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From Vacant Lots to Full Pantries: Urban Agriculture Programs and the American City

JESSICA OWLEY & TONYA LEWIS*

INTRODUCTION

Like several other post-industrial cities in America, Buffalo, New York is struggling financially. During these hard times, the number of abandoned buildings and vacant lots in Buffalo has skyrocketed. Politicians and planners alike have battled with trying to use these areas in socially productive ways. The City of Buffalo began with a policy of demolishing empty buildings in an attempt to reduce crime. Buffalo did not have a plan for the lots after it removed the buildings. They are not maintained, and no further development or action is expected. While the new vacant lots may have reduced some safety hazards, they simply moved sites of criminal activity and presented another type of blight in the community. Pockets of unattractive vacant lots signal to outsiders that the neighborhood is a struggling one. Community groups, tired with the city's inaction, have come together to make these vacant lots productive as they become sites for community gardens and urban agriculture. One of the obstacles in such efforts, however, is a battle over property rights. Community groups want some security in their rights over the land but they are not always interested in becoming landowners.

This Article builds on efforts to promote urban agriculture and remove legal and practical obstacles to its development. Specifically, we explore concerns regarding land tenure. Urban agriculture development can be retarded by uncertainties in who owns the land and what the agriculturalists' rights to the land might be. Thus, while Part I of this Article describes the benefits and challenges of urban agriculture, this Article does not focus on convincing readers that it is a worthwhile endeavor. Others have done that earlier and more ably than we could. Instead, we seek to begin a brainstorming session about property tools that

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could be helpful to farmers. One thing we learned quickly in our research is that the challenges (and therefore the most helpful tools) vary greatly from place to place. For this reason, Part II presents examples of urban agriculture efforts across the United States to demonstrate the varying challenges that jurisdictions face and to detail which property law tools have effectively been put to use. Some of the tools (like negotiating long-term leases or getting permits to farm city-owned land) are already in place. Others (like using self-help nuisance concepts) are more theoretical. What we find most intriguing and potentially widely applicable is the development of urban agricultural land trusts and uses of partial property rights like conservation easements and other servitudes. Part III delves into this. First, we draw on the experiences of New York City's community gardens. When the City of New York threatened to sell off city-owned property that had been used as community gardens, the gardeners joined together and formed land trusts. We briefly discuss how those land trusts developed and why gardeners adopted that structure. Second, we discuss conservation easements and how they might serve to protect urban agriculture plots. We end with a broader discussion of how land trusts and the property tools they have at their disposal serve to meet current urban agricultural needs.

I. BACKGROUND

When we think of urban agriculture, we often think of community "pocket gardens" tucked into overlooked corners of the city, but the concept comprises a variety of farming systems, ranging from household production using backyard, windowsill, and rooftop gardens to fully commercialized operations producing flowers, vegetables, and livestock for wholesale.¹ The range of activities under the umbrella of urban agriculture, or "urban farming," is quite broad and can include home gardens, market gardens, farm stands, aquaculture, greenhouses, and animal husbandry, as well as community supported agriculture (CSA) and farmers markets.²

It can be helpful to categorize these activities into three primary types: home gardens ("food producing spaces on private, residential property" used primarily by the property's resident), community gardens (smaller-scale agricultural sites, often serving a neighborhood, "where individuals and families grow food primarily for consumption or donation"), and urban farms, ("larger-scale, more intensive sites where food may be grown by an

1. Kate H. Brown & Andrew L. Jameton, *Public Health Implications of Urban Agriculture*, 21 J. PUB. HEALTH POL'Y. 20, 21 (2000).

2. Stephanie A. Maloney, Note, *Putting Paradise in the Parking Lot: Using Zoning to Promote Urban Agriculture*, 88 NOTRE DAME L. REV. 2551, 2556 (2013) (citing Nina Mukherji, *The Promise and the Pitfalls of Municipal Policy for Urban Agriculture* 2-3 (2009) (unpublished M.S. dissertation, University of Wisconsin-Madison), <http://minds.wisconsin.edu/bitstream/handle/1793/61975/mukherji%20urban%20ag%20urp%20Thesis.pdf?sequence=1> (last visited Dec 29, 2014)).

organization or private enterprise, and often include entrepreneurial opportunities such as growing food for sale”).³ This Article is chiefly concerned with the second two categories: community gardens and urban farms, which together we refer to as urban agriculture.

Many of today’s urban community gardens and urban farms are located on formerly vacant or unused land.⁴ This is particularly the case in de-industrialized cities where there has been significant population decline and loss of industry.⁵ Many of America’s rust belt cities are being challenged to find ways to create viable, pleasant places to live amidst urban blight and economic hardship.⁶ Some of these cities have included urban agriculture in their plans for revitalization⁷ as it can be an integral part of the urban socio-economic and ecological system.

A. History of Urban Agriculture in the U.S.

The concept of urban agriculture itself is not new. Led by citizen groups, and sometimes supported by government,⁸ early urban agriculture movements included the economic recession of 1893–1897 when food was provided to those in need through the cultivation of vacant lots and school gardens,⁹ followed by “civic improvement gardens” associated with the City Beautiful Movement during the Industrial Revolution.¹⁰ During

3. Heather Wooten & Amy Ackerman, *Seeding the City: Land Use Policies to Promote Urban Agriculture*, NATIONAL POLICY & LEGAL ANALYSIS NETWORK TO PREVENT CHILDHOOD OBESITY 4 (Oct. 2011), available at http://changelabsolutions.org/sites/phlpnet.org/files/Urban_Ag_SeedingTheCity_FINAL_20111021.pdf.

4. Brown & Jameton, *supra* note 1, at 21.

5. See Catherine J. LaCroix, *Urban Agriculture and Other Green Uses: Remaking the Shrinking City*, 42 URB. LAW 225, 227–28 (2010) (evaluating the applicability of existing land use regulations to the development of urban agriculture and green uses in “shrinking cities.” La Croix notes that the term “shrinking city” is a misnomer and that the term “hollowing city” may be more appropriate from a land use perspective.).

6. *Id.* at 227.

7. See, e.g., *Re-Imagining a More Sustainable Cleveland: Citywide Strategies for Reuse of Vacant Land*, CLEVELAND LAND LAB AT THE CLEVELAND URBAN DESIGN COLLABORATIVE, KENT STATE UNIV. 1, 2 (Dec. 19, 2008), available at <http://www.reconnectingamerica.org/assets/Uploads/20090303ReImaginingMoreSustainableCleveland.pdf>.

8. Nina Mukherji & Alfonso Morales, *Zoning for Urban Agriculture*, 3 AMERICAN PLANNING ASSOC., ZONING PRAC. 1, 2 (MARCH 2010), available at <https://www.planning.org/zoningpractice/2010/pdf/mar.pdf>.

9. *Id.*

10. The City Beautiful Movement arose in late nineteenth-century America as an effort by the ruling elites to solve the urban crisis (concentration of poverty in overcrowded tenements, dangerous sanitary conditions, blight, crime, and an overall climate of social unrest, labor struggles, and ethnic conflict). The goal of the movement was to bring social order and control through an orderly and improved urban environment. See Alessandro Busà, *City Beautiful Movement*, in 1 ENCYCLOPEDIA OF URBAN STUDIES (Ray Hutchison ed.) 152–56 (2010).

World War II, the United States government encouraged “Victory Gardens” as a way to support the war effort, when home-grown vegetables helped to stretch the household budget and reduce the reliance on resources that could otherwise be used for the military.¹¹ Following these early urban farming efforts, retail grocers began to replace the need for home and community gardening.¹² Government-supported urban agriculture waned and a number of community organizations began forming to promote the practice.¹³ In the 1970s, support for urban farming gained significant momentum when urbanites, “pulled by the new ecology movement” and “pushed by inflationary food prices,” saw farming as a means to raise awareness around environmental stewardship, as a tool to combat poverty, and as a collective response to blighted city neighborhoods.¹⁴ Many local and national organizations continued to develop during the decades to follow¹⁵ until the 1990s and 2000s, when the development boom and push to gentrify urban areas eventually marginalized the practice.¹⁶

In the 2010s, the urban agricultural movement began to regain momentum¹⁷ for reasons similar to those in times past: to promote food sustainability, increase sociability, resist consumerism, and improve the overall quality of life in urban areas.¹⁸ Some, however, question whether

11. Brown & Jameton, *supra* note 1, at 22.

12. Mukherji & Morales, *supra* note 8, at 3 (“Instead of federal efforts to foster gardening as the urbanites ‘citizen duty,’ gardening became the sub-urbanites hobby.”).

