:** PRESERVING OPEN SPACE IN LAND USE APPROVALS : (Part 2 of 2)

AUTHOR: George A. Rodenhausen George A. Rodenhausen is a partner at Rapport Meyers LLP in Rhinebeck and Hudson, New York. This article is based on his presentation at the 2011 CLE program he co-chaired, entitled "Representing the Landowner in a Conservation Easement Transaction."

HIGHLIGHT:**BODY:**

[*Editor's Note:* The first part of this article, which was published in the April 2012 edition of *Environmental Law in New York*, discussed conservation easements under New York law and their use by municipalities to preserve open space. It also discussed limitations on such uses by land trusts and municipalities. The second part, set forth below, discusses the proper use of conservation easements and alternatives for the preservation of open space in land use approvals.]

IV. Alternate Means of Protecting Open Space

Deed restrictions and restrictive covenants, essentially the same, are private declarations recorded in the chain of title. They can be written to run with the land and are enforceable by the parties according to the terms thereof. A deed restriction or restrictive covenant which is part of a land use development can generally be enforced by all lot owners in the development against each other. n1 As with conservation easements, when the purpose of the deed restriction or restrictive covenant has been frustrated by a change in circumstances, it may be extinguished. n2

Although a deed restriction or restrictive covenant may run with the land, it cannot be written to last in perpetuity. By its very nature it can be amended and terminated by the parties or their successors in interest. Even if not terminated, enforcement of a deed restriction or restrictive covenant is subject to defenses of estoppel, laches and waiver. n3 Note also that if the deed restriction or restrictive covenant is not properly recorded and a bona fide purchaser takes title without actual or constructive notice of the deed restriction or restrictive covenant, he or she is not subject to it and it is effectively extinguished. n4

Map notes to protect open space when placed on a final subdivision plat pursuant to Town Law § 276 and when filed in the office of the county clerk pursuant to the Real Property Law § 334 are enforceable against a subsequent purchaser. A map note does not amount to conveyance of an interest to a town so as to require recording of the conveyance pursuant to Real Property Law § 290(3) and General Municipal Law § 247(2) in order to give notice to subsequent purchasers. n5 Although *O'Mara* is a significant case for real estate attorneys involved in title searches, it does not alter the basic nature of a map note, namely that it is changeable by future planning boards as town administrations change. Only an Article 49, Title 3, conservation easement can be written to last in perpetuity.

V. Term Easements

ECL Article 49, Title 3, does not require that a conservation easement be drawn to last in perpetuity. Municipalities may create term easement programs to purchase development rights or protect land over defined time periods, such as ten to twenty-five years. However, term easements pose many problems in the subdivision and site plan context.

At the end of the prescribed term, the future use or protection of the property may be left to free market forces. The owner presumably will have benefited from his land being "banked" for the duration of the easement and the natural resources protected. At that point he would be free to develop the land or sell it and reap the benefit of the increased value. If the municipality or a conservation organization invested their resources in monitoring, or indeed in purchasing the easement, they would not be able to recapture their investment.

Monitoring and enforcement of a term easement by a holder with limited resources may suffer if other easements held by the same entity are perpetual. Knowing that the investment of resources may not yield a permanent benefit would surely affect the priorities of the organization.

Term easements could be devised to renew or be modified at the option of the holder so that they could be reevaluated to take account of changing conditions in the area. It has been suggested that a terminable conservation easement, essentially a restrictive covenant subject to termination or amendment at the will of the holder or the holder and grantor, may be appropriate in some circumstances. n6 Although such non-perpetual easements could comply with the ECL, they cannot overcome the problem of changing municipal attitudes and resources that argue for perpetual protection isolated from such changes.

VI. Revising Zoning and Subdivision Laws

Typically, conservation development zoning authorizes a planning board to make the discretionary decision of whether to require clustering. This decision is made on the basis of a proposed conventional subdivision, unless the developer volunteers a clustering plan initially. In some codes, the option of conventional subdivision with equally sized lots covering all developable land has disappeared. In the Town of Hyde Park, for example, there is no provision for conventional lot subdivision. All density maximums are expressed in terms of average lot size, enabling the planning board to require preservation of open space where it deems it appropriate. n7

The issue, then, is how best to provide for the preservation of open space in conservation, cluster subdivision and site plan approvals. Many municipal codes in New York require open space be preserved in perpetuity with an Article 49 conservation easement, allowing no alternative approach. n8 Others provide flexibility, leaving the mechanism for protection of open space in the discretion of the planning board. At least two municipal codes prefer deed restrictions over conservation easements. n9

Some municipal codes require specific clauses in the easement relating to management of the open space, enforcement by the town and even enforcement by all lot owners in the subdivision. n10 Particularly in those codes that offer deed restrictions as an alternative means of protecting open space, codes focus on the map notes on the final plat or site plan, indicating the protected open space, that a conservation easement or deed restriction has been filed, that a management plan may be in place and in some cases noting the recording information. n11 At least one town requires that the easement permit public use. n12

Adding to the urgency to revise zoning laws to properly address open space is the 2010 Stormwater Management Design Guidance issued by the New York State Department of Environmental Conservation. Where applicable, n13 the Guidance Manual requires that new development implement green infrastructure practices to manage stormwater. The first practice to be considered is preservation of natural features and conservation design: "[p]reservation of natural features includes techniques to foster the identification and preservation of natural areas that can be used in the protection of water, habitat and vegetative resources. Conservation design includes laying out the elements of a development project in such a way that the site design takes advantage of a site's natural features, preserves the more sensitive areas and identifies any site constraints and opportunities to prevent or reduce negative effects of development." n14

The key concept is the identification of valuable open space through a conservation analysis that precedes the layout of the development. Joel Russell, an attorney and consulting planner, has developed such a process which has been enacted in a number of towns. Before presenting the subdivision plat or site plan, the applicant must present the planning board with an existing conditions map that identifies natural and cultural resources pursuant to a list provided by the code or the board. This is followed by a conservation analysis, the purpose of which is to determine areas of conservation value around which the development is designed.

For example, the Town of Sand Lake Code provides that applicants for conservation subdivision approval shall prepare a conservation analysis "consisting of inventory maps, survey and topographic maps, written description of the land, and a written analysis of the conservation value of various site features." n15 The analysis must identify at least the thirteen listed site features with conservation value, including such features as constrained acreage (such as wetlands, watercourses and slopes), active farmland, agriculture districts, prime agricultural soils, scenic viewsheds, documented aquifers and recharge areas, unfragmented forestland, buffer areas necessary for screening new development, stone walls, highly erodible soils and trees 30 inches in diameter or larger. On further review, the Town Board can add features to analyze. n16

The conservation analysis must be documented by the applicant in a composite map, or overlay map, that identifies "areas that are suitable for development and those lands which have conservation value and may be unsuitable for development." n17

The Planning Board is then required to "make a determination as to which land has significant conservation value and should be protected from development by conservation easement or deed restriction." n18 The resulting determination is to serve as the basis for sketch plan review. In other words, the composite conservation analysis map is created in the absence of the development plan, forcing the Board and the applicant to focus on the conservation value before it is proposed to be altered. This is a radical change from the typical process, in which the applicant presents his sketch plan along with an existing conditions plan that usually fails to identify or highlight any features of conservation value. A board is then placed in a reactive mode with the development plan in front of it.

The Village of Skaneateles, which enacted this approach, was challenged in a 1983 action in federal court, in which the landowner argued the text was void for vagueness. n19 He challenged the terms "conservation analysis" and "conservation value" as permitting the Planning Board "unabridged and sole discretion" to eliminate development. The court found both terms were well defined. Although the Board had discretion to require a conservation easement, the court found the law provided a sufficient "information gathering mechanism" to support the Board's discretion. n20

The Skaneateles Code requires a conservation easement for the preservation of open space as follows:

A perpetual conservation easement restricting development of the open space land and allowing use only for agriculture, forestry, passive recreation or protection of natural resources, pursuant to § 247 of the General Municipal Law and/or §§ 49-0301 through 49-0311 of the ECL, shall be granted to the Village, with the approval of the Board of Trustees, or to a qualified not-for-profit conservation organization acceptable to the Planning Board. Such conservation easement shall be reviewed and approved by the Planning Board and be required as a condition of plat approval hereunder. The Planning Board may require that such conservation easement be enforceable by the Village of Skaneateles if the Village is not the holder of the conservation easement. The conservation easement shall prohibit residential, industrial, or commercial use of such open space land and shall not be amendable to permit such use.

An inflexible requirement for a conservation easement runs the risk that no holder will be available, but the conservation analysis process helps ensure that a land trust will be willing to accept the easement ultimately offered. In addition, by involving the potential holder of the easement in the conservation analysis and sketch plan development, it is more likely that the resulting easement will fit within the mission of a local land trust and that the easement will be enforceable without an unusual amount of effort. Most likely the conservation areas will be linked or form a cohesive whole and will not comprise the backyards of multiple homeowners.

VII. Conclusion

Protecting land with a mandated perpetual conservation easement remains the preferred condition for the protection of open space land with conservation value in land use approvals. The practitioner must be sensitive to the possible applicability of the law of regulatory takings and exactions. Codes or individual approvals that are intended to achieve a zoning density by dedication of open space regardless of conservation value may be appropriate for deed restrictions, map notes, term easements or easements with broad amendment clauses. Planning is an evolving process in all communities and desired development density and open space areas may be subject to change.

If, however, the goal of an open space program is protection and preservation of areas of significant cultural or conservation value, a mandated perpetual conservation easement is appropriate. To ensure that the easements will be applied properly and only where appropriate, a conservation analysis is essential prior to development of the subdivision plat or site plan. Zoning and subdivision laws must be drafted in a manner that involves the land trust early in the pro-

cess to inform both the developer and the municipal board of the practicality of the easement. If it is unreasonable to expect a perpetual conservation easement to be granted and accepted by a land trust, the municipality's land use laws must include optional approaches to provide long term and more flexible protection.

