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Florida's Downtowns Are Free To Grow Local Broccoli ... And Chickens (Sometimes)

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FLORIDA’S DOWNTOWNS ARE FREE TO GROW LOCAL BROCCOLI . . . AND CHICKENS (SOMETIMES)

Sidney F. Ansbacher, Michael T. Olexa and Kathleen Maurer^A

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INTRODUCTION

The United States Supreme Court in *National Federation of Independent Business v. Sebelius* (*Sebelius*),¹ famously invoked broccoli to limit the scope of Commerce Clause.² All of the Justices used broccoli as a plot device to further their respective arguments answering whether the individual mandate to buy health insurance was constitutional.³ This article discusses the other end of the economic spectrum – local. We explicate Florida’s local government regulations of urban planting, growing, and selling of broccoli, as well as other fruits, vege-

1. 132 S. Ct. 2566 (2012).

2. U.S. CONST. art. I, § 8, cl. 3, which authorizes Congress “[t]o regulate Commerce with foreign nations, and among the several States, and with the Indian Tribes.” This was the second significant Supreme Court decision to address broccoli in a negative light. In the “seven dirty words” decision, *F.C.C. v. Pacifica Foundation*, 438 U.S. 726 (1978), the Court appended a verbatim transcript of “filthy words” compiled by the Federal Communication Commission (F.C.C.). Among the said “dirty words” of prerecorded monologue the F.C.C. deemed to be indecent the following: “If she drops something, Oh, the shit hurt the broccoli.” 438 U.S. at 752. Apropos of our mission in this article, the *Pacifica* majority concluded:

As Mr. Justice Southerland wrote[,] a “nuisance may be merely a right thing in the wrong place, — like a pig in the parlor instead of the barnyard.” *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388, 47 S.Ct. 114, 118, 71 L.Ed. 303. We simply hold that when the Commission finds that a pig has entered the parlor, the exercise of its regulatory power does not depend on proof that the pig is obscene.

438 U.S. at 750-51.

3. Nat’l Fed’n of Indep. Bus. v. *Sebelius*, 132 S. Ct. 2566, 2591 (2012). Chief Justice John Roberts’ majority opinion disparaged the government’s attempts to distinguish health insurance from broccoli. Justice Ginsburg’s partial concurrence takes up the cause of the poor, green member of the cabbage family by contrasting an individual’s taste in broccoli to a purchase with the “inevitable yet unpredictable need for medical care and the guarantee that emergency care will be provided when required are conditions nonexistent in other markets.” *Id.* at 2619 (Ginsburg, J., concurring). Justice Ginsburg goes so far as to call Chief Justice Roberts’ fear of the mandatory purchase of things that are good for us “the broccoli horrible.” *Id.* at 2624-25. She sums up with fervor:

When contemplated in its extreme, almost any power looks dangerous. The commerce power, hypothetically, would enable Congress to prohibit the purchase and home production of all meat, fish, and dairy goods, effectively compelling Americans to eat only vegetables Yet no one would offer the “hypothetical and unreal possibility,” . . . of a vegetarian state as a credible reason to deny Congress the power to pass the individual mandate.

Id. at 2625 (citations omitted). One assumes broccoli is served in the Ginsburg household, whether you like it or not. The joint dissent of Justices Scalia, Kennedy, Thomas, and Alito emphasizes the green vegetable as well in arguing that mandatory healthcare coverage cannot be distinguished from broccoli compulsion, because health coverage is a “national, social-welfare problem”:

But those differences do not show that the failure to enter the health-insurance market, unlike the failure to buy . . . broccoli, is an *activity* that Congress can “regulate.” (Of course one day the failure of some . . . to eat broccoli may be found to deprive them of a newly discovered cancer-fighting chemical which only that food contains, producing health-care costs that are a burden on the rest of us)

Id. at 2650 (Scalia, Kennedy, Thomas and Alito, J.J., dissenting).

tables, and animals. This requires a history of urban agriculture and local zoning laws before we discuss current laws and suggest future directions.

I. *WICKARD V. FILBURN*, MEET EUCLID

Dean Jim Chen of the University of Louisville Law School reminds us that broccoli is a more apt commerce clause example than one might think. Agriculture is central to the history of commerce clause and general constitutional litigation:

The story of American constitutional law is in many respects an agrarian fable. Strikingly large chunks of constitutional law originate in America's rural past. Numerous constitutional controversies have arisen from seemingly humble disputes over crop production, animal husbandry, and the processing of agricultural commodities.⁴

Chen wrote about *Wickard v. Filburn*,⁵ which represented the high water mark of commerce clause regulation by the federal government. *Filburn* held that the federal government's authority over agriculture included the right to protect wheat prices by barring a farmer from growing wheat for his family's own use. Justice Robert Jackson reasoned that the local act of raising food for one's family, "though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce. . . ."⁶

Our topic parallels *Sebelius'* withdrawal from *Filburn*. Urban agriculture required the retrenchment from the Supreme Court decision establishing modern zoning, *Euclid v. Ambler Realty Co.*⁷ *Euclid* utilized nuisance analysis to confirm the right of local government to rigidly separate uses that the government deemed incompatible with each other. We discuss first the history and the place of urban agriculture in human society. We focus then on the United States' history of urban agriculture. We turn to trace the background of *Euclid*, followed by the development and impact of the planning and legal loosening of strict hierarchical "Euclidean zoning." The most famous statement in zoning is in *Euclid*: "A nuisance may be merely a right thing in the

4. Jim Chen, *The Story of Wickard v. Filburn, Agriculture, Aggregation, and Commerce*, in CONSTITUTIONAL LAW STORIES 69 (Michael C. Dorf, ed., 2d ed. 2009).

5. 317 U.S. 111 (1942).

6. *Id.* at 125.

7. 272 U.S. 365 (1926).

wrong place, like a pig in the parlor instead of the barnyard.”⁸ Euclidean zoning intentionally reduced, and often eliminated, traditional urban agriculture and agribusiness. Our article culminates by discussion of the parallel loosening of Florida’s growth management top-down hierarchy, and its impact on and implications for the renewal and expansion of modern urban agriculture.

II. SMALL-SCALE AGRICULTURE IN AN URBAN SETTING

A reader can better understand urban agriculture by first learning its nature and scale. Small-scale agriculture in an urban setting constitutes a range of activities including community gardens and family farms located within municipal statistical areas.⁹ By most urban agricultural standards, a 100 square meter plot will generate the yearly needs of the average household.¹⁰ There are a variety of larger than sustenance scale uses, including for-profit, that use a variety of landscapes, including utility right of ways, fences, hydroponic (water, rather than soil-based plants) indoor setups, floating gardens on ponds, and rooftop greenhouses.¹¹ The types of goods grown in urban agriculture are almost exclusively consumptive, rather than industrial, products such as fruits, vegetables, land livestock, and water livestock.¹² The land livestock primarily found in urban settings is necessarily small, such as poultry, goats, and sheep. Fish farming operations are generally compatible with such urban waterbodies as ponds.¹³ Most of the orchard crops and macro-livestock are cultivated for urban consumption on the outskirts of the traditional urban area, but still often in the municipal zone.¹⁴

The most vexing problem with defining urban small-scale agriculture is that even the largest urban agricultural use is generally

8. *Id.* at 388.

9. *Urban and Peri-Urban Agriculture*, FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS, <http://www.fao.org/unfao/bodies/coag/Coag15/X0076e.htm> [hereinafter *Peri-Urban Agriculture*].

10. Anne C. Bellows et al., *Health Benefits of Urban Agriculture*, Community Food Security Coalition’s North American Initiative on Urban Agriculture 2 (2004), [http://www.co.fresno.ca.us/uploadedfiles/departments/behavioral_health/mhsa/health%20benefits%20of%20urban%20agriculture%20\(1-8\).pdf](http://www.co.fresno.ca.us/uploadedfiles/departments/behavioral_health/mhsa/health%20benefits%20of%20urban%20agriculture%20(1-8).pdf); Jerome Kaufman & Martin Bailkey, *Farming Inside Cities*, 13 *LAND LINES* 1 (2001), https://www.lincolinst.edu/pubs/dl/260_LLI0101.pdf.

11. Bellows et al., *supra* note 10, at 2-3.

12. *Id.*

13. *Id.*; *Peri-Urban Agriculture*, *supra* note 9.

14. USDA, *US Farms: Number, Size, and Ownership*, STRUCTURE AND FINANCES OF US FARMS: FAMILY FARM REPORT 5 (2007), http://www.ers.usda.gov/media/201431/eib24b_1_.pdf; Bellows et al., *supra* note 10, at 2-3.

insignificant when equated with traditional notions of agricultural operations. The best example of this is rooftop farming in cities such as New York, where a 10,000 square foot rooftop garden that produces 30 tons of produce is considered a large-scale operation.¹⁵ If the urban area is expanded to include family farms in a municipal area, then small-scale agriculture includes 74-acre farms operating in a more traditional manner.¹⁶ We discuss the City Beautiful Movement below concerning the background of Euclidean zoning.¹⁷ The doctrine built on the landscape architecture of Frederick Law Olmsted, who designed New York's Central Park.¹⁸ The City Beautiful Movement sought to beat back urban blight "[i]n a somewhat romantic effort to recapture the bucolic and putatively more virtuous past of rural America."¹⁹ Most scholars say the origins of this phase lay in the classical designs of Daniel Burnham's Columbian Exposition in the 1893 Chicago World's Fair.²⁰ While the movement emphasized green spaces, its leaders were patricians who saw food gardens and soup kitchens for the poor as blight to be eradicated. Nonetheless, public and private gardens were integral to the green spaces the City Beautiful Movement envisioned.²¹

The U.S. Department of Agriculture generally divides farming into two categories, family and non-family corporate, which are further subdivided into size classifications based on annual profit and the median number of acres operated.²² Small-scale agriculture encompasses everything from 60-acre residential farms to medium sales traditional farms that range between 500 and 1100 acres.²³ Therefore, any plot of land generating an agricultural product in a municipal statistical area with an operating acreage within the range for medium sales agriculture will be considered small-scale urban agriculture. While urban farming operations are individually considered to be small-scale, in the

15. Robin Shulman, *Raising the Root*, WASH. POST (Sep. 12, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/09/11/AR2009091103836.html>.

16. Scott Malone, *Farmers Warm to Community Agriculture Model*, REUTERS (Aug. 26, 2009), <http://www.reuters.com/article/2009/08/27/us-usa-farms-community-idUSTRE57P50920090827>.

17. *See infra* Parts IV and VII.

18. Richard H. Chosed, *Euclid's Historical Imagery*, 51 CASE W. RES. L. REV. 597, 602 (2001).

19. *Id.*

20. JULIAN CONRAD JUERGENSMEYER & THOMAS E. ROBERTS, LAND USE PLANNING AND DEVELOPMENT REGULATION LAW § 2.4 (3d ed. 2013).

21. *Id.* at 19.

22. *See* ROBERT A. HOPPE ET AL., U.S. DEP'T OF AGRIC., STRUCTURE AND FINANCES OF U.S. FARMS FAMILY FARM REPORT 1-4 (2007), http://www.ers.usda.gov/media/201475/eib24_1.pdf.

23. *Id.* at 5.

year 2000, over one third of the 2 million American farms were located in municipal areas, accounting for 35% of the U.S. agricultural produce in a year.²⁴ Additionally, in the year 2002, there were over 1.4 million people engaged in urban farming, only 200,000 fewer than the 1.6 million working farms in non-urban areas.²⁵

III. INTERNATIONAL FOCUS ON SMALL-SCALE, URBAN AGRICULTURE

The United States has recently emphasized urban farming and gardening as urban cores depopulate. Urban depopulation creates areas known as “food deserts,” which present the parallel problem of food scarcity that has long made urban agriculture an international focus.²⁶ The United Nations held its first Conference on Human Settlements in 1976.²⁷ While UN studies focused on the role of urban agriculture in “suppl[y]ing sufficient food” in places such as Uganda, they found urban agriculture was widespread in major cities:

One striking conclusion from development in UA [urban agriculture] policy over the last 30 years is that, contrary to common perception, UA is neither the short-lived remnant of a rural culture nor a nasty system of arrested urban development. The real paradox is that, on the political agenda, UA is far more advanced in Northern countries than it is in the South – even where its practice would be comparatively less critical to the wellbeing of city dwellers.

