

# COMMUNITY DEVELOPMENT THROUGH GARDENING: STATE AND LOCAL POLICIES TRANSFORMING URBAN OPEN SPACE

*Jane E. Schukoske\**

“Don’t know why anyone called that lot ‘vacant.’  
The garbage was piled high as your waist . . . .”<sup>1</sup>

—*Paul Fleischman, 1997*

## INTRODUCTION

Neglected vacant lots in the modern urban setting pose great hazards to community life. These lots, which host criminal behavior, accumulate trash, and create various health risks, epitomize the frustration and despair nearby residents often feel. A recent study reports that more than one-fifth of all land in American cities is classified as vacant.<sup>2</sup> Despite the prevalence of vacant land and the reality of urban blight, many communities have been successful in transforming these dangerous urban spaces into thriving community gardens.

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\* Associate Professor, University of Baltimore School of Law and Director of the Community Development Clinic, which has represented community associations involved in community gardening. I thank Steven G. Davison, Kristine Dunkerton, Garrett Power, Peter W. Salsich, Jr., Andrew Stone, and Ved Kumari for their comments on an earlier draft of this article; Maryann Nowinski and Catherine Sauvain for their research assistance; and Jane Cupit for her preparation of a bibliography for this research.

1. PAUL FLEISCHMAN, *SEEDFOLKS* 19 (1997).

2. See ANN O’M. BOWMAN & MICHAEL A. PAGANO, *URBAN VACANT LAND IN THE UNITED STATES* 18-19 (Lincoln Inst. of Land Policy Working Paper, 1998). The Bowman and Pagano study analyzed the results of a nationwide survey of urban vacant land based on responses from 186 cities. See *id.* at 18. For the study, “vacant land” was defined as including “not only publicly-owned and privately-owned unused or abandoned land or land that once had structures on it, but also land that supports structures that have been abandoned, derelict, boarded up, partially destroyed or razed.” *Id.* The study revealed that approximately 23% of total land area in the responding cities was vacant. See *id.* at 19. It also found that, generally, vacant land is more prevalent in growing cities and abandoned structures are more prevalent in declining cities. See *id.* at 35. The most universal problem cities face regarding the use of vacant land is managing odd-shaped parcels in undesirable locations. See *id.* at 37.

The development of community gardens has led to the beautification and greening of many neighborhoods and has fostered a spirit of community cooperation. Social policies such as the promotion of health and welfare, economic development, education, youth employment, and tourism are consistent with the operation of community gardens and logically require a degree of continuity of place and participants. Nevertheless, the permanence of community gardens is very much at issue, as illustrated by the recent case *New York City Environmental Justice Alliance v. Giuliani*.<sup>3</sup> In addition to the issue of permanence, community garden organizations routinely face a number of problems, including both the difficulty of obtaining access to resources and the threat of legal liability. It is this article's contention that designing and implementing effective statutes could solve many of the problems that confront community gardens, thereby enhancing gardening as a tool for community development.<sup>4</sup>

Part I of this article discusses the stark reality of urban blight, emphasizing the success of community gardening as a means of addressing the problems associated with vacant lots.<sup>5</sup> It also explores the diverse values involved in a community's effort to transform unused land into productive gardens. Part II examines the current issues facing urban gardens and the institutions that have evolved to address them, such as land trusts and other nonprofit organizations. Part III of the article presents an in-depth analysis of current state, District of

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3. See *New York City Env'tl. Justice Alliance v. Giuliani*, 50 F. Supp. 2d 250 (S.D.N.Y. 1999). For a discussion of this case and the controversy surrounding it, see *infra* Part IV.C.4.

4. Of course statutory support alone is insufficient. Implementation requires citizen participation. One community garden program staff person observed:

[A]ll of the statutory protections and government support our Program enjoys depends on the continued activism of our gardeners and groups like our non-profit support group, the Friends of P-Patch. Governmental support may decline over time and the statutory language [may] be ignored except for the pressure brought by organized volunteers.

E-mail from Richard Macdonald, Program Manager, P-Patch Program, Seattle, Wash., to Jane Schukoske, Associate Professor, University of Baltimore School of Law (Dec. 8, 1999) (on file with author). Community garden activists observe that statutory schemes are often not followed. See E-mail from Judy Tiger, Executive Director, Garden Resources of Washington (GROW), Washington, D.C., to Jane Schukoske, Associate Professor, University of Baltimore School of Law (Dec. 24, 1999) (on file with author); see also E-mail from Andrew Stone, Director of the New York City Program, Trust for Public Land, New York, N.Y., to Jane Schukoske, Associate Professor, University of Baltimore School of Law (Dec. 13, 1999) (on file with author).

5. This article focuses on vacant lots on which buildings were razed or never built, rather than on abandoned structures. Additionally, the article's primary emphasis is on community development through gardening in low-income neighborhoods although it applies to mixed-income and prosperous communities as well.

Columbia, and local ordinances governing community gardens. The article concludes by proposing core elements of a model community gardening ordinance that, when adapted to local needs, can encourage and protect community gardening efforts.

## I

### THE GROWTH OF COMMUNITY GARDENS AS A TOOL FOR MANAGING VACANT URBAN LAND

According to a recent study, approximately twenty-three percent of the land in the average American city lies vacant.<sup>6</sup> This land is abandoned for a number of reasons, including population shifts from the cities to the suburbs due to de-industrialization and relocation by employers; changing views on desirable housing stock; and residential shifts due to the declining reputations of school systems and racial prejudices.<sup>7</sup> Land may also be vacant if it is small in size, irregular in shape, and undeveloped.<sup>8</sup> In declining neighborhoods, vacant houses often fall prey to trespass and arson, resulting in rapid deterioration.<sup>9</sup> Some of the most dangerous structures are condemned and razed, leaving vacant lots as monuments to neighborhood disinvestment.<sup>10</sup> In addition to being economically unproductive,<sup>11</sup> vacant lots endanger public health and safety by becoming illegal dumps for refuse that can contain noxious chemicals and breed disease.<sup>12</sup>

These lots strip a neighborhood of its “social capital,” a term coined by Jane Jacobs in her landmark sociological study entitled *The*

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6. See BOWMAN & PAGANO, *supra* note 2, at 5-8 (reviewing national studies of land use including both publicly and privately owned vacant land in United States). Although there had been limited case studies on vacant lands, Bowman and Pagano conducted the first comprehensive study since the 1960s that was national in scope. See *id.* at 8.

7. See PENNSYLVANIA HORTICULTURAL SOC'Y, *URBAN VACANT LAND: ISSUES AND RECOMMENDATIONS* 15-18 (1999) [hereinafter *URBAN VACANT LAND*]; see also JOHN A. JAKLE & DAVID WILSON, *DERELICT LANDSCAPES* 143-45 (1992) (discussing economic and institutional forces leading to neighborhood dereliction).

8. See BOWMAN & PAGANO, *supra* note 2, at 2.

9. See JAKLE & WILSON, *supra* note 7, at 7; David T. Kraut, Note, *Hanging Out the No Vacancy Sign: Eliminating the Blight of Vacant Buildings from Urban Areas*, 74 N.Y.U. L. REV. 1139, 1147-49 (1999).

10. See generally JAKLE & WILSON, *supra* note 7, at 150-53.

11. Vacant lots generally do not generate revenue and fail to provide a significant source of property taxes. See *URBAN VACANT LAND*, *supra* note 7, at 18; see also Kraut, *supra* note 9, at 1149-50 (discussing erosion of tax base, reduction of neighboring property values, and additional costs of nuisance abatement associated with vacant property).

12. See *URBAN VACANT LAND*, *supra* note 7, at 17-19 (examining economic and public health problems cities face because of vacant lots).

*Death and Life of Great American Cities*.<sup>13</sup> Social capital includes “features of social organization such as networks, norms and social trust that facilitate coordination and cooperation for mutual benefit.”<sup>14</sup> Vacant lots and the anti-social behavior they attract “intimidate law-abiding citizens, limiting their activity”<sup>15</sup> and leading to a greater societal disengagement from these neighborhoods, and conceivably, a decrease in the community’s social capital.

The demise of a cohesive community has been hastened by government action. Professor Robert Putnam draws a distinction between social capital and “physical capital”—the buildings, streets, sidewalks, and other physical infrastructure of a neighborhood.<sup>16</sup> Professor Putnam concludes that certain public policies have played a role in the demise of civic involvement: “In some well-known instances, public policy has destroyed highly effective social networks and norms. American slum-clearance policy of the 1950s and 1960s, for example, renovated physical capital, but at a very high cost to existing social capital.”<sup>17</sup> Professor Putnam calls for policy efforts to increase social interaction and encourage civic engagement.<sup>18</sup>

In the last three decades, community gardens have proliferated in cities across the United States<sup>19</sup> as a means for citizens to address many of the problems associated with vacant land.<sup>20</sup> A community

13. JANE JACOBS, *THE DEATH AND LIFE OF GREAT AMERICAN CITIES* 138 (1961).

14. Robert Putnam, *Bowling Alone*, 6 *J. DEMOCRACY* 65, 67 (1995) (citing JACOBS, *supra* note 13). In formulating her theory, Jacobs wrote “If self-government in the [city neighborhood] is to work, underlying any float of population must be a continuity of people who have forged neighborhood networks. These networks are a city’s irreplaceable social capital.” JACOBS, *supra* note 13, at 138.

15. Kraut, *supra* note 9, at 1150 (citing James Q. Wilson & George L. Kelling, *Making Neighborhoods Safe*, *ATLANTIC MONTHLY*, Mar. 1982, at 46, 48). Wilson and Kelling’s “Broken Windows” theory of crime posits that “physical disorder [in a neighborhood] signals social breakdown.” Robert C. Ellickson, *New Institutions for Old Neighborhoods*, 48 *DUKE L.J.* 75, 78 (1998).

16. See Putnam, *supra* note 14, at 76-77.

17. *Id.*; see also JAKLE & WILSON, *supra* note 7, at 167, 225-26 (discussing leveling of sections of Poletown, Michigan to build General Motors plant, leading to community’s demise).

18. See Putnam, *supra* note 14, at 76-77.

19. See Suzanne Monroe-Santos, *Recent National Survey Shows Status of Community Gardens in U.S.*, *COMMUNITY GREENING REV.*, 1998, at 12 (reporting over 6,000 national community gardens in 1996); H. PATRICIA HYNES, *A PATCH OF EDEN* at xiii-xiv (1996) (documenting increase in number of community gardens from 1970s through 1996). Hynes’s book examines past instances in American history when economic depressions led state and local governments to promote community gardens. See *id.* at x-xiii (describing “potato patches” of 1893-97, “relief gardens” of 1930s, and “liberty” or “victory” gardens encouraged during war shortages).

20. See *URBAN VACANT LAND*, *supra* note 7, at 75 (“In Philadelphia, over the last 20 years, gardens have become a dramatic symbol of the struggle to maintain the

garden arises when residents grow food, flowers, or greenery on publicly or privately held lots that they do not own.<sup>21</sup> In a 1996 national survey focusing on community garden activity, cities reported that 67.4% of gardens were neighborhood gardens, 16.3% were on public housing premises, 8.2% were on school grounds, 1.4% were on mental health or rehabilitation facilities, 1.4% were at senior centers, and 0.6% were part of job or economic development programs.<sup>22</sup> The role of community gardens in community development has also been studied internationally, in countries such as Canada,<sup>23</sup> Mexico,<sup>24</sup> the United Kingdom,<sup>25</sup> Cuba,<sup>26</sup> and Kenya.<sup>27</sup>

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physical and social integrity of neighborhoods in the face of overwhelming forces. More than 1,500 community gardens have been established on vacant lots.”)

21. Community gardens have been defined in various ways. *See, e.g.*, D.C. CODE ANN. § 33-901(2) (1999) (defining “urban gardens” as “any vacant lot used for the growing of food, flowers or greenery” and defining “vacant lot” as “any lot in the District of Columbia on which there is no lawful structure”); N.Y. AGRIC. & MKTS. LAW § 31-g(1) (McKinney 1999) (defining “community garden” as “public or private lands upon which citizens . . . have the opportunity to garden on lands which they do not individually own”); TENN. CODE ANN. § 43-24-102(6) (1999) (defining “garden” under Tennessee Community Gardening Act of 1977 as “a piece of land appropriate for the cultivation of herbs, fruits, flowers or vegetables”). One author refers to community gardens as “community spaces that are communally cultivated and cared for . . . [including] individually worked plots, multiple person caretaker areas, and small-scale children play areas.” *See* Katherine A. Cooper, Community Management of Open Space: A Survey of Cities 4 (Jan. 12, 1999) (unpublished paper, on file with the Urban Resources Initiative, 205 Prospect Street, New Haven, Conn. 06511, (203) 432-6570).

22. *See* Monroe-Santos, *supra* note 19, at 12.

23. *See generally* Memorandum from City Clerk, Toronto, Ontario, Canada, to Toronto Economic Development and Parks Committee (June 3, 1999) (on file with author) (recommending adoption of Community Garden Action Plan that would expand and increase support for Toronto’s community gardening program based on success of city’s 88 established community gardens). The goals of the Community Garden Action Plan include mapping existing gardens; assessing the need for additional gardens; supporting the establishment of new gardens in 1999; establishing one community garden in each ward by the end of 2001; sharing expertise concerning starting and sustaining community gardens; and assisting gardeners with resources and training. *See id.*; Dena Sacha Warman, *Community Gardens: A Tool for Community Building*, URBAN AGRICULTURE NOTES (last modified Feb. 20, 2000) <<http://www.cityfarmer.org/waterlooCG.html#waterloo>>. One study examined both the objectives behind creating community gardens and the gardens’ ultimate effect upon civic participation in Canada and Mexico. *See generally* Manon Boulianne, *Agriculture Urbaine, Rapports Sociaux, et Citoyenneté* (1999) (on file with *New York University Journal of Legislation and Public Policy*). For instance, Boulianne noted that gardens created with a goal of contributing to the food supply for populations susceptible to food shortages demonstrated the highest level of civic engagement. *See id.*

24. *See generally* Boulianne, *supra* note 23.

25. *See* ALEXANDER WILSON, *THE CULTURE OF NATURE* 108-09 (1992) (tracing history of community gardens in England from 19th century onward). Other literature has examined the feasibility of establishing a garden center or a trout farm on vacant and derelict land in North London. *See* CHRIS WARDLE ET AL., *GROWING IN THE*

Communities have found that gardens beautify areas, build a sense of community among neighbors, and abate criminal activity in or near vacant lots.<sup>28</sup> These gardens also prevent trash accumulation, illegal dumping, and littering.<sup>29</sup> Older cities, particularly on the east coast and in the mid-western United States, have attempted to “rescue [vacant land] from the downward spiral of urban blight” through the encouragement of community gardens.<sup>30</sup> These gardens are strategically used to create “defensible space”<sup>31</sup>—neighborhood areas in which escape routes for criminal perpetrators are limited and public range of vision is maximized to prevent illicit conduct.<sup>32</sup>

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CITY: PRACTICAL IDEAS FOR CREATING EMPLOYMENT USING VACANT BUILDINGS AND DERELICT LAND para. 4 (1983).