FOOTNOTES:

Footnote 1. *See Beacon Syracuse Associates v. City of Syracuse*, 560 F. Supp. 188 (N.D.N.Y. 1983).

Footnote 2. RPAPL § 1955. *See also Orange and Rockland Utilities, Inc. v. Philwold Estates, Inc.*, 52 N.Y.2d 253, 437 N.Y.S.2d 291, 418 N.E.2d 1310 (1981).

Footnote 3. *Halpin v. Poushter*, 59 N.Y.S.2d 338 (Sup. Ct. N.Y. Co. 1945).

Footnote 4. *Witter v. Taggart*, 78 N.Y.2d 234, 573 N.Y.S.2d 146, 577 N.E.2d 338 (1991).

Footnote 5. *O'Mara v. Town of Wappinger*, 9 N.Y.3d 303, 849 N.Y.S.2d 9, 879 N.E.2d 148 (2007).

Footnote 6. *See N. A. McLaughlin, Conservation Easements: Perpetuity and Beyond*, 34 *Ecology L.Q.* 673 (2007).

Footnote 7. Town of Hyde Park Code §§ 96-9, 108 (Attachment 2).

Footnote 8. *See, e.g.*, Towns of Rhinebeck, Bethlehem.

Footnote 9. *See, e.g.*, Towns of Colonie, Coxsackie.

Footnote 10. *See, e.g.*, Towns of Cazenovia, Bethlehem, Chatham.

Footnote 11. *See, e.g.*, Cazenovia, Bethlehem.

Footnote 12. *See* Town of Catskill.

Footnote 13. The Guidance Manual is applicable to all urbanized areas deemed to have Municipal Separate Storm Sewer Systems (MS4's). *See* SPDES General Permit for Stormwater Discharges from Municipal Separate Storm Sewer Systems, Permit No. GP-0-10-002 Issued Pursuant to Article 17, Titles 7, 8 and Article 70 of the Environmental Conservation Law.

Footnote 14. DEC, Stormwater Management Design Manual § 5.1 (Aug. 2010).

Footnote 15. Town of Sand Lake Code § 250-106(A).

Footnote 16. *Id.* § 250-106(B).

Footnote 17. *Id.* § 250-106(C).

Footnote 18. *Id.* § 250-107(A).

Footnote 19. *Ruston v. Town Board of Town of Skaneateles*, 2009 U.S. Dist. LEXIS 90964 (N.D.N.Y. Sept. 30, 2009).

Footnote 20. Excessive discretion could still be a problem. In *McCulloch v. Town of Milan*, 2008 U.S. Dist. LEXIS 61635 (S.D.N.Y. July 17, 2008), a Hispanic landowner claimed discrimination when the Planning Board required a conservation easement as condition of subdivision approval, but had not required a conservation easement in subdivision approvals for three prior years. The court denied the motion to dismiss.

LANGUAGE: ENGLISH

41 Real Est. L.J. 216

Real Estate Law Journal
Fall, 2012

ZONING AND LAND USE PLANNING

Jeffrey P. LeJava¹ Michael J. Goonana¹

Copyright © 2012 Thomson Reuters/West; Jeffrey P. LeJava, Michael J. Goonan

Cultivating Urban Agriculture--Addressing Land Use Barriers to Gardening and Farming in Cities

“The soil is the great connector of lives, the source and destination of all. It is the healer and restorer and resurrector, by which disease passes into health, age into youth, death into life. Without proper care for it we can have no community, because without proper care for it we can have no life.”¹

I. Introduction

Urban agriculture is not a new concept; in fact, it has been with us for centuries.² What is relatively new is the relegation of farming to areas outside of cities since the adoption of Euclidean zoning nearly 100 years ago.³ Fortunately, municipalities around the country are recognizing the importance of agriculture within their borders and making efforts to realign their land use regulations to permit such ***217** activities. This article examines the benefits of urban agriculture, the barriers that unreasonable land use regulations can pose to agricultural activities and the actions taken by municipalities to allow agriculture to begin flourishing again within cities. It concludes with a suggested course of action to evaluate and make amendments to comprehensive plans, zoning ordinances and land use regulations to promote urban agriculture.

A. Definition of Urban Agriculture

Urban agriculture is a broad term that embraces many different undertakings relating to growing food in an urban setting, including activities involved in the planting, cultivation, processing, marketing, distribution and consumption of food.⁴ It includes community gardens, personal backyard gardens, rooftop farms, commercial greenhouses, farmers markets, community supported agriculture (CSA) operations, and apiaries among other activities. For purposes of this article, the term urban agriculture is broadly defined to encompass all of these undertakings and related activities.⁵

B. Urban Agricultural Trends

Urban agriculture has grown in popularity in the United States and has become a hot and trending topic on social media everywhere. Between 1994 and 2011 the number of farmers' markets in the U.S. has grown by over 300%⁶ and the Department of Agriculture estimates that roughly 15% ***218** of the world's food is now grown within urban limits.⁷ The growth and importance of urban agriculture is also evident with the significant expansion of the White House Kitchen Garden by First Lady Michelle Obama.⁸

Despite the recent boom in growing locally consumed produce, the concept is not new to the United States.⁹ In fact, during World Wars I and II, countries, including the United States, encouraged their citizens to use their land to grow victory or war gardens in order to relieve the demand on the public food supply.¹⁰

Now in 2012, as the country continues to face an economic downturn, it is witnessing a renewed movement towards locally grown food, and is beginning to accept the many corollary benefits of urban agriculture.

II. Benefits of Urban Agriculture

The benefits of urban agriculture are many and far-reaching. They include the promotion of healthier eating habits, the reclaiming of vacant and blighted property, and the reduction of impervious surface and associated stormwater runoff. These and other benefits of urban agriculture are discussed below.

A. Health Benefits

One of the primary benefits of urban agriculture is an increase in healthy eating. As has been noted “[p]ractical experience with fresh food--growing, harvesting, identifying varieties in stores and farm stands, understanding seasonality, cooking, and preserving--positively impacts dietary habits Evidence is building that when gardeners and small-scale farmers ‘save food dollars’ by producing their *219 own food, their overall food consumption patterns and dietary knowledge improve.”¹¹

Many cities have neighborhoods where residents lack access to fresh and healthy foods, including fruits and vegetables and low preservative meats. For example, within the four square mile City of Newburgh, New York, with a population of 28,173, there is not a single supermarket.¹² By providing an opportunity for people in these areas to have access to fresh and healthy foods, urban agriculture aids in the elimination of food deserts, reduction of obesity, and lessening of other disease that are spurred on by consuming an inadequate diet.

The populations that are most affected by the lack of nutritious food are the poor and mobility-constrained populations.¹³ Within Census Tract Four in Newburgh, New York, an area that is comprised of many vacant and dilapidated properties, it is estimated that as many as 40% of households are transit dependent, and as such, lack access to private vehicles to purchase groceries.¹⁴ The residents within this area must rely on processed foods offered at corner stores where prices are often 25 to 30% higher for staple goods.¹⁵ Implementing urban agriculture programs in these areas can help diminish the impacts of living in what is called a food desert, those areas without ready access to supermarkets such as Newburgh.¹⁶

In conjunction with healthy eating, engaging in urban *220 agriculture tends to increase physical activity, in particular by children and young adults. By affording youth the proper dietary nutrition necessary to maintain a healthy and active lifestyle they will be fueled and more energized to play outdoors. The unfortunate truth is that over 16 million children in the United States are living in ‘food insecure’ conditions and are being deprived of the healthy and nutritious foods needed for their growing bodies.¹⁷

In addition, kids spend approximately half as much time outside as they did two decades ago.¹⁸ Creating outside gardens and getting children involved also will reduce the phenomenon coined by Richard Louv as “‘nature deficit disorder,” used to describe “human costs of alienation from nature.”¹⁹ Urban gardens provide a perfect outlet to allow children to be outside, connect with nature, learn about their neighborhood ecosystem, as well as educate them on where their food comes from and encourage them to make healthy food choices.²⁰

B. Economic Benefits

Urban agriculture can result in many economically beneficial impacts within a community. Vacant or dilapidated lots attract vermin, trash, loiterers, squatters, illegal activity and are generally an unsafe environment. Municipalities are turning to urban agriculture, and in particular community gardens, as a solution to their distressed and vacant properties issues.²¹ At least one recent study has shown that the *221 greening of these spaces reduces crime.²² Moreover, urban garden initiatives that replace dilapidated and unkempt lots boost community engagement, instill a sense of pride, and increase the overall attractiveness of a city thereby helping to revitalize a city that is reeling from the impacts of abandonment and apathy.²³ Jersey City, New Jersey has engaged in such an urban gardening initiative called Adopt-A-Lot. Under the city-wide program, interested community groups may lease city-owned vacant lots and underused park land for one dollar for two years to establish and maintain a community garden.²⁴ These efforts, like that in Jersey City, beautify and increase safety in urban areas, attract new residents, and often lead to increasing property values in the surrounding neighborhoods.²⁵

The implementation of urban agriculture can also economically aid a city by providing job training and internships for the young and unemployed. Those who grow their own foods and vegetables and then sell at a local farmers market or convenience store have the unique benefit of providing fresher and riper products due to the close proximity to the end destination.²⁶ With the United States Department of Agriculture estimating that the demand for locally grown food will

nearly double, plenty of opportunities exist for local *222 farmers to grow and sell their own fruits and vegetables for profit to city residents.²⁷

Lastly, not only can urban agriculture create new jobs and training opportunities, but locally grown food products will often be purchased from people living in the city as well. By strengthening the local food economy, local money recirculates within the community thereby strengthening the local economy. Moreover, since the cost to preserve and transport locally produced food items is lessened, their overall price is reduced. This may result in greater savings to the consumer that may allow him or her to then spend those savings on other activities or products in the community.²⁸

C. Environmental Benefits

A number of environmental benefits also spring from urban agriculture activities. First, many contend that growing food locally reduces the length and costs of transporting foods from various regions to the consumer. The “average supermarket food item travels 1,400 miles” before reaching the end consumer.²⁹ By growing food locally in urban environments, the need to transport food items is significantly lessened thereby resulting in reduced greenhouse gas emissions.³⁰

Second, urban agricultural activities mitigate stormwater *223 flows that often overwhelm municipal sewage systems. Due to the concentration of roads, buildings, parking lots and other impervious surfaces in an urban environment, stormwater flows from these areas are significant.³¹ By creating more green space through the establishment of urban gardens and farms, rainwater is absorbed into the soil instead of pooling or running off into urban sewage systems. Additionally, the use of rain barrels at many urban agriculture locations helps lessen stormwater runoff³² as does the use of rainwater to irrigate crops being grown on rooftop gardens.³³ In both instances, this use of rainwater has the added environmental benefit of reducing potable water usage.

