

CODE ENFORCEMENT

Poultry on the Patio: Coexisting with Urban Agriculture

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Cities and towns need certain elements to thrive, such as water, climate and transportation. But anthropologists tell us that farms have had also much to do with allowing greater concentrations of people and more vibrant business centers. Removing the need for each individual or family to "grow their own" allows land area in towns and cities to develop and be used for residences and businesses. And the concentrated work of farmers, which isn't an easy life by any stretch of the imagination, allows the rest of us to live and focus on our careers.

Increasingly, however, cities and agriculture are interacting anew. While some communities have long encouraged community gardens, such as the cities of Toronto, Montreal and Vancouver in Canada, as well as Cleveland, Detroit and others in the United States, one of the most trendy new zoning developments is related to allowing urban farming or urban agriculture. Most consider that the urban farming movement started from the fact that many of us are focusing on organic options, with a special emphasis on fresh, locally grown foods. Today, we increasingly want to know where that food comes from and how it is grown, raised and prepared. That means we want to know what livestock is fed and how it's treated, and what treatments and sprays are given to crops. And the best way to assure how livestock and crops are growth is to grow it yourself!

Yet, we know that even as a "hot" topic, agricultural uses can pose conflicts with residential areas. The United Nations Food and Agriculture Organization's 2001 report, "Livestock Keeping in Urban Areas," notes that such urban agriculture can create a host of problems, including smell, risk of disease, waterway pollution and conflicts between neighbors when animals escape their fenced areas. Similarly, raising crops can create a separate set of conflicts – including noise from threshing machines, smell and dust from fertilizers, and waterway pollution concerns as well.

As farms have developed into suburbs and urban areas, these concerns have indeed led to conflict between the new residences and farms which were already in place. Indeed, all 50 states have enacted some version of a "Right to Farm" Act, which in general terms protects farmers from nuisance complaints from nearby residents. Some, such as in Wyoming and Michigan, provide that a farm or ranch operation confirming to generally accepted agricultural principles (also known as "GAAMPS") and which was in place first, before residential development took place, simply cannot be found to create a public or private nuisance through its agricultural operations. See WYO. STAT. ANN. §11-44-103(a); MICH. COMP. LAWS §286.473, Sec. 3(1). Others, such as Nevada, establish a rebuttable presumption favoring the farm operation, establishing that farming following "good agricultural practice," meaning it violates no federal, state or local law, does not constitute a nuisance unless public health or safety is impacted. See NEV. REV. STAT. §40.140.2.

It's clear that the intent and effect of many Right to Farm laws is to protect pre-existing farming operations by pre-empting the ability of local government to enforce their own nuisance laws. Thus, the traditional "right to farm" effort limits or entirely abrogates the local ability to restrict agricultural uses. But the thrust of urban agriculture has not been pre-emption. Instead, the urban farming effort has led to the creation of local zoning laws to accommodate both agriculture and residential uses, largely by putting a series of limitations in place under which some agricultural activities are permitted, even in residential areas.

As Right to Farm laws show, there is a potential conflict between agricultural uses and the quiet enjoyment of adjoining residential property. Such a conflict may be easy to expect when homes adjoin a large farm. But conflicts can also happen for urban farming on a small scale, even as the trend is to allow elements of urban farming. The magazine "Modern Farmer" focuses on the urban farming trend, and in its January 19, 2015 issue reported that those persons trying urban farming without careful review of local laws may "find out the hard way that the zoning regulations" simply do not allow any sort of agricultural activity in urban areas. Indeed, the article reported that some local regulations prohibit growing any vegetables, especially those offered for sale. And many municipal ordinances strictly limit residences to owning animals which are pets.

But the trend is not prohibition. Indeed, local governments, including big cities far from agricultural areas, have been amending local laws and zoning ordinances to allow some urban farming. Some allow crops to be raised, under specific limitations and in certain areas, normally based on lot size, and some also allow livestock to be raised – often with similar lot size restrictions as well as limits on the types and size of livestock. No county or municipality has been reported to allow unrestricted agriculture, or impose their own Right to Farm law protecting the right to farm against nuisance complaints. Instead, even the most permissive restrict the extent of the use, often based on the size of the lot.

Many local governments have taken steps to allow growing crops – plants, ornamentals, and native species, such as Baltimore, Maryland, see BALT. CITY CODE §2-101 et seq. The City of Winston-Salem, North Carolina has adopted an Urban Agriculture Ordi-

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nance applying to plant cultivation, and which at Winston-Salem, North Carolina Unified Development Ordinances, Section B-2.6.5(b), define urban agriculture as the processing of food through cultivation. Similarly, Cleveland, Ohio reports between 30 and 40 urban farmers have been enticed onto on otherwise empty lots by policies encouraging those lots to be used for crops. Such crops include tomatoes, peppers, a variety of herbs, fruits, and Swiss chard, among others. The City reports that many of the crops are sold to local restaurants, thus satisfying the desire for fresh, local produce – and turning otherwise empty lots into productive areas. Other local governments follow Cleveland, Ohio's lead in encouraging community gardening. The Michigan State University Extension Office notes that community gardens in otherwise vacant lots can not only promote economic development but improve neighborhood safety, encourage self-reliance and increase community well-being overall. The Extension Office indeed noted that Detroit's urban agriculture production, focused on allowing crops to be grown on otherwise vacant lots, was valued at an estimated $3.8 million in 2014.