26. See Angela Moskow, *The Contribution of Urban Agriculture to Gardeners, Their Households, and Surrounding Communities: The Case of Havana, Cuba*, in FOR HUNGER-PROOF CITIES: SUSTAINABLE URBAN FOOD SYSTEMS 77 (Mustafa Koc et al. eds., 1999) (studying urban agricultural activity in Havana as way to increase food supply).

27. See generally DONALD B. FREEMAN, *A CITY OF FARMERS* 111-22 (1991) (examining informal urban agriculture in open spaces of Nairobi, Kenya, describing urban farmers themselves, and concluding acceptance of seasonal cultivation by urban communities can be understood as legitimate part of urban planning process). Other cities in Africa are also experimenting with community gardens. In Johannesburg, South Africa, the Yeoville Community Development Forum is experimenting with community gardens as an “effective way of empowering people to find creative solutions to social deprivation and decay of their community.” *Yeoville Grows Back to Its Roots*, AFRICA SERVICE NEWS, Apr. 16, 1999, available in 1999 WL 14357204. While the proposals in this article may be applied to any community garden, the discussion hereinafter will be limited to community gardens in the U.S.

28. See RUTH LANDMAN, *CREATING COMMUNITY IN THE CITY: COOPERATIVES AND COMMUNITY GARDENS IN WASHINGTON, D.C.* 100 (1993).

29. See *id.*; David Malakoff, *What Good is Community Greening?*, AM. COMMUNITY GARDENING ASS’N (last modified Dec. 14, 1999) <<http://www.communitygarden.org/pubs/whatgood.html>> (calling for further study and listing some benefits of community greening projects such as leadership development; economical food production; promotion of psycho-social health; energy-saving promotion of cool, clean air; job training; stress reduction; preservation of cultural heritage; provision of places for children to play and learn; promotion of recycling through composting; teaching of patience; promotion of physical fitness; crime reduction; improvement of community image; and community building).

30. Kristen E. H. Ruberton, *Community Management of Open Space: Atlanta and Detroit* (1999) (unpublished paper, on file with the Parks and People Foundation, 1901 Eagle Drive, Baltimore, Md. 21207, (401) 396-0730).

31. Oscar Newman first defined the term “defensible space” as “a model for residential environments which inhibits crime by creating the physical expression of a social fabric that defends itself.” OSCAR NEWMAN, *DEFENSIBLE SPACE* 3 (1972).

32. See Timothy D. Crowe & Diane L. Zahm, *Crime Prevention Through Environmental Design*, LAND DEV., Fall 1994, at 24. In their article, Crowe and Zahm assert that “proper design and effective use of the built environment can reduce the fear and incidence of crime and thereby improve the overall quality of life.” *Id.* at 22. Crowe and Zahm also explain that Crime Prevention Through Environmental Design (CPTED) can be used to reduce opportunities for criminal behavior. See *id.*; see also

Community gardens build social capital<sup>33</sup> not only by reclaiming or preserving urban space, but also by fostering collaboration among nearby residents across racial and generational lines.<sup>34</sup> The community gardening movement contributes to the current debate about the strengthening of communities, or “community building.”<sup>35</sup> Professor Gerald Frug has urged that “community building” should strive to “increase the capacity of metropolitan residents to live in a world composed of people different from themselves.”<sup>36</sup> The community gardening movement promotes interaction between the diverse residents of an urban neighborhood along common interests such as beautification, local food production, personal safety, health, and group projects. The movement draws upon individual talents, knowledge, and efforts, without such bars to participation as high cost, language barriers, or educational achievement, which may otherwise divide residents.<sup>37</sup>

Community gardens serve to “green” areas that are lacking in municipal parks.<sup>38</sup> Litigation to protest racial discrimination in the

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*generally* NEIGHBORHOOD DESIGN CENTER, DESIGN FOR SAFETY (1997) (on file with the Neighborhood Design Center, 1401 Hollins St., Baltimore, Md. 21223, (401) 223-9686) (providing readings and materials to train community associations to apply CPTED principles to their neighborhoods).

33. For a discussion of social capital, see *supra* notes 13-14, and accompanying text.

34. See, e.g., N.Y. GEN. MUN. LAW § 96 (McKinney 1999) (directing community gardens to be “community in scope”). New York’s statute reasons that this requirement will ensure “that all interested families and individuals, who reside in the area, [will] be afforded an equal opportunity to use available plots subject to reasonable continuing tenure.” *Id.* In fact, gardens have been called “significant instrumentalities of community creation.” LANDMAN, *supra* note 28, at 118. For further discussion of the inclusive nature of community gardens, see *infra* note 37 and accompanying text.

35. See GERALD E. FRUG, CITY MAKING 115 (1999) (proposing reconceptualization of local government law in way that redefines city self-interest, includes inter-city connection, and promotes community building).

36. *Id.*

37. See GAIL FEENSTRA ET AL., ENTREPRENEURIAL COMMUNITY GARDENS 22-23 (1999) (noting community gardens promoted neighborhood cohesion and trust across racial and generational lines); see also, e.g., D’Vera Cohn, *Anacostia’s ‘Urban Oasis’*, WASH. POST, July 8, 1999, at DC1 (discussing community garden in Anacostia, Washington, D.C., where local residents, students, and homeless persons from nearby shelter work together in farming land).

38. Arguments have been made that municipal parks are predominantly developed in white, well-to-do neighborhoods. See Michel Gelobter, *The Meaning of Urban Environmental Justice*, 21 FORDHAM URB. L.J. 841, 853-54 (1994). Gelobter describes “the often horrific configurations of urban spaces, [where] people of color historically have been denied access to . . . public amenities designed to ease urban tension and provide outlets for physical activity, recreation, and relaxation.” *Id.* at 853; see also Bernadette Cozart, *The Greening of Harlem*, in AVANT GARDENING 35, 37 (Peter Lamborn Wilson & Bill Weinberg eds., 1999) (stating “during the 1990s the

provision of park facilities was filed in Chicago in the 1980s<sup>39</sup> and to protest community garden closure in New York City in the late 1990s.<sup>40</sup> Parks and recreation facilities were found to be scarce in black and Hispanic neighborhoods in Chicago.<sup>41</sup> Professor Jon Dubin identifies a number of factors that lead to an inequitable distribution of urban facilities in communities of color: racially discriminatory zoning practices, urban renewal, discriminatory siting of noxious land uses, and the relocation of communities due to redevelopment.<sup>42</sup> Commenting on the causes of the inequitable treatment of many black communities, Professor Dubin asserts that

The failure to respect and protect the quality of the residential environment of these communities is a by-product of separate land use policies, resulting in the absence of zoning protection from diverse modern-day land use threats ranging from the siting of environmental hazards to the foreseeable development-induced displacement of low-income residents.<sup>43</sup>

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Department of Parks of New York City acquired more than 500 acres of new park land. 95 percent of this land was in wealthier white districts which already had more open space per person than poorer districts whose residents are largely people of color.”)

39. See *Alexander v. Chicago Park Dist.*, 709 F.2d 463, 467 (7th Cir. 1983) (affirming denial of preliminary injunction in action alleging, inter alia, racial discrimination in provision of recreational resources in Black and Latino neighborhoods in Chicago because evidence did not credibly support finding of disparate impact).

40. See *New York City Env'tl. Justice Alliance v. Giuliani*, 50 F. Supp. 2d 250, 254-55 (S.D.N.Y. 1999) (denying preliminary injunction in action brought under city, state, and federal laws including Title VI of Civil Rights Act of 1964 and First Amendment of U.S. Constitution). In *New York City Environmental Justice Alliance*, although the plaintiffs argued that the auctioning of selected community gardens in New York City had a discriminatory effect on Hispanic and black residents, the court rejected plaintiffs' Title VI claim on the grounds that Title VI only prohibited intentional discrimination. See *id.* at 253. Commentators have analyzed the environmental justice theories raised in *New York City Environmental Justice Alliance* and in other litigation brought by garden and environmental groups against New York City to halt the auctioning of garden lands. See Stephen L. Kass & Jean M. McCarroll, *Environmental Justice and Community Gardens*, N.Y.L.J., Aug. 27, 1999, at 3, 7. See also *infra* notes 224-233 and accompanying text.

41. See Cooper, *supra* note 21, at 17 (discussing Chicago's 1993 Parkland Needs Analysis, which found approximately 135,000 people in Chicago lived in areas underserved by city's park system).

42. See Jon C. Dubin, *From Junkyards to Gentrification: Explicating a Right to Protective Zoning in Low-Income Communities of Color*, 77 MINN. L. REV. 739, 760-61, 764-68 (1993) (examining use of zoning laws that disempower African American communities and identifying constitutional arguments for protective zoning in those same communities); see also Charles P. Lord, *Community Initiatives: Environmental Justice Law and the Challenges Facing Urban Communities*, 14 VA. ENVTL. L.J. 721, 723-24 (1995) (describing disinvestment in Boston's inner-city neighborhoods including permitting trash accumulation, and redlining on bank loans and insurance).

43. Dubin, *supra* note 42, at 744.



Community gardens promote self-respect in residents of low-income neighborhoods.<sup>44</sup> In those instances in which gardens are operated without authorization, community gardens might be viewed as environmental justice self-help.<sup>45</sup> This self-help gardening ethic among urban residents is comparable to the wilderness ethic of the environmental movement. Just as the wilderness ethic provides its adherents with “the moral value which has as its central theme preserving the wilderness,”<sup>46</sup> so does the gardening ethic offer communities a local, anthropocentric, cultural interaction with nature and neighbors.<sup>47</sup>

Characterized as part of the “new agriculture,”<sup>48</sup> community gardening policy furthers local food production and education about nature.<sup>49</sup> Community food production provides partial relief to the problem of substandard grocery stores, which often operate in low-

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44. See HYNES, *supra* note 19, at 6 (describing “pride in the greening of Harlem”); LANDMAN, *supra* note 28, at 100 (“Tenants get used to working together, they develop pride, and with the gardens beautifying the grounds, trash is reduced. With their sense that they know how to take joint action the tenant gardeners reported that they are better able to resist drug dealers who thrive in a messy setting.”).

45. See SAM BASS WARNER, JR., *TO DWELL IS TO GARDEN* 22 (1987). Warner recounts the initiative of community gardeners in the 1970s, who began gardening on lots adjacent to their homes without any formal organization or formal permission. *See id.* at 27. This initiative reflected a shift in the gardeners’ attitude as they stopped waiting for public institutions to act and adopted an outlook of self-help. *See id.* at 22; *see also* Catharine R. McManus & Karen N. Steer, *Towards a Unified Strategy for Open Space Management in Baltimore: Community-Managed Open Space* 6 (1997) (unpublished paper on file with Urban Resources Initiative, 205 Prospect Street, New Haven, Conn. 06511, (203) 432-6570) (“Just as often, communities and individuals claim vacant land without undertaking legal formalities by simply planting a tree or a garden.”).

46. James M. Caragher, *The Wilderness Ethic of Justice William O. Douglas*, 1986 U. ILL. L. REV. 645, 645 n.6 (1986).

47. See MICHAEL POLLAN, *SECOND NATURE: A GARDENER’S EDUCATION* 190-96 (1991) (describing new garden ethic to supplement wilderness ethic of environmentalism in United States, and discussing new ethic’s local focus, pragmatic orientation, enlightened self-interest, realism regarding nature and human intervention, and lessons gardeners learn from nature).

48. Neil D. Hamilton, *Tending the Seeds: The Emergence of a New Agriculture in the United States*, 1 DRAKE J. AGRIC. L. 7, 9 (1996) (defining “New Agriculture” as agriculture devoted to producing quality food in system that creates opportunities for farmers, marketers, consumers, and processors to experience satisfaction and wholesomeness associated with healthy food system).

49. *See id.* at 16-18 (discussing important role of community gardens in building strong “community food systems,” which can improve quality of community’s diet and foster social pleasures associated with food production). Detroit, for example, has operated a Farm-A-Lot program since 1975, using vacant lots to provide inexpensive, fresh produce to low-income communities. *See* Ruberton, *supra* note 30, at 22.

income urban neighborhoods where a lack of transportation limits consumer options.<sup>50</sup>

Although community gardens are often viewed as an interim use of land,<sup>51</sup> over thirty-two percent of the 6,018 gardens responding to a recent national survey had been operating for more than ten years.<sup>52</sup> Techniques for maintaining community gardens on a long-term basis, through use of park department stewardship, land trusts, conservation easements, and lease agreements are spreading around the country.<sup>53</sup>

Under the rubric of an open space preservation policy,<sup>54</sup> some localities preserve undeveloped urban land, including “areas whose characteristics would maintain the conservation of natural or scenic

50. For a discussion of the issues concerning food security for urban populations, see Mustafa Koc et al., *Introduction: Food Security is a Global Concern*, in FOR HUNGER-PROOF CITIES: SUSTAINABLE URBAN FOOD SYSTEMS 1, 3-4 (Mustafa Koc et al. eds., 1999).

51. See generally Sarah Ferguson, *The Death of Little Puerto Rico*, in AVANT GARDENING: ECOLOGICAL STRUGGLE IN THE CITY & THE WORLD 60, 66 (Peter Lamborn Wilson & Bill Weinberg eds., 1999) (recalling that gardeners of “Little Puerto Rico” community garden on Lower East Side of Manhattan “were squatters, with no right to the land other than the virtue that led [them] to clean up the forsaken lots in the first place.”); WARNER, JR., *supra* note 45, at 27 (describing trend of individuals to garden without permission on lots adjacent to their homes, “turning the nearby ugly and often dangerous lots into a source of family food and personal accomplishment.”). Ferguson discusses how attempts to lease the land were denied by the city, yet gardening continued. See Ferguson, *supra*, at 66.

52. See Monroe-Santos, *supra* note 19, at 12.

53. See Pamela R. Kirschbaum, *Borrowed Land, Borrowed Time: Preserving Community Gardens*, COMMUNITY GREENING REV., 1998, at 7-11.

54. “Open space” has been defined as:

land without structures, that is, with no man-made spatial enclosures—or, alternatively, may include large tracts with only relatively minor structures. Open space thus includes parks, areas used for farms and forestry, and open areas not really used for anything, in gradual transition towards the local climax vegetation. It also clearly includes open areas on the same tract with low-density residential, commercial and industrial development. Moreover, under the alternative definition above, open space may also include the open areas on large tracts which are reserved, but not fully used, for other purposes, as for example airports and military reservations.