13. *Id.* at 2–3 (During World War I, the Great Depression, and World War II, urban agriculture was primarily a tool of food security. These efforts were “legitimized and supported by federal education campaigns, and they provided nutrition and psychological support in hard times.”).

14. Brown & Jameton, *supra* note 1, at 22.

15. Mukherji & Morales, *supra* note 8, at 3.

16. *Id.*

17. Madeline Fletcher, Jennifer Rushlow, Jennifer Schwartz Berky & Jeffrey P. LeJava (moderator), *Overcoming Barriers to Cultivating Urban Agriculture*, 41 REAL EST. L. J. 216, 217–18 (2012) (citing U.S. Dep’t of Agriculture, *Farmers Markets and Local Food Marketing*, available at <http://www.ams.usda.gov/AMSv1.0/ams.fetchTemplateData.do?template=TemplateS&leftNav=WholesaleandFarmersMarkets&page=WFMFarmersMarketGrowth&description=Farmers%20Market%20Growth&acct=frmdirmkt>); see also Neil D. Hamilton, *America’s New Agrarians: Policy Opportunities & Legal Innovations to Support New Farmers*, 22 FORDHAM ENVTL. L. REV. 523, 526 (2010) (“The interest in urban agriculture or community-based agriculture is burgeoning across the nation . . .”).

18. See generally LaCroix, *supra* note 5 (citing Lorene Hoyt & Andre Leroux, *Voices from the Forgotten Cities*, 1, 8 (2007), available at <http://community-wealth.org/sites/clone.community-wealth.org/files/downloads/report-hoyt-leroux.pdf>;

Joseph Schilling, *Buffalo as the Nation’s First Living Laboratory for Reclaiming Vacant Properties in CITIES GROWING SMALLER*, 33 (2008)). On potential reasons why urban agriculture is so “hot” right now, see Jennifer Blecha & Helga Leitner, *Reimagining the Food System, the Economy, and Urban Life: New Urban Chicken-Keepers in US Cities*, 35 URBAN GEOGRAPHY 86 (Oct. 2013) (analyzing the re-emergence of keeping livestock in backyards in Portland and Seattle and considering potential reasons for the recent trend);

the current surge in urban agricultural initiatives is a permanent feature of the U.S. landscape (as people aim to become more conscious of where their food comes from) or whether it is simply a short-term supply response to the “Great Recession.”¹⁹ Either way, urban agriculture has come to represent an important force not just for improving food access in communities (often the urban poor), but also for stimulating economic development and neighborhood restoration projects.²⁰

Not unlike the earliest of urban gardens, today’s gardens are often situated on vacant lots.²¹ Sometimes these lands are leased or loaned free of charge by the city or individual property owner,²² while other times the gardens are illegally kempt by gardeners sometimes referred to (perhaps unfavorably) as “squatters”²³ or “guerrilla gardeners.”²⁴ Either way, the result is a transitional right, if any, to use the land. This tenuous pattern of land tenancy can result in negative implications for the community gardener, with the most obvious being that the land can be sold out from under the farmer.²⁵

see also Sarah Schindler, *Unpermitted Urban Agriculture: Transgressive Actions, Changing Norms, and the Local Food Movement*, 2014 WIS. L. REV. 269, 371 (2014) (Sarah Schindler describes it as part of a growing locavore movement and embracing an alternative food system.)

19. See Kristin Choo, *Plowing Over: Can Urban Farming Save Detroit & Other Declining Cities? Will the Law Allow It?*, A.B.A.J. 43, 44 (Aug. 2011).

20. Many “New Agrarians” (today’s modern farmers) see their involvement in food production as a dimension of public service and the production of healthy food and restoration of land as an important social good, as well as an economic opportunity. See Hamilton, *supra* note 17, at 527. The practice can facilitate temporary or permanent responses to local food deserts, see Emily M. Broad Leib, *All (Food) Politics is Local: Increasing Food Access Through Local Government Action*, 7 HARV. L. & POL’Y REV. 321, 323 (2013) (discussing methods of fostering access to healthy foods and the role of government in urban environments and food “deserts”), and address consumer demand, economic inequality, and mobility-constrained populations. See Mukherji & Morales, *supra* note 8, at 2.

21. This is especially the case in rustbelt cities. Flint, Michigan is home to 11,000 vacant lots. See Megan Masson-Minock & Deirdra Stockmann, *Creating a Legal Framework for Urban Agriculture: Lessons from Flint, Michigan*, 1 J. AGRIC., FOOD SYSTEMS, & COMM. DEV. 91, 93 (2010). Detroit has 31,000 vacant lots and Philadelphia has 40,000. See Choo, *supra* note 19, at 46 & 49.

22. Brown & Jameton, *supra* note 1, at 21.

23. Choo, *supra* note 19, at 43.

24. Guerrilla gardening is based on the logic that land should be returned to its wild inhabitants and by gardening neglected spaces, property bounds are overcome and war is waged against scarcity and neglect. See Sara S. Metcalf & Michael J. Widener, *Growing Buffalo’s Capacity for Local Food: A Systems Framework for Sustainable Agriculture*, 31 APPLIED GEOGRAPHY 1242, 1242 (2011).

25. Brown & Jameton, *supra* note 1, at 22 (noting that in 1999, over 100 of the 700 community gardens in New York City were at risk of being sold for new housing and commercial development, despite some of the gardens having been in operation for twenty years). See Dan Barry, *Sudden Deal Saves Gardens Set for Auction*, N. Y. TIMES (May 13, 1999), available at <http://www.nytimes.com/1999/05/13/nyregion/sudden-deal-saves->

Less obvious implications arising from the lack of long-term commitment (or none at all) between landowner and tenant include the reluctance of gardeners to improve the garden plot itself (by improving soil conditions through composting, etc.) and the increased likelihood that the gardener will plant only short-term, seasonal crops.²⁶ Gardeners are also less likely to invest in larger-scale projects, such as introducing trees and shrubbery, undertaking erosion prevention measures, or developing a means for water harvesting.²⁷ However, when properly sited, urban agriculture can provide neighborhood amenities as well as contribute to a positive community image.²⁸

B. Benefits (and Potential Nuisances) of Urban Agriculture

An important contribution of agriculture in an urban area is the provision of nutritious food.²⁹ Full-service grocery stores, farmers' markets, and other vendors that sell fresh fruits, vegetables, and other healthful foods are often absent from urban environments, especially in low-income and minority neighborhoods.³⁰ These "food deserts" (areas where there is little or no access to healthful and affordable food) often contain an abundance of convenience stores and fast-food restaurants offering cheap, high-fat, high-sugar, processed foods.³¹ Encouraging the cultivation of more fruits and vegetables through urban agriculture can help to increase food security.³² In a 2010 Michigan study, researchers

gardens-set-for-auction.html. This pattern of leasing out properties for temporary use while waiting for more lucrative development opportunities (such as if and when the economic climate improves) can be problematic.

26. Luc J.A. Mougeot, *Urban Agriculture: Definition, Presence, Potentials, & Risks*, in GROWING CITIES, GROWING FOOD: URBAN AGRICULTURE ON THE POLICY AGENDA. A READER ON URBAN AGRICULTURE 162 (N. Bakker, M. Dubbeling, S. Gundel, U. Sabel-Koschella & H. DeZeeuw, eds., 1999).

27. *Id.*

28. Mukherji & Morales, *supra* note 8, at 2.

29. Food & Agricultural Org. of the U.N., Legislative Study 108, *Pro-poor Legal and Institutional Frameworks for Urban and Peri-Urban Agriculture* ¶1.2 (Rome, 2012) (by Yves Cabannes), available at <http://www.fao.org/docrep/017/i3021e/i3021e.pdf>.