When urban agriculture is permitted by a local government, enforcement of the limitations falls to the code enforcement process, and local government staff and attorneys all play a major role. The code enforcement challenges for crops will be based on the specific zoning allowances, often based on the size of the lot. But the local allowances are also often limited to certain types of crops. For example, the Lawrence, Kansas City Code, at §§ 20-1779 and 1780, specifically allow urban agriculture both for crops and animal husbandry, even as it does not allow livestock sales. Specific zoning regulations allow crop agriculture, but do not allow crops to be grown near sidewalks, nor allow crops over three (3) feet in height which are within eight (8) feet of a road or three (3) feet of a sidewalk – or within the site distance triangle of an intersection, which is twenty-five (25) feet. Any sales areas are limited by lot size, and signs are limited in size and location. All of these specific restrictions are enforced through code enforcement, but as to crops, violations are often based on such measurable units as size and distance, and thus can be enforced with some regularity.

Agriculture involves more than just plants and crops, but animals and livestock as well – including chickens, goats, cows and horses, among others. Baltimore City's Health Department, for example, allows the keeping of animals for urban agriculture under its September 2013 Regulations for Wild, Exotic and Hybrid Animals. These regulations specify that all zoning and State Department of Agriculture requirements must be satisfied, including lot sizes, and prohibit slaughtering of animals. In some instances, the urban farming trend for livestock is longstanding. Chicago, Illinois, is reported to be the only urban area in the United States which has never explicitly outlawed farm animals.

Even so, urban faming laws establish specific rules under which persons can so engage. Thus, local governments allowing farm animals generally restrict the type of animal and numbers based on the lot size. Thus, Modern Farmer's January 15, 2015 issue reports that Austin, Texas, allows residents to slaughter up to ten (10) chickens per week on an acre of land. Similarly, Seattle, Washington, allows residents to keep goats, sheep, cows and even horses – but under Section 23.42.052 of the City Code, only one animal is allowed for every quarter-acre of land. Pigs, other than as pets, are not allowed, and other rules ensuring proper treatment of the animals are also enforced. Boston, Massachusetts in 2013 passed Article 89 of the Zoning Code, which is an urban agriculture amendment allowing agricultural uses in the City, with lot size requirements for particular agricultural uses. And Lawrence, Kansas regulations restrict the number of animals to lot size as well as requiring appropriate coops and housing, and limiting slaughtering, noise and bad odors; thus allowing chickens but not roosters, requiring that male goats older than four weeks be neutered, and limiting breeds to a height of not more than 24 inches.

As with crops, enforcing the rules on animals falls, of course, to local code enforcement. While lot size limits and restrictions on the numbers of animals can be enforced based on measurements, complaints of excessive noise and odor are based on the strength of the evidence, and in many cases the credibility of the person testifying. Such complaints, to be successful, need to include evidence from nearby residents in order to show the violation – and to show it's a serious violation requiring a fine and a court order.

Complaints may also be related to additional traffic and parking, where produce or livestock is sold, as well as signs highlighting the area where agricultural products are for sale; and certainly fears of theft and related security concerns may also be voiced by nearby residents. Code enforcement staff responding to a complaint will turn to the limitations which are generally contained in the local government's zoning code, especially for crops, but limitations for livestock may also be reflected, both in zoning codes and in other Animal Control or nuisance ordinances limiting agricultural animals or crops. The local government will seek to show that the urban farmer's use violates one of these restrictions, thus leading both to a fine and, in many cases, a civil order requiring compliance with the local restrictions.

The interest in livestock has created at least some proposals to create an urban "Right to Farm" act. A 2015 report from Michigan's Urban Livestock Workgroup on proposed changes to the 1981 Right to Farm Act noted the increased interest from residents in "raising livestock in urban/suburban areas for home use and sale to local markets." The workgroup recommended passage of the Urban Agriculture Act which, along the lines of the Right to Farm law, would limit local authority and give authority to the Commission of Agriculture and Rural Development to establish guidelines, which would then, in turn, be enforced by the local government, even as nuisance complaints would have been largely pre-empted as long as the Act's limitations were followed. The bill has been introduced but not moved through the Senate's Committee on Agriculture.