5 NORMAN WILLIAMS, JR. & JOHN M. TAYLOR, AMERICAN PLANNING LAW § 157.01 (rev. 1985). Federal and state governments have increasingly sought to preserve “open spaces” or “green areas” to counter “the accelerating urbanization taking place in the United States and the resulting loss of parks and other green areas.” 2 PATRICK J. ROHAN, ZONING AND LAND USE CONTROLS § 16.02[2][b] (1999); see also F. STUART CHAPIN, JR. & EDWARD J. KAISER, URBAN LAND USE PLANNING 378-79 (3d ed. 1979) (providing list of policies underlying open space preservation including protection of urban investments and people from natural environmental hazards; protection and management of valuable natural resources and environmental processes; protection and management of natural resources for economic production; protection, provision, and enhancement of natural amenities; protections, provision, and enhancement

resources or the production of food or timber.”<sup>55</sup> Increasingly, localities are recognizing community gardens in their open space planning process.<sup>56</sup> These efforts, which coincide with a greater attention to the management of public vacant land, are beginning to correct the marked lack of social planning in comprehensive plans.<sup>57</sup> Studies in some cities have identified the need to inventory and track vacant lots to promote possible constructive uses, such as community gardening.<sup>58</sup> “Community management of open space” emphasizes the active role of the public in facilitating its use.<sup>59</sup>

In sum, vacant lots are a considerable hazard to the well-being of an urban community. These lots contribute to the physical debilitation of a community, diminishing its quality of life. Vacant lots can also become host to criminal activity, trash accumulation, and safety hazards. Gardening has developed as a viable alternative to vacancy,

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of outdoor recreational, educational, and cultural opportunities; shaping urban form; and reservation of land for future urban development).

55. 5 FRANK P. GRAD, *TREATISE ON ENVIRONMENTAL LAW* § 10.03 (1999) (summarizing state laws that permit acquisition of land for open space preservation).

56. *See, e.g.*, CITY OF BERKELEY, CAL., 2ND DRAFT BERKELEY GENERAL PLAN: A FRAMEWORK FOR PUBLIC DECISION-MAKING: 2000-2020 at 68 (1999) (listing community gardens as recreational use within open space category); CITY OF MADISON, WIS. PARKS DIVISION, PARKS AND OPEN SPACE PLANS 32 (1991). Although the city of Madison’s 1991 Plan recommended “that the Parks Division be capital funded to acquire suitable sites for as many as 2,000 City-owned, permanent garden plots of approximately 200-800 square feet in size each,” the 1997 plan dropped the proposal. *See id.* at 31 (1997) (making no mention of capital funding and although, “Madison needs a public gardening program . . . the Parks Division cannot provide either management or permanent garden sites.”); CITY OF SEATTLE, WASH., TOWARDS A SUSTAINABLE SEATTLE: A PLAN FOR MANAGING GROWTH 1994-2014, at G-74 (July 1994) [hereinafter TOWARDS A SUSTAINABLE SEATTLE] (establishing one community garden per 2,500 households as open space goal); *see also* Kirschbaum, *supra* note 53, at 7-11 (examining different approaches used by localities to protect and sustain community gardens).

57. *See* BOWMAN & PAGANO, *supra* note 2, at 10-13 (noting trend among U.S. cities toward tracking and managing vacant urban land).

58. *See, e.g.*, McManus & Steer, *supra* note 45, at 19 (emphasizing Baltimore’s lack of comprehensive list of amount, location, and ownership of vacant lots and proposing computerized database containing property records, ownership liens, and other pertinent information to be located in land management office); *see also id.* at 3, 5 (explaining ownership and responsibility for Baltimore’s 40,000 vacant lots is spread out across 31 city agencies); Ruberton, *supra* note 30, at 7 (reporting no official vacant lot or open space policies in Atlanta, which possesses 1,036 acres of vacant residential land); *id.* at 20-21 (noting absence of official policy or program in Detroit to redevelop or maintain its approximately 7,400 acres of vacant land).

59. *See* LISA ARMSTRONG ET AL., *COMMUNITY MANAGED OPEN SPACE ON VACANT PROPERTY IN BALTIMORE* 2, 16-17 (1995) (describing community managed open space (CMOS) as vacant lots transformed by individuals or groups into open space with beneficial uses and discussing planning considerations and procedures for implementing CMOS projects).

and has often led to increased safety, beautification, and cooperation within the community.

## II

### LEGAL ISSUES FACED BY COMMUNITY GARDEN ORGANIZATIONS

Citizens create community gardens to further a variety of social objectives. In their quest to meet these objectives, community garden organizations face a number of complicated issues, such as organizational maintenance, control of garden lands, and access to resources. Each of these issues will be explored in this section. While garden organizations may face additional legal issues stemming from the employment of gardeners and the sale of produce, these considerations are beyond the scope of this section.

#### A. *Organizational Maintenance*

Community garden organizations typically form as unincorporated associations, either as independent entities or under the auspices of a pre-existing community association. However, some organizations incorporate as nonprofit corporations to enhance their ability to obtain grants, to obtain the liability protection afforded individual board members under the corporate form, and to develop the operational structure provided by state nonprofit corporate law.<sup>60</sup> An incorporated community garden organization, like any other corporation, must comply with routine state law requirements such as holding annual meetings and elections, filing bylaws, and submitting annual reports, or face suspension or revocation of its corporate charter.<sup>61</sup>

A community garden group often seeks formal recognition as a charitable organization under the federal income tax laws both in order to attract in-kind and cash donations from taxpayers who will benefit from charitable deductions, and to qualify for grants from

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60. See generally BRUCE R. HOPKINS, *A GUIDE TO STARTING AND MANAGING A NONPROFIT ORGANIZATION* 12-15 (2d ed. 1993) (describing benefits of incorporating as nonprofit organization).

61. See, e.g., *Sea-Land Services, Inc. v. Pepper Source*, 941 F.2d 519, 521 (7th Cir. 1999) (stating, inter alia, that "failure to maintain adequate corporate records or to comply with corporate formalities" may lead court to disregard corporate form and pierce veil of limited liability); JAMES D. COX ET AL., *CORPORATIONS* § 7.4 (1997) (stating lapses in corporate formalities may lead to corporate "veil piercing"). For a discussion of a local ordinance that imposes requirements of corporate formalities on community gardening groups, see AUSTIN, TEX., *CODE OF ORDINANCES* § 11-4(A)(2)(a)-(g) (1999) (requiring community gardens to submit articles of incorporation and bylaws to maintain status of "qualified community garden").

foundations and governmental offices.<sup>62</sup> Community garden organizations that combat community deterioration, lessen neighborhood tensions, reduce juvenile delinquency, or educate the public about the environment can demonstrate that they meet the statutory definition of "charitable organization" and qualify for a tax exemption under section 501(c)(3) of the Internal Revenue Code.<sup>63</sup> Recognition of federal tax-exempt status is a requirement for participation in at least one municipal program for community gardens.<sup>64</sup> Charitable community garden organizations that have less than \$5,000 in annual gross receipts and meet the requirements of 501(c)(3) qualify for an automatic exemption, and need not file for recognition.<sup>65</sup>

Organizations that are recognized as tax exempt under federal law may nonetheless be subject to taxation on income unrelated to the exempt purposes (referred to as unrelated business income taxation or UBIT).<sup>66</sup> Many community garden organizations are exempt from

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62. See generally BRUCE R. HOPKINS, *THE LAW OF TAX-EXEMPT ORGANIZATIONS* §§ 6.1-10 (7th ed. 1998) (discussing charitable activities as defined by § 501(c)(3) of the Internal Revenue Code). Additionally, a community garden organization might seek a federal tax exemption as an educational organization. See generally *id.* §§ 7.1-7. As agricultural or horticultural organizations, community gardens may qualify for tax exemption under I.R.C. § 501(c)(5). See *id.* §§ 15.2-.3. Organizations that engage in "farming" may find it advantageous to organize as a "farmers' cooperative" in order to gain tax-exempt status under § 521 of the Internal Revenue Code. See *id.* § 18.11. However, these bases for federal income tax exemption are less advantageous to most community garden organizations than section 501(c)(3) status because, unlike section 501(c)(3), the exempt status under sections 501(c)(5) and 521 does not confer the benefit of a charitable deduction under I.R.C. § 170 for donors to the organization.

63. See I.R.C. § 501(c)(3) (1994); HOPKINS, *supra* note 62, §§ 6.6, 7.5; Rev. Rul. 68-655, 1968-2 C.B. 213 (determining organization formed to promote racial integration in communities tax exempt under section 501(c)(3)); Rev. Rul. 76-205, 1976-1 C.B. 154 (determining organization formed to aid immigrants and eliminate prejudice and discrimination tax-exempt under 501(c)(3)); Rev. Rul. 78-85, 1978-1 C.B. 150 (determining organization operated by volunteers to maintain a public park tax exempt under section 501(c)(3)); Rev. Rul. 68-14, 1968-1 C.B. 243 (determining organization formed to promote and assist in city beautification projects and public education about street planting tax exempt under section 501(c)(3) because organization combated deterioration and lessened burdens on government). *But see* Rev. Rul. 75-286, 1975-2 C.B. 210 (denying section 501(c)(3) exemption to block association formed to preserve and beautify members' block, but granting association section 501(c)(4) tax exemption as social welfare organization).

64. See AUSTIN, TEX., CODE OF ORDINANCES § 11-4-1(1)(a) (1999). See discussion *infra* Part IV.C.3.

65. See I.R.C. § 508(c)(1) (1994); 26 C.F.R. § 1.508-1(a)(3)(b) (1998); INTERNAL REVENUE SERVICE, U.S. DEP'T OF TREASURY, PUB. NO. 557, TAX-EXEMPT STATUS FOR YOUR ORGANIZATION 14 (May 1997) (exempting organizations having less than \$5,000 annual gross receipts and meeting requirements of section 501(c)(3), without filing Form 1023); HOPKINS, *supra* note 62, § 23.3(b).

66. See generally HOPKINS, *supra* note 62, ch. 26 (unrelated business activities).

UBIT under the exception for organizations that carry out a substantial amount of their work through volunteer labor.<sup>67</sup> Although there are no reported cases pertaining to the UBIT of community garden organizations, it is conceivable that they would be treated similarly to agricultural organizations whose revenues from the sale of supplies and equipment are subject to UBIT.<sup>68</sup>

In addition to benefits from federal income tax laws, a not-for-profit or horticultural organization may qualify for state or local tax exemptions.<sup>69</sup> For example, some laws provide tax relief on sales<sup>70</sup> and on personal property that the organization owns.<sup>71</sup>

Community garden organizations must fulfill potentially expensive and labor-intensive organization requirements in order to realize their goal of serving the public. In addition to complying with routine state corporate law requirements such as holding annual meetings and elections and filing bylaws, community garden organizations may be required to procure a license to sell produce.<sup>72</sup> Furthermore, as entities that have the responsibility for operating garden programs for members and the public, community garden organizations may face legal liability for injury. Garden organizations need appropriate insur-

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67. See I.R.C. § 513(a)(1) (1994); HOPKINS, *supra* note 62, at § 27.2(a) (discussing exceptions from unrelated business taxation).

68. See *id.* § 26.5(e) nn.448-51 (unrelated business activity in labor and agricultural organizations).

69. See, e.g., CAL. REV. & TAX. CODE § 214 (West 1998); CONN. GEN. STAT. § 12-81 (1958 & Supp. 1999); IDAHO CODE § 63-602C (1996); MD. CODE ANN., TAX-PROP. § 7-202 (1994 & Supp. 1999); MASS. GEN. LAWS ANN. ch. 59, § 5 (West 1988 & Supp. 1999); MISS. CODE ANN. § 27-31-1 (1999); MONT. CODE ANN. § 15-6-201(1)(c) (1999); NEV. REV. STAT. § 361.140 (1999); N.H. REV. STAT. ANN. § 72:23 (1991 & Supp. 1999); N.Y. TAX LAW § 1116 (McKinney 1987 & Supp. 1999); WYO. STAT. ANN. § 39-16-105 (Michie 1999).

70. See, e.g., N.Y. TAX LAW § 1116 (McKinney 1999); WYO. STAT. ANN. § 39-16-105 (Michie 1999).

71. See, e.g., CONN. GEN. STAT. § 12-81 (providing tax exemption to property belonging to agricultural or horticultural societies); MONT. CODE ANN. § 15-6-201(1)(c) (exempting "property used exclusively for agricultural and horticultural societies"). An organization's property may, of course, be treated differently according to its use. See *Down Home Project, Inc. v. Dep't of Revenue of the State of Mont.*, No. SPT-1991-4, 1993 Mont. Tax LEXIS 12, at \*10 (Mont. Tax App. Bd. Jan. 21, 1993) (finding donated residential properties in which community gardeners reside and at which gardening workshops were conducted were properly exempt from state taxation under Montana law).

72. See, e.g., MINNEAPOLIS, MINN., CODE OF ORDINANCES § 265.360 (1996), available in <[http://www.municode.com/CGI-BIN/om\\_isapi.dll?infobase=11490.NFO&softpage=Browse\\_Frame\\_Pg42](http://www.municode.com/CGI-BIN/om_isapi.dll?infobase=11490.NFO&softpage=Browse_Frame_Pg42)> (permitting nonprofit organization to obtain license to sell vegetables, fruits, garden produce, farm produce, and arts and crafts on its premises or on public rights-of-way).

ance coverage for personal injury that occurs either on garden lands or while using any of the organization-owned garden equipment.<sup>73</sup>

### B. Control of Garden Lands

In some jurisdictions, publicly owned vacant lands may be used for community gardens.<sup>74</sup> The duration of garden lot leases is specified in various authorizing laws, and ranges from as long as five years (renewable) in Seattle,<sup>75</sup> to two years in Boston,<sup>76</sup> to as short as one growing season under New York law.<sup>77</sup> Although these leases each run for a specific term, some are terminable on short notice. The Adopt-A-Lot program in Baltimore, Maryland, for example, provides renewable one-year leases, but the city reserves the right to terminate the agreement upon thirty days notice to use the lot for another public purpose, and upon five days notice in the event of complaints concerning the use of or condition of the lot.<sup>78</sup> Although Chicago permits community garden organizations to use specific sites that it has agreed not to develop for three years, the city refuses to enter into any leases with community garden groups.<sup>79</sup> Furthermore, some leases may require gardening groups to provide liability insurance<sup>80</sup> and to acknowledge that the governmental lessor is not responsible for providing compensation for any improvements to its land.<sup>81</sup>

Gardeners sometimes seize control of privately owned vacant urban lots by beginning to use them when the land becomes vacant. While there may be no expressed objection to such use when the vacant land is owned by an absentee private owner, squatters nevertheless face such obstacles as prosecution for trespass and difficulty in

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73. See *ACGA Programs*, AM. COMMUNITY GARDEN ASS'N (visited Mar. 10, 1999) <<http://communitygraden.org/programs/index.html>> (reporting American Community Gardening Association, national organization promoting community gardening, is currently negotiating General Liability Insurance program for its members).