In Cities of the North, public UA initiatives initially promoted household and community gardening for food security in times of economic crisis (for example, the British Allotments Act of 1925 and the War Gardens of Canada, 1924 – 1947). Today, cities such as Amsterdam, London, Stockholm, Berlin, and St. Petersburg in Europe, or New York, Philadelphia, Cleveland, Montreal, Toronto, and

24. Jerome Kaufman & Martin Bailkey, *Farming Inside Cities*, 13 LAND LINES 1 (2001), https://www.lincolnst.edu/pubs/dl/260_LLI0101.pdf. Famine has been unfortunately common throughout history. For a synopsis of famine over five millennia, see generally CORMAC Ó GRÁDA, *FAMINE A SHORT HISTORY* (2009). While Ó Gráda determines famine is less pervasive, “food insecurity” remains. Using the definition of “food security” as “access by all people to enough good for an active, healthy life,” the United States Department of Agriculture estimated, in 2012, that forty-nine million Americans lived in food insecure households. ALISHA COLEMAN-JENSEN ET AL., U.S. DEP’T OF AGRIC., *HOUSEHOLD FOOD SECURITY IN THE UNITED STATES IN 2012*, 2 (Sept. 2013), <http://www.ers.usda.gov/media/1183208/err-155.pdf>.

25. *ARMS Farm Financial and Crop Production Practices*, USDA, <http://www.ers.usda.gov/Data/FarmandRelatedEmployment/> (last visited Feb. 6, 2016).

26. Catherine J. LaCroix, *Urban Agriculture and Other Green Uses: Remaking the Shrinking City*, 42 URB. LAW. 225, 236 (2010).

27. LUC J. A. MOUGET, *GROWING BETTER CITIES: URBAN AGRICULTURE FOR SUSTAINABLE DEVELOPMENT* xiii (2006).

Vancouver in North America have connected UA with resource recycling and conservation, therapy and recreation, education and safe food provision, community development, green architecture, and open space management.²⁸

* * *

[T]he migration of people from Southern to Northern cities is adding diversity to local values and culture. UA enables many minority groups to connect in a very meaningful way among themselves and with their foreign host culture. European immigrants, for example, spearheaded the post-World War II community gardens movement in Montreal.²⁹ This translates into more UA, enabling cities to reduce their *ecological footprint*. UA, therefore, can act as a practical entry for our cities into a more sustainable world.³⁰

Mouget is one of the world's leading experts on urban agriculture, having managed over forty related projects in the developing world.³¹ He studied urban agriculture holistically, reminding us that developing nations' urban cores reflect historic cities:

Morning has a different sound in the cities of the South than in Northern cities. In the South, roosters compete with the sounds of early morning traffic to announce the new day. Listen carefully, and you may hear goats bleating, cattle lowing, and, as the city wakes, the cries of street vendors offering fresh produce, bread, and other prepared foods.³²

This was typical of ancient cities, such as Baghdad and Macchu Picchu.³³ The scale and the number of urban agriculture explodes with population as populations blow up in the developing world.³⁴

Urban agriculture is a historical result of cities and food production both needing good soils, water sources and access. Urban agriculture and rural farms, however, typically need different assets. For example, larger livestock needs more space than can be found in a

28. *Id.*

29. Sean Cosgrove, *Community Gardening in Major Canadian Cities*, URBAN AGRICULTURE NOTES (July 3, 1998), <http://www.cityfarmer.org/canadaCC.html>.

30. Mouget, *supra* note 27, at ix, xiv-xv (emphasis in original).

31. *See id.* at xvi.

32. *Id.* at 1.

33. *Id.* at 3; Jac Smit et al., *Urban Agriculture Yesterday and Today*, in URBAN AGRICULTURE: FOOD, JOBS AND SUSTAINABLE CITIES 6 (2001), <http://www.jacsmit.com/book/Chap02.pdf> ("Macchu Picchu, the 'lost city of the Inca, appears to have been self-sufficient in food within walking distance. The main city also had a suburb a few miles away that served principally for intensive agriculture.").

34. Smit et al., *supra* note 33, at 3-4.

city, while higher urban land and product costs accentuate the need for diverse urban agriculture.³⁵

Regardless, convenient sources of food were increasingly important to urbanizing cities throughout history. Modern scholars do not know whether individual urban centers adopted agricultural resources in a strategic or haphazard way, or both.³⁶ Regardless, food sources were essential to combat food insecurity in developing urban centers.³⁷ “Some might argue that intensive food production [in and around urban centers] is what allowed societies to create cities and civilizations.”³⁸

Urban agriculture was endemic to core cities and their perimeters until well into the industrial revolution:

For centuries, and in different parts of the world, cultivation and animal husbandry inside and outside city walls were standard practices. Before “modern” urban sanitation systems were developed in the latter half of the 19th century, urban agriculture was the principal treatment and disposal method for urban wastes. Food was delivered by donkey cart to the markets, and the city wastes in turn were delivered to both rural and urban fields.³⁹

IV. HISTORICAL OVERVIEW IN THE UNITED STATES: A SOCIOLOGICAL APPROACH

Today’s western urban agriculture, particularly in the United States, resulted from a series of dramatic shifts. American consumers today tend to mentally compartmentalize food and living spaces. Urban agriculture responds to problems presented by rising food transportation costs, unsustainable large-scale farming practices, resource limitations, and food inequality by bridging these two separate paradigms and challenging the legal, economic, and environmental validity of separating residential land and areas of food production prominent in Euclidean zoning. We best understand this shift by analyzing the history of American agriculture.

Early immigrants brought various forms of urban and urban fringe agriculture from their home countries. Economic cycles tem-

35. *Id.* at 3.

36. *Id.* at 4-5.

37. *Id.* at 5.

38. *Id.* (citing local “intensive production” of perishable fruit and vegetables, small livestock, fish and poultry, along with nearby grains, fruits and vegetables on larger scale; Smit suggests urban development was benefitted by locally grown and processed medicinal herbs).

39. *Id.* at 7.

pered rapid urbanization's impact on core center agriculture. Vacant lots or blocks were often used for subsistence agriculture.⁴⁰ Detroit's modern urban agriculture is principally efficient urban infill in a modern food desert.⁴¹ It parallels a more rustic 19th century model in that city – “Pingree's Potato Patches.” Detroit Mayor Hazen Pingree pushed for unemployed residents to plant and cultivate urban gardens on vacant lots in an economic crisis in 1893:

Pingree developed his idea to use some of the thousands of acres of vacant and idle lands in the city for subsistence gardens. In Pingree's eyes, it seemed the perfect way to occupy idle lands and idle hands, all while saving taxpayers the cost of aiding the poor through direct charity. Early in 1894, he created Detroit's Agricultural Committee, and charged them with the responsibility of acquiring land, tools, and people willing to garden for food.⁴²

At its peak, the Pingree's Potato Patches Program allowed nearly 1,000 families to raise crops on 430 acres.⁴³ Buffalo and Boston followed suit.⁴⁴

We discuss the City Beautiful Movement below concerning the background of Euclidean zoning.⁴⁵ This major urban planning movement arose at the same time as Pingree's Potato Patches. The doctrine built on the landscape architecture of Frederick Law Olmsted, who designed New York's Central Park.⁴⁶ The City Beautiful Movement sought to beat back urban blight “[i]n a somewhat romantic effort to recapture the bucolic and putatively, more virtuous past of rural America.”⁴⁷ Most scholars' say it originates in the classical designs of Daniel Burnham's Columbian Exposition in the 1893 Chicago World's Fair.⁴⁸ While the movement emphasized green spaces, its leaders were patricians who saw food gardens and soup kitchens for the poor as

40. *Id.* at 21.

41. John E. Mogk et al., *Promoting Urban Agriculture as an Alternative Land Use for Vacant Properties in the City of Detroit: Benefits, Problems and Proposals for a Regulatory Framework for Successful Land Use Integration*, 56 WAYNE L. REV. 1521, 1523 (2010).

42. Community of Gardens Team, *Pingree's Potato Patches*, SMITHSONIAN GARDENS COMMUNITY OF GARDENS, <http://communityofgardens.si.edu/items/show/29> (last visited Mar. 1, 2016).

43. *Id.*

44. *Id.*

45. *See infra* pp. 29.

46. Richard H. Chused, *Euclid's Historical Imagery*, 51 CASE W. RES. L. REV. 597, 602 (2001).

47. *Id.*

48. *See, e.g.*, JUERGENSMEYER & ROBERTS, *supra* note 20.

blight to be eradicated. Nonetheless, public and private gardens were integral to the green spaces the City Beautiful Movement envisioned.⁴⁹

Liberty Gardens sprang up in World War I. Farmer enlistment in the military combined with the allocation of food and materials for the war effort created massive food insecurity on the homefront.⁵⁰ Both government and business pushed urban agriculture, principally “Liberty Gardens.”⁵¹

As we discuss more below, increasing post-war urbanization exacerbated population growth of both immigrants and minorities in denser housing, and single family and smaller scale housing for the more affluent. The latter opposed the former’s subsistence kitchen gardens. This resulted in nuisance, and then zoning actions to arrest, limit and, in many cases, eradicate existing and expanding urban agriculture uses.⁵² These confrontations and policy-making in favor of residential use typified the Roaring Twenties. *Euclid* arose in a typical battle between less intensive single family and tenement housing in the 1920s. The Great Depression reintroduced urban agricultural use of vacant and vacated urban property.

The Great Depression led local, state and federal governments to support “Relief Gardens” to feed wide swaths of needy individuals and communities.⁵³ At its peak, the Great Depression required Roosevelt to establish the Federal Emergency Relief Administration (FERA). FERA distributed billions of dollars to eligible gardeners to grow fruits and vegetables for the needy.⁵⁴ FERA imposed stricter standards as the Depression abated, only to have World War II reintroduce First World War home front food shortages.⁵⁵

The United States repeated the Liberty Garden paradigm from World War I by developing Victory Gardens in World War II. As in the First World War, the program responded to the failure of the American food distribution system under wartime constraints.⁵⁶ At the same

49. *Id.*

50. Julie M. Slabinski, *From Wasteland to Oasis: How Pennsylvania Can Appropriate Vacant Urban Land Into Functional Space Via Urban Farming*, 22 WIDENER L.J. 253, 256-57 (2012).

51. *Id.*

52. *See infra* Section VII.

53. Thomas Bassett, *Vacant Lot Cultivation: Community Gardening in America, 1893-1978* (Dec. 1978) (unpublished M.A. dissertation, University of California, Berkeley) (on file with author).

54. *Id.* at 94-95.

55. Slabinski, *supra* note 50, at 257.

56. ANN VILEISIS, *KITCHEN LITERACY: HOW WE LOST KNOWLEDGE OF WHERE FOOD COMES FROM AND WHY WE NEED TO GET IT BACK* 410-11 (2010).

time as demand for food grew overseas, for both U.S. troops and Allied civilians, the U.S. was facing a domestic food crisis to an extent that famine was a repeated headline concern.⁵⁷ The U.S. government now faced the challenge of educating the public on the basics of food production. Public service bulletins detailed the basics of gardening.⁵⁸ Victory Gardens were often community affairs tended by the public in any large space that could be converted into arable soil.⁵⁹ During World War II, Victory Gardens provided over 40 percent of the food consumed in the U.S.⁶⁰ Victory Gardens helped improve morale and alleviate some local food shortages, but more importantly, emphasized the idea that traditional farming could no longer feed a modern population.