30. Sarah Treuhaft & Allison Karpyn, *The Grocery Gap: Who Has Access to Healthy Food and Why It Matters*, POLICYLINK & THE FOOD TRUST 1, 7 (2010), available at http://thefoodtrust.org/uploads/media_items/grocerygap.original.pdf; see also Leib, *supra* note 20 (discussing methods fostering access to healthy foods and the role of government in urban environments).

31. Nationally, low-income zip codes have thirty percent more convenience stores than middle-income zip codes. See Treuhaft & Karpyn, *supra* note 30, at 8; see also Samina Raja, Changxing Ma & Pavan Yadav, *Beyond Food Deserts: Measuring and Mapping Racial Disparities in Neighborhood Food Environments*, 27 J. PLAN. EDUC. & RES. 469, 469–70 (2008) (noting that food deserts may not be present where there are small grocery stores even where no larger retailers are nearby).

32. Leib, *supra* note 20, at 332–33 (citing Amy Gilroy & Beth Sanders, *Urban Food Zoning: Health, Environmental and Economic Considerations*, OR. PUB. HEALTH INST. 3,

determined that intensive urban agriculture in Detroit could supply city residents with thirty-one percent of their vegetables and seventeen percent of their fruit annually.³³

Better access to healthy food also corresponds with healthier eating and better health in general.³⁴ Community gardeners eat significantly more fruits and vegetables than both home gardeners and non-gardeners.³⁵ Access to healthful food has also been associated with lower risks of obesity and other diet-related chronic diseases.³⁶ In addition to nutritional benefits and contributions to food security, urban agriculture has also been associated with personal wellness (relaxation, stress reduction) and physical fitness (fine motor skills when pruning; gross motor tasks such as turning a compost pile).³⁷ Urban gardens also provide an outlet for children to be outside, connect with nature, learn about their neighborhood ecosystem, and to learn about where their food comes from.³⁸ In essence, gardening is good for you.

Urban agriculture has also been associated with positive economic benefits for communities as the conversion of vacant lots to urban gardens can save a city money, protect property values, and provide entrepreneurial opportunities.³⁹ Upkeep of vacant lots is costly. A recent study of Philadelphia determined that vacant lots were costing the city some \$20 million per year to provide basic services, while the city lost some \$2

available

<http://efiles.portlandoregon.gov/webdrawer/rec/4450557/view/urban%20food%20zoning%20supplementpdf.PDF> at

33. See Kathryn J.A. Colasanti & Michael W. Hamm, *Assessing the Local Food Supply Capacity of Detroit, Michigan*, 1 J. AGRIC., FOOD SYS. & CMTY DEV. 41, 41 (2010).

34. Treuhart & Kapryn, *supra* note 30, at 8; see also Fletcher, Rushlow, Berky, & LeJava, *supra* note 17, at 218–19. Note that simply introducing healthful foods (either through urban agriculture or by bringing in new supermarkets) alone may not ensure that people will make healthier choices and that providing related nutritional education can be of benefit. See Leib, *supra* note 20, at 333.

35. See Jill S. Litt, Mah-J. Soobader, Mark S. Turbin, James W. Hale, Michael Buchenau & Julie A. Marshall, *The Influence of Social Involvement, Neighborhood Aesthetics, & Community Garden Participation on Fruit & Vegetable Consumption*, 101 AM. J. PUB. HEALTH 1466, 1466 (2011) (describing the results of a study conducted in Denver, Colorado finding that community gardeners consumed fruits and vegetables 5.7 times per day compared with home gardeners consuming 4.6 times per day and non-gardeners 3.9 times per day).

36. Treuhart & Kapryn, *supra* note 30, at 8.

37. Richard H. Mattson, *Prescribing Health Benefits through Horticultural Activities*, in THE ROLE OF HORTICULTURE IN HUMAN WELL-BEING AND SOCIAL DEVELOPMENT: A NATIONAL SYMPOSIUM 161, 163–64 (Diane Relf ed., 1992).

38. Fletcher et al., *supra* note 17, at 220 (citing *Youth and School Gardening*, THE NATIONAL GARDENING ASSOCIATION, <http://assoc.garden.org/programs/#youth> (last visited Dec. 30, 2014)).

39. Brown & Jameton, *supra* note 1, at 26.

million a year in uncollected tax revenue.⁴⁰ The vacant lots also cost nearby property owners an estimated \$3.6 billion in lost property value.⁴¹ When converted to urban agricultural use, these vacant lots can result in a local food production network spawning new jobs for residents,⁴² as well as job training related to farming and marketing for marginalized populations, the young, and unemployed.⁴³ At the most basic level, someone can start a small-scale garden without much capital or technical skill and gain a return on the initial investment.⁴⁴ On a larger scale, local economies could benefit as local food production requires local processing facilities and agribusiness supplies, equipment, and services (such as equipment repairs).⁴⁵

Urban agriculture has also been associated with a number of ecological and environmental benefits.⁴⁶ Smaller, local farms may have fewer environmental impacts overall from pesticides, fertilizers, and wastes than larger industrialized operations.⁴⁷ The availability of local food also reduces the need for transporting food over long distances, thereby reducing associated greenhouse gas emissions.⁴⁸ Urban agriculture increases green space, which can reduce the amount of stormwater runoff.⁴⁹ This mitigation of stormwater flow is particularly beneficial in municipalities like Buffalo, New York or Milwaukee, Wisconsin where stormwater/sewer overflow is a recurring problem. Urban areas are typically covered by impervious surfaces (concentration of buildings, parking lots, paved roads, sidewalks, etc.), which results in the significant runoff of stormwater into the city's sewer system, which can (and often

40. See *Vacant Land Management in Philadelphia: The Costs of the Current System and the Benefits of Reform*, ECONSULT CORPORATION & PENN INSTITUTE FOR URBAN RESEARCH 5 (Nov. 2010), available at http://planphilly.com/uploads/media_items/http-planphilly-com-sites-planphilly-com-files-econsult_vacant_land_full_report-pdf.original.pdf.

41. *Id.*

42. Wooten & Ackerman, *supra* note 3, at 5.

43. Kathryn A. Peters, *Current & Emerging Issues in the New Urban Agriculture: A Case Study*, 7 J. OF FOOD L. & POL'Y 297, 300 (2011) [hereinafter *Current & Emerging Issues*].

44. *Id.*; but see Sarah B. Schindler, *Of Backyard Chickens and Front Yard Gardens: The Conflict Between Local Governments and Locavores*, 87 TUL. L. REV. 231, 243 (2012) (suggesting that permitting and other costs could make these endeavors costly).

45. See Joel Russell, *Local Agricultural Food Preservation: Making the Food System Connection*, AM. PLANNING ASS'N, PAS MEMO (March/April 2011), available at http://www.joelrussell.com/articles/11_03_04_Russell_%20PASMemo_Natural_Resource_Protection_Zoning.pdf.

46. See Wooten & Ackerman, *supra* note 3.

47. See Kathryn A. Peters, *Creating a Sustainable Urban Agricultural Revolution*, 25 J. ENV'T'L L. & LITIG. 203, 207–211 (2010) (explaining how modern, industrial agricultural practices seeking to increase productivity employed science-based technologies, including chemical pesticides and fertilizer, that resulted in significant environmental degradation).