74. See, e.g., N.Y. AGRIC. & MKTS. LAW § 31-g to -i (McKinney 1991).

75. See SEATTLE, WASH., PUBLISHED ORDINANCES § 3.35.080 (1997).

76. See Cooper, *supra* note 21, at 8.

77. See N.Y. AGRIC. & MKTS. LAW § 31-h(2)(b) (McKinney 1991).

78. See DEPARTMENT OF PUBLIC WORKS, BALTIMORE, MD., LICENSE AGREEMENT FOR ADOPT-A-LOT paras. 6, 7, 9 (on file with *New York University Journal of Legislation and Public Policy*); see also ARMSTRONG ET AL., *supra* note 59, at 16-20 (containing terms of agreement for Adopt-A-Lot gardens).

79. See Cooper, *supra* note 21, at 19.

80. See DEPARTMENT OF PUBLIC WORKS, BALTIMORE, MD., *supra* note 78, para. 3; see also TENN. CODE ANN. § 43-24-103 (1993) (requiring that "any person who is granted the use of garden land shall indemnify and save harmless the state of Tennessee . . . against suits and any claims of liability arising out of, or in consequence of the use of vacant public land.").

81. See DEPARTMENT OF PUBLIC WORKS, BALTIMORE, MD., *supra* note 78, para. 3.

obtaining a water supply. Squatters may also have difficulty obtaining insurance coverage for injuries that occur on the land.

A claim of ownership may mature when the garden organization adversely possesses a vacant lot.<sup>82</sup> Adverse possession allows for the transfer of title from the owner to those in continuous possession for a prescribed number of years.<sup>83</sup> However, such title is unlikely to be marketable without litigation.<sup>84</sup> Gardeners may also seek the use of garden land through a claim of an implied dedication.<sup>85</sup> An implied dedication of land to public use can occur when the public uses land for recreational purposes for a requisite period with the knowledge of the owner and without the owner's permission or objection.<sup>86</sup> Like adverse possession, a claim of implied dedication may involve extensive litigation that requires the party asserting the claim to meet a high evidentiary burden.<sup>87</sup>

Outright ownership of garden lands provides the greatest degree of control. While ownership of garden lots may be feasible and prudent for community organizations that are firmly established, the process of obtaining title may require a greater investment of resources and a longer time commitment than less established garden organizations can provide.<sup>88</sup> For example, unless relief by means of a tax ex-

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82. Adverse possession permits the occupier of another's land to gain title to the land if that possession is actual, open and notorious, hostile, exclusive, and continuous. *See, e.g.*, ROGER A. CUNNINGHAM ET AL., *THE LAW OF PROPERTY* § 11.7 (1993). Nevertheless, there is a split of authorities on whether seasonal use of unenclosed land constitutes the actual, open and notorious, continuous, hostile, and exclusive use necessary to gain title through adverse possession. *See id.* § 11.7 nn.10, 11.

83. *See, e.g.*, N.Y. C.P.L.R. § 212(a) (McKinney 1990) (requiring claimant to possess land for 10 years prior to commencing claim for adverse possession).

84. *See generally* RALPH E. BOYER, *SURVEY OF THE LAW OF PROPERTY* 236 (1981) (describing taking title by adverse possession as "drastic procedure" with claimant bearing burden of proof).

85. *See* JESSE DUKEMINIER & JAMES E. KRIER, *PROPERTY* 814 (2d ed. 1998) (defining implied dedication as situation where "the landowner evidences an intent to dedicate and the state accepts by maintaining the land used by the public"); *see generally* Neal A. Roberts, *Beaches: The Efficiency of the Common Law and Other Fairy Tales*, 28 *UCLA L. REV.* 169 (1980) (discussing reallocation of rights between public users and private owners).

86. *See* *Gion v. City of Santa Cruz*, 465 P.2d 50, 59 (Cal. 1970) (holding implied dedication of shoreline property occurred when public used land for recreational purposes for more than five years, with knowledge of owner, without owner's permission, and without any objection).

87. *See* *State ex rel Haman v. Fox*, 594 P.2d 1093, 1100 (Idaho 1979) ("Party claiming a right by dedication bears the burden of proof on every material issue. The intent of the owner to dedicate his land to public use must be clearly and unequivocally shown and must never be presumed.").

88. *See, e.g.*, NEIGHBORSPACE, *IT'S YOUR LITTLE CORNER OF GREEN* (noting few community groups and local businesses can take costly and complicated step of buy-



emption is provided, paying property taxes on garden land can be a major obstacle to ownership for fledgling garden organizations.<sup>89</sup>

For those garden organizations that are interested in ownership, quieting or obtaining title to vacant lots may prove time-consuming and costly. Privately owned vacant lots in urban areas are often encumbered by property tax, utility, and other liens, particularly if there was once a structure on the land. Transferring title to land encumbered with liens is difficult. Even if title is transferred, failure to satisfy these liens may result in insecurity of title and an ultimate loss of control.

### C. Raising Other Resources

Community garden organizations may need legal assistance in obtaining required resources: access to land, water, materials (for example, seeds, water, water hoses, fertilizer, tools, perimeter fencing, storage bins or sheds, vehicles, signs, benches and walkways), and technical expertise on gardening. For example, installing a water connection to a vacant lot may require special approval from the local municipality.<sup>90</sup> To assist community garden organizations in these situations, public agencies such as state university cooperative extension service offices and municipal departments offer educational and technical support.<sup>91</sup> Funding for the gardens has also been provided by

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ing land for gardens) (pamphlet, on file with *New York University Journal of Legislation and Public Policy*); see also, e.g., WARNER, JR., *supra* note 45, at 34 (describing precarious position of smaller fledgling community gardening groups in contrast to municipally-recognized gardening organizations in Boston); William Poole, *Preserving Urban and Suburban Gardens and Parks: The Trust for Public Land and Its Partners*, in *LAND CONSERVATION THROUGH PUBLIC/PRIVATE PARTNERSHIPS* 61, 71 (Eve Endicott ed., 1993) (describing essential assistance provided by Trust for Public Land to small gardening groups in securing properties and "negotiat[ing] long-term leases . . . to purchase and hold parcels").

89. See, e.g., MD. CODE ANN., TAX-PROP. § 9-107 (1999) (providing tax exemption for lands donated to conservation organization under conservation easement). The Community Law Center considered making a legislative proposal to exempt the real and personal property of low-income charitable community organizations with net yearly assets under \$10,000. See Letter from Kristine Dunkerton, Staff Attorney, Community Law Center, Baltimore, Md., to Jane Schukoske, Associate Professor, University of Baltimore 2 (Nov. 22, 1999) (on file with author).

90. See AUSTIN, TEX., CODE OF ORDINANCES § 25-9-99 (1999); see also ARMSTRONG ET AL., *supra* note 59, at A-6 (reporting water line in Baltimore can cost from \$2,000 to \$3,000 to install and requires agreement with land owner). *But see* E-mail from Kristine Dunkerton, Staff Attorney, Community Law Center, to Jane Schukoske, Associate Professor, University of Baltimore School of Law (Mar. 28, 2000) (stating Baltimore City Department of Public Works has waived installation costs and water charges upon showing of garden's public benefit).

91. Extension service programs vary widely. See, e.g., Ohio State University, *Seeds of Hope . . . Harvest of Pride!* (last modified Dec. 30, 1999) <<http://www.bright.net/>

general state revenues,<sup>92</sup> grants,<sup>93</sup> and other creative funding mechanisms.<sup>94</sup>

### III

#### INTERMEDIARIES: CLEARING TITLE AND HOLDING LAND

In an attempt to quiet title and hold land, community gardening groups have sought the assistance of intermediary organizations. The forms of these intermediaries evolve in response to local contexts. The role of land banks, land trusts, and the potential role of a land reserve agency described in the American Law Institute's Model Land Development Code provide some examples of this intermediary function.

The process of clearing title and holding land typically begins by mapping an area, determining ownership of each lot, and researching

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[~gardens/whatis.html](#)> (describing Ohio State University Extension's Urban Gardening Program, which provides leadership training, soil improvement, approved vegetable garden cultural practices, responsible use of pesticides and fertilizers, gardening advice, encouragement of entrepreneurial opportunities, adaptation of gardening activities into classroom curricula, and development of user-friendly educational materials); University of Arizona, *Community Gardening in Maricopa County Arizona* (visited Apr. 4, 2000) <<http://ag.arizona.edu/maricopa/garden/html/comunity/community.htm>> (describing University of Arizona Cooperative Extension Maricopa County Home Horticulture program which provides information on seed sources, sources for organic matter, and technical and educational assistance); WSU Cooperative Extension in Pierce County, *Master Gardener*, WASH. ST. U. (last modified Apr. 28, 1999) <<http://www.pierce.wsu.edu/text/progmg.htm>> (describing Master Gardener program of Washington State University Cooperative Extension in Pierce County, which provides advice on growing plants, insect identification, and managing disease problems). For a discussion of municipal support, see *infra* Part IV.C.

92. See S. 2000, 208th Leg., Reg. Sess. (N.J. 1998) (proposing appropriating New Jersey general revenue funds for Urban Agriculture and Community Gardens Programs in Trenton and Camden).

93. See, e.g., Cooperative State Research, Education, and Extension Service Request for Proposals: Community Food Projects Competitive Grants Program, 64 Fed. Reg. 19,430 (1999) (announcing availability of grant funds for U.S. Department of Agriculture Community Food Projects Competitive Grants Program, which provides funding and technical assistance for community garden projects); CAL. EDUC. CODE § 51795-98 (West 1999) (establishing instructional school gardens program and directing California Integrated Waste Management Board to give program preferential consideration during Board's annual discretionary grant-funding process); ILL. ADMIN. CODE tit. 47, § 120.110 (1999) (determining community garden projects to be example of typical nutrition program, which may be funded under Community Services Block Grant program).

94. See National Landmarks Committee of National Park System Advisory Board Meeting, 2 Fed. Reg. 54,652 (1997) (reporting terms of Consent Decree in case brought under Clean Water Act and Resource, Conservation and Recovery Act, which mandated restoration of community garden).

the tax and other liens on the property.<sup>95</sup> In Atlanta, for example, the Fulton County/City of Atlanta Land Bank Authority has the power to forgive taxes on abandoned, tax-delinquent properties.<sup>96</sup> Of the 1,036 acres of vacant residential land in Atlanta, seventy-five percent is privately owned, and approximately 700 applications for forgiveness of delinquent taxes were filed with the Land Bank Authority.<sup>97</sup> A researcher has explained why an intermediary, distinct from community organizations and governmental entities, is needed to clear title:

[T]he complicated process of determining property ownership (not to mention the expense of purchasing property saddled with back taxes, liens and even unpaid utility bills) poses one of the greatest barriers to reclamation of vacant land. This obstacle *alone* can be enough to prevent communities from taking on the responsibility of managing vacant lots by converting them into open spaces. They may reasonably fear that without proper title and ownership, they may lose the property, and therefore all their hard work rehabilitating it, down the line. The creation of the Land Bank Authority in Atlanta demonstrates in the clearest terms how reducing bureaucracy and red tape associated with the lien release process can have the net result of encouraging housing and commercial redevelopment, as well as the creation of new community managed open spaces.<sup>98</sup>

The problem of cumbersome lien clearance procedures is being examined in many cities including Baltimore<sup>99</sup> and Chicago.<sup>100</sup>

Land trusts, nonprofit corporations established to hold title in perpetuity expressly for community purposes, can play a key role in community garden development.<sup>101</sup> In a number of cities, land trusts

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95. See generally INST. FOR COMMUNITY ECON., THE COMMUNITY LAND TRUST HANDBOOK 148-55 (1982).

96. See FULTON COUNTY/CITY OF ATLANTA, LAND BANK AUTHORITY (pamphlet, on file with *New York University Journal of Legislation and Public Policy*); Ruberton, *supra* note 30, at 16-17.

97. See Ruberton, *supra* note 30, at 16.

98. *Id.* at 18.

99. See William Schockner, Baltimore City Government and the Management of Open Space 7 (1997) (unpublished paper, on file with the Baltimore Urban Resources Initiative, Parks and People Foundation, 1901 Eagle Dr., Baltimore, Md. 21207 (410) 396-0730)).

100. See Cooper, *supra* note 21, at 17-19 (discussing Chicago's CitySpace Plan recommendation to Chicago Tax Reactivation Program, which would facilitate transfer of city-owned lots and tax-delinquent parcels to community groups).

101. See, e.g., INST. FOR COMMUNITY ECON., *supra* note 95, at 18 ("A community land trust is an organization created to hold land for the benefit of a community."); Terry Bremer, *Portrait of Land Trusts*, in LAND-SAVING ACTION 17 (Russell L. Breneman & Sarah M. Bates eds., 1984) (defining "land trust" as "a private, nonprofit entity directly involved in land transactions that protect open space, recreation, and

own and provide liability coverage for community gardens.<sup>102</sup> In addition to owning land, land trusts negotiate conservation easements<sup>103</sup> on privately owned land to use for gardening.<sup>104</sup> This is an expansion of traditional state conservation easements that have been widely used to protect the natural, scenic, and open-space values of property.<sup>105</sup> In

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resource lands.”). Bremer discusses the growth of land trusts in the second half of the twentieth century. See, e.g., *id.* Presently, there are 1,227 local, regional and national land trusts in the U.S. See *Land Trusts: The Front Guards of Land Protection*, LAND TRUST ALLIANCE (visited Nov. 14, 1999) <<http://www.lta.org/whattl.html>> (describing land trusts as nonprofit, voluntary organizations that use conservation easements, land donations and purchases, and strategic estate planning to protect America’s open spaces and green places, which are threatened by sprawl and development); Stephen G. Greene, *Preserving Open Space for the Ages*, CHRON. PHILANTHROPY, July 29, 1999, at 1 (reporting approximately 1,200 land trusts, with total membership close to one million individuals, have protected nearly five million acres of farms, ranches, wetlands, forests, and other open space). For an example of a land trust, see TRUST FOR PUBLIC LAND, LAND AND PEOPLE: GREENING THE CITIES ANNUAL REPORT 1992, at 12 (1992) (describing Trust for Public Land’s protection of 70 urban community gardens in New York City since 1978). The Trust for Public Land is a national land conservation organization founded specifically to save land for public use and appreciation and to assist the development of communities. See also, e.g., Poole, *supra* note 88, at 61. Poole discusses the role the Trust for Public Land played in creating community gardens in Manhattan’s Upper West Side and Boston’s South End; *id.* at 71-72. Additionally, for a discussion of the achievements of a Chicago-based land trust formed in 1996, which has grown to hold interests in 52 park and garden sites by 1998, see NEIGHBORSPACE, 1998 ANNUAL REPORT (1998).

102. See Cooper, *supra* note 21, at 6; NEIGHBORSPACE, *supra* note 88 (stating once NeighborSpace (land trust) owns property, it obtains liability insurance for it).