The federal and state governments turned increasingly to the other side of the scale. They determined that only factory farms seemed to produce enough food to sustain a nation in war. This mindset led America to adopt an industrial approach to food production.⁶¹

Population migrations to the cities, and later, from the urban core to suburbs, affected agricultural production needs and locations throughout the later nineteenth and twentieth centuries. The American migration to cities in the nineteenth century had led to a society that relied on consumerism and reduced its self-sufficiency.⁶² Rural residents were able to and remain able to sustain themselves in a manner that city dwellers had to rely upon others to provide.⁶³ The next major migration started in the 1950s. Huge numbers left the urban core for the suburbs, and then in the 1970s into previously predominantly agricultural exurbs.⁶⁴ In her seminal 1984 article on right-to-farm laws, Jacqueline Hand stated: "Over forty percent of the homes built during (the 1970s) were constructed on rural land and often were scattered throughout the countryside on relatively large

57. *Id.*

58. *Id.* at 416-17; *Within These Walls: Victory Gardens*, Nat'l Museum of Am. History (last visited Feb. 5, 2016), <http://americanhistory.si.edu/house/yourvisit/victorygarden.asp>.

59. A. Bryan Endres & Jody M. Endres, *Homeland Security Planning: What Victory Gardens and Fidel Castro Can Teach Us in Preparing for Food Crisis in the United States*, 64 *FOOD & DRUG L.J.* 405, 416-18 (2009); *The Victory Garden*, *supra* note 58.

60. Endres & Endres, *supra* note 59, at 409.

61. VILEISIS, *supra* note 56, at 149-50.

62. See, e.g., Gary Alan Fine & Patricia Turner, *Contemporary Legends and Claims of Corporate Malfeasance: Race, Fried Chicken and the Marketplace*, 50 *DEPAUL L. REV.* 635, 636 (2000).

63. *Id.* (explaining that depressions and wars led urban dwellers to repeatedly develop agricultural skills).

64. *Id.*

lots.”⁶⁵ The new residents clashed with longstanding agricultural operations. While the new suburban uses eliminated farmland, agricultural production itself further industrialized.⁶⁶

Hand highlighted the most significant impact of farmland conversion due to encroaching development. “The most productive land often was affected . . . by such shifts in population.”⁶⁷ The reasons were logical, and compelling:

[M]any American cities were founded along major land and water transportation routes which generally bisected fertile river or coastal flood plains. The cities often began as trading and market centers for the surrounding agricultural region upon which they now encroach. The result is that approximately one million acres of land annually converted to development uses is the most productive land, termed prime farmland.⁶⁸

In sum, agriculture and urban areas long sought the same lands. Clashes always were, and always will remain inevitable. We have not answered the clashes at the suburban-rural fringe. Nonetheless, we must develop policies that accommodate urban agriculture’s return in the twenty-first century.

The deterioration of urban cores in the Rustbelt and other cities has, again, led to renewed pushes for urban agriculture. This has been exacerbated by “food deserts” in urban cores, which are in turn exacerbated by the rapid depopulation, job loss, and decrepitude of urban centers.⁶⁹ All of these factors were accentuated by the patriotic push to mitigate food deserts as home front assistance during the post-9/11 military push overseas.

The modern Freedom Garden is a new approach to urban agriculture designed similarly to the elements of World War II Victory Gardens.⁷⁰ The city of San Francisco, for example, implemented a new style of the Victory Garden program, called Victory Gardens 2007 that supports the transition of “backyard, front yard, window boxes, roof-

65. Jacqueline P. Hand, *Right to Farm Laws: Breaking New Ground in the Preservation of Farmland*, 45 U. PITT. L. REV. 289, 290-91 (1984).

66. Terence J. Centner, *Governments and Unconstitutional Takings: When do Right-to-Farm Laws Go Too Far?*, 33 B.C. ENVTL. AFF. L. REV. 87, 90-93 (2006).

67. Hand, *supra* note 65, at 291.

68. *Id.*

69. See, e.g., Cameryn Rivera, *A Fresher Law: Amending the Florida Right to Farm Act to Include Urban Micro Farming as a Key Initiative to Promote Sustainability, Food Access, and Environmental Justice for Low Income Communities*, 8 FLA. A & M U. L. REV. 385 (2013).

70. Slabinski, *supra* note 50, at 258.

tops and unused land into food production areas.”⁷¹ In keeping with the original Victory Garden model, San Francisco promotes ‘backyard’ gardens by providing information and materials for constructing gardens, as well as gardening workshops and demonstrations of successful gardening.⁷² Additionally, one of San Francisco’s stated purposes for urban gardens is promoting food security, a goal of the original Victory Gardens.⁷³ The San Francisco model is not unique, as other U.S. metropolitan areas have also developed programs to promote community agriculture in the urban area.⁷⁴ However, San Francisco has one of the more aggressive programs, exemplified by the transformation of the City Hall lawn into a quarter acre garden and the plan for developing a full urban farming program.⁷⁵

Today, urban agriculture and small-scale farms attempt to recapture the traditional food paradigm and reinvent a new modern paradigm, which allows for a symbiotic relationship between the two. Food can be fresh, convenient, and sustainable. Keeping food production local eliminates the need for extended transportation and harmful preservatives. Local farming keeps overhead and other costs to a minimum. Community gardens allow new generations to learn about their food system and witness the bountiful harvests produced by traditional farming methods.

V. IMPORTANCE OF URBAN AGRICULTURE

A. *Why Return?*

1. Environmental Mitigation

Many reasons underlie the current agriculture renewal movement. A primary reason for returning to small-scale urban agriculture is to reduce the impacts of conventional agriculture, including the loss

71. *What is Victory Gardens 2007+?*, VICTORY GARDENS 2007+, <http://www.futurefarmers.com/victorygardens/what.html> (last visited Feb. 5, 2016); Zahid Sardar, *Victory in the garden! Designing utopia can be considered art or politics, and sometimes they both start the same way*, SFGATE (Mar. 10, 2007), <http://www.sfgate.com/homeandgarden/article/Victory-in-the-garden-Designing-utopia-can-be-2611822.php>.

72. VICTORY GARDENS 2008+, <http://www.sfvictorygarden.org/about.html> (last visited Feb. 5, 2016).

73. *Id.*

74. *See, e.g., Cmty. Programs & Servs.*, N.Y.C. HOUS. AUTH., www.nyc.gov/html/nycha/html/community/garden.shtml (last visited Feb. 5, 2016); *What is Victory Gardens 2007+?*, *supra* note 72.

75. VICTORY GARDENS 2008+, *supra* note 72.

of agricultural lands due to soil erosion and similar resource impacts.⁷⁶ Two of the most common types of environmental impacts from traditional agriculture are increased carbon emissions from the long distance transportation of goods and the resource requirements of large scale farming operations.⁷⁷ By comparison, urban agriculture requires far less transportation, production costs are severely diminished, and the farming practices are often low intensity. The preservation of or conversion to green spaces for urban agricultural production promotes environmental protection by improving water quality and reducing greenhouse gases.

Urban agriculture typically has a minimal carbon footprint.⁷⁸ Statistically, conventional produce sources often travel over 1,000 miles before they reach a single consumer under the traditional agriculture system.⁷⁹ This creates a huge system of transportation.⁸⁰ By comparison, urban agriculture is consumed within the same vicinity that it is grown.⁸¹ This largely removes the cost of transportation from the price of goods, increasing public accessibility to fresh produce.⁸²

Urban farms are characterized by diverse crops, organic methods, and low intensity practices.⁸³ Low intensity is also particularly relevant to water quality degradation, as larger farms generate more

76. Christopher B. Connard, Comment, *Sustaining Agriculture: An Examination of Current Legislation Promoting Sustainable Agriculture as an Alternative to Conventional Farming Practices*, 13 PENN ST. ENVTL. L. REV. 125, 125-26 (2004); EDWARD THOMPSON, JR., FUNDER'S NETWORK FOR SMART GROWTH & LIVABLE COMMUNITIES, AGRICULTURAL SUSTAINABILITY AND SMART GROWTH: SAVING URBAN-INFLUENCED FARMLAND 2 (2001), <http://www.smartgrowth.bc.ca/Portals/0/Downloads/US%20Farmland%20Watch%20paper.pdf>.

77. Connard, *supra* note 76, at 127-28.

78. Kaye Spector, *5 Examples of Creative Urban Agriculture From Around the World*, ECOWATCH (Oct. 16, 2013, 5:20 PM), <http://ecowatch.com/2013/10/16/creative-urban-agriculture/>.

79. RICH PIROG & ANDREW BENJAMIN, LEOPOLD CTR. FOR SUSTAINABLE AGRIC., CHECKING THE FOOD ODOMETER: COMPARING FOOD MILES FOR LOCAL VERSUS CONVENTIONAL PRODUCE SALES TO IOWA INSTITUTIONS 1-6 (2003), <http://www.leopold.iastate.edu/sites/default/files/pubs-and-papers/2003-07-checking-food-odometer-comparing-food-miles-local-versus-conventional-produce-sales-iowa-institution.pdf>.

80. RICH PIROG ET AL., LEOPOLD CTR. FOR SUSTAINABLE AGRIC., FOOD, FUEL AND FREEWAYS: AN IOWA PERSPECTIVE ON HOW FAR FOOD TRAVELS, FUEL USAGE, AND GREENHOUSE GAS EMISSIONS 14-15 (2001), http://ngfn.org/resources/ngfn-database/knowledge/food_mil.pdf.

81. *Id.*

82. KATHERINE BROWN, URBAN AGRIC. COMM. OF THE CMTY. FOOD SECURITY COAL., URBAN AGRICULTURE AND COMMUNITY FOOD SECURITY IN THE UNITED STATES: FARMING FROM THE CITY CENTER TO THE URBAN FRINGE 3-8 (Feb. 2002), http://ocfoodaccess.org/wp-content/uploads/2013/08/Urban-Agriculture-Food-Security_CFSC-2002.pdf.

83. Neil D. Hamilton, *Tending the Seeds: The Emergence of a New Agriculture in the United States*, 1 DRAKE J. AGRIC. L. 7, 11 (1996).

animal waste and nutrient pollutants that must be managed.⁸⁴ Nutrient pollutants, primarily nitrogen and phosphorous, are applied in heavy quantities in large scale farming operations, ensuring that each acre produces at maximum efficiency.⁸⁵ In addition, monoculture crop production often exhausts the soil nutrient levels.⁸⁶ In contrast, urban agriculture, which focuses on consumptive farming, promotes diverse crops planted in rotating seasonal patterns, which naturally improves soil quality with a minimum of fertilizer.⁸⁷ Urban agriculture also provides natural landscape that improves water quality and reduces greenhouse gases relative to typical urban uses.⁸⁸ Both of these are achieved by the replacement of impervious surfaces with plants and soil (or water-based hydroponic farms) in urban gardens.⁸⁹ Rather than urban areas with bare medians, parking lots where water collects and attracts pollutants, or storm drains where polluted water directly enters the water table: garden plots provide permeable surfaces where water naturally filters through the ground before reaching the water system.⁹⁰ On the other hand, such urban agriculture methods as green roofs can be used to retain up to 75 percent of storm water, preventing flooding and mitigating the need for watering, while also sequestering carbon in the plants.⁹¹

Regardless of the benefits, urban agriculture must address environmental impacts at two levels: ambient environmental conditions and the process of agriculture itself.⁹² Contaminated soils, water sources, and air are common in urban settings.⁹³ Removal of soil and replacement of clean topsoil on top of contaminated soil is common.⁹⁴ A 1983 study, for example, found elevated lead, cadmium, copper, nickel, and zinc in Baltimore urban garden soils.⁹⁵

84. David Tillman et al., *Agricultural Sustainability and Intensive Production Practices*, 418 *NATURE* 671, 673 (2002).

85. *Id.* at 674-75.

86. *Id.*

87. *Id.* (saying that many large-scale operations rotate crops for control of plant disease or soil erosion, but monoculture on a large scale tends to affect resources more than small urban plots do).