Third, open space and vegetation provided by urban gardens and farms aids in reducing local excessive heat. The term “heat island” refers to urban areas consisting of roads, buildings, parking lots and other structures that are hotter than adjacent rural areas.³⁴ According to the United States Environmental Protection Agency, in such areas with populations of one million or more residents, the annual mean air temperature can be 1.8-5.4°F (1-3°C) warmer than its surroundings.³⁵ In the evening, the difference between *224 urban and exurban areas can be as high as 22°F (12°C).³⁶ These heat islands can impact communities by increasing summertime peak energy demand, air conditioning costs, air pollution and greenhouse gas emissions, heat-related illness and mortality, and reducing water quality.³⁷ Increasing vegetation through the planting of community gardens and establishment of roof top gardens and farms mitigates the heat island effect by providing shade and removing heat through evapotranspiration.³⁸

III. Concerns Raised by Urban Agriculture

While the benefits of urban agriculture are many, there are also a number of concerns that farming in the city raises that must be addressed if agriculture is to become an important component of a municipality’s urban fabric. These concerns generally stem from three issues: neighboring properties, past property use, and resource inputs.

Given that density is an integral part of living in an urban setting, the effect of agricultural activities on neighbors must be considered. Noise from machinery, tools and animals like roosters and goats are inherent in agricultural production. Neighbors who may have formerly had a quiet lot next door are now faced with hearing these sounds early in the morning and on weekends.³⁹ Similarly, farming activity can give rise to significant odors that emanate from compost and manure piles and animals themselves if they are kept onsite.⁴⁰ Neighbor safety is another important consideration. There is the potential for injuries where farm animals escape their pens, and where apiaries are maintained, there is the risk that bees may sting neighbors.⁴¹ Additionally, traffic and parking concerns may be implicated where urban farmers maintain onsite sale of produce and other food items.⁴²

Urban agricultural operations also may pose risks to the participants themselves. Urban parcels that are or may be used for agricultural operations might have been previously *225 used as locations for gas stations, dry cleaners or other uses where soil contamination occurred. These soils may contain toxic levels of heavy metals, including lead, cadmium, mercury, nickel and copper.⁴³ Those working the soil might be exposed to these contaminants through ingestion (breathing and swallowing, the latter especially by children), while those who receive or purchase food from these lands risk indirect exposure by consuming items that may have absorbed the toxins.⁴⁴

Finally, there are concerns that arise due to the resource needs of urban agricultural activities. For example, onsite soil and water may become contaminated by overuse of fertilizer, insecticides and manure, and this contamination may flow onto adjacent property or into local water bodies.⁴⁵ Moreover, most agricultural activities require water to function properly, and as such, could tax existing municipal water supply systems that are already near capacity.

IV. Unreasonable Land Use Barriers to Urban Agriculture

Municipal governments are at the forefront of balancing the exercise of private property rights with the health, safety, and welfare of the public. One of their primary tools to accomplish this balance is zoning, which has been in use for nearly a century.⁴⁶ Applying zoning and related land use regulations to address the concerns caused by the resurgence of urban agricultural activities has been no exception.⁴⁷ In many instances, however, the application of zoning and other ***226** land use regulations to urban agricultural concerns has either pushed agriculture beyond the city boundary or has made it very difficult to conduct within city limits. This section begins with a brief discussion of the emergence of zoning and then highlights the more unreasonable zoning and related land use provisions that have impacted the ability of urban residents to engage agricultural-related activities.

As urban areas grew throughout the nineteenth century, so did the concerns of having incompatible land uses located adjacent to one another.⁴⁸ Then, in 1916, as a result of issues such as traffic congestion, inadequate waste disposal, overcrowding, and the spread of disease, New York City adopted the nation's first comprehensive zoning ordinance.⁴⁹ It segregated the city into various land use districts, allowing private property owners to use their parcels only for the purposes permitted in the applicable district.⁵⁰

In 1926, the United States Supreme Court upheld the constitutionality of zoning in the seminal case *Village of Euclid v. Ambler Realty Co.*⁵¹ Ambler Realty challenged the Village of Euclid, Ohio's adoption of a zoning ordinance that divided the village into six classes of use districts, three classes of height districts and four classes of area districts. Ambler argued that this type of regulation amounted to an illegal diminishing of its property value and was therefore an unconstitutional taking.⁵² In upholding the ordinance, the Supreme Court found that the village properly exercised its police power through the establishment of the various zoning districts.⁵³ Interestingly, in its analysis, the Supreme ***227** Court likened the separation of land uses into various zoning districts to "a pig in the parlor instead of the barnyard."⁵⁴

As a result of zoning's constitutionality, municipalities around the country have adopted land use measures under their zoning code and other real property provisions that impact the ability to conduct urban agriculture. Some of these measures either prohibit urban agricultural activities or have the effect of significantly impacting its exercise.

A. District or Zone Limitations

In adopting zoning ordinances, some urban municipalities exclude agriculture or related activities as a permitted use within zoning districts. For example, until June 2010, the City of Los Angeles, California prohibited residents from growing crops in residential zoning districts and from the on-site sale of produce.⁵⁵ Other cities, like Portland, Oregon previously banned agriculture as a primary use in certain zoning districts.⁵⁶

The most prevalent of these prohibitions involves the keeping of farm animals. Albany, New York finds that the keeping of farm animals is inherently "incompatible with urban life" and excludes them from the city.⁵⁷ Similarly, Yonkers, New York prohibits the keeping of certain farm animals like: "cows, cattle, horses, ponies, donkeys, mules, pigs, goats, sheep, chickens, ducks, geese, or other animals or fowl usually known as 'farm animals or fowl.'"⁵⁸

There are also situations where agriculture is not mentioned as either a permitted or special use in zoning ***228** districts.⁵⁹ This silence creates regulatory ambiguity and may lead to confrontations between neighbors or the landowner and municipality when the resident attempts to engage in farming activity.⁶⁰

B. Lot Sizes and Setbacks

Urban municipalities have also implemented land use provisions regarding lot sizes and setbacks that impact agricultural activity. After finding that the keeping of certain farm animals on an inadequately sized and setback parcel constitutes the interference with the "quality of life of the public, property values and the public health, safety and welfare of the community,"⁶¹ the City of New Rochelle, New York adopted a requirement that farm animals may only be kept "on a parcel

of land comprising [no] less than two acres with not less than one acre of land for each such animal.”⁶² While establishing a minimum lot size in and of itself is reasonable to address the concerns raised by animal husbandry, requiring that parcel of land be at least two acres may be excessive where urban lots are typically significantly smaller than the minimum required. Moreover, in the case of the New Rochelle, the provision does not distinguish between a cow, goat or chicken.⁶³ Thus, as written, the two-acre minimum lot size applies to a resident wishing to keep only one chicken.⁶⁴

C. Number and Licensing of Animals

In order to mitigate the concerns of urban agriculture, ^{*229} municipalities have also adopted animal limits that make it impermissible to have more than a certain number of individual animals or species. For example, in Buffalo, New York residents may keep up to five chickens or one cow, but they must first obtain a permit from the City.⁶⁵ To obtain a permit for keeping a cow, the city ordinance requires “conformity with the City Code and with the rules and regulations adopted by the Department of Health in the interest of public health.”⁶⁶ Determining which rules and regulations apply and where to find information on them is a daunting exercise for residents. To obtain a license for chickens, residents must follow a complicated license application which includes, among other things, “a signed statement from any resident residing on a property adjacent to the applicant’s property consenting to the applicant’s keeping of chicken hens on the premises” as well as “the addresses of all properties within a fifty-foot radius of the subject property.”⁶⁷ The annual licensing fee is \$25, however, any and all produce from the chickens may only be used for personal use, as sales are disallowed under the code.⁶⁸

D. Restrictions on Sale of Products from Urban Farms

Lastly, municipalities may prohibit or limit the sale of produce grown locally. For example, in Berkeley, California, a hotbed of the locavore movement,⁶⁹ residents are currently prohibited from selling produce grown on residential lots because it is neither a permitted or accessory use.⁷⁰ Fortunately, ^{*230} this may soon change.⁷¹ In May, 2012, the Berkeley Planning Commission adopted amendments to the zoning code establishing a definition of “Non-Processed Edibles,” which includes items such as fruit, vegetables, nuts, honey, and shell eggs, but not meat, and which makes the sale of such items a valid accessory use in residential districts subject to certain requirements.⁷² These proposed amendments will now go before the Berkeley City Council in July 2012.⁷³

Similarly, in 2010, Kansas City, Missouri adopted amendments to its Zoning and Development Code to further support agricultural and horticultural activities in residential neighborhoods.⁷⁴ However, some restrictions on the on-site sale of produce remain. For example, produce may be sold on-site for those agricultural operations that meet the definition of Community Garden, but only if the premises are vacant.⁷⁵

Other communities require vendors’ license to sell produce grown locally. Thus, in Troy, New York residents must obtain a peddler’s license to sell home grown produce offsite.⁷⁶ A resident must pay a \$75 fee if they are selling their goods on foot, while a \$500 permit fee is required if the produce is being sold out of vehicle.⁷⁷ While requiring a license is not an unreasonable requirement, the City of Troy mandates that the resident also maintain insurance naming the city as an additional insured.⁷⁸ In the case of the peddler’s license the insurance requirements are \$350,000 for general aggregate; ^{*231} \$350,000 for personal injury; \$350,000 per occurrence; \$100,000 for fire damage and \$5,000 for medical expenses.⁷⁹

V. Examples of Municipal Efforts Nationwide

While the land use-related code provisions of many municipalities continue to erect impediments to engaging in urban agricultural activities, a number of municipalities have started addressing these challenges with amendments to their local zoning ordinances and other land use regulations. In this section, the article examines several efforts occurring around the country.