103. A conservation easement is generally defined as “a nonpossessory interest of a holder in real property imposing limitations or affirmative obligations the purposes of which include retaining or protecting natural, scenic, or open-space values of real property, assuring its availability for agricultural, forest, recreational, or open-space use . . . .” UNIF. CONSERVATION EASEMENT ACT § 1(1), 12 U.L.A. 170 (1996). For further examination of conservation easements, see generally Melissa Waller Baldwin, *Conservation Easements: A Viable Tool for Land Preservation*, 32 LAND & WATER L. REV. 89, 103-20 (1997) (discussing features, advantages, and disadvantages of conservation easements). Baldwin reports that 46 states and the District of Columbia have enacted legislation recognizing conservation easements; additionally, although Pennsylvania lacks legislation, its common law favors conservation easements. See *id.* at 109. Baldwin attributes the popularization of conservation easements as a tool for land preservation to William Whyte. See *id.* at 90 n.5 (citing William Whyte, *Serving Open Space for Urban America: Conservation Easements*, 36 URB. LAND INST. TECHNICAL BUL. 1 (1959)).

104. See Poole, *supra* note 88, at 66-67; Baldwin, *supra* note 103, at 105-06.

105. See, e.g., ALA. CODE §§ 35-18-1 to -6 (Supp. 1999); ARIZ. REV. STAT. ANN. §§ 33-271 to -276 (West 2000); DEL. CODE ANN. tit. 7, §§ 6901-6906 (1991 & Supp. 1998); FLA. STAT. ANN. § 704.06 (West 1988 & Supp. 2000); GA. CODE ANN. §§ 44-10-1 to -5 (1982 & Supp. 1999); IDAHO CODE §§ 55-2101 to -2108 (1994); IND. CODE ANN. §§ 32-5-2.6-1 to -7 (West Supp. 1999); KAN. STAT. ANN. §§ 58-3810 to -3817 (1994); KY. REV. STAT. ANN. §§ 382.800-.860 (Michie Supp. 1998); MD. CODE ANN., REAL PROP. § 2-118 (1996); ME. REV. STAT. ANN. tit. 33, §§ 476-479B (West Supp. 1999); MINN. STAT. ANN. §§ 84C.01-.05 (1995); MISS. CODE ANN. §§ 89-19-1 to -15

exchange for allowing a community garden to be established on their property, landowners may receive income, property, and estate tax benefits.<sup>106</sup>

To secure a conservation easement, a willing grantor is needed. However, in distressed urban neighborhoods property owners have often neglected and abandoned their properties and these owners cannot be located. Under these circumstances, obtaining conservation easements would not be a viable alternative.

A land reserve agency—a state agency that acquires land for the express purpose of implementing the state's long-term land use policies and planning objectives<sup>107</sup>—can serve as another intermediary entity in the public acquisition of lots for gardening. The American Law Institute proposed a model state land reserve agency which would enable state and local governments to hold land for future development.<sup>108</sup> If implemented, land reserves would be another source of public land that could be made available for gardening purposes.

#### IV

#### EXISTING STATE AND LOCAL LEGISLATION ON COMMUNITY GARDENS

Some state and local legislation provides support for the development of community gardens. Nevertheless, the state laws generally focus on narrow governmental interests such as: providing clear authorization of use of public lands;<sup>109</sup> limiting time for gardening use

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(1999); NEV. REV. STAT. §§ 111.390-440 (1999); N.M. STAT. ANN. §§ 47-12-1 to -6 (Michie 1995); N.Y. ENVTL. CONSERV. LAW §§ 49-0301 to -0311 (McKinney 1997); S.C. CODE ANN. §§ 27-8-10 to -80 (Law Co-op Supp. 1999); TEX. NAT. RES. CODE ANN. §§ 183.001-.005 (1993); VA. CODE ANN. §§ 10.1-108 to -114 (Michie 1998); WASH. REV. CODE § 64.04.130 (1994); WIS. STAT. ANN. § 700.40 (1997).

106. See I.R.C. § 170(f)(3)(B)(iii), (h)(1)-(4) (1994). Under federal law governing charitable deductions from income, the donation of a conservation easement may qualify as a deductible gift if it is given to an organization exclusively for conservation purposes. See *id.* § 170(h)(1)(C). The value of the deduction is determined by subtracting the fair market value of the land without the easement from the value of the encumbered property. See Baldwin, *supra* note 103, at 107. Federal estate tax benefit provisions are available for conservation easements as well. See I.R.C. § 2031(c) (Supp. 1997); Brenda J. Brown, *Land Preservation Provides Estate Tax Benefits: Section 2031(c)*, 17 UCLA J. ENVTL. L. & POL'Y 117, 121-23 (1998-1999). Property tax relief is available in some states. See, e.g., MD. CODE ANN. TAX-PROP. § 9-107 (1999) (providing property tax credit for land with perpetual conservation easement).

107. See MODEL LAND DEV. CODE § 6-101 (1976).

108. See *id.*

109. See, e.g., TENN. CODE ANN. § 43-24-103(a) (1999) (stating citizen may use vacant public lands after applying for and receiving permit from commissioner).

by establishing short lease periods;<sup>110</sup> and protecting governments from tort liability for injury during such use.<sup>111</sup> Often this legislation fails to provide for successful interim use of the vacant land. Legislators should realize that community gardening is consistent with social policies such as the promotion of health and welfare, environmental protection, economic development, education, youth employment, and tourism. The promotion of these policies through community gardening requires provisions designed to provide permanence as well as technical and material support. Provisions permitting government officials to summarily close community gardens are inconsistent with the aforementioned social policies.

#### A. *State Statutes Recognizing Community Gardens as a Public Use*

Some state laws recognize community gardens as a permissible public use of state and local land.<sup>112</sup> In states where no express community garden statutes can be found, it is conceivable that general provisions regarding parks and recreation or agriculture may serve as a basis for community garden activity. Some state legislation specifically mentions community gardens within its provisions on food production and agriculture,<sup>113</sup> education,<sup>114</sup> parks and environment,<sup>115</sup>

110. See *supra* notes 75-77 and accompanying text.

111. See, e.g., TENN. CODE ANN. § 43-24-103(d) (stating person granted use of garden land shall indemnify and hold harmless state of Tennessee).

112. See, e.g., N.Y. AGRIC. & MKTS. LAW § 31-i(1) (McKinney 1991).

113. See, e.g., MASS. GEN. LAWS ch. 20, §§ 13-18 (West 1999) (authorizing Bureau of Land Use in Division of Agricultural Development of Department of Food and Agriculture to enter into agreements with applicants for use of public vacant lands for garden, arbor, or farm purposes); MASS. REGS. CODE tit. 330, § 18.02 (1999) (governing acquisition of land by Bureau from other public agencies and private owners by contract and agreement, to be offered to civic groups organized for garden purposes); N.Y. AGRIC. & MKTS. LAW § 31-g(1) (McKinney 1999) (defining "community garden," as "public or private lands upon which citizens of the state have the opportunity to garden on lands which they do not individually own"); see also 20 ILL. COMP. STAT. 3923/1-/99 (West 1997) (repealed 1999) (establishing task force to develop two year community food garden pilot program).

114. See, e.g., CAL. EDUC. CODE § 10901(f) (West 1999) (defining "recreation center" to include recreational community gardens); CAL. EDUC. CODE §§ 51795-51798 (West 1999) (establishing instructional school garden program to be administered by state Department of Education through allocation of grants to school districts and county offices of education).

115. See, e.g., N.Y. COMP. CODES. R. & REGS. tit. 9, § 437.1 (4)(x) & (6)(iii) (1999) (providing community gardens eligibility as municipal park project for state assistance); *id.* § 441.1(c)(2) (declaring community gardens as eligible development projects under Part 441, "Parks Projects").

and social services.<sup>116</sup> In addition to provisions in substantive codes, authorization for use of state and municipal land for community garden programs appears in municipal enabling law,<sup>117</sup> state government codes,<sup>118</sup> and one state's state code.<sup>119</sup> Furthermore, public housing authority laws often define "housing project" to include lands for gardening on the property.<sup>120</sup> One state even recognizes community gar-

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116. *See, e.g.*, WIS. STAT. § 46.765(2) (1998) (authorizing community-based hunger prevention program grants to develop "innovative hunger prevention resources and programs, such as community gardens . . .").

117. *See* N.Y. GEN. MUN. LAW § 96 (McKinney 1999) (authorizing municipality to hold land for community gardening purposes and assist in their development by contributing or providing at cost initial site preparation and materials such as soil, perimeter fencing, storage bins, fertilizer, and municipally produced compost, seeds, and tools).

118. *See* CAL. GOV'T CODE § 12804.5 (West 1999) (authorizing Secretary of State and Consumer Services Agency to develop program of technical and financial assistance for self-help community vegetable gardens); *id.* § 14670 (authorizing Department of General Services to lease state lands for period up to five years to public agency at less than fair market value for use as self-help community vegetable gardens); *id.* § 66477(i) (including "recreational community gardening" within purview of "park and recreational purposes"). In addition, authorization for use of state and municipal land for community gardening programs once appeared in now repealed laws. *See, e.g.*, 20 ILL. COMP. STAT. 3923/5 (West 1997) (repealed 1999); N.Y. EXEC. LAW §§ 848-848-d, repealed by 1986 N.Y. Laws 862, § 3. Many of the substantive provisions of sections 848 through 848(d) have been transferred into New York's Agriculture and Market Laws. *See* N.Y. AGRIC. & MKTS. LAW §§ 31-g to -i (McKinney 1991).

119. *See* CAL. STS. & HIGH. CODE § 104.7(a) (West 1999) (authorizing Department of Transportation to lease unimproved land held for future projects to community gardens).

120. *See, e.g.*, ALA. CODE § 24-1-22(9) (1999) (municipal housing authorities); ALA. CODE § 24-1-61(8) (county housing authorities); ARIZ. REV. STAT. § 36-1401 (West 1999) (municipal housing authorities); ARK. CODE ANN. § 14-169-203 (1997); CAL. HEALTH & SAFETY CODE § 34212(a) (West 1999); COLO. REV. STAT. § 24-55-101 (1998); COLO. REV. STAT. § 29-4-103 (1998) (slum clearance); COLO. REV. STAT. § 29-4-203 (creating housing authorities); COLO. REV. STAT. § 29-4-502 (county housing authority); CONN. GEN. STAT. ANN. § 8-39 (West 1999) (municipal housing authorities); CONN. GEN. STAT. ANN. § 8-113a (West 1999) (housing for elderly persons); IDAHO CODE § 31-4203 (1999) (county housing authority); IDAHO CODE § 50-1903 (1999) (municipal housing authority); KY. REV. STAT. ANN. § 80.010 (Michie 1998) (low cost housing); MD. CODE ANN. § 1-103 (1998); MISS. CODE ANN. § 43-33-1 (1998) (housing authorities); MO. REV. STAT. § 99.020 (1999); MONT. CODE ANN. § 7-15-4402 (1998) (municipal housing authorities); N.H. REV. STAT. ANN. § 203:3 (1999) (housing authorities); N.J. STAT. ANN. § 40A:12A-3 (West 1999) (municipalities and counties); N.M. STAT. ANN. § 3-45-3 (Michie 1999) (municipal housing); N.M. STAT. ANN. § 11-3A-3 (Michie 1999) (regional housing); N.C. GEN. STAT. § 157-3 (1999) (housing authorities); N.D. CENT. CODE § 23-11-01 (1999) (housing authorities); OHIO REV. CODE ANN. § 3735.40 (Anderson 1999) (metropolitan housing authority); OR. REV. STAT. § 456.065 (1997) (housing authorities); PA. STAT. ANN. tit. 35, § 1543 (1999) (housing authorities); P.R. LAWS ANN. tit. 17, § 33 (1996) (housing authorities); R.I. GEN. LAWS § 45-25-3 (1998) (housing authorities); TENN. CODE ANN. § 13-20-102 (1999) (housing authorities); TEX. LOC. GOV'T CODE ANN.

dens as an amenity for purposes of its low-income housing tax credit system.<sup>121</sup> Community gardens appear explicitly in New Jersey's annual appropriations act<sup>122</sup> and in Illinois's community development block grant regulations.<sup>123</sup> They are also acknowledged in exemptions from waste management and pollution control requirements,<sup>124</sup> and from a drought water emergency plan.<sup>125</sup>

### 1. *New York State: Agriculture and Markets Law*

Certain states, such as New York, have adopted some of the basic statutory elements for a successful community gardening program. In 1978, New York incorporated provisions governing community gardens into its Executive Law.<sup>126</sup> New York state law provides for compiling an inventory of vacant lots; permitting the use of public lands for community gardens; and coordinating gardening groups and state and local agencies to facilitate the use of vacant public lands.<sup>127</sup> Implementation of these laws requires the Office of Community Gardens to identify vacant lands;<sup>128</sup> establish a clearinghouse to provide information and referrals to gardeners;<sup>129</sup> and encourage contact between

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§ 392.002 (West 1999) (housing authorities); VT. STAT. ANN. tit. 24, § 4002 (1999) (housing authorities); VA. CODE ANN. § 36-3 (Michie 1999) (housing authorities); WASH. REV. CODE ANN. § 35.82.020 (West 1999); WIS. STAT. § 66.395 (1998) (housing authorities for elderly persons); WIS. STAT. § 66.40 (1998) (housing authorities). The definition has also been adopted in other contexts of housing development. *See, e.g.*, FLA. STAT. ch. 159.603 (2000) ("housing development" for purposes of bond financing); HAW. REV. STAT. § 201G-1 (1999) ("housing project" owned by Housing and Community Development Corporation of Hawaii); IDAHO CODE § 67-6205 (1999) (in Idaho Housing Agency); IND. CODE ANN. § 5-20-3-2 (Michie 1999) (in mutual housing association); N.H. REV. STAT. ANN. § 204-C:1 (1999) (for housing finance authority); PA. STAT. ANN. tit. 35, § 1595.3 (1999) (in national defense housing).

121. *See* N.J. ADMIN. CODE tit. 5, § 5:80-33.16 (Supp. 1999).

122. *See, e.g.*, S. 2000, 208th Leg., Reg. Sess. (N.J. 1998) (proposing New Jersey general revenue funds appropriation for Urban Agriculture and Community Gardens Programs in Trenton and Camden, vetoed by Governor Christine Todd Whitman).

123. *See, e.g.*, ILL. ADMIN. CODE tit. 47, § 120.110 (1999) (including community gardening projects within scope of state-funded nutrition programs).

124. *See, e.g.*, CAL. CODE REGS. tit. 14, § 17855(a)(1) (1999) (exempting community gardens from requirements for composting operations or facilities); ILL. ADMIN. CODE tit. 35, § 830.104 (1994) (exempting community gardens from composting regulations).

125. 4 PA. CODE § 119a.3 (1999) (watering of urban gardens is "nonessential use" of water supply under Philadelphia Drought Water Emergency Plan).

126. *See* N.Y. EXEC. LAW §§ 848-848-d, *repealed by* 1986 N.Y. Laws ch. 862, § 3. Many of the substantive provisions of sections 848 through 848-d have been transferred into New York's Agriculture and Market Laws. *See* N.Y. AGRIC. & MKTS. LAW §§ 31-g to -i (McKinney 1999).

127. *See* N.Y. AGRIC. & MKTS. LAW § 31-h (McKinney 1991).

128. *See id.* § 31-h(2)(a).