88. THOMPSON, JR., *supra* note 76.

89. Bellows et al., *supra* note 10, at 9-10.

90. THOMPSON, JR., *supra* note 76, at 3.

91. Timothy Beatley, *Biophilic Urbanism: Inviting Nature Back Into Our Lives*, 34 *WM. & MARY ENVTL. L. & POL'Y REV.* 209, 217-18 (2009).

92. *See, e.g.*, Rebecca Kessler, *Urban Gardening: Managing the Risks of Contaminated Soil*, 121 *ENVTL. HEALTH PERSPECTIVES* A1, A327 (2013).

93. *Id.*

94. Bellows et al., *supra* note 10, at 2.

95. *Id.* at 2-3; Kessler, *supra* note 92, at A327; Chosed, *supra* note 18, at 601.

2. Economic Incentive

Urban agriculture aids urban centers through agricultural sales, lower cost infrastructure, and job creation. Urban agricultural sales provide economic incentives to municipalities in two general ways: upmarket produce sales and restaurant development. Upmarket produce, targeted at consumers with more disposable income, is a lucrative business in many urban centers.⁹⁶ Similarly, a local produce meal is a niche commodity that often garners higher menu prices from restaurant consumers.⁹⁷

Additionally, urban agriculture provides an economic incentive to municipalities by reducing the costs of infrastructure.⁹⁸ In this instance, urban agriculture primarily refers to the traditionally sized small farms located at an urban periphery, but within the municipal statistical area. Such farms require less infrastructure than suburban sprawl.⁹⁹ The deterioration of suburban infrastructure has resulted in a maintenance deficit which increases dramatically each year.¹⁰⁰

In addition, farms offset sprawl by generating revenue proportionally greater, in relation to infrastructure costs, than the property taxes on sprawl development.¹⁰¹ By maintaining agriculturally-zoned land at the periphery of urban areas, cities can restrict sprawl without having to limit property rights.¹⁰² In addition, urban farms also reduce the costs of infrastructure because low-density sprawl is more expensive for municipalities than high-density urban areas. Farms can act as development buffers that necessarily create higher density development as growth turns vertical.¹⁰³

Urban agriculture can be used to create jobs under state or federal programs that provide tax incentives for grocery markets that sell affordable fresh produce in urban areas. Urban agriculture provides

96. DICK ESSEKS ET AL., UNIV. OF NEB. LINCOLN, SUSTAINING AGRICULTURE IN URBANIZING COUNTIES 36-37 (2009).

97. See Garry Stephenson & Larry Lev, *Common Support for Local Agriculture in Two Oregon Communities*, 19 RENEWABLE AGRIC. & FOOD SYS. 210, 210 (2004).

98. THOMPSON, JR., *supra* note 76, at 2.

99. See *id.*; Edward H. Ziegler, *The Case for Megapolitan Growth Management in the 21st Century: Regional Urban Planning and Sustainable Development in the United States*, 41 URB. LAW. 147, 155-56 (2009).

100. Ziegler, *supra* note 99, at 155-56.

101. David L. Szlanfucht, *How to Save America's Depleting Supply of Farmland*, 4 DRAKE J. AGRIC. L. 333, 339 (1999); see also Bellows et al., *supra* note 10, at 2.

102. THOMPSON, JR., *supra* note 76, at 2-6. *But see, infra* note, 415-436 and accompanying text concerning conversion of "agricultural enclaves" that are no longer viable.

103. See Daniel R. Mandelker, *Managing Space to Manage Growth*, 23 WM. & MARY ENVTL. L. & POL'Y REV. 801, 802-04 (1999).

easy access to cheap produce for grocery stores interested in such a tax incentive, encouraging the development of jobs in both the grocery stores and the urban farms necessary to generate the required supply of produce.

Michigan's adaptation of a grocery incentive program is a typical response to a key problem for selling produce in urban grocery stores. Prohibitive costs of acquisition and transportation are such impediments, both of which are eliminated by local production.¹⁰⁴ These urban agriculture jobs can be created without the underlying tax incentives, as grocery stores, especially health food stores, will capitalize on the ready access to local produce.

Similarly, in Illinois, a state agricultural task force has focused on local agriculture as a tool for economic growth by using state purchasing directives to create the infrastructure for local food sales.¹⁰⁵ While the state has to subsidize many costs at the beginning of the local agriculture program, both directly and by preferential produce contracts, the state expects the boost in local agriculture to create an extra \$30 billion in the state economy.¹⁰⁶ This projection is largely based on the local multiplier effect, an economic model emphasizing the exponential ripple effect of reinvesting larger portions of local money into local businesses.¹⁰⁷ As more money is spent in local industries like agriculture, there is an increase in the spending potential of other local consumers rather than a global consumer with access to different markets.¹⁰⁸

Finally, urban agriculture presents economic incentives for farmers. The consolidation in locations provides ready access to consumers. Overwhelmingly, the greatest deterrent to purchasing farm-direct or local produce was the lack of availability in consumer spaces like grocery stores.¹⁰⁹ Urban agriculture, however, places the source close to the urban consumer, reducing travel distance to the farm and encouraging sales either in local grocery stores or directly to consum-

104. See, e.g., BROWN, *supra* note 82, at 5-6, 7-9.

105. John O'Connor, *Illinois law to boost demand for locally grown food*, GLOBAL-REPORT SEATTLE REPORT (Aug. 18, 2009), <http://www.global-report.com/seattle/a356210-illinois-law-to-boost-demand-for-locally-grown-food>; see also Brooke Jarvis, *Can a Farm State Feed Itself?*, YES! MAGAZINE (Sept. 4, 2009), <http://www.yesmagazine.org/new-economy/eating-in>.

106. Jarvis, *supra* note 105.

107. THOMPSON, JR., *supra* note 76.

108. See BROWN, *supra* note 82, at 5-6.

109. ESSEKS ET AL., *supra* note 96, at 216.

ers.¹¹⁰ According to research on farm-direct and other local purchases, local good consumers were interested in purchasing local produce due to freshness, support of the local economy, and knowing where food came from. Increasing accessibility to those consumers would almost necessarily raise sales.¹¹¹

3. Community Food Project Grants (CFP); Low Income Citizen Support

Community Food Projects are urban programs designed to promote food self-sufficiency in low-income communities, with a particular focus on nutritious food.¹¹² The U.S. Department of Agriculture, oversees CFPS, which generally focus on connecting rural producers with urban consumers to facilitate urban access to agricultural products.¹¹³ However, the widespread development of urban agriculture would be an even better option for many low income urban communities, as it would provide the residents with economic opportunity as well as food. The U.S. Department of Agriculture has recognized the benefit of urban agriculture to low income people, and promotes the use of food welfare like vouchers at local farmers' markets.¹¹⁴ Urban agriculture not only provides a source of produce previously unavailable in many impoverished urban areas, it provides that produce at prices much lower than metropolitan grocery stores.¹¹⁵ In many instances, however, city or state control of urban farming sales is still necessary because of the logistical problems, such as crowd control at popular sites and maintenance of voucher programs, as well as the need to subsidize starter agricultural projects until the projects are self-sustaining.¹¹⁶

110. Steve Martinez et al., *Local Food Systems Concepts, Impacts, and Issues*, USDA 29-31 (May 2010), http://ers.usda.gov/media/122868/err97_1_.pdf.

111. *Id.*

112. *Community Food Projects Competitive Grants Program (CFPCGP)*, U.S. DEP'T OF AGRIC. NAT'L INST. OF FOOD & AGRIC., <http://nifa.usda.gov/program/community-food-projects-competitive-grant-program-cfpcgp> (last visited Feb. 6, 2016).

113. *Id.*

114. *Women, Infants, and Children (WIC)*, U.S. DEP'T OF AGRIC. FOOD & NUTRITION SERV., <http://www.fns.usda.gov/wic/women-infants-and-children-wic> (last updated Sept. 2, 2015); *WIC Farmers' Market Nutrition Program (FMNP)*, U.S. DEP'T OF AGRIC. FOOD & NUTRITION SERV., <http://www.fns.usda.gov/wic/FMNP/FMNPfaqs.htm> (last updated Feb. 20, 2015).

115. ANDY FISHER, *HOT PEPPER AND PARKING LOT PEACHES: EVALUATING FARMERS' MARKETS IN LOW INCOME COMMUNITIES* 4 (1999).

116. *Id.* at 9-30.

As noted in the previous section, urban agriculture can be marketed successfully to both restaurants and general consumers as local and organic, factors that generate job growth. Studies in Iowa indicate that urban agriculture in a ten county area can increase labor incomes by almost two million dollars and create almost thirty additional jobs.¹¹⁷ Therefore, urban agriculture programs can provide low income citizens with access to potential jobs as well as healthier diets. One example of this is Illinois' recent Food, Farms, and Jobs Act, which is designed to promote food quality and health by developing urban agriculture.¹¹⁸ The Act is designed to create an entire local food infrastructure based on urban agriculture, which requires heavy state support because of the lack of farmers or the mechanisms for food distribution.¹¹⁹ One of the primary directives for passage of the Act was massive job creation for urban farm workers in a variety of capacities, including crop production, transportation, and sales.¹²⁰

Cheaply available local produce benefits low income citizens either by making produce freely available or by donations to such organizations as the "Plant a Row" Program. The program is a community service effort that encourages urban gardeners to donate excess produce to local food banks.¹²¹ Gardening information centers, such as the Garden Writers Association, advocate for using urban agriculture to support low income citizens by providing instructions in how to donate to food banks and what crops the food banks need.¹²² The Garden Writers Association has been successful in using urban agriculture to promote healthy living, noting that over twenty million pounds of produce have been distributed through the program since 1995.¹²³ Independently of organized community services, studies indicate that many people involved in urban farming provide free produce for needy members of the community.¹²⁴

117. DAVE SWENSON, *THE ECONOMIC IMPACT OF FRUIT AND VEGETABLE PRODUCTION IN SW IOWA CONSIDERING LOCAL AND NEARBY METROPOLITAN MARKETS* 1 (2010).

118. THE ILL. LOCAL & ORGANIC FOOD & FARM TASK FORCE, *LOCAL FOOD, FARMS, AND JOBS: GROWING THE ILLINOIS ECONOMY A REPORT TO THE ILLINOIS GENERAL ASSEMBLY* 3 (2009), <https://www.agr.state.il.us/newsrels/taskforcereport-outside.pdf>.

119. *Id.* at 17-19.

120. *Id.* at 19-26.

121. *Plant a Row Program*, OREGON FOOD BANK, <http://www.oregonfoodbank.org/give-food/plant-a-row-program> (last visited Feb. 6, 2016).

122. *Plant a Row for the Hungry*, GARDEN WRITERS ASSOCIATION, <http://www.garden-writers.org/gwa.php?p=par/index.html> (last visited Feb. 6, 2016).

123. *Id.*

124. Bellows et al., *supra* note 10, at 5.

4. Health and Welfare

The three primary reasons why urban agriculture is important to the public health and welfare are healthy eating, community welfare, and widespread disease. In a system of concentrated agricultural distribution centers, diseases are likeliest to spread rapidly as a single contaminated shipment is rapidly distributed to a broad geographic area rather than being contained in the local market.¹²⁵

The United States faces an unprecedented health crisis, in the form of obesity and its related illnesses such as heart disease and diabetes.¹²⁶ A primary cause of this obesity epidemic is a reliance on fast, junk food rather than natural food products, as highly processed foods have very low nutrition values.¹²⁷ This reliance on junk food is primarily a result of the high financial and temporal costs associated with acquiring a steady diet of natural produce.¹²⁸ Obesity is not the only health impact associated with urban agriculture, as studies show that five to ten day transportation causes produce to lose thirty to fifty percent of total nutritional value.¹²⁹ By providing urban dwellers with cheap and easy access to natural produce, providers can divert customers from the tendency to over-consume nutritionally deficient foods, and shift to healthier diets.¹³⁰

Urban agriculture also promotes community welfare by promoting social life and improving the quality of the urban environment.¹³¹ Urban gardens are often communal projects that attract diverse members of the surrounding neighborhood to both work the garden and collect produce.¹³² The connections formed by urban gardens are more than ephemeral, as studies correlate communal gardens to decreases in crime and juvenile delinquency.¹³³ In addition, the expansion of

125. Ali Khan et al., *Precautions Against Biological and Chemical Terrorism Directed at Food and Water Supplies*, 116 PUBLIC HEALTH REPORTS 3, 3 (2001), <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1497290/pdf/11571403.pdf>; see, e.g., *Multistate Outbreak of Salmonella Typhimurium Infections Linked to Peanut Butter, 2008-2009 (FINAL UPDATE)*, CTR. FOR DISEASE CONTROL (May 11, 2009), <http://www.cdc.gov/salmonella/typhimurium/update.html>.