A. Seattle, Washington

One of the nation’s cities at the forefront of urban agriculture is Seattle, Washington. Known for being a green and environmentally friendly city, it is no surprise that Seattle has implemented many programs and ordinances permitting and aiding in the implementation of urban agriculture. Seattle has created the Office of Sustainability and Environment that, among other things, puts a heavy focus on local food initiatives including, “growing, harvesting, processing, packaging,

ZONING AND LAND USE PLANNING, 41 Real Est. L.J. 216

transporting, distributing, buying and selling, cooking, eating, disposing of waste,” in an effort to equitably make available affordable and healthy food to citizens of Seattle.⁸⁰ In aiding in this effort, the Mayor and City Council have supported many local food initiatives evidenced by the “passing of a resolution to establish the Local Food Action Initiative in 2008, declaring 2010 the Year of Urban Agriculture, and passing a resolution for the Seattle Farm Bill Principles.”⁸¹ Resolution 31019, adopted April 28, 2008, acknowledges the importance and necessity of having fresh water and food available, in particular to lower income families, and sets forth goals and a policy framework to achieve a stronger and more secure food system in Seattle.⁸² Resolution 31296 supports the efforts of Seattle Farm Bill Principles, particularly by providing a healthy food system *232 within the city and calls for federal lobbying support to renew the Federal Farm Bill.⁸³

In addition to having political support for urban agriculture, Seattle’s comprehensive plan includes elements of community gardening, and is reflected by Seattle’s Department of Planning and Development Urban Agriculture Zoning Ordinance. Ordinance 123378, which took effect on September 23, 2010, now permits Urban Farms and Animal Keeping as accessory uses at statutorily specified set back and scale limitations.⁸⁴

B. Pittsburgh, Pennsylvania

Another City that has taken the lead in permitting urban agriculture within its boundaries is Pittsburgh, Pennsylvania. In 2011, the City amended its zoning ordinance to allow urban agriculture in many of its zoning districts either as a primary⁸⁵ or accessory use.⁸⁶ The outright commercial growing of crops and raising of livestock is only allowed in certain zoning districts and on parcels at least three acres, but certain beekeeping activity is allowed on 2,000 square foot lots and commercial growing of crops are permitted as a primary use on parcels.⁸⁷ The city allows for the housing of chickens and honeybees as an accessory use if lot-size and barrier requirements are met, for example two beehives for every 2,000 square feet of lot size and three chickens for a lot size of 2,000 feet, allowing an extra chicken for every 1,000 feet over the first 2,000.⁸⁸

C. Jersey City, New Jersey

Jersey City, New Jersey, has experienced a significant renewed interest in urban agriculture and has undertaken a number of initiatives to promote its growth within the city. *233 Most importantly, on April 13, 2011, the Municipal Council adopted amendments to the city’s Land Development Ordinance that enable urban agricultural practices.⁸⁹ These amendments permit community gardening, rooftop gardens and raised planters in all zones and redevelopment plan areas of the city, and exempt these uses from site plan approval.⁹⁰ The amendments also allow commercial agriculture operations in commercial, industrial and mixed use redevelopment plan area zones.⁹¹

Importantly, the amendments allow green roofs. The municipal ordinance defines green roofs as “vegetated roof system used in place of a conventional roof which typically involves a water proof membrane and root repellent system, a drainage system, filter cloth, a lightweight growing medium and species appropriate plants.”⁹² These roofs are exempt from the rooftop limit of 20% for rooftop appurtenances and, in certain circumstances exempt from site plan approval.⁹³

In addition to amending its zoning ordinance, Jersey City has also enhanced or established several programs to encourage more urban agricultural activities. For example, as mentioned above, the city recently amended its Adopt-a-Lot Program⁹⁴ that allows community and non-profit organizations to lease City-owned vacant lots and City-owned open space in need of improvement for \$1 for two years to develop and maintain community gardens.

In 2011, the City also applied for funding to construct and operate two hydroponic greenhouses (operated by Garden State Urban Farms, Inc.) and 250 grow boxes.⁹⁵ The project will be built in one of Jersey City’s most food-insecure neighborhoods, near a shopping center and light rail station. A local food cooperative will distribute food grown from these structures to local food banks, senior centers, and low-income *234 housing projects. The greenhouses will also be used to provide educational opportunities and employment training. This initiative will coordinate with a municipal chapter of “Buy Fresh, Buy Local.” Buy Fresh, Buy Local is part of the national non-profit FoodRoutes Network, headquartered in Pennsylvania.⁹⁶ Jersey City will be the first municipality in New Jersey to participate in this program, which allows local restaurants, schools, food banks and hospitals to buy local, fresh food at wholesale rates.

D. New York, New York

ZONING AND LAND USE PLANNING, 41 Real Est. L.J. 216

Although urban agriculture has occurred in New York City for more than a century, its modern programs and influences were spurred in the 1970s when the City faced a crippling financial crisis.⁹⁷ Heralded as the driving force behind convincing the city and other New Yorkers of the benefits and worth of gardening efforts in New York, Liz Christy's efforts brought about the first community garden in New York City known as the "Bowery Houston Community Farm and Garden."⁹⁸ In the wake of this initial success, the City established the Green Thumbs program in 1978 funded in large part by federal Housing and Urban Development Community Development Block Grants.⁹⁹

Vacant and blighted properties were leased by the City to community groups who turned the dilapidated properties into lush and vibrant gardens.¹⁰⁰ Although these leases were initially offered on a temporary basis, 1984 and 1989 gave rise to ten-year leases and designations of "preservation sites," which allows for permanent community garden use so long as they are in use and being cared for, respectively.¹⁰¹ These program aspects have been important in shaping community garden growth in New York City and have paved the way for Green Thumb to be the largest urban gardening program in the nation.¹⁰²

New and existing community gardens in New York City are now regulated by the Department of Parks and Recreation through Section 6 of the agency's Rules and Regulations.¹⁰³ These rules provide the details of the Garden Review process, and after entering into a Retention Agreement with the City, the garden's use must not be contrary to law, amount to a public nuisance, or threaten the health or safety of the community it is located, else a default and loss of license may occur.¹⁰⁴

Recently, the New York City adopted amendments to its zoning ordinance in order to promote sustainable communities throughout the five Boroughs.¹⁰⁵ As part of these amendments, termed "Zone Green," the City eliminated limitations on floor area and building height that had previously constrained opportunities for rooftop greenhouses and farms.¹⁰⁶ These changes allow greenhouses and agricultural activity on industrial, commercial and school buildings to enable year-round local food production and provide valuable educational opportunities. By certification of the Chair of the City Planning Commission, a greenhouse is now exempt from floor area and height limits, provided that it is located on top of a building that does not contain residences or sleeping accommodations. These greenhouses must not exceed 25 feet in height, must be set back six feet from the roof edge, and *236 must include practical measures to limit water consumption.¹⁰⁷

New York City's adoption of these amendments is timely given the likelihood for significant expansion of rooftop farming within the City. Recently, Gotham Greens, a 20-employee operation began harvesting bok choy, basil and oak leaf lettuce from its hydroponic greenhouse on a rooftop in the Greenpoint section of Brooklyn.¹⁰⁸ The company, which sells its produce to Wholefoods and other area concerns, plans to open three more rooftop greenhouses next year in Brooklyn, Queens and the Bronx.¹⁰⁹ In March 2012, the company BrightFarms announced that it would establish a 100,000-square foot hydroponic greenhouse on a roof in Sunset Park, Brooklyn.¹¹⁰ When it opens in 2013, BrightFarms anticipates that the operation will grow a millions pounds of produce per year, which it will sell to the A&P supermarket chain.¹¹¹ And on June 11, 2012, the city's Economic Development Corporation released a request for proposals for the development and operation of a rooftop farm at an approximately 200,000 square foot property on Food Center Drive in Hunts Point.¹¹² This location currently serves as the city's primary food distribution facility, the 329-acre Food Distribution Center ("FDC"), which serves over 15 million customers in the greater metropolitan region.¹¹³

IV. Recommendations for Further Cultivation

Where an urban municipality believes that the promotion and implementation of agriculture within its borders can greatly benefit the community, there are a number of concrete steps that it may take to ensure that agriculture becomes a permanent component of its urban fabric. Based upon the initiatives highlighted above, the following discussion *237 suggests four-step process for an urban municipality to put in place the land use framework to encourage agriculture.

A. Adopt a Policy Statement or Municipal Resolution Supporting Urban Agriculture

The local legislature or chief municipal executive such as a mayor can lay the ground work for urban agriculture through the adoption of resolutions, policy statements, or executive orders. These policy tools help initiate local action on urban agriculture by identifying goals and allocating responsibilities to local boards, officers and in some instances, a task force.