129. *See id.* § 31-h(2)(b).



established and nascent community garden programs.<sup>130</sup> The New York legislature has determined that community gardening of vacant land preserves open space; discourages illegal dumping and vandalism; and offers environmental, educational and nutritional benefits.<sup>131</sup> Although the law initially prohibited the sale of produce from community gardens, this limitation was repealed in 1987.<sup>132</sup>

New York's current statutory scheme provides for interagency, intergovernmental, and public or private coordination of community gardens through the state's Office of Community Gardens (OCG).<sup>133</sup> The OCG is a subdivision of the state's Department of Agriculture and is responsible for identifying vacant public lands.<sup>134</sup> The OCG coordinates with other state agencies including the departments of environmental conservation, education, state, and cooperative extension in an effort to create viable community gardens.<sup>135</sup> In practice, the OCG assesses the suitability of vacant public land for community garden

130. *See id.* § 31-h(2)(c).

131. As the relevant law states:

The legislature hereby finds that the publicly owned vacant lands in and around population centers are of great value to the community when properly used. Permanent garden sites are a community asset both as attractive open space and as a source of locally produced food.

Gardening serves as a productive use of vacant lands which otherwise untended often become unsightly and unsafe dumping grounds. Open space given to use as community gardens reduces vandalism, engenders a sense of community involvement and increases surrounding property values. In addition, neighborhood gardening offers environmental, educational, and nutritional benefits to the community.

The legislature further finds that many more people in the state would garden if provided access to land and assisted with necessary technical information. The resulting food production would be a substantial cost savings to low-income families and nutritional benefit to all participants.

It is hereby declared to be the policy of the state to encourage community gardening efforts by providing access to land, offering technical and material assistance to those groups seeking to rehabilitate or better use vacant lands by gardening and other greening practices.

1978 N.Y. Laws 632, § 1. Andrew Stone of the Trust for Public Land does not "believe [this legislation] ever led to much activity—primarily given the reality that so much control over land and related resources for comm [sic] gardening is at the municipal level." E-mail from Andrew Stone, Director of the New York City Program, The Trust for Public Land, New York, N.Y., to Jane Schukoske, Associate Professor, University of Baltimore School of Law (Dec. 6, 1999) (on file with author). Stone served as a member of the Advisory Committee for the New York Office of Community Gardens for several years before the office was disbanded. *See id.*

132. *See* N.Y. EXEC. LAW § 848-c (1978), *repealed by* 1986 N.Y. Laws 862, § 3.

133. *See* N.Y. AGRIC. & MKTS. LAW § 31-h(1).

134. *See id.* § 31-h(2)(A).

135. *See id.* § 31-h(1). The OCG will also coordinate with municipalities in order to carry the state's community garden provisions. *See id.*

purposes; matches the vacant public land to interested community groups; supports and encourages contact between existing garden programs and the new garden program; provides assistance; and seeks funding to the extent it is available.<sup>136</sup>

In New York, “vacant public land” means “any land owned by the state or a public corporation including a municipality that is not in use for a public purpose, is otherwise unoccupied, idle or not being actively utilized for a period of at least six months and is suitable for garden use.”<sup>137</sup> Any state entity “with title to vacant public land may permit community organizations to use such lands for community gardening purposes.”<sup>138</sup> To limit bureaucratic delay, state agencies must respond to an application to use the public land for such purposes within 30 days and make a final determination within 180 days.<sup>139</sup> The law also allows for similar cooperation between the OCG and municipal agencies to identify land resources suitable for gardening.<sup>140</sup> A “municipality” is defined by the code as “any county, town, village, city, school district or other special district.”<sup>141</sup> With or without the assistance of the OCG, the municipality may permit the creation of a community garden on land that it holds outright in fee or through a lease, contract, or agreement with the land owner.<sup>142</sup>

Financial assistance from the government is also permissible under New York’s statutory scheme. Municipal corporations may contribute or provide at cost “initial site preparation, including top soil and grading; water systems; perimeter fencing; storage bins or sheds; and other necessary appurtenances or equipment.”<sup>143</sup> The statute specifically states that loaning tools to the community garden, or the at-cost sale of seeds, municipally-produced compost, and tools are valid municipal purposes.<sup>144</sup>

Community gardeners’ use of public lands is conditioned on meeting certain requirements.<sup>145</sup> Conditions may include acquisition of liability insurance and acceptance of liability for injury or damage resulting from the use of the land for community gardening.<sup>146</sup> Simi-

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136. *See id.* § 31-h(2)(d).

137. *Id.* § 31-g(6).

138. *Id.* § 31-i(1).

139. *See id.* § 31-i(2).

140. *See id.* § 31-h(1) to -h(2); *see also* N.Y. GEN. MUN. LAW § 96(2) (McKinney 1991).

141. N.Y. AGRIC. & MKTS. LAW § 31-g(3).

142. *See* N.Y. GEN. MUN. LAW § 96(1).

143. *Id.* § 96(3).

144. *See id.* § 96(4).

145. *See id.* § 96(1).

146. *See id.*

larly, the gardening organization may be responsible to pay fees to cover the costs of site preparation.<sup>147</sup>

An issue may arise concerning the sale of produce grown in a community garden. New York repealed a provision of the 1978 law that prohibited the sale of such produce, subsequently placing the community gardening provisions into New York's Agriculture and Markets Law.<sup>148</sup> The silence of the current statutory scheme regarding the sale of community garden produce may suggest that it is currently permissible.<sup>149</sup>

## 2. *Tennessee: Agriculture and Horticulture*

The Tennessee Community Gardening Act of 1977 expressly authorizes the creation of community gardens, but does not include provisions that provide technical assistance to gardeners.<sup>150</sup> The Act mandates that any citizen of the state may apply to the commissioner of agriculture for a permit to use available vacant land for the purpose of gardening.<sup>151</sup> However, priority is given to needy individuals and families in allocating the lots.<sup>152</sup> Under Tennessee law, produce grown in community gardens may not be sold.<sup>153</sup>

Like the New York statutory scheme, Tennessee's Community Gardening Act requires the state's commissioner of agriculture to compile lists of vacant public lands suitable for gardening.<sup>154</sup> The state agency is then required to send information concerning vacant public land within their counties to county agents.<sup>155</sup> The counties, cities, municipalities, and other state agencies and departments are then authorized to make vacant public lands available for gardening permits.<sup>156</sup> The statute also provides for contracts between the De-

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147. *See id.*

148. *See* N.Y. EXEC. LAW § 848-c (McKinney 1978) (repealed 1987).

149. *Compare id.* §§ 848-848-d (repealed 1987), *with* N.Y. AGRIC. & MKTS. LAW §§ 31-g to -i (McKinney 1999).

150. *See* TENN. CODE ANN. § 42-24-101 to -107 (1999). The Tennessee Department of Agriculture has not issued regulations under the statute. *See* E-mail from Patricia Clark, Counsel, Tennessee Department of Agriculture, to Jane Schukoske, Associate Professor, University of Baltimore School of Law (Mar. 28, 2000) (on file with author).

151. *See id.* § 43-24-103(a)-(b).

152. *See id.* § 43-24-104(a) (providing priority be given to elderly persons of low income, families of low income, and children between ages of 7 and 16).

153. *See id.* § 43-24-104(b).

154. *See id.* § 43-24-105(a).

155. *See id.* § 43-24-105(b). Certain counties are exempt from the program, apparently as part of a political compromise. *See id.* § 43-24-108 (providing, for example, chapter does not apply to counties with population between 24,000 and 24,300).

156. *See id.* § 43-24-105(c).

partment of Agriculture and private land owners to acquire lands for community gardens.<sup>157</sup> In all cases, the statute provides that the state, its agencies, and its employees are to be indemnified and saved harmless by gardeners and those private land owners who participate in the community gardening program.<sup>158</sup> When a locality or other agency contracts with the commissioner of agriculture to participate in the gardening program, the contract may contain a termination date.<sup>159</sup> If the contract does not contain a termination date, either party may terminate the agreement by providing written notice, as long as the contract does not terminate before the end of the harvest season.<sup>160</sup>

### 3. *Summary: State Law Concerns*

A review of the New York and Tennessee community gardening statutes reveals three key similarities: (1) express grants of permission to use vacant state lands for gardening purposes; (2) creation of a system for tracking vacant lots and their assignment to garden organizations; and (3) protection of the state from liability for personal injury and property damages while the land is being used by the community garden. States may also enable local governments to provide technical and material support to community gardens by recognizing community gardens as a valid public use of the land.<sup>161</sup>

The community gardening laws of both New York and Tennessee acknowledge the significant role that gardens can play in reducing urban blight and strengthening the social fabric. For example, the legislative history of New York's community gardening statute specifically cites the crime-reducing benefits that can be reaped by transforming vacant lots into community gardens.<sup>162</sup> Similarly, Tennessee's statute benefits low-income families, the elderly, and school-age children by giving them priority when allocating garden plots.<sup>163</sup>

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157. *See id.* § 43-24-106.

158. *See id.* §§ 43-24-103(d), -106(b).

159. *See id.* § 43-24-105(d).

160. *See id.*

161. *See, e.g.*, 1986 N.Y. Laws 862 § 1 (finding state should aid citizens "by providing access to land, offering technical and material assistance . . .").

162. *See supra* note 131 and accompanying text.

163. *See* TENN. CODE ANN. § 43-24-104(a) (1999).

*B. District of Columbia: Food Production, Land Reuse, and Science and Vocational Education*

The District of Columbia's statutory scheme for community gardens, authorized under the District's Food and Drugs Code,<sup>164</sup> articulates multiple social policy objectives.<sup>165</sup> The District's law defines "urban gardens" as "any vacant lot used for the growing of food, flowers or greenery."<sup>166</sup> The District of Columbia Comprehensive Plan Act of 1984 called for the establishment of a Food Production and Urban Gardens Program.<sup>167</sup> This program was implemented three years later in 1987.<sup>168</sup> The program provides for maintaining an inventory of vacant lots, listing each lot's location, size, and dates of availability; providing public access to the inventory, including quarterly publication in the District of Columbia Register; and formulating procedures to donate and cultivate vacant lots.<sup>169</sup> Through its comprehensive planning regulations, the District explicitly supports the provision of technical assistance to gardeners and nonprofit community garden organizations.<sup>170</sup>

The District disseminates standard form agreements for use by community gardeners and private owners of vacant lots.<sup>171</sup> These agreements serve to relieve the owners from maintenance and insurance duties<sup>172</sup> by compelling the community gardeners to accept formal responsibility for cultivating and maintaining a garden on the lot.<sup>173</sup> The District is then allowed to include the community gardening projects as one of its youth employment sites.<sup>174</sup> In addition, through the University of the District of Columbia, the District provides technical assistance and research to citizen gardening efforts.<sup>175</sup> In conjunction with the Board of Education, the Food Production and Urban Gardens Program is required to locate suitable garden sites to develop "instructional programs in science and gardening that prepare

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164. See D.C. CODE ANN. § 33-902 (1981) (promoting food production, education, and employment).

165. See *id.*

166. *Id.* § 33-901(2).

167. See *id.* § 33-902.

168. See *id.* § 33-901.

169. See *id.* § 33-902 (1)-(3).

170. See D.C. MUN. REG. tit. 10, § 4-408.2(e)-(f) (1995).

171. See D.C. CODE ANN. § 33-902(3)(A) (1981).

172. See *id.*

173. See *id.*

174. See *id.* § 33-902(3)(B); D.C. MUN. REG. tit. 10, § 4-408.2(e).

175. See D.C. CODE ANN. § 33-902(3)(C).

students for related career opportunities such as restaurant produce supply, landscaping, and floral design.”<sup>176</sup>

Beyond employment and educational goals, the District of Columbia’s code seeks to encourage “food buying clubs and produce markets throughout the District of Columbia to increase the supply of and demand for urban gardens.”<sup>177</sup> Its emphasis on local food production evokes the paradigm of the “new agriculture,” described by Professor Hamilton.<sup>178</sup>

The advantage of the District of Columbia’s statutory scheme lies in its encouragement of cooperation among the District’s cooperative extension offices, schools, nonprofit gardening organizations, employment programs, and produce markets.<sup>179</sup> This cooperation creates an environment that supports the continued existence of community gardens. A weakness of the District’s legislation resides in its lack of specific provisions regarding access to material resources such as land and water.

### C. *Local Ordinances Promoting Community Gardens Programs*

In addition to the District of Columbia code and the two state statutes examined above, some localities have enacted community gardening ordinances to comply with state law and address local circumstances. Local government power to legislate derives from state constitutional provisions, state statutes, and home rule powers.<sup>180</sup> These grants of power vary from state to state.<sup>181</sup> Due to this lack of uniformity, advocates for community gardens must assess the local legal context when proposing legislation.

Codes of many U.S. municipalities use the term “gardens” only in reference to privately owned land, and to a lesser extent, in zoning

176. *Id.* § 33-902(3)(D).

177. *Id.* § 33-902(3)(E).

178. See Hamilton, *supra* note 48, at 9.

179. See D.C. CODE ANN. § 33-902 (1981).

180. See 2 C. DALLAS SANDS ET AL., LOCAL GOVERNMENT LAW § 13.01 (1994). “Home-rule arrangements . . . rest on vague constitutional or statutory language granting powers of ‘local self-government’ to qualifying municipalities.” OSBORNE M. REYNOLDS, JR., HANDBOOK OF LOCAL GOVERNMENT LAW 96 (1982). Such home-rule provides cities the freedom to take action to confront the myriad of problems of contemporary life in contrast to traditional dependence upon the state legislature for enabling legislation. See JEFFERSON B. FORDHAM, LOCAL GOVERNMENT LAW 70-71 (1975). For additional analysis of home-rule powers, see 1 SANDRA M. STEVENSON, ANTIEAU ON LOCAL GOVERNMENT LAW § 21 (2d ed. 1999).

181. See REYNOLDS, *supra* note 180, at 96 (describing home-rule arrangements as varying from state to state and frequently changing).

provisions<sup>182</sup> and trespass statutes.<sup>183</sup> Some municipal ordinances recognize gardens by including them within the definition of the broader term “park,”<sup>184</sup> and community gardening may fall under the jurisdiction of the local parks department as a recreational activity.<sup>185</sup> Depending on a lot’s prior use or location, some municipally owned vacant lots may fall under the jurisdiction of agencies other than the parks department.<sup>186</sup> It would greatly benefit gardeners who seek to use the non-park public land to gain authorization by law or lease agreement.