48. Wooten & Ackerman, *supra* note 3, at 4.

49. See Fletcher et al., *supra* note 17, at 223.

does) overflow into the streets.⁵⁰ The addition of green spaces through both ground and rooftop gardens, coupled with the use of rain barrels for water collection, reduces stormwater runoff.⁵¹ In addition, the organic content typically added to gardens, such as compost, leaf mulch, and soil improves the overall soil quality and water capacity, further supporting plant growth.⁵² The open space and vegetation provided by urban gardens and farms has also been associated with a reduction in localized heat (the “urban heat island effect”) that often results from heat absorbent paved surfaces.⁵³ When appropriate, urban agriculture has even been used to transform old industrial brownfield sites deemed unfit for development.⁵⁴ The result is a number of vacant lots no longer in need of mowing or maintenance, which cease to serve as illegal dumping grounds attracting rats and other pests.⁵⁵

Despite the benefits detailed above, if not implemented carefully, urban agriculture can result in unwelcomed effects. The primary complaints surrounding urban farming practices include issues related to large-scale gardening (e.g., smell, pests, increased foot traffic), the keeping of animals in urban areas, sanitation issues related to composting, and traffic and parking issues resulting from the establishment of community gardens and farm stands.⁵⁶ Nuisance concerns are exacerbated when it comes to the keeping of livestock and chickens.⁵⁷ The most frequently expressed concern surrounding the urban keeping of chickens is that they will be noisy (roosters in particular), emit an odor, spread diseases such as avian flu and salmonella, and result in a reduction of neighborhood property values.⁵⁸ Concerns have also been raised over the potential for polluting the local water supply through the addition of chemical fertilizers,

50. *Id.*; see also *Green Development Zone*, PUSH BUFFALO.ORG, <http://pushbuffalo.org/green-development-zone1> (last visited Dec. 31, 2014) (discussing how the community organization, People for Sustainable Housing (PUSH) Buffalo, has transformed a number of urban lots into green spaces and replaced many impervious surfaces with more pervious ones, including sloped rain gardens).

51. See Fletcher et al., *supra* note 17, at 223.

52. Wooten & Ackerman, *supra* note 3, at 4–5.

53. Fletcher et al., *supra* note 17, at 223 (citing *Urban Heat Island*, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, <http://www.epa.gov/hiri/> (last visited Dec. 31, 2014)).

54. Not all brownfield sites are suitable for growing food and many require clean up (e.g., soil remediation) prior to use, see U.S. ENVIRONMENTAL PROTECTION AGENCY, *HOW DOES YOUR GARDEN GROW? BROWNFIELDS REDEVELOPMENT & LOCAL AGRICULTURE 1*, 1–4 (2010), available at http://www.epa.gov/brownfields/success/local_ag.pdf.

55. Peters, *Current & Emerging Issues*, *supra* note 43, at 299–300.

56. *Id.* at 300.

57. See generally Jamie Bouvier, *Illegal Fowl: A Survey of Municipal Laws Relating to Backyard Poultry & a Model Ordinance for Regulating City Chickens*, 42 ENVTL L. REP. 10888 (discussing the benefits and concerns surrounding the raising of backyard chickens and considering the efficacy of select city ordinances on the practice).

58. *Id.* at 10894–95.

pesticides, and manure.⁵⁹ Safe agricultural practices should also be followed to protect both the urban farmers and neighboring residents.⁶⁰ The introduction of urban agriculture should not replace existing problems associated with vacant lots (pests, fires, crime, lost taxes, demolition costs, lower property values, social impacts (city pride)) with new ones (animal odors, noise, foot traffic, groundwater pollution), yet where “vast swaths of land in cities like Detroit and Cleveland are abandoned by residents and businesses headed elsewhere, it’s better to grow something on it than to let it just sit there.”⁶¹

Municipalities can address resident concerns surrounding the potential negative implications of urban agriculture and animal husbandry in their zoning codes, health codes, and/or animal regulations.⁶² A number of cities have modified their zoning codes to limit the number of animals and the size of garden plots in urban neighborhoods to alleviate resident concerns.⁶³ Problems can arise where a city’s zoning code does not recognize agriculture. Although there are some 400 community gardens and farms operating throughout Detroit, most “exist on the shady side of the law because Detroit’s zoning ordinance does not recognize agriculture as a permitted use.”⁶⁴ In contrast, Cleveland has established an “urban garden district” zoning category, “to ensure that urban garden areas are appropriately located and protected to meet needs for local food production, community health, community education, garden-related job training, environmental enhancement, preservation of green space, and community enjoyment on sites for which urban gardens represent the highest and best use for the community.”⁶⁵ Cleveland’s urban garden district includes both community gardens and market gardens, defining

59. See Schindler, *supra* note 44, at 256–57.

60. Wooten & Ackerman, *supra* note 3, at 5.

61. Kristin Choo, *Plowing Over: Can Urban Farming Save Detroit & Other Declining Cities? Will the Law Allow It?*, ABA J. 43, 46 (August 2011). The transformation of vacant lots for urban agriculture has also been associated with a reduction in crime rates. See Wooten & Ackerman, *supra* note 3, at 5 (describing urban agriculture as “an effective crime-prevention strategy, by activating underutilized community space, promoting community engagement, and increasing “eyes on the street,” a term coined by urbanist Jane Jacobs to describe the crime-prevention effect that neighbors and residents have when they are able to watch over space”).

62. Peters, *Current & Emerging Issues*, *supra* note 43, at 329.

63. For example, in Milwaukee, residents are allowed to keep up to two hives of honey bees on private property pursuant to permit requirements and a fee; Cleveland has limited the number of animals to one chicken, duck, rabbit, or similar animal for each 800 square feet of parcel or lot area; and, the City of Baltimore provides oversight for animal control and protection in urban areas under the City’s Health Code, authorizing the Commissioner of Health to adopt rules and regulations, perform inspections, and set fees related to the keeping of animals. See Peters, *Current & Emerging Issues*, *supra* note 43, at 329–33.

64. Choo, *supra* note 62, at 49.

65. CLEVELAND, OHIO, ORDINANCES tit. VII, ch. 336.01 (2009).

community gardens as those on “an area of land managed and maintained by a group of individuals . . . for personal or group use, consumption, or donation”⁶⁶ and a market garden “managed and maintained by an individual or group . . . to grow and harvest . . . crops . . . to be sold for profit.”⁶⁷ This formal zoning designation is important because it reserves particular land for urban gardening; the zoning cannot be changed without rezoning the property through the standard re-zoning process.⁶⁸

Despite zoning certain sections of the city for agriculture, the problem of acquiring the right to farm on vacant parcels remains. Different techniques and policies have been used to both promote the practice and secure rights in land. The following section provides a few examples of efforts across the United States using different approaches.

II. PROPERTY TOOLS FOR SECURING LAND & THE UNIQUE CHALLENGES OF CITIES

Land insecurity is one of the “greatest barrier[s] to the implementation and sustainability of city farming.”⁶⁹ One of the chief problems encountered by those seeking to develop urban agriculture at nearly any scale is ensuring some security in their ability to use the land. In some cases, viable sites sit empty because absentee landlords or public landowners are reluctant to sell or lease their land for urban agriculture. A lack of clear title or leasehold may make it challenging for the farmers to obtain services like water and garbage. An uncertainty in the future of the farm deters investment in structures like raised beds, hoop houses, and farm stands that can increase the viability of the farm and improve the healthfulness of the products grown.

The property rights issues for urban farms vary greatly among towns and it is hard to give any one prescription. For example, in one city, much of the land may be owned by the city or county who has no interest in selling. In other cities, the land may be owned by investors who do not want to allow encroachers onto the property. Still elsewhere, the chief problem may be determining the owner and even just figuring out who you need to deal with. What’s an urban farmer to do?

66. CLEVELAND, OHIO, ORDINANCES tit. VII, ch. 336.02(a) (2009).

67. CLEVELAND, OHIO, ORDINANCES tit. VII, ch. 336.02(b) (2009).

68. Catherine J. LaCroix, *Urban Agriculture and Other Green Uses: Remaking the Shrinking City*, 4243 URBAN L. REV 225, 237 (2010).

69. Jeffery Yuen, *City Farms on CLTs: How Community Land Trusts are Supporting Urban Agriculture*, LAND LINES 2, 3 (April 2014) (citing a 1998 survey of more than 6,000 community gardeners where 99.9% of respondents “saw land tenure as both a challenge and a vital element to the future success of the movement”).

A. Methods for Securing Property Rights

1. Purchases and Leases

A straightforward way for urban agriculturalists (farmers and gardeners) to obtain security regarding the land they farm is to become the fee simple owners of the land. Unfortunately, this can be more complicated than it sounds. In some cases, it can be hard to track down the current landowners to negotiate a purchase. In other situations, the property may be carrying so much debt and so many liens that title transfer becomes complicated. In some cases, the current landowners may be uninterested in selling. Although the landowners make no revenue from the land sitting vacant, they incur few liabilities and property taxes are often low. Many landowners thus may want to leave open the possibility that the land could be used for something more profitable in the future. Vacant land is a low-cost investment opportunity.