Such a resolution or executive order may begin by setting forth the community benefits generated by urban agriculture and the establishment of a local food system, detailing the city's current farming-related activities, and discussing the perceived barriers to advancing urban agriculture.¹¹⁴ This resolution may also institute goals that the community wants to achieve regarding urban agriculture.¹¹⁵ These goals may include expanding the production of and increasing access to locally grown

food, promoting healthy eating habits, and supporting the development of enterprises related to urban agriculture and food enterprises. The resolution may also establish an interdepartmental team to support existing and future city-wide urban agricultural efforts.¹¹⁶ Lastly, the resolution may look to establish partnerships with community gardening organizations, county, regional and state-level agencies, and educational institutions at all levels.¹¹⁷

B. Establish an Urban Agriculture Task Force

Assuming that a municipality has not previously engaged in efforts to promote urban agriculture, it is advisable that the resolution establish a task force to examine and make recommendations to the community so that it may strengthen its support of urban farming through its land use *238 regulatory system.¹¹⁸ Specifically, the task force should be authorized to retain consultants, gather information and data, conduct surveys, evaluate the results of these efforts, engage local residents, and work with experts to develop recommendations for land use regulatory amendments.

Where the local legislature or municipal executive chooses to establish a task force, the first consideration is the task force's composition. Assembling key stakeholders may include representatives of community gardens and farms, local schools and universities, religious institutions, soup kitchens and food pantries, municipal, county and regional governments, community land banks, local businesses, including food-related purveyors and restaurateurs, as well as developers, community activists, and local environmental organizations.

1. Inventory Current Agricultural Activities and Determine Future Needs

One of the first responsibilities of the task force will be to make sure that it understands what existing urban agricultural activities are occurring within the municipality. The task force should inventory these efforts, including identifying all back yard, community and school-related gardens, farmers' markets, local grocery stores, soup kitchens, and restaurants in the city. As part of this effort, the task force may consider conducting a communitywide survey that seeks the residents' input on these activities. This information could then be presented through an interactive website to gain further community input.

The task force should also seek to identify where urban agricultural activities are needed and are most appropriate *239 within the city. This examination would include an understanding of the community's vacant and abandoned parcels; what prior activities may have occurred there, including activities that might have contaminated the soil and water; which parcels have ready access to water; and how often citizens purchase produce and meats from local and regional farmers' markets and other purveyors among many other issues. Information developed from this work would help the task force understand that the scope and extent of urban agriculture's future in the city.

2. Determine Land Use Regulatory Barriers

After gathering and evaluating the above information, the task force should next examine the barriers imposed by the comprehensive plan and existing land use regulations to promoting and growing urban agricultural activities.¹¹⁹ This assessment should include an examination of the comprehensive plan's existing goals as they may relate to agriculture, health, environmental protection, economic development and community interaction.

With respect to the municipal zoning ordinance and development regulations, the task force should look to see whether existing definitions and regulations encompass urban agriculture or create confusion about its inclusion. In particular, the task force should pay attention to the permitted uses and accessory uses within the various zoning districts, the requirements for setbacks and height limitations, and whether the definition of home occupation would prohibit the sale of locally produced food items.

A good example of this auditing effort is demonstrated by Milwaukee, Wisconsin. With support from Region 5 of the United State Environmental Protection Agency, under an Environmental Justice Showcase Pilot Project, the city and its partners engaged in an evaluation of the city's zoning *240 ordinance as well as its building code.¹²⁰ This review revealed that while "agricultural uses" are defined in the zoning code, there is no discussion of scale of operations (i.e. home garden versus community garden versus urban farm), which may create confusion about the types of urban agricultural operations and

ZONING AND LAND USE PLANNING, 41 Real Est. L.J. 216

accessory uses that may be permitted within specified zoning districts.¹²¹ The zoning code review also determined that other provisions of the city's code, such as that pertaining to the keeping of animals, conflicted with the terms of the zoning code.¹²² Additionally, the audit showed that some agriculture-related uses associated with community gardens in residential neighborhoods, such as sales, educational uses, community centers, offices and parking, were not being addressed the same way by the city.¹²³ In some instances, the sponsors of community gardens sought special use permits. In other circumstances, the sponsors actually sought rezonings from residential to Planned Development District to create site-specific zoning. Another area of confusion that exists within the zoning code is the siting of gardens; it does not contain specific language where urban gardens may be located on a lot.¹²⁴ Finally, through the audit, the city discovered that there are many additional items that should be defined and regulated under the provisions of the zoning code. These include:

- Consider refining the use definition for Agricultural Use as appropriate to include considerations such as scales of agricultural use, accessory versus principal use, whether agricultural products are intended for sale, and regulation of sales in residential districts.
- Consider expanding the definition of agricultural use to include a general category for agricultural structures, developing standards regarding where such structures can be located, and addressing structural considerations.
- ***241** • Consider adding a definition, structural standards and permissible use categories for rainwater harvesting systems such as cisterns to the building and zoning code.
- Consider adding use definitions and classifications to the zoning code for food processing and commercial/industrial scale composting operations.¹²⁵

3. Make Recommendations for Amendments

As it evaluates the information derived from the work discussed above, the task force should consider five key questions as suggested by Heather Wooten and Amy Ackerman, authors of *Seeding the City*:

1. What form(s) of urban agriculture should the community allow?
2. Where should different forms of urban agriculture occur?
3. Should urban agriculture be a "permitted" or "conditional" use?¹²⁶
4. What operating standards should be placed on urban agriculture activities?
5. What activities related to urban agriculture should the community allow and what conditions should be placed on those activities?¹²⁷

Answering these questions will help the task force prepare its recommendations to the local legislature or mayor. Once answers to these questions have been obtained, then the task force can prepare a report detailing its findings with specific recommendations for amendments to the comprehensive plan and land use regulations.

4. Public Engagement

Throughout all of these efforts, the municipality and the task force should ensure that the public is thoroughly engaged. At various stages during the task force's work, public meetings should be held, including those that are communitywide and those conducted in neighborhoods. The task force may also consider establishing a website that is regularly updated to keep the residents well informed of its ***242** efforts.¹²⁸ It will be important that the municipality's residents have opportunities to provide input on each of the items outlined above, including an ability to comment on and provide changes to the task force report with recommended changes.

C. Amend the Comprehensive Plan

Once the task force has completed its work, it will be the responsibility of the local legislature to make the necessary

amendments to the comprehensive plan. Ensuring that the comprehensive plan contains explicit policy statements recognizing the community benefits of urban agriculture and establishes the promotion of urban farming activities as a comprehensive plan goal are critical to a municipality's efforts to become more urban agriculture friendly. Moreover, this step is essential in those states that require land use regulations be consistent with comprehensive master plans.¹²⁹ The failure to at least mention the need to address urban agricultural concerns in the comprehensive plan could leave subsequent urban agriculture-related land use provisions subject to legal challenge.

In the case of Newburgh, New York, it determined that previous versions of its master plan failed to address local food production. Thus, during the revision of its master plan in 2008, the city provided a description of the circumstances regarding food availability and production within the municipal limits and the highlighted its desire to increase urban gardening and greenhouses so that the city would be less reliant on distant food supplies.¹³⁰ The City then establishes *243 two goals and related targets and strategies in the master plan to help it achieve its local food vision.¹³¹

D. Amend the Zoning Ordinance and Related Land Use Regulations

Having amended the comprehensive plan, the municipality will then have to amend its zoning ordinance and related land use regulations. Which specific amendments are made will vary greatly from municipality to municipality and will depend upon the extent to which the community wants agriculture to continue or grow within its borders. As discussed above, amendments that may be incorporated include defining what activities constitute urban agriculture; making agriculture a primary or accessory use in all or some zoning districts; allowing locally food produced to be sold despite being generated on land in residential districts; reducing minimum lot sizes, setbacks and height requirements; establishing or eliminating licensing requirements for animal husbandry and bee keeping; determining whether agricultural activities will be allowed only upon the issuance of a special use or conditional permit; and clarifying the types of accessory structures that may be permitted in support of urban agricultural activities, among other provisions.

E. Other Municipal Efforts to Promote Urban Agriculture

Finally, in addition to amending the comprehensive plan, zoning ordinance and land use regulations, communities around the country have also implemented other strategies to augment their urban agricultural efforts that other municipalities may wish to consider.

One such strategy may include establishing a community land bank. While not permitted in every state, a number of states have enacted legislation that allows municipalities to form land banks.¹³² Generally, land banks are authorized to acquire, manage, maintain, and repurpose vacant, abandoned, and foreclosed parcels so that these properties may *244 be put to back to productive use.¹³³ Several municipalities have begun to use their land banks to promote urban agriculture.¹³⁴ In these communities, the land banks have acquired title to vacant property and then leased or sold the land to community garden organizations or urban farms. Because the cost of land may be significant, the role of land banks is important as they are able to provide land at prices that are affordable. Columbus, Ohio is one of the first communities to use this strategy.¹³⁵

A second strategy that municipalities have employed is the creation of partnerships with local or regional land trusts to support a city's urban agricultural efforts. A land trust is a not-for-profit organization that actively works to conserve land by either taking title to or acquiring a conservation easement in land for the purpose of preserving the land's important ecological, agricultural or historical characteristics.¹³⁶ Some land trusts work in conjunction with municipalities to secure land for urban agricultural activities. For example, the organization Baltimore Green Space has a special agreement with the city whereby it may purchase city-owned vacant lots for \$1.¹³⁷ A community group or not-for-profit organization may then seek to lease the land from Baltimore Green Space to establish a community garden. Baltimore Green Space maintains liability insurance for the parcels of land that it owns further reducing the concerns of organizations cultivating the property for urban farming activities.¹³⁸

VII. Conclusion

Urban agricultural activities are vital to establishing and maintaining a city's sustainability efforts. How a municipality plans for and regulates urban farming through its *245 comprehensive plan, zoning ordinance and land use regulations are critical components to ensuring the long-term viability of this increasing and important urban movement.