126. Frederick Kirschenmann, *Farming, Food and Health*, GLEANINGS 1, 3-4 (2006).

127. *Id.* at 3-4.

128. *Id.* at 1-3.

129. Bellows et al., *supra* note 10, at 4.

130. Kirschenmann, *supra* note 126, at 4.

131. Bellows et al., *supra* note 10, at 8.

132. *Id.*

133. *Id.*

green spaces improves local air quality by increasing the number of plants available to absorb greenhouse gases.¹³⁴

The final health consideration for urban agriculture is providing a viable alternative to industrial farming so that disease outbreaks have a reduced impact.¹³⁵ The current American model of consolidated food processing creates a scenario where a single disease outbreak has national consequences, as the diseases are often discovered after widespread transmission.¹³⁶ In the case of livestock diseases, outbreaks can be disastrous both for human health and the economy.¹³⁷ In England, for example, over eleven million cattle were slaughtered in 1996 alone.¹³⁸ One scholar says this was due to diseases spread from intense confinement practices, but the core problem was foot and mouth disease.¹³⁹ Farmers attempt to prevent this spread by feeding animals antibiotics, but sub-therapeutic doses or antibiotics can undermine the benefits. Antibiotic resistant diseases spread to humans through a variety of channels.¹⁴⁰ Most animal antibiotics are closely related to the medicines given humans. Development of resistance to one class of antibiotics often promotes resistance to similar antibiotics.¹⁴¹ Essentially, insects and contaminated animal feed sources carrying such bacterial diseases as *Salmonella* and *Campylobacter* come into contact with animal antibiotics, and the diseases gradually become resistant to animal antibiotics.¹⁴² Then, these resistant diseases are spread to humans through interactions with contaminated livestock, insects, improperly treated food, and contaminated animal feces or waste feed that enter water sources.¹⁴³

134. *Id.* at 8-9.

135. Endres & Endres, *supra* note 59, at 407-08.

136. *Id.*; David Tilman et al., *Agricultural Sustainability and Intensive Production Practices*, 418 *NATURE* 671, 674-75 (2002).

137. Tilman et al., *supra* note 136.

138. *Id.* at 675.

139. *Id.*

140. *Id.*

141. Lakshmikantha Channaiah, *Polyphasic Characterization of Antibiotic Resistant and Virulent Enterococci Isolated From Animal Feed and Stored-Product Insects* (2009) (unpublished Ph.D dissertation, Kansas State University), <http://krex.k-state.edu/dspace/bitstream/handle/2097/1392/LakshmikanthaChannaiah2009.pdf?sequence=1&isAllowed=y>.

142. *Id.* at 2-5.

143. *Id.*

VI. SUSTAINABILITY

A. *Definition*

Sustainability is also intrinsic to urban agriculture. Sustainability has a variety of definitions and connotations, depending on the user, but the most ubiquitous is a system of cultural development that focuses on preserving life for future generations.¹⁴⁴ Sustainable agriculture consists of “agricultural practices [that] protect the environment while preserving the economic profitability of farmers.”¹⁴⁵ The U.S. Department of Agriculture’s Sustainable Agriculture Research and Education (SARE) program supports human food needs while also enhancing environmental quality and general quality of life in a manner that sustains the economic viability of farms.¹⁴⁶ The focus on economic viability is important to sustainability because no agricultural practice is sustainable if it does not supply a certain level of income.¹⁴⁷

The ultimate goal of sustainable farming is to establish a system of small to midsize diversified farms that supply the majority of a region’s food needs.¹⁴⁸ Sustainability also governs the operations of these farms by imposing strict limitations on using synthetic fertilizers or pesticides while also promoting water quality, responsible soil management, and maximized farm biodiversity.¹⁴⁹ Sustainability focuses on integrated pest management and organic matter from crop rotation or livestock manure.¹⁵⁰ Sustainable farming is designed to mitigate harmful impacts to the environment so that sustaining human consumption of food does not taint the consumption of water or other natural resources.¹⁵¹

B. *Context*

One fundamental element of sustainability for urban agriculture is improving soil and crop management practices to reduce the

144. Tilman et al., *supra* note 136, at 674-75; Connard, *supra* note 76, at 126.

145. Neil Hamilton, *The Role of Law in Promoting Sustainable Agriculture: Reflections on Ten Years of Experience in the United States*, 3 DRAKE J. AGRIC. L. 423, 425 (1998).

146. 7 U.S.C. § 3103 (2010).

147. Richard Earles, *Sustainable Agriculture: An Introduction*, THE NAT’L SUSTAINABLE AGRIC. INFO. SERV. (2005), <https://attra.ncat.org/attra-pub/viewhtml.php?id=294>.

148. *Id.*

149. Connard, *supra* note 76, at 136-37; Earles, *supra* note 147, at 4-5.

150. Connard, *supra* note 76, at 136-37.

151. *Id.* at 126; Earles, *supra* note 147, at 2-3.

introduction of synthetic chemicals.¹⁵² This will promote healthier ecosystems, which mitigate the human impact on the environment from nonpoint source agricultural runoff. Reducing dependence on soil enhancements will also improve water quality, while effective soil management will improve the amount of available groundwater, an important element of sustainable living.¹⁵³ One form of sustainable operation is organic farming. Urban farms present the perfect sites for organic farming because of the local market and consumer demands.¹⁵⁴ Education is a key component of promoting sustainability.¹⁵⁵ More populous urban settings provide additional opportunities to spread information concerning related practices. Urban agriculture focuses on crop rotation that naturally promotes healthy soil.¹⁵⁶ Similarly, local markets allow urban farmers to produce food based more on quality of taste and nutrition, rather than ability to ship.¹⁵⁷ This promotes biodiversity in the agricultural plot, which in turn promotes general environmental biodiversity.¹⁵⁸ In addition, urban agriculture promotes sustainability by reducing transportation.¹⁵⁹ Any related reduction of the global transportation of agricultural goods not only improves air quality, it also lessens fuel needs.¹⁶⁰

Urban agriculture also provides a measure of necessary metropolitan independence from external influences.¹⁶¹ While total self-sufficiency is impractical for most metropolises, because available food space will never meet the demand, urban agriculture provides a way to reduce the negative impact of potential natural or man-made disasters on the American distribution system.¹⁶² The post-World War II American agricultural model, based on centralized agriculture and widespread transportation, functions when infrastructure performs as designed, while severely constraining access to food if the infrastruc-

152. Tilman et al., *supra* note 136, at 671-74.

153. *Id.*

154. ESSEKS ET AL., *supra* note 96, at 36-37.

155. VICTORY GARDENS 2008+, *supra* note 72.

156. KATHERINE BROWN, URBAN AGRIC. COMM. OF THE CMTY. FOOD SECURITY COAL., URBAN AGRICULTURE AND COMMUNITY FOOD SECURITY IN THE UNITED STATES: FARMING FROM THE CITY CENTER TO THE URBAN FRINGE 3-8 (Feb. 2002), http://ocfoodaccess.org/wp-content/uploads/2013/08/Urban-Agriculture-Food-Security_CFSC-2002.pdf.

157. *See generally* DARRIN NORDAHL, PUBLIC PRODUCE: THE NEW URBAN AGRICULTURE (2009).

158. *Id.*; Earles, *supra* note 147.

159. *See* PIROG & BENJAMIN, *supra* note 80, at 2.

160. *Id.* at 1-6.

161. Endres & Endres, *supra* note 59, at 406.

162. *Id.*

ture fails.¹⁶³ Additionally, American agriculture has become increasingly reliant on global food production to the extent that many urban areas are wholly dependent upon long distance shipments for a stable food supply.¹⁶⁴ As noted in the 2009 Illinois Food, Farms, and Jobs Act, even agricultural states import many agricultural products because the agricultural system is designed to ship products long distance rather than make local connections.¹⁶⁵ This creates a dangerous situation for American food supplies, for example, the current level of grazing and resulting loss of agricultural diversity strains domestic production of food in times of crisis.¹⁶⁶

We must protect our concentrated and complex food distribution system from potential terrorist attacks.¹⁶⁷ The introduction of a biological agent at a single food distribution facility has the potential to impact millions, as was illustrated by the accidental contamination of a peanut plant in 2008 and lunch meats in 1998.¹⁶⁸ Intentional food contamination has already been used as a method of terrorism, with various levels of success, so it is not a hypothetical problem.¹⁶⁹ Potentially exacerbating the impact of a bioterror attack on the American food distribution system is the diffuse system of delivery, which slows appropriate responses because the individual incidents are treated as isolated instances of naturally occurring contamination.¹⁷⁰

Another threat to Homeland Security under our current agricultural model is food contamination from outside the United States, because many fruits and vegetables consumed per year in our nation are imported from other countries.¹⁷¹ Large outbreaks of bacterial and viral diseases in America have resulted from the consumption of contaminated international food products, and may be expected to do so again.¹⁷² Similarly, international food products are sometimes grown in fields contaminated by toxic chemicals that can be transmitted in

163. *Id.*

164. THOMAS A. LYSON, *CIVIC AGRICULTURE: RECONNECTING FARM, FOOD, AND COMMUNITY* 4 (2004); Endres & Endres, *supra* note 59, at 419-20.

165. Jarvis, *supra* note 105; PIROG & BENJAMIN, *supra* note 80.

166. Thomas Elmqvist et al., *Response diversity, ecosystem change, and resilience*, 1 *FRONTIERS IN ECOLOGY & THE ENV'T* 488, 490 (2003), [http://onlinelibrary.wiley.com/doi/10.1890/1540-9295\(2003\)001\[0488:RDECAR\]2.0.CO;2/epdf](http://onlinelibrary.wiley.com/doi/10.1890/1540-9295(2003)001[0488:RDECAR]2.0.CO;2/epdf); Endres & Endres, *supra* note 59, at 419-20.

167. Endres & Endres, *supra* note 59, at 406-07; Khan et al., *supra* note 125.

168. Endres & Endres, *supra* note 59, at 408; Khan et al., *supra* note 125, at 4.

169. Khan et al., *supra* note 125, at 4-5.

170. *Id.*

171. *Id.* at 6.

172. *Id.*

the food.¹⁷³ While these problems of international contamination have been accidental so far, there is no definitive way to mitigate an intentional attack. Expanded local agriculture would, however, reduce the need for imported food.