Where the land is publicly held (owned by the city, county, or state) other laws may limit the transfer of title. For example, in New York the state Constitution limits the ability to transfer or convert public parkland to other uses, potentially inhibiting the use of some publicly-owned lands as urban agriculture sites.⁷⁰ In some areas, state and local laws facilitate transfer of ownership. There may be viable models for urban agriculture where nonprofit organizations become the fee simple landowners and work with farmers and others to provide access to the land. Such an arrangement could be associated with an already existing organization like a church or school or could be a newly created organization more akin to a land trust.

In Pennsylvania, the state's Abandoned and Blighted Property Conservatorship Act⁷¹ was successfully applied to transfer blighted property in the City of Philadelphia (home to some 40,000 vacant lots)⁷² to a nonprofit organization for urban agricultural use.⁷³ The Act allows for investors, municipalities, and nonprofit organizations to take over control of derelict properties, clean them up, sell them, and keep the profits.⁷⁴

70. STATE OF NEW YORK, NEW YORK STATE OFFICE OF PARKS, RECREATION AND HISTORIC PRESERVATION, HANDBOOK ON THE ALIENATION AND CONVERSION OF MUNICIPAL PARKLAND IN NEW YORK (March 2012), available at <http://parks.ny.gov/publications/documents/AlienationHandbook.pdf>.

71. 68 PA. CONS. STAT. § 1101 (West 2004 & Supp. 2014).

72. Choo, *supra* note 62, at 46.

73. The Philadelphia Court of Common Pleas awarded Urban Tree Connection, a non-profit organization that has converted nearly thirty vacant lots for urban agriculture in the poverty-stricken neighborhood of Haddington, conservatorship over the property upon learning that the lots owner, who lived in Florida, had no objection (Judge William J. Manfredi, Philadelphia County Court of Common Pleas, Urban Tree Connection).

74. 68 PA. CONS. STAT. § 1103 (West 2004 & Supp. 2014) (The Act limits who can be appointed Conservator of the property to lien-holders or other secured creditors, non-profit organizations within the same municipality and who have completed a project within one

Although the text of the law suggests that the legislature had only buildings in mind,⁷⁵ in one particular case, the court-appointed conservatorship was extended to a nonprofit organization that maintained a community garden on the property. Under the Act, once a conservator has been appointed, the property owner has six months to petition to terminate the conservatorship and regain control over the property.⁷⁶ If the property owner fails to do so, the conservator can petition the court to order the sale of the property.⁷⁷ Effectively, the Act facilitates the cleanup of blighted properties, at the property owner's expense, and in some instances, the transfer of all property interests from neglecting and/or absentee owners to parties interested in cleaning up or improving the property, including urban farmers.

Even where vacant parcels in economically depressed areas may be acquired at low cost, urban farmers may be reluctant to become landowners. In community garden models, there may be many gardeners working the land and placing ownership in one person may not seem logical. Even where one agriculturalist (or family or organization) plans to work the land, landownership may bring with it liabilities and obligations that the farmer doesn't want to take on. She may not want to be saddled with taxes and insurance. Agriculturalists might not be ready to invest in long-term involvement in the land. This could be especially true where those involved are new to agriculture and unsure of their likelihood of success (or affection for the task).

One common solution is for the local government or some government agency to purchase the land and then allow farming through leasing or licensing. This can insulate the land from speculative market forces and also remove the tax liability associated with the parcels. That is, in theory a lease price should be cheaper from a government entity (or for that matter a nonprofit organization) that is not shouldering the burden of paying property taxes on the parcel that it needs to pass onto the farmers.

These challenges⁷⁸ to fee simple purchase may make leasing an attractive alternative. For potentially low payments, agriculturalists could gain some security as to their rights to use the land. The farmers and landowners could negotiate for a lease term acceptable to both parties.

mile of the property in question, a school district or municipality in which the property is located, and residents or business owners within five-hundred feet of the property.).

75. *Id.* at § 1101 ("An Act, Providing for court-appointed conservators to bring residential, commercial and industrial buildings into municipal code compliance when owners fail to comply.").

76. *Id.* at § 1109(b). For the owner to successfully petition to terminate the conservatorship, the owner must demonstrate that the conditions which constituted the grounds for the petition will be promptly abated or have been corrected. *See also* § 1010(1-2).

77. *Id.* at § 1109(b).

78. But not insurmountable challenges.

Some farmers may seek longer leases, recognizing that long time horizons encourage investment in improving the conditions of the soil, water access, and general lot conditions. Some landowners may seek to limit the leases to only a few years at a time to enable conversion of the lot to other uses should community circumstances change.⁷⁹ Landowners may worry that if they allow community gardens or more intensive urban agriculture projects to develop, there will be strong community resistance and bad press if they one day seek to change that use.

2. *Condemnation (with City Ownership or City Transfer of Land)*

Where landowners are hard to track down or unwilling to make any active use of their land, eminent domain may be a useful tool. Eminent domain has served to reduce blight in the past and the Supreme Court's *Kelo v. City of New London* decision reaffirmed the broad definition of public use for government condemnation power.⁸⁰ In some areas where urban agriculture has begun to flourish, a history of eminent domain use that disrupted communities may make the public resistant to the use of the tool.⁸¹ For example, in Detroit the legacy of eminent domain use and cases like *Poletown Neighborhood Council v. Detroit*,⁸² make activists nervous anytime they hear the term condemnation. But where the eminent domain does not put the land into the hands of wealthy developers nor does it evict any existing community members, it may become quite attractive.

Once a government entity exercises eminent domain (and it must be an entity that has such power to start with), it then needs to decide who will be holder of the land. Where the government retains the land, it can then allow the urban farmers to work the land through long-term leases, licenses, or other arrangements. In some cases, the government entity may decide to transfer landownership to farmers or to nonprofit organizations like land trusts. Whether through purchase, foreclosure, or condemnation, city ownership of urban farmland is attractive.

79. While landowners and public entities speak of urban agriculture as an interim strategy until the local government is able to rebuild its economy, we found no examples of urban farms in rust belt cities being converted back to other uses. There may be an exception to this for high value lands in thriving cities like New York City. There was also a big protest when landowners evicted community gardeners in South Central Los Angeles in 2006, which was the subject of the 2008 documentary movie "The Garden." As of January 2015, the lot is still vacant.

80. *Kelo v. City of New London*, 545 U.S. 469 (2005).

81. At a UDM Law presentation, Detroiters bristled when Jessica Owley suggested that eminent domain might be desirable.

82. *Poletown Neighborhood Council v. Detroit*, 410 Mich. 616 (1981), *overturned by* *Cnty. of Wayne v. Hathcock*, 684 N.W.2d 765 (2004).

3. *Squatting and Adverse Possession*

Many urban farmers (especially those who label themselves guerilla gardeners) are not waiting to sort out issues with title to land. Instead, they are moving in and digging up the land. In some cases, long-term open use can ripen into title via adverse possession. Where the land is publicly owned, adverse possession principles do not operate and the farmers cannot gain title. Title might not be interesting or useful to them if they are able to use the land how they desire even in absence of title. Landowners may be able to prevent claims of adverse possession by simply consenting to the use of the land. Giving a farmer permission to use the land can remove claims of adverse title or hostility.

In some cases, principles of estoppel may solidify land claims even when the statute of limitations or other requirements of adverse possession have not been met. Generally, to show estoppel, the landowner must have watched the farmers invest time and energy in the land and either failed to act in response while the farmers relied on a sense that they would have the ability to remain on the land or perhaps the landowner even actively conveys the message that the farmers can use the property. While we have found no example of successful estoppel cases, this may provide a fruitful future avenue of securing land.