**LEJAVA JEFFREY 10/15/2012
For Educational Use Only**

ZONING AND LAND USE PLANNING, 41 Real Est. L.J. 216

Footnotes

- a1 Jeffrey P. LeJava is Managing Director of Innovation at the Land Use Law Center at Pace Law School as well as a member of the school's adjunct faculty.
- aa1 Michael J. Goonan is the LL.M. Research Fellow at the Land Use Law Center at Pace Law School.
- 1 WENDELL BERRY, *THE UNSETTLING OF AMERICA: CULTURE AND AGRICULTURE* 86 (1977).
- 2 Patricia E. Salkin, *Trends in Urban Agriculture, in ALL-ABA Course of Study Land Use Institute: Planning, Regulation, Litigation, Eminent Domain, and Compensation* American Law Institute--American Bar Association at FN 18 (2011) (citing Katherine L. Adam, *Community Gardening*, National Sustainable Agriculture Information Service 7, available at <https://www.attar.ncat.org/attar-pub/PDF/communitygarden.pdf>); Richard Hoff et al., *Sustainable Benefits of Urban Farming as a Potential Brownfield Site Remedy*, 3 (2010), <http://www.eswp.com/brownfields/Present/Hoff%205A.pdf>.
- 3 Kristin Choo, *Plowing Over: Can Urban Farming Save Detroit and Other Declining Cities? Will the Law Allow It?* Aug. 1, 2011, ABA Journal available at http://www.abajournal.com/magazine/article/plowing_over_can_urban_farming_save_detroit_and_other_declining_cities_will/.
- 4 Heather Wooten & Amy Ackerman, *Seeding the City: Land Use Policies to Promote Urban Agriculture*, 4 (2011), available at http://www.changelabsolutions.org/sites/changelabsolutions.org/files/Urban_Ag_SeedingTheCity_FINAL_%28CLS_20120530%29_20111021_0.pdf.
- 5 “While there is not yet a universally agreed-upon definition, Urban and Peri-urban Agriculture ... is perceived as agriculture practices within and around cities which compete for resources (land, water, energy, labour) that could also serve other purposes to satisfy the requirements of the urban population. Important sectors of UPA include horticulture, livestock, fodder and milk production, aquaculture, and forestry.” Food and Agriculture Organization of the United Nations (FAO), *Urban and Periurban Agriculture*, <http://www.fao.org/unfao/bodies/COag/cOAG15/X0076e.htm> (last visited July 12, 2012).
- 6 U.S. Dep't of Agriculture, *Farmers Markets and Local Food Marketing*, <http://www.ams.usda.gov/AMSV1.0/ams.fetchTemplateData.do?template=TemplateS&leftNav=WholesaleandFarmersMarkets&page=WFMFarmersMarketGrowth&description=Farmers%20Market%20Growth&acct=frmdirmkt> (last visited July 12, 2012).
- 7 U.S. Dep't of Agriculture, *Farms and Community*, <http://www.afsic.nal.usda.gov/farms-and-community/urban-agriculture> (Last visited July 12, 2012).
- 8 See generally, First Lady Michelle Obama, *American Grown: The Story of the White House Kitchen Garden and Gardens Across America* (2012).
- 9 Salkin, *Regional Foodsheds: Are Our Local Zoning and Land Use Regulations Healthy?*, 22 *Fordham Envtl. L. Rev.* 599, 599 (2011) (citing Am. Planning Ass'n, *Policy Guide on Community and Regional Food Planning* 2 (2007), <http://www.planning.org/policy/guides/pdf/foodplanning.pdf>).
- 10 Claudia Reinhardt, *Farming in the 1940s: Victory Gardens*, http://www.livinghistoryfarm.org/farminginthe40s/crops_02.html (last visited July 12, 2012).

LEJAVA JEFFREY 10/15/2012
For Educational Use Only

ZONING AND LAND USE PLANNING, 41 Real Est. L.J. 216

- 11 Anne C. Bellows, Ph.D. et al., *Health Benefits of Urban Agriculture*, at 2, <http://www.foodsecurity.org/UAHealthArticle.pdf> (last visited July 12, 2012).
- 12 Pathstone, *A Plan for Green Urban Land Use in the City of Newburgh*, Greenway community Grant Report 2 (Mar. 2012) (on file with authors).
- 13 See Barb Murphy, *Living in a Food Desert: How Lack of Access to Healthy Foods Can Affect Public Health*, Jan. 25, 2011, The National Academies Press, available at <http://notes.nap.edu/2011/01/25/living-in-a-food-desert-how-lack-of-access-to-healthy-foods-can-affect-public-health/>.
- 14 *Id.*
- 15 *Id.*
- 16 APA, *Zoning Practice: Urban Agriculture* (March 2010), available at <http://www.planning.org/zoningpractice/2010/pdf/mar.pdf>; “A ‘food desert’ is an area where residents have limited access to supermarkets and supercenter stores. The term originated in Europe to describe places with few food retailers. U.S. researchers have only recently begun to apply this concept to rural areas in the U.S.” U.S. Dep’t of Agriculture, Food and Nutrition Assistance Research Database, summary available at <http://162.79.45.209/data-products/food-and-nutrition-assistance-research-database/ridge-project-summaries.aspx?type=2&summaryId=113>.
- 17 Feeding America, *Child Hunger Facts*, <http://www.feedingamerica.org/hunger-in-america/hunger-facts/child-hunger-facts.aspx> (last visited July 12, 2012).
- 18 Dan, Shapley, *Encourage Children to Play (and Learn) Outside: The introduction of the No Child Left Inside Act of 2011 this week reminds us that kids need environmental education, citizen science projects and time to simply playing outdoors*, <http://www.thedailygreen.com/going-green/tips/no-child-left-inside-2011> (last visited July 12, 2012).
- 19 Richard Louv, *Last Child in the Woods: Saving Our Children from Nature-Deficit Disorder* (2005).
- 20 National Gardening Association, About NGA, <http://assoc.garden.org/> (last visited July 12, 2012).
- 21 The leading example of this effort is Detroit, Michigan. With over 91,000 vacant or abandoned parcels, the city and its residents are relying on urban agriculture to help deal with effects of population loss and urban decay while simultaneously strengthening community relationships and providing healthier food. See Mogk et al., *Promoting Urban Agriculture as an Alternative Land Use for Vacant Properties in the City of Detroit: Benefits, Problems and Proposals for a Regulatory Framework for Successful Land Use Integration*, 56 Wayne L. Rev. FN. 10, (2010), available at http://www.law.wayne.edu/pdf/urban_agriculture_policy_paper_mogk.pdf; see also, Kristine Choo, *Plowing It Over: Can Urban Farming Save Detroit and Other Declining Cities? Will the Law Allow It?*, A.B.A. J. (Aug. 1, 2011), http://www.abajournal.com/magazine/article/plowing_over_can_urban_farming_save_detroit_and_other_declining_cities_will/ (last visited on July 12, 2012).
- 22 Charles C. Branas et al., *A Difference-in-Differences Analysis of Health, Safety, and Greening Vacant Urban Space*, American Journal of Epidemiology Advance Access, at 6-7 (Nov. 11, 2011), available at

LEJAVA JEFFREY 10/15/2012
For Educational Use Only

ZONING AND LAND USE PLANNING, 41 Real Est. L.J. 216

eddyburg.it/filemanager/download/2137/Epidem_Green.pdf.

- 23 Mogk, *supra* note 21, at 13-14.
- 24 Jersey City, N.J., Ordinance § 11-019 (2011).
- 25 Schumkoske, *Community Development Through Gardening: State and Local Policies Transforming Urban Open Space*, 3 N.Y.U. J. Legis. & Pub. Pol’y 351, 351-353 (1999-2000).
- 26 Jac Smit et al., *Urban Agriculture: Food, Jobs and Sustainable Cities*, Chapter 7: Benefits of Urban Agriculture 14-15 (2001), available at <http://www.jacsmit.com/book/Chap07.pdf>.
- 27 Mogk, *supra* note 21, at 11 (citing Debra Tropp, *Emerging Opportunities for Local Food in the U.S. Consumer Markets*, U.S. Dep’t of Agric. 3, Aug. 2008, available at <http://www.ams.usda.gov/amsv1.0/getfile?ddocname=stelprdc5072587>); see also *USDA pushes buying local ag products for schools*, TheTandD.com, May 25, 2011, available at http://www.thetandd.com/business/article_c1c5f2b4-8343-11e0-afd4-001cc4c002e0.html.
- 28 Smit, *supra* note 26, at 2-3.
- 29 Salkin, *supra* note 2, at 2 (citing Peters, *Creating a Sustainable Urban Agriculture Revolution*, 23 J. Envt. L & Litig. 203, at 231 (2010) (quoting Center for Urban Education about Sustainable Agriculture, *Issues in a Nutshell: How Far Does Your Food Travel to Get to Your Plate?*, http://www.cuesa.org/sustainable_ag/issues/foodtravel.php (last visited Apr. 17, 2010))).
- 30 Natural Resources Defense Council, *Health Facts--Food Miles: How Far Your Food Travels Has Serious Consequences for Your Health and the Climate* (2007), <http://www.food-hub.org/files/resources/Food%20Miles.pdf> (last visited July 12, 2012); Some argue that the concern over “food miles” is not as simple as locally produced food is better from a sustainability perspective. David Owen in his book “Green Metropolis” explains that factors such as “how [food] is grown, how it got to where it is going, and what else was traveling with it” are just as critical in determining the carbon foot print of a particular food item. David Owen, *Green Metropolis: Why Living Smaller, Living Closer, and Driving Less are the Keys to Sustainability* 300 (2009). Similarly, Christopher L. Weber and H. Scott Matthews in *Environmental Science & Technology* contend that “Transportation as a whole represents only 11% of life-cycle GHG emissions, and final delivery from producer to retail contributes only 4%. Different food groups exhibit a large range in GHG-intensity; on average, red meat is around 150% more GHG intensive than chicken or fish.” They suggest that “‘dietary shift can be a more effective means of lowering an average household’s food-related climate footprint than ‘buying local.’ Shifting less than one day per week’s worth of calories from red meat and dairy products to chicken, fish, eggs, or a vegetable-based diet achieves more GHG reduction than buying all locally sourced food.” Christopher L. Weber & H. Scott Matthews, *Env’tl Science & Tech.*, available at http://www.psufoodscience.typepad.com/psu_food_science/files/es702969f.pdf.
- 31 Jon E. Barry, *Forests and Urban Stormwater*, *Agriculture and Natural Resources* 1, <http://www.privatelandownernetwork.org/pdfs/forests%20urban%20stormwater.pdf>.
- 32 *Id.*; *Every Drop Counts ... Rain Barrel Benefits*, http://www.raingardenregistry.com/clientuploads/rain-barrel_benefits.pdf.
- 33 Mogk, *supra* note 21, at 16.
- 34 United State Environmental Protection Agency (U.S. EPA), *Urban Heat Island*, <http://www.epa.gov/hiri/> (last visited July 12,

2012).