Finally, urban agriculture supports sustainability because the modern population trend in developed countries is towards urban sprawl, with agricultural land routinely providing the fodder for new suburban communities.¹⁷⁴ Apart from the general sustainability critiques of urban sprawl, the most fundamental concern is that combining more suburban development with the reduction of agricultural land will inevitably lead to decreased food availability. Urban agriculture, however, can reduce development pressure on nearby farms, constraining sprawl and protecting viable food sources.¹⁷⁵

VII. URBAN LAND USE REGULATION OF AGRICULTURE

A. *Public Nuisance Law and Its Genesis*

Now we turn to land use and zoning regulation of agriculture. The most commonly cited modern resource on agricultural conversion was the National Agricultural Lands Study (the Study).¹⁷⁶ The United States Department of Agriculture (USDA) and the President's Council on Environmental Quality co-chaired the Study. The Study was intended to determine the causes of conversion of agricultural land to nonagricultural uses, evaluate the consequences of such conversion, and recommend government actions that would be necessary to reduce potential harm to the nation that might result from such conversion.¹⁷⁷

The Study found that domestic and foreign demand would increase so much that "most if not all of the nation's 540 million acre cropland base is likely to be in production" by 2000.¹⁷⁸ Simultaneously, of the three million acres per year converted from agricultural land, about one million acres was from the cropland base.¹⁷⁹ The Study concluded that conversion "for practical purposes, [rendered] the loss of this resource to U.S. agriculture . . . irreversible."¹⁸⁰

173. *Id.*

174. THOMPSON, JR., *supra* note 76.

175. *Id.*

176. See NAT'L AGRIC. LANDS STUDY, EXEC. SUMMARY OF FINAL REP. (1981), <http://www.farmlandinfo.org/executive-summary-final-report-national-agricultural-lands-study>.

177. *Id.* at 4.

178. *Id.* at 6.

179. *Id.*

180. *Id.*

The most common objection that new property owners registered against agricultural operations was, and is, that they constitute a nuisance. An agricultural nuisance has been defined as “a condition that substantially interferes with the use and enjoyment of land causing unreasonable discomfort or annoyance to persons of ordinary sensibilities attempting to use and enjoy [their land].”¹⁸¹

Jason Jordan’s recent law review article on the Texas Right to Farm Act noted three general categories of nuisance: (1) activity that causes property damage; (2) actions that cause personal injury on the affected property; and (3) “even when there is not physical harm to the property or its occupants, a nuisance claim may arise from emotional harm to a person caused by deprivation of the use and enjoyment of that person’s property because of fear, apprehension or loss of peace of mind.”¹⁸²

Early United States courts followed English common law of public nuisance. Most significantly to this article, the Industrial Revolution created many situations where public nuisance claims objected to conflicting urban uses. “With urbanization and industrialization, the nature of land use changed and more conflicts arose regarding which land uses were acceptable.”¹⁸³ We discuss this case law more thoroughly in the next section, which addresses the transition from public nuisance law into traditional, hierarchical “Euclidean” zoning. Municipalities often weigh public nuisance claims in nuisance abatement boards, code enforcement boards and courts.

B. Zoning Issues

While we call zoning districting “Euclidean,” municipal zoning in the U.S. predates the *Euclid* decision by two decades. Various local governments adopted regulatory zoning codes. One authority states that zoning enabling ordinances were “widespread” by the time *Euclid* was decided.¹⁸⁴

In fact, tools akin to zoning have a long tradition in the U.S. For example, the Massachusetts colony apparently authorized municipal

181. Jason Jordan, Comment, *A Pig in the Parlor or Food on the Table: Is Texas’s Right to Farm Act an Unconstitutional Mechanism to Perpetuate Nuisances or Sound Public Policy Ensuring Sustainable Growth?*, 42 TEX. TECH L. REV. 943, 951 n. 70 and accompanying text (2010) (quoting *Holubec v. Brandenburger*, 111 S.W.3d 32, 37 (Texas 2003)).

182. *Id.* at 951-52.

183. Victor E. Schwartz & Phil Goldberg, *The Law of Public Nuisance: Maintaining Rational Boundaries on a Rational Tort*, 45 WASHBURN L.J. 541, 545-46 (2006).

184. Richard H. Chused, *Euclid’s Historical Imagery*, 51 CASE W. L. REV. 597, 600 (2001).

boards of health to bar “offensive trades” except in limited areas.¹⁸⁵ While the trades bar was a quasi-public nuisance limitation, European zoning allegedly existed as early as an 1810 decree of Napoleon “while acting as Protector of the Confederation of the Rhine.”¹⁸⁶ A 1937 Harvard Law Review note cited a 1799 local fire regulation in Pennsylvania that banned wooden buildings in certain areas.¹⁸⁷

Leading scholar Eric Claeys¹⁸⁸ explains that nineteenth century local governments and experts in the United States emphasized the need to exclude harmful uses:

Municipalities regulated the height and composition of buildings. They abated moral nuisances and gunpowder houses, slaughterhouses, and other sources of serious pollution. When certain neighborhoods “tipped” toward industrial, residential, or other uses, a city might define the boundaries of the ready-made “locality” and excluded non-conforming uses. Otherwise, however, they left land-use decisions to owners.¹⁸⁹

The “City Beautiful Movement” was the next step in urban planning. The City of Chicago was the center of this movement, which sought to replicate the centralized city plan of the City of Paris. Baron Haussman’s city plan for Paris “emphasized geometric order: long, straight streets, culminating in vistas; formal squares and places; elaborate parks; and the ability to link all of these elements into one coherent whole.”¹⁹⁰ Chicago sought to integrate lakefront parks with tenement reduction and grand public spaces and structures as early as the 1830 plat of the Loop, developed further for the “White City” in the 1893 World’s Columbian Exposition, and culminating with Daniel Burnham and Edward Bennett’s landmark plan of Chicago in 1908.¹⁹¹

185. MASS. GEN. LAWS ch. 23, § 1 (1692).

186. M. T. Van Hecke, *Zoning Ordinances and Restrictions in Deeds*, 37 YALE L. J. 407, 408 (1928).

187. Note, *A New Phase in the Development of Affirmative Equitable Servitudes*, 51 HARV. L. REV. 320, 320 (1937) (citing *Republica v. Duquet*, 2 Yeats 493 (Pa. 1799)).

188. See generally Eric R. Claeys, *Euclid Lives? The Uneasy Legacy of Progressivism in Zoning*, 73 FORDHAM L. REV. 731 (2004).

189. *Id.* at 737.

190. Gilbert A. Stetler, *Rethinking the Significance of the City Beautiful Idea*, in URBAN PLANNING IN A CHANGING WORLD: THE TWENTIETH CENTURY EXPERIENCE 98, 99 (Robert Freestone ed., 2000).

191. Sidney F. Ansbacher, *Stop the Beach Renourishment: A Case of MacGuffins and Legal Fictions*, 35 NOVA L. REV. 587, 629-32 (2011).

The City Beautiful Movement was entirely private, but for the McMillan Commission in Washington, D.C.¹⁹²

Public zoning followed soon afterward. “[I]t is clear that the zoning ordinance as we know it today first came into general use in Germany about 1894 and was introduced in England and the United States about 1909.”¹⁹³ European zoning ordinances attempted to separate factories from residential neighborhoods.¹⁹⁴ American zoning further segregated a lot more perceived incomplete uses, such as the Euclid zoning ordinance that separated single family from multi-family uses.¹⁹⁵ Localities throughout the nation quickly adopted zoning ordinances. The 1915 Los Angeles zoning code allowed mixed districts, with industrial and commercial uses coexisting with residences. This is called “hierarchical” zoning, where higher priority zones contain only favored, less intensive uses, but “lesser” zones allow mixed uses. By the following year, New York’s code barred more intensive uses in residential zones. Berkeley, California, pioneered the single family zoning district in 1916.¹⁹⁶

The then-United States Secretary of Commerce, Herbert Hoover, is arguably the father of comprehensive planning and zoning. “Hoover himself started – and took personal interest in – the Better Homes in America movement.”¹⁹⁷ He sought to foster universal home ownership. One of the keys he saw was establishing orderly communities:

The enormous losses in human happiness and in money, which have resulted from the lack of city plans which take into account the conditions of modern life, need little proof . . . [o]ur cities do not produce their full contribution to the sinews of American life and national character. The moral and social issues can only be solved by a new conception of city building.¹⁹⁸

192. The Senate established the commission to update L’Enfant’s plan of the District Report of the Senate Committee on the District of Columbia on the Improvement of the Park System of the District of Columbia, S. REP. NO. 166, 57th Cong., 1st Sess. (1902).

193. Van Hecke, *supra* note 186, at 408.

194. Eliza Hall, *Divide and Sprawl, Decline and Fall: A Comparative Critique of Euclidean Zoning*, 60 U. PITT. L. REV. 915, 923 (2007).

195. *Id.* at 923-24.

196. Marc A. Weiss, *Urban Land Developers and the Origins of Zoning Laws: The Case of Berkeley*, GLOBALURBAN, http://www.globalurban.org/Berkeley_Zoning_Origins.pdf.

197. Ruth Knack et al., *The Real Story Behind the Standard Planning and Zoning Acts of the 1920s*, 48 LAND USE L. & ZONING DIG. 3, 3 (1996), <https://www.planning.org/growing-smart/pdf/LULZDFeb96.pdf>.

198. *Id.* (quoting Robert K. Murray, *Herbert Hoover and the Harding Cabinet*, in HERBERT HOOVER AS SECRETARY OF COMMERCE: STUDIES IN NEW ERA THOUGHT AND PRACTICES 94 (Ellis W. Hawley ed., 1974)).

Euclid represented a transition from purer nuisance related legal exclusion of incompatible uses to more “top-down,” centralized local government plans that began blossoming with the City Beautiful movement in the Nineteenth Century.¹⁹⁹ *Euclid* still used nuisance analysis, which we explicate below. *Euclid* might not have initiated hierarchical zoning, but it confirmed the method. So much so, that we call strict use separation “Euclidean zoning.” The opinion featured the most famous phrase in zoning law, a phrase that is particularly apropos to our issue: “[a] nuisance may be merely the right thing in the wrong place, like a pig in the parlor instead of the barnyard.”²⁰⁰ The preceding passage in *Euclid* clarifies the nuisance basis for the *Euclid* decision. It also emphasizes the distinction between densities and intensities of uses allowed in urban and rural settings:

The ordinance now under review, and all similar laws and regulations, must find their justification in some aspect of the police power, asserted for the public welfare. The line which in this field separates the legitimate from the illegitimate assumption of power is not capable of precise delineation. It varies with circumstances and conditions. A regulatory zoning ordinance, which would be clearly valid as applied to the great cities, might be clearly invalid as applied to rural communities. In solving doubts, the maxim “*sic utere tuo ut alienum non laedus*,” which lies at the foundation of so much of the common law of nuisances, ordinarily will furnish a fairly helpful clew [sic]. And the law of nuisances, likewise, may be consulted, not for the purpose of controlling, but for the helpful aid of its analogies in the process of ascertaining the scope of the power. Thus the question whether the power exists to forbid the erection of a building of a particular kind or for a particular use, like the question whether a particular thing is a nuisance, is to be determined, not by an abstract consideration of the building or of the thing considered apart, but by considering it in connection with the circumstances and the locality.²⁰¹

Before “Euclidean zoning,” exemplified by Berkeley’s single family districts as early as 1916, urban settings interwove commercial and residential uses, as residents would take a short walk to, or even

199. Claeys, *supra* note 188, at 732-41, 762-69.

200. *Euclid v. Amber Realty Co.*, 272 U.S. 365, 388 (1926).