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182. Zoning provisions regulating gardens fall into three general categories: (1) exceptions from certain requirements because there is no structure on the land, *see, e.g.*, ANNAPOLIS, MD., MUNICIPAL CODE AND CHARTER § 21.02.090 (1990) (excepting lots “used for garden purposes” from side-yard requirement); MADISON, WIS., GEN. ORDINANCES § 28.04 (3)(f) (1995) (making side yard exception); MADISON, WIS., GEN. ORDINANCES § 28.12(5)(a) (1986) (providing exception to requirement of zoning certificate to lots used for garden purposes); *id.* § 28.12(6) (providing exception for land used for garden purposes to requirement of certificate of occupancy); MINNEAPOLIS, MINN. CODE OF ORDINANCES §§ 535.240, 546.30 <[http://www.municode.com/CGI-BIN/om\\_isapi.dll?infobase=11490.NFO&softpage=Browse\\_Frame\\_Pg42](http://www.municode.com/CGI-BIN/om_isapi.dll?infobase=11490.NFO&softpage=Browse_Frame_Pg42)> (making side yard exemption); (2) provisions for gardening as a permitted or accessory use of the land, *see, e.g.*, ANCHORAGE, ALASKA, MUNICIPAL CHARTER CODE §§ 21.40.030-.100 (1996) (permitting non-commercial gardens as accessory uses and structures in residential zoning districts); (3) requirements of special use permits for garden activity in a residential district, *see, e.g.*, ATLANTA, GA., CODE OF ORDINANCES § 16-03.005(1)(d) (1995) (requiring special use permits for, inter alia, garden clubs in single-family residential districts); and (4) open space requirements, *see, e.g.*, LOS ANGELES, CAL., MUNICIPAL CODE, GENERAL PROVISIONS AND ZONING § 12.08.5(5) (1996) (including garden area as example of usable open space).

183. *See* DENVER, COLO., REV. MUN. CODE § 38-72 (1982) (making it unlawful for any person, except persons empowered with police authority acting within performance of their duties, to trespass upon “any garden or field of growing crops.”).

184. *See* ONTARIO, CAL., CODE OF ORDINANCES § 10-1.01(f) (1981) (defining “park” [to] mean and include all parks, median parkways, *gardens*, lakes, plazas, totlots, trails, and other property owned by the City, including park facilities and structures thereon, and used, operated, or maintained for recreational purposes, whether active or passive.”) (emphasis added).

185. *See, e.g.*, AUSTIN, TEX., CODE OF ORDINANCES § 11-4-1 (1999) (establishing that Parks & Recreation Department is responsible for qualifying community gardens); HARTFORD, CONN., MUNICIPAL CODE § 26-15 (1977) (empowering parks and recreation advisory commission to develop and administer Municipal Garden Program); PORTLAND, OR., CODE OF THE CITY OF PORTLAND, OREGON §§ 20.04.010–020 (1999) (stating that Council of Parks and Recreation is responsible for general management of all parks, squares, openings, and public grounds surrounding public buildings).

186. *See* McManus & Steer, *supra* note 45, at 5 (noting ownership and responsibility for care of publicly owned vacant lots in Baltimore is distributed among 31 city agencies).

### 1. Community Gardens Must Serve a Public Purpose

Localities supporting community garden development should identify the public purposes of the gardens that warrant support. Generally, a locality's "power to acquire and hold property, including the power to determine its use, is restricted to public purposes."<sup>187</sup> Courts defer to the local legislature's determination that a named purpose falls within the definition of a public good.<sup>188</sup> By stating the gardens' public purposes, ordinances promoting community gardens clarify what distinguishes them from for-profit agricultural production.

Some localities explicitly declare community gardening a legitimate use of public resources.<sup>189</sup> Like the District of Columbia's statute, some local ordinances direct municipal bodies to maintain inventories of vacant public lands, to manage garden lot assignments, and to regulate use of the gardens.<sup>190</sup> Local law usually contains a requirement that community gardens hold the city harmless in the event of injury, and may also contain provisions authorizing the imposition of user fees.<sup>191</sup>

The role that the gardens play as an expression of neighborhood character, as a tool in crime prevention, and as an urban open space, benefits the public beyond any individual aggrandizement. Localities may determine that community gardens constitute a public use as either urban revitalization<sup>192</sup> or as parks and recreation.<sup>193</sup> Similarly, courts have held that a lease, granted to a private party and yielding a legitimate public benefit, constitutes a valid public purpose.<sup>194</sup> Addi-

187. SANDS, *supra* note 180, § 21.03.

188. *See id.*; Michael Simon, *The Supreme Court's 1987 "Takings" Triad: An Old Hat in a New Box or a Revolution in Takings Law?*, 1 U. FLA. J.L. & PUB. POL'Y 103, 113 (citing *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 125 (1978)) ("[T]he Court emphasized the deference courts give to land use regulations that promote the public health, safety, morals, or general welfare.").

189. *See, e.g.*, HARTFORD, CONN., MUN. CODE § 26-15(a) (1999) (empowering parks and recreation advisory commission to develop and administer municipal garden program on publicly owned lots). *See also, e.g., infra* Parts IV.C.2, IV.C.4, IV.C.5.

190. *See, e.g.*, HARTFORD, CONN., MUN. CODE § 26-15(a) (1999); *see also, e.g.*, D.C. CODE ANN. § 33-902 (1981) (providing for collection and maintenance of up-to-date and comprehensive inventory of vacant lots).

191. *See* HARTFORD, CONN., MUN. CODE § 26-15(c)-(d) (1999).

192. *See generally*, STEVENSON, *supra* note 180, § 24.12[8] (1999) ("The taking of land for slum clearance and urban redevelopment is uniformly held to be a taking for a public use.") (citations omitted).

193. *See* SANDS, *supra* note 180, § 14.33 (categorizing amusements and recreations as public activities which may be regulated).

194. *See* *Murphy v. Erie County*, 268 N.E.2d 771, 774 (N.Y. 1971) (holding lease of stadium to private corporation did not create private use, because local residents would still benefit from facility regardless of who operated it), *cited in* STEVENSON, *supra* note 180, § 24-12[6] n.7 (1999).



tional bases for legitimization of community gardens will likely emerge as localities expand community participation in their open space planning and development approval processes.

## 2. *Portland, Oregon: Parks and Open Space*

The Planning and Zoning Code of Portland, Oregon specifically recognizes community gardens within its definition of "Parks and Open Areas."<sup>195</sup> The city of Portland directed:

[T]he City through the Bureau of Parks will coordinate the project by finding and making available the vacant property and will assign participants to such property for the purpose of gardening; that an agreement should be entered into between the property owner and the participant to regulate the use of the property and provide conditions in connection therewith and to hold harmless the city and the property owner from any damage or claims because of use of such property for the gardening project purposes . . . .<sup>196</sup>

This ordinance authorizes both the Superintendent of the Bureau of Parks and the Assistant Superintendent of the Bureau of Parks to enter into agreements with public or private property owners and participants in the Community Gardens Project.<sup>197</sup> In addition, the City Council has drafted a form agreement for the parties to use.<sup>198</sup>

Currently, Portland's Parks & Recreation Community Gardens Program supports twenty-three gardens located throughout the city.<sup>199</sup> The program encourages gardening as well as food production and intergenerational activities.<sup>200</sup>

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195. See PORTLAND, OR., CODE OF THE CITY OF PORTLAND, OREGON § 33.920.460 (1998) (identifying "Parks and Open Areas" as "uses of land focusing on natural areas, large areas consisting mostly of vegetative landscaping or outdoor recreation, community gardens or public squares" and providing "botanical gardens" as example).

196. Portland, Or., Ordinance No. 139598 (Mar. 13, 1975).

197. See *id.*

198. See *id.*

199. See PORTLAND PARKS & RECREATION, PORTLAND COMMUNITY GARDENS: PROVIDING GARDEN SPACE AND EDUCATIONAL EVENTS WITHIN PORTLAND'S NEIGHBORHOODS (1999) (pamphlet, on file with the *New York University Journal of Legislation and Public Policy*).

200. See *id.* (including "Produce for People[:] A program to coordinate donations of excess produce from community gardens to local food agencies" and "Children's Gardening Program[:] An in-school and after-school program").

### 3. *Austin, Texas: Parks and Recreation*

The city of Austin, Texas regulates community gardens under its Parks and Recreation Code.<sup>201</sup> In 1998, Austin Community Gardens, a nonprofit organization that receives city grants, focused on acquiring leases to state-owned land, land held by the city real estate division, and land belonging to private owners.<sup>202</sup>

The city of Austin has recognized community gardening as a proper “civic use.”<sup>203</sup> A “qualified community garden” is defined as “a parcel of land used as a cooperative garden . . . by a group of people associated with an organization which meets the qualifications of this section.”<sup>204</sup> The city exempts qualified community gardens from platting requirements<sup>205</sup> and impact fees,<sup>206</sup> and authorizes the issuance of temporary water tap permits for garden use.<sup>207</sup> To qualify, a garden group must demonstrate to the Parks and Recreation Department (1) that it is incorporated in Texas; (2) that it has obtained recognition of tax-exempt status under section 501(c)(3) of the Internal Revenue Code; (3) “that the nonprofit organization’s purpose includes agriculture, gardening, and/or economic development;” and (4) that it has operated for at least a year and “has a history with community gardening,” or that it is sponsored by a recognized community gardening organization.<sup>208</sup> The ordinance further requires proof that the group is organized, that a plan exists for the garden (including a garden manager and membership to implement the plan), and that at least four unrelated individuals or families will garden the tract.<sup>209</sup> In addition, the organization must prove that no habitable or permanent structures are located on the lot.<sup>210</sup> Finally, the garden must either be located within a target area for the Community Development Block

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201. See AUSTIN, TEX., CODE OF ORDINANCES, § 11-4-1 (1999).

202. See Kirschbaum, *supra* note 53, at 11. Austin Community Gardens (ACG) leased a six-acre site with 330 plots and a 7,500-square-foot food bank garden—both on state owned land at the Texas School of the Blind and Visually Impaired. See *id.* Additionally, ACG leased 14 one- or two-lot sites from the city real estate division and private owners. See *id.*

203. AUSTIN, TEX., CODE OF ORDINANCES § 25-2-6(A) (1999) (defining “civic use” as use with public purpose, including “the performance of utility, educational, recreational, cultural, medical, protective, and governmental functions, and other uses that are strongly vested with public or social importance”); see *id.* § 25-2-6(B)(39) (including qualified community gardens as “civic use”).

204. *Id.* § 11-4-1(A).

205. See *id.* § 25-4-3(A).

206. See *id.* § 25-9-346(A).

207. See *id.* § 25-9-99(B).

208. See *id.* § 11-4-1(A)(1)(a), (b), (e), (f).

209. See *id.* § 11-4-1(A)(1)(c), (g).

210. See *id.* § 11-4-1(A)(1)(d).

Grant Programs designated by the City Council or be within a census tract in which at least fifty-one percent of the families are below the federal poverty level.<sup>211</sup>

Documentation demands are considerable under the ordinance. The applicant must provide census tract data to demonstrate that the location is eligible—if census tract data is the basis for location eligibility.<sup>212</sup> The applicant must also file (1) articles of incorporation; (2) bylaws; (3) a letter of recognition of the organization's nonprofit status from the Internal Revenue Service; (4) a twelve month lease with the property owner, if applicable; (5) financial documents; (6) a garden plan (including a map, hours of garden operation, membership fees and other requirements); (7) the name and contact information for the garden manager; and (8) the names and addresses of at least four additional gardeners.<sup>213</sup>

The ordinance demands a relatively high level of formal organization by the gardeners. The incorporation requirement provides a way to hold the organization accountable, thereby accounting for the transience of active membership that is common among such associations. However, the requirement of formal recognition of federal nonprofit status may unnecessarily exclude some garden groups from the benefits of the program, because—as noted earlier—a charitable organization may qualify for federal tax exemption without filing for recognition if the annual revenue of the organization is less than \$5,000.<sup>214</sup> A group solely involved in community gardening may not meet this threshold income level, and would therefore be unable to show documentation from the Internal Revenue Service under the express provisions of the Austin ordinance.

#### 4. *New York, New York: Parks*

New York City's volatile real estate market exacerbates the problem of permanence for community gardens. The city has promoted community gardens through the Parks Department's GreenThumb

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211. *See id.* § 11-4-1(A)(1)(h).

212. *See id.*

213. *See id.* § 11-4-1(A)(2)(a)–(g).

214. *See* INTERNAL REVENUE SERVICE, U.S. DEP'T OF TREASURY, PUB. NO. 557, TAX EXEMPT STATUS FOR YOUR ORGANIZATION 5735 (1999) (stating that some organizations are not required to file for recognition of exemption, but are automatically exempt, including organizations which normally have annual gross receipts of not more than \$5,000 according to gross receipts test). The gross receipts test uses an averaging approach, so that in its first year of operation a charitable organization may have up to \$7,500, in its first two years a total of up to \$12,000, and in its first three years a total of up to \$15,000. *See id.*

program<sup>215</sup> as a way of “involving local communities in neighborhood beautification efforts utilizing abandoned mostly city-owned vacant lots” that were often “garbage-filled, rat-infested eyesores which were a blight upon the communities in which they were located.”<sup>216</sup> In 1998, for example, GreenThumb licensed 1000 properties to 700 community groups throughout New York City.<sup>217</sup> GreenThumb also provides lumber, tools, materials for fencing, picnic tables, plants, seeds, and bulbs to various community gardens.<sup>218</sup>

In 1997, disputes arose between community gardeners and the city, when the “immediate redevelopment of fifty gardens and eventual redevelopment of three hundred additional gardens”<sup>219</sup> was scheduled. In response, New York City Green, a coalition of nine New York open space organizations, was formed to urge the city to consider the value of open space when making development decisions.<sup>220</sup> Further support for the effort to protect the gardens came from legislation introduced by State Sen. John Sampson in the Spring of 1997.<sup>221</sup> However, in April of 1998, Mayor Rudolph W. Giuliani transferred the lots from the Parks Department to the Department of Housing Preservation and Development and revoked all GreenThumb garden leases.<sup>222</sup> The Department of Housing Preservation and Development announced a plan to auction a number of the GreenThumb garden lots to housing developers.<sup>223</sup>

Seeking to halt the auction of 1,100 garden lots, the New York City Environmental Justice Alliance filed a motion for a preliminary

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215. GreenThumb is the New York City Community gardening program sponsored by the Department of Parks and Recreation. See Department of Parks and Recreation, *Helping to Care for Your Local Park*, CITY OF NEW YORK (last modified Feb. 12, 1998) <<http://www.ci.nyc.ny.us/html/serdir/html/xdpr07.html>>. The importance of the program has been recognized in proposed legislation. See New York City Council Res. No. 631 (1999).

216. New York City Council Res. No. 631 (calling for New York State Legislature to amend New York City Charter regarding disposition of real property owned by City which is occupied or used by nonprofit entities as part of community garden program); see also Department of Housing Preservation & Development, *GreenThumb Program*, CITY OF NEW YORK (last modified Nov. 1, 1999) <<http://www.ci.nyc.ny.us/html/hpd/html/tenant/green-thumb.html>>.

217. See Cooper, *supra* note 21, at 25.

218. See *id.*

219. Kristi Cameron, *Community Gardens: New York City's Land Wars* (last visited Mar. 7, 2000) <<http://pages.nyu.edu/~kc370/cghome/cgtimeline.htm>>.