35 *Id.*

36 *Id.*

37 *Id.*

38 U.S. EPA, *Trees*, <http://www.epa.gov/hiri/mitigation/trees.htm> (last visited July 12, 2012); U.S. EPA, *Green Roofs*, <http://www.epa.gov/hiri/mitigation/greenroofs.htm> (last visited July 12, 2012).

39 See generally Mogk, *supra* note 21, at 22.

40 *Id.* at 22-24.

41 *Id.* at 26-27.

42 *Id.* at 29.

43 *Id.* at 16 (citing Natural Resources Conservation Service, *Heavy Metal Soil Contamination*, U.S. Dep't of Agriculture, 2000, available at http://www.soils.usda.gov/sqi/management/files/sq_utm_3.pdf).

44 *Id.*

45 Barry, *supra* note 31, at 1-5.

46 See generally, Nolon, *Historical Overview of the American Land Use System: A Diagnostic Approach to Evaluating Governmental Land Use Control*, 23 Pace Envtl. L. Rev. 821 (2006).

47 Amanda Powell Hodierne, *Livestock in the Suburban Landscape*, 7 Land Use Quarterly, Zoning, Planning and Land Use Section of the North Carolina Bar Association, Section No. 3, at 7 (Apr. 2012), where the author describes a recent conflict in Aberdeen, North Carolina between those raising chickens and those opposed. The conflict required the Aberdeen Board of Commissioners to mediate between the opposing groups and propose amends to the town ordinance to allow chickens in smaller residential lot zoning districts but with more restrictions on how they are kept. *Id.*, available at <http://www.zoningplanningandlanduse.ncbar.org/media/23775771/zplu042012.pdf>.

48 Nolon, *supra* note 46, at 829-830. (“During the 1800s, building on private lots in urban areas to respond to market demand again caused a tangle of construction, poor traffic circulation, inadequate waste disposal, and overcrowding. The spread of diseases such as tuberculosis and cholera was a result of these conditions, as were serious fires in 1828 and 1835 in New York City. As modern industrial cities emerged during the 19th century, the negative effects of uncontrolled urbanization became clear.”)

49 *Id.* at 830.

LEJAVA JEFFREY 10/15/2012
For Educational Use Only

ZONING AND LAND USE PLANNING, 41 Real Est. L.J. 216

- 50 *Id.* at 830.
- 51 *Village of Euclid v. Ambler Realty*, 272 U.S. 365 (1926).
- 52 *Id.* overturning *Ambler Realty Co. v. Village of Euclid*, Ohio, 297 F. 307 (N.D. Ohio Jan 14, 1924).
- 53 *Id.* at 397.
- 54 *Id.* at 388.
- 55 Sara B. Schindler, *Of Backyard Chickens and Front Yard Gardens: The Conflict Between Local Governments and Locavores*, 87 Tulane Law Review No. 2 at 10, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2030526.
- 56 Voigt, *Pigs in the Backyard or the Barnyard: Removing Zoning Impediments to Urban Agriculture*, 38 B.C. Envtl. Aff. L. Rev. 537, 550 and FN 125 (2011). Portland, Oregon, amended its zoning code in June 2012 to define and regulate various urban agricultural activities that City had previously prohibited or allowed to occur on temporary, ad hoc bases. Carrie A. Richter, *Urban Farming: Zoning for Growing and Distributing Food in Portland Neighborhoods*, Planning Law, 9 (Spring 2012).
- 57 Albany, N.Y., City Code § 115-30.
- 58 Albany, N.Y., City Code § 115-31; Yonkers, N.Y., City Code § 43-28 (The City of Yonkers, in its Use and Dimensional Regulation of Land, Buildings and Structures, explicitly prohibits the raising of livestock or fowl.).
- 59 For example, the City of Buffalo's zoning code is silent regarding whether agricultural use is allowed either as a primary or accessory use in any of the city's zoning districts. Kailee Neuner & Samina Raja, *Buffalo's Food System: An Assessment of Current Municipal, County and State Policies that Regulate Buffalo's Food System* at 8 (2012), available at <http://www.scribd.com/doc/80690710/Buffalo-Food-System-2011>.
- 60 Schindler, *supra* note 55 at 10-11. The author discusses the case where Dekalb County, Georgia cited a gardener for growing vegetables on his parcel is in a zone that does not explicitly permit growing vegetables as an allow use.
- 61 New Rochelle, N.Y., City Code § 89-16.
- 62 New Rochelle, N.Y., City Code § 89-17.
- 63 New Rochelle, N.Y., City Code § 89-17.A.
- 64 In Chesire, Connecticut, a neighbor dispute over four pet chickens came before the city's planning and zoning commission. During the course of the hearings, the commission members came to learn that the city code required a minimum of three acres for the keeping of any number of chickens. The city subsequently amended its code to allow up to twelve hens on a minimum of an 80,000 square foot lot. Roosters, however, are prohibited on lots smaller than three acres. Orbach and Sjoberg, *Debating Over*

LEJAVA JEFFREY 10/15/2012
For Educational Use Only

ZONING AND LAND USE PLANNING, 41 Real Est. L.J. 216

Backyard Chickens, 44 Conn. L. Rev. 1, 22 (2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1742930.

- 65 City of Buffalo, N.Y., City Charter and Code §§ 78-2 to 78-4 (1974); Kailee Neuner & Samina Raja, *Buffalo's Food System: An assessment of current municipal, county, and state policies that regulate Buffalo's food system*, available at http://www.mass-ave.org/wp-content/uploads/2012/02/HKHC-Policy-Brief-4_Food-Municipal-County-and-State.pdf.
- 66 *Id.*
- 67 Buffalo, N.Y., City Code Chapter 341.11.2.
- 68 Buffalo, N.Y., City Code Chapter 341.11 *et seq.*
- 69 See e.g., Cultivating a Movement: Putting a Face to Organic Farming in CA, Upcoming events & things to do, <http://www.upcoming.yahoo.com/event/9335619/CA/Berkeley/Cultivating-a-Movement-Putting-a-Face-to-Organic-Farming-in-CA/Jewish-Community-Center-of-the-East-Bay/>.
- 70 Berkeley, Cal., Code § 23D.16.030 (2012).
- 71 Tracey Taylor, *Berkeleyans closer to being able to sell backyard produce*, Berkeleyside, May 17, 2012, available at <http://www.berkeleyside.com/2012/05/17/berkeleyans-closer-to-being-able-to-sell-backyard-produce/>.
- 72 Berkeley Planning and Development Department, Memorandum, May 16, 2012, available at <http://www.berkeleyside.com/2012/05/17/berkeleyans-closer-to-being-able-to-sell-backyard-produce/>.
- 73 Berkeley City Council Meeting Agenda for July 17, 2012, available at http://www.ci.berkeley.ca.us/Clerk/City_Council/2012/07Jul/City_Council_07-17-2012_-_Regular_Meeting_Agenda.aspx.
- 74 Food Not Lawns--Kansas City website, <http://www.foodnotlawnskc.org/a-guide-to-urban-agriculture-codes-in-kcmo/> (last visited July 12, 2012).
- 75 Kansas City, Missouri, City Code § 88-312-02-B.
- 76 Troy, N.Y., City Code § 224-2.
- 77 Troy, N.Y., City Code § 224-9.
- 78 Troy, NY Peddler's License Application, available at <http://www.troyny.gov/Libraries/permitslicenses/peddlerslicense.sflb.ashx>.
- 79 *Id.*
- 80 Office of Sustainability and Environment, <http://www.seattle.gov/environment/food.htm>.