201. *Id.* at 387-88 (emphasis added). Professor Charles Haar and Michael Wolf emphasize *Euclid*’s somewhat surprising emergence four years after *Pennsylvania Coal Co. v. Mahon*, which is today considered a trailblazing regulatory takings opinion. Charles Haar & Michael Wolf, *Euclid Lives: The Survival of Progressive Jurisprudence*, 115 HARV. L. REV. 2158, 2167 (2002). Justice Holmes famously said: “The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.” *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). Haar and Wolf note that the trial court in *Euclid* relied on *Mahon* in ruling against the village.

live where they worked. *Euclid* recognized that urbanization combined with industrialization led to increasingly massive scale and intensive industry. Euclidean zoning was a stark response. It was akin to William Buckley's mission statement for the National Review: "It stands athwart history, yelling 'Stop' . . ." ²⁰²

One commentator states the rigid application of Euclidean zoning:

As originally conceived, zoning . . . was intended to be a self-administering land use allocation system, that is, a system of pre-stated land use classifications and rules under which only cases of particular hardship would require administrative (variance) or legislative (zone amendment) action to resolve. A desire to avoid legislative or administrative interference with the land market drove this original premise. In other words, concern for property rights and the goal of maximizing the productivity of private actors in the land market led the founders of zoning to create a "zoning by rules" system of land use control. ²⁰³

Municipalities implemented *Euclid* by seeking to separate incompatible uses in order to avoid the perceived "inherent conflict between uses that were not identical." ²⁰⁴

Unfortunately, the hierarchical zoning under *Euclid* segregates single use zones so strictly that "[t]he fundamental problem with Euclidean zoning is that it . . . ignores how cities actually operate." ²⁰⁵ Jay Wickersham quotes new urbanist, Jane Jacobs' seminal book, *The Death and Life of Great American Cities*: "Intricate minglings of different uses in cities are not a form of chaos. On the contrary, they represent a complex and highly developed form of order." ²⁰⁶

While today, the decision is noted for its approval of "Euclidean Zoning," many courts and commentators forget the underlying context. The parties' briefs distill the underlying arguments in *Euclid*. The Village's brief emphasized the development of zoning to protect higher-end residential housing from encroaching tenements:

202. William F. Buckley, Jr., *Our Mission Statement*, NAT'L REV. (Nov. 19, 1955), <http://www.nationalreview.com/article/223549/our-mission-statement-william-f-buckley-jr>.

203. Brian W. Blaesser, *Substantive Due Process Protection at the Outer Margins of Municipal Behavior*, 3 WASH. U. J. L. & POL'Y 583, 583 (2000).

204. Patricia E. Salkin, *From Euclid to Growing Smart: The Transformation of the American Local Land Use Ethic Into Local Land Use and Environmental Controls*, 20 PACE ENVTL. L. REV. 109, 110 (2002).

205. Jay Wickersham, *Jane Jacobs' Critique of Zoning: From Euclid to Portland and Beyond*, 28 B.C. ENVTL. AFF. L. REV. 547, 563 (2001).

206. *Id.* (quoting JANE JACOBS, *THE DEATH AND LIFE OF GREAT AMERICAN CITIES* 222 (1961)).

[M]odern tendencies are rapidly destroying and undermining the continuance of separate and individual homes and residences. The best minds of America are exhorting Congress and the States to do all that is possible in order to stem and prevent this tendency. As each city grows, there are proportionately less families living in houses than in apartments and tenements and above stores.²⁰⁷

Ambler also framed the issue as one of what furthered the common good. Ambler claimed that the village of Euclid was fostering the rights of rich single family homeowners over the rights of property owners who could bring jobs to improve the overall community. Ambler argued that Euclid exceeded its police power based, nuisance abatement authority: “[Zoning] is not the power merely to negative dangerous or anti-social uses, but the power affirmatively to select among admittedly harmless uses those which the political power deems the most popular and to prohibit all others.”²⁰⁸

The amicus brief for the Village, filed for the National Conference on City Planning and other land use planning groups, is one of the most famous briefs in American planning and zoning. Bettman saved the village by asking permission from his friend Chief Justice Taft to file the amicus brief on a second hearing of the case.²⁰⁹ This brief framed the issue squarely as one of codified public nuisance, and therefore focused on nuisance aspects behind zoning: “[Zoning is necessary to prevent] blighted districts whose general conditions are more productive of sickness and delinquency.”²¹⁰

Bettman focused on the nuisance underpinnings because he recognized the Court’s concern with Euclid’s aggressive advocacy of expanded zoning authority.²¹¹ Metzenbaum’s brief for the village ar-

207. Brief on Behalf of the Appellants, *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (No. 665), in 24 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 411, 490 (Philip B. Kurland & Gerhard Casper eds., 1975).

208. *Id.* Various scholars have quoted the ultimate decision in asserting that anti-immigrant and racist analysis underlay the arguments against apartments and tenements, more likely to have immigrants and minorities; see, e.g., Chused, *supra* note 185, at 604-14; Hall, *supra* note 195, at 923-25.

209. Lora A. Lucero, *Editors Note to Village of Euclid v. Ambler: The Bettman Amicus Brief*, 58 PLAN. & ENVTL. L. 3 (2006).

210. Amicus Brief for Appellant, *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (No. 665), in 24 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 763, 796 (Philip B. Kurland & Gerhard Casper eds., 1975).

211. Garrett Power, *Advocates at Cross-Purposes: The Briefs on Behalf of Zoning in the Supreme Court*, 22 J. SUP. CT. HIST. (Issue 2) 79, 84 (1997). Bettman was fortunate to have the second chance. While he was one of the leading zoning law experts then, or ever, he missed the filing deadline for an amicus brief. He got the second chance when the Court reheard the case after failing to reach a decision.

gued forcefully for the expansion of the police power authority to “put everything, and everybody, in the appropriate place.”²¹² He said zoning protected single family homes from such deemed incompatible use as “[s]mokestacks, slaughterhouses, and stables,” as well as apartments and row houses.²¹³

Metzenbaum already had to surmount the long odds of any appeal, let alone one in front of a historically conservative Supreme Court that appeared likely to appreciate Adler’s argument that zoning constituted discrimination.²¹⁴ Bettman’s argument that multi-family housing could be zoned away from single family homes due to traditional nuisance or quasi- nuisance authority might have better fit precedent than did Metzenbaum’s argument, but Bettman risked overreach.²¹⁵ Metzenbaum took the rare step of disavowing Bettman’s arguments on his behalf.²¹⁶ This decision was particularly significant because, while both men finished their careers as all-time great zoning law authorities, Bettman enjoyed a far greater reputation than Metzenbaum did when *Euclid* was considered. Regardless, the text of the decision above shows that the Court adopted Bettman’s rationale. The decision did so far more, and more colorfully, than apartments warranted. Scholars then and now assumed that predictable views of the era concerning minority tenants informed the decision.

The background to *Euclid* augments evidence of zoning’s nuisance law origins, as advocated by Bettman and decided by the *Euclid* Court. The urbanization of modern America in the turn of the 20th century led to zoning as an outgrowth of public nuisance law:

In the early part of the 20th century, zoning was viewed as a means to an end – the end being to separate incompatible land uses because there was an inherent conflict between uses that were not identical (e.g., residential, agricultural, business and commercial). This is referred to as “Euclidean zoning,” which describes the historical use of zoning as merely a tool to separate what had been viewed as incompatible land uses. The first zoning ordinances were enacted just at the start of the industrial revolution. Overcrowding in the cities was a paramount concern since it impacted numerous

212. *Id.* at 85.

213. *Id.*

214. *Id.* The Court struck a race-based Louisville zoning ordinance the previous decade in *Buchanan v. Warley*, 245 U.S. 60 (1917).

215. Power, *supra* note 211, at 85.

216. *Id.* at 85-86 (emphasized Justice Sutherland’s calling apartments “parasites” that sucked off of single family neighborhoods).

public health, safety and welfare issues (e.g., spread of disease and fire).²¹⁷

As noted above, the *Euclid* opinion paid homage to the Supreme Court's various, then-recent, decisions in acknowledging the nuisance underpinnings of what it saw as zoning authority:

*There is no serious difference of opinion in respect of the validity of laws and regulations fixing the height of buildings within reasonable limits, the character of materials and methods of construction, and the adjoining area which must be left open, in order to minimize the danger of fire or collapse, the evils of overcrowding and the like, and excluding from residential sections offensive trades, industries and structures likely to create nuisances.*²¹⁸

Euclid cited the four nuisance opinions that ultimately led to the court's approval of "Euclidean" zoning. *Hadacheck v. Sebastian*, which held that police power authorizes banning of brickyards in a portion of city; a use that is not a nuisance *per se* may be a nuisance in fact;²¹⁹ *Reinman v. Little Rock*, which held that municipality could bar livery stables in a district if not done so arbitrarily or discriminatorily;²²⁰ *Thomas Cusack Co. v. City of Chicago*, which upheld bars on billboards on certain blocks except with consent of owners of majority of frontage;²²¹ and *Welch v. Swasey*, which upheld lower maximum building heights in residential v. commercial sections of Boston.²²² Of these, *Reinman* is most significant to our issue. In this case, the Court acknowledged that a livery was not a nuisance *per se*.²²³ Nonetheless, Justice Pitney said that was "beside the question."²²⁴ The Court concluded:

Granting that it is not a nuisance *per se*, it is clearly within the police power of the state to regulate the business, and to that end to declare that in particular circumstances and in particular localities, a livery stable shall be deemed a nuisance in fact and in law, provided this power is not exerted arbitrarily, or with unjust discrimination, so as to infringe upon rights guaranteed by the [Fourteenth] Amendment.²²⁵

217. Patricia E. Salkin, *From Euclid to Growing Smart: The Transformation of the American Local Land Use Ethic Into Local Land Use and Environmental Controls*, 20 PACE ENVTL. L. REV. 109, 110 (2002) (footnotes omitted).

218. *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926).

219. 239 U.S. 394 (1915).

220. 237 U.S. 171 (1915).

221. 242 U.S. 526 (1917).

222. 214 U.S. 91 (1909).

223. *Reinman*, 237 U.S. at 176.

224. *Id.* at 175.

225. *Id.* at 176.

The Supreme Court addressed zoning in two opinions that followed immediately after *Euclid*. Then the Court failed to address zoning for half of a century. First came *Zahn v. Board of Public Works of City of Los Angeles*, which was a relatively short opinion.²²⁶ In *Zahn*, the court upheld the California Supreme Court's decision allowing the City to zone a sparsely populated and largely undeveloped stretch of Wilshire Boulevard for residential, church, club, medical office and educational use.²²⁷ The Court rejected a Fourteenth Amendment argument that the property should be available for more lucrative business use.²²⁸ The decision to zone for a less intensive use was found to not be arbitrary.²²⁹

The second decision, *Nectow v. City of Cambridge*,²³⁰ limited *Euclid* significantly, and was the Supreme Court's last word on zoning for a half century. While *Nectow* followed the *Euclid* analysis, the Court ruled that the Fourteenth Amendment protected against arbitrary zoning that did not allow a property owner a reasonable return on investment, stating:²³¹

The governmental power to interfere by zoning regulations with the general rights of the land owner by restricting the character of his use is not unlimited, and other questions aside, such restriction cannot be imposed if it does not bear a substantial relation to the public health, safety, morals, or general welfare. Here, the express finding of the master, already quoted, confirmed by the court below, is that the health, safety, convenience, and general welfare of the inhabitants of the part of the city affected will not be promoted by the disposition made by the ordinance of the locus in question, That the invasion of the property by the plaintiff in error was serious and highly injurious is clearly established, and since a necessary basis for the support of that invasion is wanting, the action of the zoning authorities comes within the ban of the Fourteenth Amendment, and cannot be sustained.²³²

The Court cited to *Euclid* and *Nectow* in *Agins v. Tiburon*.²³³ The property owners there challenged a legislative rezoning that placed their property in a low-density residential district. The petitioners did not file for any development approvals, so there was no concrete controversy allowing an as applied challenge to the zoning ordinance.

226. 274 U.S. 325 (1927).

227. *Id.* at 327.

228. *Id.*

229. *Id.* at 328.

230. 277 U.S. 183 (1928).

231. *Id.* at 187-89.

232. *Id.* at 188-89.

233. 447 U.S. 255 (1980).