4. *Nuisance Abatement*

Self-help nuisance abatement may provide another avenue for invoking property law tools to establish community gardens. Becky Witt from the University of Maryland has been exploring this possibility.⁸³ This approach rests on being able to identify and label vacant or mal-used properties as a nuisance. Then, community members affected by the nuisance have traditional nuisance remedies at their disposal. One such remedy is that of self-help where those affected by the nuisance have the power to enter the property and abate the nuisance in absence of abatement actions by the landowners. This is a tricky conundrum and will not work in all communities. First, one must be able to meet state property law requirements for a nuisance. Many vacant lots will not meet that requirement on their own. Community members would have to show that the existence of the condition of the lot is creating an unreasonable harm to the neighbors. This may be shown through presence of pests, dangerous materials or wastes, or even bad smells. A simple eyesore or reducing neighboring property values may be pieces of a nuisance puzzle but on their own unlikely to equate with an actionable nuisance.

Second, for private nuisance, those taking action must be the neighbors who are directly affected by the nuisance. In many cases, it may

83. Becky Lundberg Witt, *Medieval Roots, Modern Fruits: Transforming Privately-Owned Abandoned Properties into Community Spaces*, 91 U. DET. MERCY L. REV. 305 (2015).

not be the adjacent landowners who are interested or able to convert the vacant lot to a community garden or urban farm. Third, self-help is a disfavored remedy. Generally, nuisance claims result in an injunction against the landowner. Self-help nuisance abatement will only be a viable action in communities where you can show an actionable nuisance claim and yet cannot find the landowners. Finally, as Witt notes, one of the hardest things to determine is the reasonableness of an abatement action.⁸⁴ Is it reasonable to turn a vacant lot into a garden to abate the nuisance or is it only reasonable to clean up the trash? You can bill that hard-to-find landowner for your trash clean-up, but could you bill him for your gardening? While this route of land securitization remains cloudy, Witt's work in Baltimore could carve an interesting new path.

5. *Land Banks*

Where cities face crises of vacant and abandoned properties often carrying tax delinquencies, maintenance costs, and clouded titles, the establishment of land banks can foster the redevelopment and sale of these properties to protect the public interest.⁸⁵ A land bank, generally, is a governmental entity that takes title to a tax-delinquent property, secures the property (perhaps demolishing the structures on it), and identifies the best long-term use for the land.⁸⁶ The land bank may hold property for interim use or transfer it back to private ownership with clear title. Statutory authority is required for the establishment of a land bank, which may take the form of a department of local government or become a new, distinct legal entity.⁸⁷ A state's land bank statute might specify that the land bank be available to specific counties, cities, or particular metropolitan areas.⁸⁸ In addition, land bank statutes generally identify the source of funding to support the land bank as well as the specific powers of the land bank, which may include the acquiring, managing, and disposing of property.⁸⁹

Land banks have been established in a number of cities, including, Cleveland, Flint, Philadelphia, Atlanta, and Louisville. The Philadelphia Land Bank, as a public entity, holds the city's nearly 10,000 publicly owned properties, has the power to acquire tax-delinquent properties, approve the transfer of the properties, and offer flexible pricing to incentivize community-beneficial development, including urban

84. *Id.* at 103.

85. For general information on land banks, see Frank S. Alexander, *Land Bank Strategies for Renewing Urban Land*, 14 J. AFFORDABLE HOUSING 140 (2005).

86. Catherine J. LaCroix, Commentary, *Urban Green Uses: The New Renewal*, 63 AMER. PLANNING ASSOC. PLANNING & ENVTL. L. 3, 5 (2011).

87. *Id.*

88. *Id.*

89. *Id.*

agriculture.⁹⁰ Cleveland established the Cuyahoga Land Bank in 2009 to address the city's some 15,000 vacant and abandoned properties, thereby granting the land bank the authority to acquire tax-delinquent or bank-owned properties without waiting through the normal foreclosure process. Instead, the land bank can acquire the properties, evaluate the properties' best use, rehabilitate or demolish on-site structures at its option, and bundle clusters of properties for future uses.⁹¹ In line with Cleveland's mission of becoming "a green city on a blue lake," neighborhood groups, churches, schools, and individuals can apply for funding and technical assistance to transform vacant lots held by the land bank into a community garden or other green land use.⁹²

In 2011, New York's Governor signed into law the Land Bank Act, enabling cities and counties to create and administer their own land banks to convert vacant, abandoned or tax-delinquent properties into productive uses. The law allows for the creation of ten land banks within the state through the adoption of local laws, ordinances, or resolutions.⁹³ Each land bank is limited to acquiring property within its jurisdictional boundaries via donations, purchase contracts, lease purchase agreements, installment sales contracts, land contracts and transfers from municipalities.⁹⁴ The land bank may then convey, exchange, sell, and transfer the properties at will.⁹⁵ The government unit creating the land bank (city, county, etc.) can also establish a hierarchical ranking of priorities for the use of the properties it conveys, such as use for public spaces, affordable housing, retail, commercial, or conservation areas. For example, the Broome County Land Bank Corporation (in Binghamton, New York) includes in its list of focus properties: those that are highly visible within community gateways or heavily traveled corridors, prominent sites that have a blighting influence on their neighborhood, brownfield sites, historic sites, and those sites suitable for assemblage into more developable tracts.

Land banks are not without their fair share of challenges, however. If not provided ample start-up funding, a land bank's ability to conduct its activities and acquire properties can be slowed. Once established, most land banks can receive and retain payments for a variety of activities, including services rendered, rents, and income from investments.⁹⁶ In

90. City of Philadelphia Bill No. 130156-A §16-705-708, available at <http://phlcouncil.com/wp-content/uploads/2014/01/CertifiedCopy130156-A02.pdf>.

91. LaCoix, *supra* note 86, at 5.

92. CLEVELAND URBAN DESIGN COLLABORATIVE, *supra* note 7.

93. N.Y. Not-For-Profit Corporation Law § 1603(g) (McKinney 2011).

94. *Id.* at § 1608(e).

95. *Id.* at § 1609(d).

96. See *Broome County Land Bank Corporation*, BROOME COUNTY, http://gobroomecounty.com/files/planning/_pdf/Land%20Bank/BCLB_Overview_Updated.pdf (last visited Jan. 1, 2015) (The Broome County Land Bank in New York applies

recognition of the lack of start-up funds in New York, the State Attorney General allocated \$20 million in grant funds from the national mortgage foreclosure settlement with major banks to land banks from 2013–2015, including a two-million dollar grant to the Buffalo Erie Niagara Land Improvement Corporation. This twenty-fold addition to the coffers of the Land Bank will increase its staff to become fully operational; help demolish severely blighted, vacant properties; and transfer vacant lots to neighboring homeowners who will maintain the land and pay taxes on the property.

Once established, one way to provide a continuous stream of funding to a land bank is through the adoption of local ordinances granting a portion of the property taxes collected on each parcel the land bank acquires and then transfers to a tax-paying interest to the land bank for up to five years following the acquisition of the parcel.⁹⁷

Another challenge in New York is the current limitation on the number of land banks that can be established in the state. Recognizing the absence of land banks in New York City and Albany, despite “a critical need for the kind of community redevelopment that land banks can make possible,” in 2014 the State Attorney General called for an increase in the number of statewide land banks from ten to twenty.⁹⁸ With adequate funding, the land bank may prove to be a valuable resource for urban farmers and non-profits seeking to acquire property to farm.

6. *Community Land Trusts*

Community Land Trusts (CLTs) are nonprofit community-based corporations with a unique structure.⁹⁹ They have place-based membership and a publicly elected board. They must have a charitable commitment to use land to the benefit of the local population. CLTs differ from land banks and from traditional land trusts (discussed more below). CLTs are part of a growing trend of government partnerships with nonprofit organizations, where they carry out what might have traditionally been seen as public duties. In this case, the CLT works to revitalize a community by converting land to more favorable uses. This puts it in league with a land bank but it differs in its legal and governance structure as well as its focus.

proceeds from the sale of properties, lease payments, and shared property tax revenues to offset the costs of maintaining, cleaning, and marketing the sites.)