LEJAVA JEFFREY 10/15/2012
For Educational Use Only

ZONING AND LAND USE PLANNING, 41 Real Est. L.J. 216

- 81 Office of Sustainability and Environment, [http:// www.seattle.gov/environment/food.htm](http://www.seattle.gov/environment/food.htm).
- 82 Seattle, Wash., Resolution 31019, *available at* [http:// www.clerk.seattle.gov/~scripts/nph-brs.exe?s1=&s2=&s3=31019&s4=&Sect4=AND&l=20&Sect2=THESON&Sect3=PLURON&Sect5=RESN1&Sect6=HITOFF&d=RES3&p=1&u=%2F~public%2Fresn1.htm&r=1&f=G](http://www.clerk.seattle.gov/~scripts/nph-brs.exe?s1=&s2=&s3=31019&s4=&Sect4=AND&l=20&Sect2=THESON&Sect3=PLURON&Sect5=RESN1&Sect6=HITOFF&d=RES3&p=1&u=%2F~public%2Fresn1.htm&r=1&f=G).
- 83 Seattle, Wash., Resolution 31296, *available at* [http:// www.clerk.ci.seattle.wa.us/~archives/Resolutions/Resn_31296.pdf](http://www.clerk.ci.seattle.wa.us/~archives/Resolutions/Resn_31296.pdf).
- 84 Seattle, Wash., City Code, §§ 23.42.51 and 23.42.52, *available at* <http://www.clerk.seattle.gov/public/toc/23-42.htm>.
- 85 Pittsburgh, Pa., City Code § 911.04.A.2(a) to (c).
- 86 Pittsburgh, Pa., City Code § 912.07.
- 87 Pittsburgh Department of City Planning, Urban Agriculture Zoning, http://www.pittsburghpa.gov/dcp/files/urbanagriculture/Urban_Agriculture_Handout.pdf (last visited July 12, 2012); Pittsburgh, Pa., Zoning Code § 911.04.A.2(a) to (c).
- 88 Pittsburgh Department of City Planning, Urban Agriculture Zoning, http://www.pittsburghpa.gov/dcp/files/urbanagriculture/Urban_Agriculture_Handout.pdf (last visited July 12, 2012); Pittsburgh, Pa., Zoning Code § 912.07.B(8) to (9).
- 89 Jersey City, N.J., Resolution 11-041.
- 90 *Id.*
- 91 *Id.*
- 92 *Id.*
- 93 *Id.*
- 94 Jersey City, N.J., Ordinance 11-019 (Jan. 31, 2011).
- 95 Jersey City, N.J., Resolution 11-168; Matt Hunger, *Jersey City Unveils Ambitious “365 Days of Green” Blueprint for Sustainability Initiatives*, *available at* <http://www.jerseycityindependent.com/2011/04/13/jersey-city-unveils-ambitious-365-days-of-green-blueprint-for-sustainability-initiatives/> (press release based on statements by Jersey City Mayor Healey).
- 96 Buy Fresh, Buy Local, <http://www.buylocalpa.org/>.

LEJAVA JEFFREY 10/15/2012
For Educational Use Only

ZONING AND LAND USE PLANNING, 41 Real Est. L.J. 216

- 97 N.Y.C. Dep't of Parks and Recreation, *The Community Garden Movement: Green Guerrillas Gain Ground*, <http://www.nycgovparks.org/about/history/community-gardens/movement> (last visited July 12, 2012).
- 98 *Id.*
- 99 *Id.* ("Green Thumb is still funded largely by community block grants from the federal Housing and Urban Development program.").
- 100 *Id.*
- 101 *Id.*
- 102 *Id.*; Mindy Goldstein et al., *Urban Agriculture: A Sixteen City Survey of Urban Agriculture Practices Across the Country* 37-39, available at <http://www.georgiaorganics.org/Advocacy/urbanagreport.pdf>. ("Green Thumb is "nation's largest urban gardening program, providing assistance and support to over 600 gardens and nearly 20,000 garden members throughout the city ... [and] community gardens account for over 32 acres of parkland in the city ..." (quoting N.Y.C. Dep't of Parks and Recreation, *The Community Garden Movement: Green Guerrillas Gain Ground*, <http://www.nycgovparks.org/about/history/community-gardens/movement>).
- 103 N.Y.C. Dep't of Parks and Recreation, Rules and Regulations, available at <http://www.nycgovparks.org/rules>.
- 104 *Id.* at § 6, available at <http://www.nycgovparks.org/rules>.
- 105 N.Y.C. Dep't of City Plan'g, Zone Green text Amendment, available at <http://www.nyc.gov/html/dcp/html/greenbuildings/index.shtml> (last visited July 12, 2012).
- 106 New York City Zoning, Article VII, § 75-01 (Certifications for Rooftop Greenhouses).
- 107 *Id.*
- 108 Lisa W. Foderaro, *To Find Fields to Farm in New York City, Just Look Up*, New York Times, July 11, 2012, available at <http://www.nytimes.com/2012/07/12/nyregion/in-rooftop-farming-new-york-city-emerges-as-leader.html?hp>.
- 109 *Id.*
- 110 *Id.*
- 111 *Id.*
- 112 N.Y.C. Economic Development Corporation, *Request for Proposals: Rooftop Farming* (June 11, 2012), available at <http://www.nycedc.com/opportunity/rooftop-farming-consulting-services-rfp> (last visited July 12, 2012).

LEJAVA JEFFREY 10/15/2012
For Educational Use Only

ZONING AND LAND USE PLANNING, 41 Real Est. L.J. 216

- 113 *Id.* at 6.
- 114 City of Seattle, Wash., Resolution 31019 (Apr. 28, 2008).
- 115 See *id.*
- 116 See, e.g., City of Burlington, VT, Resolution (March 2011), available at <http://www.burlingtonvt.gov/docs/3958.pdf>. This resolution states that the City of Burlington will create an Urban Agriculture Task Force to recommend to the City Council a “cohesive urban agriculture policy, improved rules and regulations addressing urban agriculture, and steps to better promote urban agriculture in Burlington.”
- 117 See *id.*
- 118 A community may also wish to consider establishing a food policy council. There are currently over 100 food policy councils in the United States with most organized at the municipal or county level. “Food policy councils bring together stakeholders from diverse food-related sectors to examine how the food system is operating and to develop recommendations on how to improve it Food policy councils have been successful at educating officials and the public, shaping public policy, improving coordination between existing programs, and starting new programs. Examples include mapping and publicizing local food resources; creating new transit routes to connect underserved areas with full-service grocery stores; persuading government agencies to purchase from local farmers; and organizing community gardens and farmers’ markets.” North American Food Policy Council, <http://www.foodsecurity.org/FPC/> (last visited July 12, 2012). Here, because of the article’s focus on changes to a municipality’s land use system, a task force is a more appropriate body to make recommendations for land use regulatory amendments.
- 119 Keep in mind that such an evaluation may also be conducted as part of a more comprehensive assessment of the current and future use of urban agriculture in a community. An excellent example of this comprehensive approach is evident in the work of Rochester, New York. In September 2011, the city’s Department of Neighborhood and Business Development published “Urban Agriculture and Community Gardening Feasibility Study: A Vision for a More Sustainable Future.” This 309-page document examines all aspects urban agriculture and ways to create a more sustainable community food system, including an assessment of Rochester’s zoning ordinance and development regulations.
- 120 U.S. EPA, Region 5, Urban Agriculture Code Audit: Milwaukee, Wisconsin (Apr. 2012) (hereinafter “Audit”), available at http://www.city.milwaukee.gov/ImageLibrary/Groups/cityDCD/Urban-Agriculture/pdfs/MilwaukeeCodeAudit_acknowledge.pdf.
- 121 *Id.* at 12.
- 122 *Id.* at 12. Chapter 78 of Milwaukee’s City Code of Ordinances permits only the keeping of bees and chickens, while Section 295-203-14.b of the zoning code allows the raising of a multitude of livestock. Milwaukee, Wis., City Code ch. 78 § 295-203-14.b.
- 123 Audit, *supra* note 120, at 13.
- 124 *Id.* at 14.
- 125 *Id.* at 5.

LEJAVA JEFFREY 10/15/2012
For Educational Use Only

ZONING AND LAND USE PLANNING, 41 Real Est. L.J. 216

- 126 A community may also want to consider certain types of urban agriculture as an accessory use in residential districts as Berkeley, California is doing with respect to the sale of produce from home gardens. Berkeley Planning and Development Department, *supra* note 72.
- 127 Wooten, *supra* note 4, at 4.
- 128 A good example of this is seen in the website maintained by the Burlington, Vermont Food Policy Council. The Council has continually updated a page on its website with information regarding the activities of Burlington's Urban Agriculture Task Force. Burlington Food Council, Urban Agriculture Task Force, <http://www.burlingtonfoodcouncil.org/our-projects/uatf/> (last visited July 12, 2012). Additionally, using the Food Policy Council's website, the Task Force established an online survey for Burlington residents to provide information about their involvement with urban agriculture. Local Food Economy Survey, <http://www.surveygizmo.com/s3/620413/UATF-Public-1> (last visited July 12, 2012).
- 129 See e.g. New York. New York's zoning enabling statutes for cities, towns and villages all require that zoning laws be adopted in accordance with a comprehensive plan. N.Y.S. Dep't of State, *Zoning and the Comprehensive Plan*, at 1 (2009).
- 130 City of Newburgh, New York, Plan-It Newburgh: Sustainable Master Plan, at 72-73 (Dec. 8, 2008), available at http://www.cityofnewburgh-ny.gov/masterplan/docs/MasterPlanDraft120808ann_accepted_changes-FINAL.pdf.
- 131 *Id.* at 75-76.
- 132 States that have passed enabling legislation authorizing the creation of land banks are Georgia, Indiana, Kentucky, Maryland, Michigan, Missouri, Ohio, and Texas. Smart Growth America, *Restoring Prosperity*, at 1, http://www.smartgrowthamerica.org/documents/sga_statepolicy_toolkit.pdf (last visited July 8, 2012).
- 133 United States Environmental Protection Agency, *Land Revitalization Fact Sheet--Land Banking*, at 1 (Apr. 2011), available at http://www.epa.gov/landrevitalization/download/fs_land_banking.pdf.
- 134 Wooten, *supra* note 4, at 11.
- 135 Land Redevelopment Division, Department of Development, City of Columbus, Ohio, <http://www.development.columbus.gov/landredevelopment/content.aspx?id=40112> (last visited July 12, 2012).
- 136 Land Trust Alliance website, <http://www.landtrustalliance.org/landtrusts> (last visited July 2, 2012).
- 137 Renee Beck, *Cultivating Community: Garden Sprout in Former Vacant Spaces*, [bmoremedia.com](http://www.bmoremedia.com), <http://www.bmoremedia.com/features/powerofdirt061212.aspx> (last visited July 12, 2012).
- 138 Baltimore Green Space website, <http://www.baltimoregreenspace.org/pages/how-neighborhoods-benefit.html> (last visited July 12, 2012).