This 2015 Report reflects the key concern that such Right to Farm Acts could limit local enforcement of laws allowing urban agriculture. A 2011 Michigan State Law Review article, "When Urban Agriculture Meets Michigan's Right to Farm Act: The Pig's in the Parlor," 2011 MICH. ST. L. REV. 365, 384-85, reviewed the impact of the state's Right to Farm laws on local

enforcement. In fact, the chance of such pre-emption within an urban area seems slim. First, it may be difficult if not impossible to show that an individual urban farm operation complies with all of the generally-accepted agricultural protocols (GAAMPS). But the reality is that the urban farming operation was almost always not in place before surrounding residential development was built. Thus, in most cases, urban farming does not meet the requirements to win protection under any right-to-farm laws, and local code enforcement efforts are typically not limited by those laws.

Moreover, as the Michigan State Law Review article noted, urban farming laws are not focused on pre-empting any part of the community. Instead the article states, such laws are implemented at by the local government, and involve "local master plans, zoning ordinances, and land use regulations created by communities which "minimizes conflicts arising from incompatible land uses." As such, where urban agriculture can take place, the rules under which it can do so are at some level agreed upon by the community.

A key aspect of local government is that no part of the community can be ignored. Thus, while urban farming continues to attract interest, and the trend continues in which local governments work with residents and those interested in urban farming to allow some limited crops and livestock, neither part of the community has been pre-empted. And that involvement continues even after the laws are in place, as those laws have to be enforced. The code enforcement challenges can be straightforward or, in some cases, daunting. But even for urban agriculture, local laws restricting agriculture to limit conflict with the surrounding community are only effective to the extent they can be enforced. And that can depend on the facts. When persons work with local code enforcement staff to address problems, as happens in most cases, enforcement through the court system can be avoided. But when those laws have to be enforced, the limits and rules in place, including limits on noise and odors, are only as effective, in a specific complaint, as the evidence supporting the charges! ML

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IV. Aggressive Panhandling, Begging, Charitable and Political Solicitation Prohibited

(a) Aggressive panhandling, begging, charitable and political solicitation prohibited. No person shall engage in aggressive panhandling, begging, charitable or political solicitation as defined in section II(a) of this ordinance at anytime, anywhere in this jurisdiction.

(b) Penalties [link to penalties provision to be developed below.]

[Note: Aggressive panhandling might warrant more serious penalties than those imposed for other offenses, and might warrant more severe penalties in some contexts or settings].

[Comment: This section was drafted based on conceptual considerations, after reviewing a variety of ordinances from jurisdictions around the country. Many such ordinances unfortunately seem to conflate regulation of aggressive panhandling and solicitation, with panhandling and solicitation in particular areas. This model ordinance seeks to separate these issues so they can be considered straightforwardly by policymakers and by any reviewing court. Note, too, that this model ordinance explicitly states that aggressive panhandling is regulated separately from "passive panhandling" to make the point that the city is attentive to various sorts of governmental interests and how they should be balanced. In a sense, the draft model ordinance endeavors to take to heart the "balancing test" suggested in Justice Breyer's concurring judgment in Reed, and to strike appropriate balances between the freedom of solicitors/panhandlers and the implications of their activities on others.]

V. Regulation of Panhandling, Begging, Charitable and Political Solicitation in Areas with Specific Personal Safety and Privacy Concerns

(a) *Regulated locations*. Both "passive" and "aggressive" panhandling, begging, charitable and political solicitation activities are regulated in the following areas that give rise to specific personal safety and privacy concerns as defined in part II of this ordinance:

i) Areas with heightened personal security concerns as previously defined in subsection II (b); and

ii) Areas with heightened privacy considerations as previously defined in subsection II(c).

(b) Prohibition. Neither "aggressive" nor "passive" panhandling, begging, charitable and political solicitation shall be conducted in areas defined as involving heightened personal security or heightened privacy considerations.

(c) Penalties. [It may be appropriate to create heightened penalties for aggressive panhandling in these sensitive areas. The current draft prohibits both passive and aggressive panhandling in these areas and does not differentiate in terms of penalties as between the two types. Jurisdictions might wish to prohibit only aggressive panhandling in these sensitive areas and might impose more serious penalties than in other areas where aggressive panhandling is prohibited.]

VI. Panhandling, Begging, Charitable Protection of Public Access and Vehicular Safety in Public Streets and Highways and on Traffic Medians and on High Volume and High Speed Highways.

(a) Areas regulated.

i) Areas regulated by this section include those defined as "areas with heightened public safety concerns" as defined in section II (d) of this Ordinance.

(b) Findings. The City Council finds as follows:

1. Public Safety. Both aggressive and passive begging, panhandling, charitable or politicals licitation within streets and highway rights of way, or on small traffic medians (under 8 square feet in size), or on traffic medians located on high speed and high-volume traffic corridors as

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