97. *Id.*

98. T.J. Pignataro, *Schneiderman Targets ‘Zombie’ Homes*, THE BUFFALO NEWS (Feb. 10, 2014), available at <http://www.buffalonews.com/city-region/state/schneiderman-targets-zombie-homes-20140209>.

99. For information about community land trusts, see generally James J. Kelly, Jr., *Land Trusts that Conserve Communities*, 59 DEPAUL L. REV. 69 (2010).

Most CLTs focus on affordable housing (e.g., the Central Vermont CLT¹⁰⁰) but their origin is actually in response to agriculture land issues in rural Georgia.¹⁰¹ In an urban agriculture model the CLT could purchase land and then lease it to farmers and gardeners. CLTs have already been cropping up largely in poor communities as a way to manage vacant lands and foreclosures. The CLT purchases or receives the property and then as a group makes the decisions about what would be the best use of the land on behalf of the community. This could easily include urban agriculture, particularly in places where housing needs are already being met.¹⁰²

B. The Power of Land Trusts and Conservation Easements

Community Land Trusts are distinguishable from traditional land trusts. A land trust is a nonprofit land conservation organization that works to protect land by using property tools like fee simple ownership, conservation easements, and less frequently deed restrictions. They differ from CLTs because they are usually 501(c)(3) nonprofit organizations, not nonprofit corporations. Their focus on the land is conservation, while CLTs often concentrate on other land uses such as affordable housing and community redevelopment. That is, CLTs often work to develop land while traditional land trusts work to stop or slow development. While CLTs may offer an interesting opportunity for urban farmers, we believe that traditional land trusts represent an underexplored opportunity.

This section examines the potential strength of using land trusts to protect community gardens and urban farms by detailing a dispute over community gardens in New York City and the subsequent embrace of the land trust model by community gardeners. We follow with a description of conservation easements. While not used by the New York City gardeners, conservation easements are a common land protection tool employed by land trusts. Conservation easements could also protect and promote urban agriculture and land trusts could use this tool to further the mission of urban agriculture.

1. Lessons Learned from New York City's Community Gardens

The many community gardens of New York City faced threats of dissolution in early 2000s. Community groups had been using little pockets of land within the city without possessing any legal rights to do so.

100. CENTRAL VERMONT COMMUNITY LAND TRUST, available at <http://www.central-vt.com/web/landtrust/> (last visited Dec. 31, 2014).

101. Yuen, *supra* note 71, at 3; see also INST. FOR CMTY. ECON., available at <http://www.nhtinc.org/ice.php> (last visited Dec. 31, 2014) (The Institute for Community Economics asserts that it is the originator of the CLT model, which it describes as being "a housing model.").

102. In some cases, CLTs do not become the fee simple landowners but instead lease the land with subleases to users of the land (in our case the agriculturalists).

In many cases, the land was owned by the City, which was reluctant to dedicate land to gardening when it could also provide a promising source of revenue. Often these small pocket parks were located on highly valuable parcels. In 1999 in New York City, Mayor Rudolph Giuliani proposed auctioning off some 600 community gardens across the city. Community organization quickly brought suit to enjoin the selling or bulldozing of city lots holding community gardens.¹⁰³ While the gardens did not prevail in court on their claims that the sales would violate their civil rights (because of the disparate impact on communities of color), the case helped bring their plight to public attention.¹⁰⁴

To strengthen their political power, the gardeners decided to form land trusts and create clear governing structures and rules.¹⁰⁵ Their demonstration of organization and determination was likely a key factor in convincing the city to keep the gardens. The land trust form was essential in creating an organization that could negotiate with the city and be a signatory on a lease. The community gardens example is an illustration of how important organizing is in promoting and protecting urban agriculture. The participants in the community gardens decided that land trusts were the best model for them even while the land trusts they formed differed from traditional land trusts because they operate in urban areas and involve active coordination with gardeners using the sites. Traditional land trusts tend to have a more hands off approach, and their protected lands tend to be in rural areas.

2. *Traditional Land Trusts*

Land trusts are nonprofit land conservation organizations. Different from other environmental nonprofit organizations, land trusts specifically use property tools including landownership and conservation easements to achieve their land protection goals. The exact goal of the groups may differ widely. Some land trusts are mostly concerned with architectural treasures and protecting building façades and interiors. Others concentrate on specific ecosystems or ecological features. Many seek to protect special places within a community for scenic, open space, and recreational value. Still others specifically work to protect working landscapes like forests and farms. Many land trusts have multiple goals and seek to protect all these items as vital pieces of our heritage and important components of our ecological systems.

When the New York City gardeners decided to adopt a land trust model, they did so for several reasons. First, although the individual

103. N.Y. Env'tl. Just. Alliance v. Giuliani, 50 F. Supp. 2d 250 (1999).

104. Dan Barry, *Giuliani Seeks Deal to Sell 63 Gardens to Land Group and End Suits*, N.Y. TIMES, May 12, 1999, at B1.

105. *History and Mission*, THE NEW YORK CITY GARDEN LAND TRUSTS, <http://nycgardenlandtrust.org/> (last visited Dec. 31, 2014).

gardeners were not planning to hold title (or even partial title to the land), the gardeners were interested in using property tools. The land trust could hold fee simple title and could be an appropriate and trusted holder of a long-term lease agreement with the city. Second, land trusts have developed a positive reputation and the national Land Trust Alliance (a type of industry association for land trusts) is able to provide support in the form of expertise and periodic grant funding. The growing network of land trusts across the nation means that the New York City gardeners will have colleagues to draw on for expertise.

3. *Conservation Easement Use*

The area available to farmers could be expanded if land trusts reached beyond the fee simple ownership model and called upon their experience with conservation easements to secure rights to farm. Conservation easements are partial property rights that must adhere to designated conservation purposes. Generally with conservation easements, landowners agree to refrain from engaging in an activity that they would otherwise be able to engage in. One of the most common conservation easement prohibitions is a limitation on development. Conservation easements need not be negative however. One could also write an agreement that requires the landowner to engage in certain activities or maintain certain land conditions. Additionally, conservation easements need not be solely about the landowner's activity. A conservation easement could also be written to give the conservation easement holder affirmative rights to conduct activity on the land.

Because conservation easements differ from traditional servitudes like easements and real covenants, states passed statutes specifically enabling their use. These state enabling acts (and nearly half of them follow the 1981 Uniform Act) define, inter alia, the acceptable purposes of conservation easements and who may hold the conservation easements. Where a conservation easement is associated with a charitable tax deduction, the conservation easement must also comply with requirements of the federal tax code.

Conservation easements may prove a useful tool for protection of urban agricultural land. As some of the challenges described above indicate, obtaining fee simple ownership of urban farming or community garden sites may not be feasible or desirable. In other cases, fee simple ownership may appear inadequate. Where communities struggle with locating landowners, conservation easements do not provide additional assistance because one needs to negotiate conservation easements with the underlying landowners. Where a landowner is known but uninterested in selling fee title, the landowner may be willing to place a conservation easement on the property, particularly if the conservation easement could result in a payment or a tax deduction. Such conservation easements could give the holder the affirmative right to maintain the property and conduct

agricultural activities. Although generally permanent, conservation easements could instead be for a term of years, giving the landowner the opportunity to regain full control of the land upon expiration of the term.¹⁰⁶ While such conservation easements may need to be accompanied by (or just mirror) leases, there may be tax implications that make them more attractive to landowners. Also, because conservation easements must be held by a government entity or a nonprofit organization, landowners may feel more comfortable transacting with such entities.

In some cases, urban agriculturalists may be able to influence public entities, nonprofit organizations, or even private landowners to allow them to either lease their property or have a license to use it (without making payments). Agriculturalists may be concerned that the landowners will change their mind. Encumbering a property with a conservation easement preventing (permanently or temporarily) development, could give the agriculturalists greater peace of mind regarding the long-term viability of her farm or garden.

4. *The Potential of Urban Agriculture Land Trusts*

Urban farmers should consider the strength of the land trust model. First, land trusts can hold land in fee simple. They can serve as the landowner and the organization can manage the land and work with various farmers or gardeners. This could be attractive where the farms are small (like community gardens) or where the farmers are inexperienced and uncertain of their farms' long-term liability or where the farmers are reluctant to become landowners. Local governments may be more likely to convey land to land trusts because the land trusts' charitable charters and federal oversight as 501(c)(3) tax-exempt organizations will ensure that the land is used for public purposes.