220. See *id.*

221. See S. 2127, 223d Leg., Reg. Sess. (N.Y. 1999); see also Cameron, *supra* note 219.

222. See Kass & McCarroll, *supra* note 40, at 3; Cameron, *supra* note 219.

223. See Kass & McCarroll, *supra* note 40, at 3; Cameron, *supra* note 219.

injunction in federal court.<sup>224</sup> The plaintiffs argued that the sale or destruction of the community gardens would have a disparate impact on blacks and Hispanics in violation of both Title VI of the Civil Rights Act of 1964, and the regulations promulgated by the Environmental Protection Agency (EPA) to implement Title VI.<sup>225</sup> The court held that the plaintiffs could not succeed on their Title VI claim because they failed to raise allegations of intentional discrimination.<sup>226</sup> The court also held that the EPA regulations did not provide a right of private action.<sup>227</sup>

In addition, the plaintiffs raised claims that the city violated the Housing and Community Development Act,<sup>228</sup> the State Environmental Quality Review Act (SEQRA),<sup>229</sup> the New York City Administrative Procedures Act,<sup>230</sup> and the plaintiffs' First Amendment rights.<sup>231</sup> The court determined that the plaintiffs failed to demonstrate the likelihood of success on the merits of each of these claims,<sup>232</sup> and the injunction was denied.<sup>233</sup> A significant part of this controversy became moot when celebrity Bette Midler's New York Restoration Project and the Trust for Public Land purchased the gardens and set forth

224. See *New York City Env'tl. Justice Alliance v. Giuliani*, 50 F. Supp. 2d 250, 251 (S.D.N.Y. 1999); David M. Herszenhorn, *Two More Suits Seek to Stop Sale of Gardens*, N.Y. TIMES, May 8, 1999, at B3.

225. See *New York City Env'tl. Justice Alliance*, 50 F. Supp. 2d at 252-53. Section 601 of Title VI provides that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program receiving Federal financial assistance." 42 U.S.C. § 2000d. The Environmental Protection Agency's regulations state "[a] recipient shall not use criteria or methods of administering its program which have the effect of subjecting individuals to discrimination because of their race, color, national origin, or sex." 40 C.F.R. § 7.35(b).

226. See *New York City Env'tl. Justice Alliance*, 50 F. Supp. 2d at 253 (citing *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582, 610-12 (1983)).

227. See *id.* at 253.

228. See *id.* at 254.

229. See *id.* at 254-55. "[T]he primary purpose of SEQRA . . . is 'to inject environmental considerations directly into government decision making.'" *New York City Coalition for Preservation of Gardens v. Giuliani*, 670 N.Y.S.2d 654, 660 (Sup. Ct. 1997) (citations omitted).

230. See *New York City Env'tl. Justice Alliance*, 50 F. Supp. 2d at 255 (arguing city changed policy without having gone through proper rule-making procedures).

231. See *id.* at 254 (arguing city decided to sell garden lots in retaliation for earlier protests).

232. See *id.* 253-55. In particular, the court determined that plaintiffs lacked standing to bring the SEQRA claim because "'without a license to property or with only a license revocable at will, one lacks a legally cognizable interest upon which to base standing to complain of decisions affecting that property.'" *Id.* at 254 (quoting *New York Coalition for the Preservation of Gardens*, 670 N.Y.S.2d at 659). The standing issue will continue to plague gardening groups seeking court protection.

233. See *New York City Env'tl. Justice Alliance*, 50 F. Supp. 2d at 255.

plans to convey them to community gardeners.<sup>234</sup> However, not all community gardens in New York City shared this auspicious fate.<sup>235</sup>

The claims advanced in *New York City Environmental Justice Alliance v. Giuliani* illustrate an opportunity to challenge the historical pattern of racial and ethnic discrimination that has produced an unequal distribution of public resources. Moreover, the struggle of community gardeners in New York City highlights the need for increased community involvement in land use planning and environmental decisions. Participation by citizens of low-income communities in the decision to allocate environmental resources is essential to ensure fairness. The New York City litigation demonstrates the need for a balancing of social objectives (such as community gardening, affordable housing, and safety) and economic interests in the making of land use decisions. Legislative proposals in New York reflect the need to both accord community gardeners a voice in the process, and to value the contribution of community gardens.<sup>236</sup>

##### 5. *Seattle, Washington: Neighborhood Open Space*

Seattle's "P-Patch" Community Gardening Program, founded as a volunteer effort and adopted by the city in 1973,<sup>237</sup> serves as a model for programs seeking to address open space needs. The city first purchased land for its community gardens program in 1975.<sup>238</sup> In 1992, the Seattle City Council and the Mayor resolved to expand opportunities for community gardening, recommending that the gardens

234. See Rose Harvey, *New York's Community Gardens: The Next Challenge*, ON THE LAND, Summer 1999, at 2. Midler's organization purchased 51 of the lots, and provided one million dollars toward the Trust for Public Land's purchase of the remaining 112 lots. See Dan Barry, *Sudden Deal Saves Gardens Set for Auction: Bette Midler Clears Way for Purchase of 112 Lots*, N.Y. TIMES, May 13, 1999, at B1.

235. See *Crowd Storms Former Garden to Protest Bulldozing by City*, N.Y. TIMES, Mar. 6, 2000, at B3; *Death of a Garden*, N.Y. TIMES, Feb. 17, 2000, at A28 (recounting bulldozing of 22-year old Esperanza Community Garden in lower Manhattan); Clyde Haberman, *Program Lets 2nd Chances Begin to Grow*, N.Y. TIMES, Nov. 19, 1999, at B1 (noting approximately 450 other community gardens were still vulnerable to city auction); *200 Demand Garden's Return from Lower East Side Builder*, N.Y. TIMES, Feb. 22, 2000, at B5 (reporting 200-person protest on site of former Esperanza Garden demanding its return from developer).

236. See S. 2127, 223d Leg., Reg. Sess. (N.Y. 1999) (proposing community gardens not be sold without consent of community board).

237. See Kirschbaum, *supra* note 53, at 18 (noting "P" in "P-Patch" comes from Picardo family whose truck farm became Seattle's first community garden).

238. See City of Seattle, Wash., Ordinance 104475 (1975), which authorizes negotiation by the Superintendent of Parks and Recreation for the purchase of land for use as community gardens for up to \$78,000 from the Emergency Fund.

be part of the city's comprehensive plan.<sup>239</sup> To accomplish this goal, the city sought to encourage inter-agency and inter-governmental cooperation among the school district, the housing authority, and various city departments (including parks, engineering, water, electricity, and transportation).<sup>240</sup> The resolution recommended that the P-Patch Program target "low income families and individuals, youth, the elderly, physically challenged and other special populations" because of its inherent "economic, environmental and social value."<sup>241</sup>

The Seattle ordinances, which implement the aims of the 1992 resolution, govern the city's open space policies and expressly include provisions for community gardens.<sup>242</sup> The P-Patch program is included as a priority in the Acquisition and Development and the Environmental Education sections of the city of Seattle Parks Department Comprehensive Plan.<sup>243</sup> Seattle's Comprehensive Plan currently calls for "one dedicated community garden for each 2,500 households in the Village with at least one dedicated garden site."<sup>244</sup>

Two circumstances surrounding the P-Patch program warrant special attention because they signal the recognition of community gardening as a legitimate community-building activity. First, the community garden program was removed from the Department of Housing and Human Services and reassigned to the Department of Neighborhoods in 1997.<sup>245</sup> P-Patch Program staff have indicated that the transfer of the program into a department that focuses on strengthening communities has yielded great benefits.<sup>246</sup> Second, the Director of the Department of Neighborhoods is authorized to lease land to the P-Patch Program for up to five years, renewable, and subject to an an-

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239. See Seattle, Wash., Res. No. 28610 (1992) (recommending any ordinance relating to P-Patch "be strengthened to encourage, preserve and protect community gardening, particularly medium and high density residential areas.").

240. See *id.*

241. *Id.*

242. See SEATTLE, WASH., PUBLISHED ORDINANCES § 23.12.105 (1999) (intending to "maintain, improve and protect the existing open space system, so that future generations can appreciate and enjoy the city's outstanding natural features . . . . Seattle's open space system shall also be used to provide light and air, buffer residential areas from incompatible uses . . . ."). Community gardens are listed among the open space tools and strategies. See *id.* (including community gardens under category of street parks and indicating that undeveloped street rights-of-way provide community garden opportunities).

243. See TOWARDS A SUSTAINABLE SEATTLE, *supra* note 56, at 1994-2014, at L-152.

244. *Id.* at G-74.

245. See Seattle, Wash., Ordinance 118546 (1997).

246. See Letter from Richard Macdonald, Program Manager, P-Patch Program, Seattle, Wash., to Jane Schukoske, Associate Professor, University of Baltimore School of Law (Oct. 11, 1999) (on file with author) (explaining Seattle Ordinance 104475 (1975)).

nual cap of \$2,000.<sup>247</sup> The five year renewable lease of public lands both affords a substantial period of time for the planning and implementation of garden programs, and grants gardeners some security of tenure.

#### 6. *Summary: Local Ordinances and a Model Proposal*

This survey of local ordinances illustrates many of the benefits of community gardening, including community-building, food production, open space maintenance, recreation, education, and job development. Approaches to promoting community gardens vary from significant governmental support in Seattle to strictly nonprofit organizational support in Austin. Lease commitments given to community gardens also vary widely—from ninety days to several years. With these variations in mind, what features should be included in a model ordinance?

In crafting ordinances, localities must consider many circumstances, such as (1) the number, size and location of vacant lots; (2) the climate; (3) gardeners' interests in food production and marketing; (4) the real estate market; (5) the level of potential interest among gardeners; (6) the local legal context;<sup>248</sup> and (7) the nonprofit and private sector entities that exist or can be created to meet local needs. Moreover, the model adopted by a locality should be practical and suited to meet the particular needs of the host community.<sup>249</sup> In older cities, community garden ordinances may be part of a larger city re-

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247. See SEATTLE, WASH., PUBLISHED ORDINANCES § 3.35.080 (1997) (authorizing city agency to enter into leases, easements, and other agreements for community gardens or other open space use). Additionally, the Director of the Department of Neighborhoods is authorized to grant revocable permits for P-Patch garden plots and to collect fees for their use. See *id.* § 3.35.060. The legislated fee schedule requires a payment of \$21 per year for a 10 foot by 10 foot plot, \$34 per year for a 10 foot by 20 foot plot, and \$53 per year for a 10 foot by 40 foot plot. See *id.* The Director can grant fee adjustments for irregular lot sizes and for lot use that is less than the full growing season. See *id.* The ordinance provides for fee adjustments every two years according to changes in the federal consumer price index. See *id.* Moreover, the code permits a flat fee of \$5 per year for participants from households with income under the federal poverty level. See *id.*

248. Specifically, localities should first look into whether there is existing, pending, or potential state legislation on community gardens and whether there are local requirements, such as platting and impact fees that could stand as obstacles to community garden establishment. See, e.g., discussion of Austin, Tex., *supra* notes 201-13 and accompanying text.

249. For example, a number of community gardens in Detroit have set up "grannie porches," decks on which the elderly may choose to sit and watch gardening activity when they are not gardening themselves, to accommodate the community's elderly population. See Ruberton, *supra* note 30, at 28-29 (quoting Jim Stone, *Gardening Angels*, in *IN CONTEXT* 42 (1995)).



structuring effort designed to facilitate the return of abandoned, tax-delinquent property to “productive use.”<sup>250</sup> In other cities, where abandoned, tax-delinquent land is less of a problem, community garden programs and legislation can advance other social goals. For example, a school can use a local community garden for educational purposes.<sup>251</sup>

The following is a proposed model for local governments seeking to implement community garden programs. The elements have been extracted from common community garden ordinances throughout the United States and from the “best practices” in successful local programs:

(1) Assign the duty of inventorying vacant public lots and vacant private lots in low-income neighborhoods, and the duty to make that information readily accessible to the public;

(2) Authorize contracting with private landowners for lease of vacant lots;

(3) Authorize the use of municipal land for minimum terms long enough to elicit commitment by gardeners, such as five years; and provide for the possibility of permanent dedication to the parks department after five years’ continuous use as a community garden;

(4) Provide for inter-agency coordination of resources to facilitate creation and operation of community gardens;

(5) Provide for the clearing of rubble and contamination where needed, and for regular trash collection;

(6) Prepare land for gardening by tilling and building raised beds, configuring some gardens for access by disabled gardeners;

(7) Provide for access to water without charge to gardeners, where possible;

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250. See Ruberton, *supra* note 30, at 16 (describing role Fulton County/City of Atlanta Land Bank Authority plays clearing liens from abandoned properties put to open space use); see also BALTIMORE, MD., CODE § 21-16 (1980) (authorizing city to file Petition for Immediate Taking, which vests Mayor and City Council with possession and title 10 days after personal service of petition on all defendants); URBAN VACANT LAND, *supra* note 7, at 22 (describing Philadelphia’s program facilitating transfer of vacant lots to adjacent property owners as side yards for low price).

251. See, e.g., CAL. EDUC. CODE §§ 51795-51798 (2000) (establishing Instructional School Gardens Program and directing California Integrated Waste Management Board to give program preferential consideration during its annual discretionary funding process); see generally Pamela R. Kirschbaum, *Gardening in the Schoolyard*, COMMUNITY GREENING REV., 1999, at 2 (describing state and local school gardening programs such as California’s “A Garden in Every School” and Brooklyn Botanical Garden’s “GreenBridge” and citing studies reporting positive impact of gardening programs on education).

(8) Provide compost from the locality's recycling programs, if available;

(9) Provide tools, hoses, and secure storage facilities for tools and other necessary items;

(10) Tap resources for training about gardening, including organic methods or pesticide use, and consulting about particular garden problems;

(11) Provide technical assistance to support programs with youth, elderly, disabled, low-income, and other populations depending on neighborhood needs and interests;

(12) Provide signage, if requested;

(13) Network with farmers' markets, entrepreneurship programs, vocational education, and organizational leadership programs;

(14) Provide for liability insurance against personal injury;

(15) Permit sale of excess produce by charitable organizations;

(16) Provide trash collection service;

(17) Provide maintenance for adjacent park property;

(18) Provide favorable tax treatment for loan of private land for garden use;

(19) Identify sources of program materials (for teachers, youth and senior counselors, etc.); and

(20) Provide a funding mechanism to cover the locality's costs in establishing a computer database and mapping program, property acquisition and maintenance, and technical assistance.

#### CONCLUSION

This article has addressed the beneficial influence that gardens can have in curbing the problems associated with vacant lots and urban blight. It has also highlighted the other social benefits that can be reaped from establishing a community garden. Further, this article has examined the state and local laws that govern community gardens as well as the role of intermediary organizations such as land trusts. By extracting those factors which have made garden programs successful in communities throughout the country, this article has set forth the elements of a model local ordinance.

Community garden legislation has heretofore received little attention in legal literature. In view of the fact that community gardening is widespread in cities across the United States, it behooves localities to enact thoughtful legislation which balances the multiple concerns of community residents, local government, and private developers.