Second, many land trusts have experience working with agricultural land. Several land trusts hold conservation easements over rural farms.¹⁰⁷ This places land trusts in a good position to extend their scope to urban farms. They are already familiar with agricultural land uses and laws regarding agricultural land. They have drafted conservation easement covering agricultural land and regularly work with farmers and foresters.

106. Conservation easements are required to be perpetual in California, Hawaii, and Florida. In other states, they can be for a term of years, but some states have minimum terms. Urban agriculture has often been viewed as an interim strategy to keep land in active use until a "better" use can be developed. Where urban agriculture is considered an interim solution to protecting land in anticipation of a revitalized community, temporary conservation easements may prove most attractive.

107. Our research has only revealed one land trust that has made the leap from rural farms to urban farms: The Oregon Sustainable Agriculture Land Trust. OSALT, however, does not use conservation easements to meet its goals. It owns the land in fee simple and then enters into lease agreements with the farmers.

Third, land trusts and government entities are the only organizations that can hold conservation easements. Where underlying landowners are unwilling to sell their land (and this seems likely with landowners who are speculators or even where the government is the underlying landowner), they may be willing to convey a conservation easement. Only a few states require conservation easements to be perpetual (California, Hawaii, and Florida), so land trusts could also be holders of term conservation easements. This may be more palatable to community members who worry that conveyances of land to urban farmers are little more than a land grab. This is admittedly an infrequent situation, but the Hantz Farm in Detroit presents a good example.¹⁰⁸ The city of Detroit conveyed land to a large wealthy developer who has pledged to develop a large urban farm.¹⁰⁹ If the city had given the developer a shorter term maybe folks would be less concerned. If the city had given them a conservation easement and the organization was bound by the rules governing land trusts, Detroiters might also have found some solace.

III. BEGIN WITH BUFFALO

Buffalo has lost half of its population, declining by over a quarter of a million people, since the 1950s.¹¹⁰ Of the City's over 50,000 vacant properties and 14,000 vacant lots, most are concentrated in the city's East Side, whose residents are predominantly African-American, many of whom live below the poverty threshold.¹¹¹ Alongside abundant vacant and abandoned spaces, violent crime, homelessness, and poverty have remained

108. HANTZ WOODLANDS, available at <http://www.hantzfarmsdetroit.com/> (last visited Dec. 31, 2014).

109. See, e.g., David Sands, *Hantz Farm Deal, Controversial Land Sale, To Go Before Detroit City Council*, HUFFPOST DETROIT (Nov. 19, 2012), available at http://www.huffingtonpost.com/2012/11/19/hantz-farms-deal-land-detroit-council_n_2159863.html; John Gallagher, *Critics Say Hantz Getting Unfair Advantage as Detroit Council Prepares to Revisit Plan for Land Sale*, DETROIT FREE PRESS (Dec. 10, 2012), available at <http://www.freep.com/article/20121210/BUSINESS06/312100041/Critics-say-Hantz-getting-unfair-advantage-as-Detroit-council-prepares-to-revisit-plan-for-land-sale>; Jezra Thompson, *Detroit: Land Grab or City Revival?*, CIVIL EATS (Dec. 26, 2012), available at <http://civileats.com/2012/12/26/detroit-land-grab-or-city-revival/>; Leslie Macmillan, *Vast Land Deal Divides Detroit*, N.Y. TIMES (Dec. 10, 2012), available at http://green.blogs.nytimes.com/2012/12/10/vast-land-deal-divides-detroit/?_php=true&_type=blogs&_r=0.

110. Joseph Schilling, *Buffalo as the Nation's First Living Laboratory for Reclaiming Vacant Properties*, CITIES GROWING SMALLER, KENT STATE UNIV. 33, 33 (2008) (stating that the population fell from 580,000 in 1950 to 279,000 in 2005). The most recent available population estimate (2013) for Buffalo is 258,959. See U.S. Census Bureau, *State & County Quick Facts*, <http://quickfacts.census.gov/qfd/states/36/3611000.html> (last visited Dec. 31, 2014).

111. Metcalf & Widener, *supra* note 24, at 2–3.

acute problems for the City.¹¹² Decades of economic dysfunction and derelict properties, often bulldozed and leaving behind unmaintained vacant lots attracting vermin and vagrants, have left residents disillusioned with local government.

This disillusionment and lack of faith in the ability of industry and government to provide for its citizens “has given rise to a parallel movement of community organizers constructing landscapes of self-sufficiency and social support,” including a number of organizations actively promoting local food and urban farming.¹¹³ One such organization is the Massachusetts Avenue Project, founded initially to expose troubled youth to opportunities for economic development and community engagement.¹¹⁴ Today, the non-profit organization’s urban farm consists of thirteen lots, covering over an acre of reclaimed vacant lots in a residential neighborhood on Buffalo’s West Side.¹¹⁵ At the farm, youth work together to grow, market, and distribute organic produce for communities, restaurants and retail establishments in Buffalo.¹¹⁶ The farm is no small undertaking, with its one-thousand gallon rain water collection system, two state-of-the-art greenhouses (one complete with the capacity for 35,000 fish to be cultivated in an aquaculture/hydroponics system), urban chickens, and a vermiculture composting system.¹¹⁷

Another organization with broader reaching implications is People United for Sustainable Housing (PUSH Buffalo); a local membership-based community organization fighting to make affordable housing a reality on Buffalo’s West Side. The organization (through its housing arm, Buffalo Neighborhood Stabilization Company) purchases and rehabilitates vacant lots either by constructing (using local labor and green technologies) multi-family, affordable rental units, or green spaces, community gardens, and rain garden demonstration projects.¹¹⁸ The organization has developed more than fifty properties, including thirty parcels in a twenty-five block radius known as the “Green Development Zone,” which combines green affordable housing construction, community-based renewable energy projects, housing weatherization projects, and green jobs training

112. *Id.* at 3.

113. *Id.* at 4. For a video presentation of a number of dilapidated and abandoned properties being transformed into community gardens, see *Grassroots Gardens of Buffalo*, <http://www.grassrootsgardens.org/> (last visited Nov. 9, 2014).

114. *Id.*

115. Massachusetts Avenue Project, *About*, http://mass-ave.org/?page_id=2 (last visited Dec. 31, 2014).

116. *Id.*

117. *Id.*

118. *Housing*, PUSH BUFFALO.ORG, <http://pushbuffalo.org/housing> (last visited Dec. 31, 2014).

programs.¹¹⁹ Essentially, PUSH buys dilapidated properties, ensures that local laborers are hired to complete the project and receive job training, uses green technologies and weatherization to keep heating costs down for residents, and provides affordable rents to one of the most impoverished neighborhoods in the nation with a per capita income of approximately \$9000.¹²⁰

The question we are grappling with in Buffalo is no longer how we can sustainably develop but how can we grow smaller gracefully. While some view urban agriculture as a placeholder until Buffalo is great again, we see a way that Buffalo can develop urban agriculture as part of a model of a new smaller more sustainable city. The number of organization and community members involved in these efforts is numerous and demonstrates the investment and interest on the part of Buffalonians.¹²¹ A missing element here is an urban agricultural land trust that can marry the strength of the land trust movement with the efforts at urban revitalization. Buffalo could then be a model for other regions. As with other parts of the state and country, the suburban and rural areas of the Western New York region already have land trusts and local governments investing in agricultural protection and promotion. By moving into the city, these efforts could expand the number and types of people who benefit.

119. *Green Development Zone*, PUSH BUFFALO.ORG, <http://pushbuffalo.org/green-development-zone1> (last visited Dec. 31, 2014).

120. *Id.* at 119.

121. Just a few organizations and efforts include: The Buffalo Revitalization Strategy, Blueprint Buffalo, Distressed Properties Taskforce, Vacant Lot Taskforce, Buffalo Community Gardens, Massachusetts Avenue Project, Buffalo Greenprint, and ArtFarms.