The only ripe issue was the facial takings challenge. The Court cited *Nectow* in holding that the rezoning was not a taking, because, inter alia, it advanced legitimate state interests.²³⁴ The public purpose was to discourage the “premature and unnecessary conversion of open-space land to urban uses.”²³⁵

The Supreme Court clarified the “substantially advancement” test under *Euclid* and *Nectow* in *Lingle v. Chevron USA, Inc.*²³⁶ It noted that the formula would apply to a due process challenge, but not to a takings claim.²³⁷ The Court emphasized that enforcing strict requirements when reviewing takings claims would result in the judiciary substituting its judgment for elected legislatures and expert agencies.²³⁸

Lingle shows that federal courts are far less likely to entertain zoning related due process claims.²³⁹ Byrne writes, “How likely is it that landowners will be able to prevail against local governments on substantive due process claims challenging land use decisions? In federal court, the answer will – and should – be virtually never.”²⁴⁰ Byrne concludes, “that state court due process review is especially appropriate to correct local political distortions.”²⁴¹

The Eleventh Circuit, in *McKinney v. Pate*, gutted substantive due process rights in federal courts in Florida.²⁴² While not a land use decision, *McKinney* eviscerated federal substantive due process rights under planning and zoning law claims within our controlling federal circuit. *McKinney* held that substantive due process does not apply to administrative decisions, and that property rights are created by the state—therefore they are not fundamental federal Constitutional rights. Since *McKinney*, federal courts in the Eleventh Circuit, including Florida, have virtually eliminated zoning related substantive due process claims.²⁴³ The net effect of the limits to legal challenges to zon-

234. *Id.* at 260.

235. *Id.* at 261 (citing CAL. GOV'T CODE § 65561(b) (West Supp. 1979)).

236. 544 U.S. 528 (2005).

237. *Id.*

238. *Id.* at 544.

239. J. Peter Byrne, *Due Process Land Use Claims After Lingle*, 34 *ECOLOGY L.Q.* 471 (2007).

240. *Id.* at 472.

241. *Id.* (Byrne quotes noted Seventh Circuit Court of Appeals Judge, Richard Posner: “No one thinks substantive due process should be interpreted so broadly as to protect landowners against erroneous zoning decisions.”).

242. 20 F.3d 1550 (11th Cir. 1994).

243. See, e.g., Erica Chee, *Property Rights: Substantive Due Process and the “Shocks the Conscience” Standard*, 31 *U. HAW. L. REV.* 577, 591-92 (2009).

ing decisions means that protection of creative, non-Euclidean uses must come at the legislative policy level. It is particularly beneficial when the changes occur at the local level.

Loss of productive farmland is one of the established results of strict Euclidean zoning, as agriculture is pushed out of areas that municipalities and counties legislatively determine are suited better for other uses.²⁴⁴ Not only urban agriculture is affected. Sprawl caused by pushing out uses deemed incompatible has combined with the suburban migration of recent decades to eradicate farmland at a shocking rate.²⁴⁵ The over-all impact on consumers is cumulative. The impact on urban dwellers in food deserts, however, is direct. The less local food supply available, the less opportunity to feed urban residents of limited means.

VIII. COMPREHENSIVE LAND USE PLANS

The other prong of planning and zoning law that Florida focuses on is the central land use plan. Justice Sutherland did not require a long-range plan to direct Euclidian zoning. *Euclid* did, however, support central planning to direct top-down, hierarchical land use controls. The concept of citywide, comprehensive land use plans developed along with comprehensive zoning in the early twentieth century. Stuart Mack points to a report of the Committee on Legislation to the Fifth National Conference on City Planning in 1913.²⁴⁶ The committee report focused on infrastructure for a modern city, eminent domain, platting, districting, and planning department jurisdiction.²⁴⁷ To that end, the committee generated model acts.²⁴⁸ While early efforts addressed zoning, comprehensive planning followed almost immediately.

Ruth Knack explained the origins of modern comprehensive land use planning in the Standard State Zoning Enabling Act's third draft. The third draft stated initially, "such [zoning] regulations shall

244. Timothy Beatley & Richard C. Collins, *Americanizing Sustainability: Place-Based Approaches to the Global Challenge*, 27 WM. & MARY ENVTL. L. & POL'Y REV. 193, 196-97 (2002).

245. Eliza Hall, *Divide and Sprawl, Decline and Fall: A Comparative Critique of Euclidean Zoning*, 68 U. PITT. L. REV. 915, 927-28 (emphasizing that under one-fifth of the United States constitutes "high quality farmland," but noting that urban sprawl has eliminated such lands at a rate approaching two acres per minute (2007)).

246. STUART MECK, MODEL PLANNING AND ZONING ENABLING LEGISLATION: A SHORT HISTORY 1 n.2 (citing PROCEEDINGS OF THE FIFTH NATIONAL CONFERENCE ON CITY PLANNING, CHICAGO ILLINOIS 247-59 (1913)).

247. *Id.*

248. *Id.*

be made in accordance with a well-considered plan.”²⁴⁹ Knack tells us that Harland Bartholomew proposed the change from “well-considered plan” to “comprehensive city plan” in a memorandum.²⁵⁰ Edward Bassett edited out the word “city,” creating the phrase that survives to this day in planning and zoning: “such [zoning] regulations shall be made in accordance with a comprehensive plan.”²⁵¹ The standard was supported by a note to the Standard State Enabling Act: “It is highly desirable that all zoning schemes should be worked out as an integral part of the city plan.”²⁵²

The Advisory Committee on City Planning and Zoning (ACCPZ) turned to drafting an enabling act for comprehensive plans after it finished the Model Zoning Act in 1924 and revised it in 1926. The 1928 Standard City Planning Act (SCPEA) contained six subjects, which noted planner, Stuart Mack, sets forth as follows:

1. The organization and power of the planning commission, which was directed to prepare and adopt a “master plan.”
2. The content of the master plan for the physical development of the territory governed by one of the class of local governments authorized to plan.
3. Provision for adoption by the governing body of a master plan and subsequent control of private building in the bed of mapped but unopened streets and of public buildings in unofficial or unapproved streets.
4. Provision for approval by the planning commission before approval by the legislative body of all public improvements (the act permitted a legislative override of commission vetoes).
5. Control of private subdivision of land into building parcels and accompanying streets and other open spaces.
6. Provision for the establishment of a region and regional planning commission, for the making of a regional plan, and for the adoption of that plan by any municipality in the region that desired to do so.²⁵³

249. Knack et al., *supra* note 197, at 5.

250. *Id.* at 5, n.7, and accompanying text.

251. *Id.* at 5.

252. ADVISORY COMMITTEE ON ZONING. U.S. DEP'T OF COMMERCE, A STANDARD STATE ZONING ENABLING ACT 9, n.41 (Rev. ed. 1926), <https://www.planning.org/growingsmart/pdf/SZEnablingAct1926.pdf>.

253. Stuart Meck, *Model Planning And Zoning Enabling Legislation: A Short History* 2, n.16 and accompanying text, citing summary of SCPEA from AMERICAN LAW INSTITUTE (ALI), A MODEL LAND DEV CODE, No. 1, Reporter's Memorandum xvii – xviii (Phila, Pa.: ALI 1968).

The marriage of the general growth management plan with implementing zoning would become a hallmark of Florida local government regulation. This regulation has always involved the protection of, and often protection from, agriculture.

Transferable Development Rights, or TDRs, are a useful tool to further urban agriculture or any urban greenspace. TDRs respond to strict Euclidean zoning by allowing “an owner of property that has been restrictively zoned to recoup any economic loss on the restricted property by selling the property’s severed development rights to receiving properties authorized for increased density of development.”²⁵⁴ In effect, it is the next step up from on-site density transfers that allow more density in one spot in return for greenspace elsewhere:²⁵⁵

Transferable Development Rights (TDRs) are a flexible market-based tool that allows land planners to overcome many of the shortcomings associated with traditional zoning practices. A TDR program works by designating a “sending” zone where development is restricted in exchange for the right to “transfer” that development to a “receiving” zone. Receiving zones are areas where development is permitted with the purchase of transferable development rights (TDRs) from a sending zone.²⁵⁶

One commentator aptly sums up classical Euclidean zoning: “Although successful in separating incompatible land uses, traditional zoning sets rigid, static and inflexible limits on development.”²⁵⁷ Traditional tools to soften the rigidity include special exceptions, nonuse variances, planned unit development (PUD), and cluster zoning.²⁵⁸ Most of these “relief valves” still require discretionary local board approval, so their efficacy and availability are uncertain.

TDRs add predictability for the landowner and income as well, while allowing the local government to redirect development from areas deemed worthy of density protection and to areas deemed more appropriate for more intense uses.²⁵⁹ This lessens the severity of Euclidean zoning without eviscerating it.

254. Linda A. Malone, *The Future of Transferable Development Rights in the Supreme Court*, 73 KY. L. J. 759 (1985).

255. See Sarah Stevenson, *Banking on TDRs: The Government's Role as Banker of Transferable Development Rights*, 73 N.Y.U. L. REV. 1329, 1333-34 (1998).

256. Andrew J. Miller, *Transferable Development Rights in the Constitutional Landscape: Has Penn Central Failed to Weather the Storm?*, 39 NAT. RESOURCES J. 459 (1999).

257. *Id.* at 463-64.

258. *Id.* at 464.

259. See John Costonis, *Development Rights Transfer: An Exploratory Essay*, 83 YALE L. J. 75, 85-86 (1973).

The Supreme Court supported the concept of TDRs in dicta in the landmark *Penn Central Transportation Co. v. City of New York*.²⁶⁰ The Court held that the City's landmark designation of Grand Central Station did not constitute a taking, even though it severely limited the property's development rights necessary for a compensable taking.²⁶¹ The Court supported TDRs in what was likely dicta, given that it had already found no taking occurred. Nonetheless, it stated that TDR rights to assign development rights to another parcel mitigated for the landmark designation's prohibition of the two proposed high-rises at issue above Grand Central.²⁶² Regardless, Justice Brennan's opinion for the majority was a typical Supreme Court takings analysis. He left open what or whether any impact a TDR's availability would have on a takings claim. *Penn Central* led to the substantially increased use of TDRs, despite *Penn Central*'s uncertain and incomplete support for the tool.²⁶³

TDRs are commonly used to protect urban fringe farmland from encroachment by sprawl.²⁶⁴ While farmland preservationists were slow to utilize TDRs, they are an increasingly common tool.²⁶⁵ Multiple Florida communities have TDR ordinances, but TDRs have not caught on as farmland preservation tools in the state.²⁶⁶ There is no reason TDRs cannot similarly work to foster and preserve urban agriculture. TDRs are commonly used to transfer density rights in the urban core.²⁶⁷ A local ordinance might allow urban agriculture as greenspace to support mixed use in infill projects.²⁶⁸

260. 438 U.S. 104 (1978).

261. *Id.*

262. *Id.* at 137.

263. Malone, *supra* note 254, at 764; see *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997) (Court cast further doubt on whether the TDR can prevent a takings liability or merely constitute compensation for a taking); see also R. S. Radford, *Takings and Transferable Development Rights in the Supreme Court: The Constitutional Status of TDRs in the Aftermath of Suitum*, 28 STETSON L. REV. 685 (1999).

264. AMERICAN FARMLAND TRUST, FARMLAND INFORMATION CENTER FACT SHEET: TRANSFER OF DEVELOPMENT RIGHTS 3 (2008), http://www.farmlandinfo.org/sites/default/files/TDR_04-2008_1.pdf.

265. *Id.* at 2.

266. See JOHN SNOOK ET AL., TRANSFERABLE DEVELOPMENT RIGHTS (TDR): USING TDRS TO STRETCH PRESERVATION DOLLARS AND ACHIEVE SMART GROWTH, AMERICAN PLANNING ASSOCIATION, PENNSYLVANIA CHAPTER, at 8, 10 (Oct. 5, 2009), http://planningpa.org/presentations09/11_Using_TDRs.pdf.

267. James A. Kushner, § 2:14 Agricultural Preservation, 1 Subdivision Law & Growth Mgmt. (2d ed.) (May 2016).

268. *Id.*

IX. FLORIDA'S AGRICULTURAL DEVELOPMENT

We turn to agriculture, urban agriculture, nuisance, and zoning law in Florida. Florida has always been a leading agricultural state. Humans first came to Florida at least 12,000 years ago.²⁶⁹ While the first inhabitants were hunter/gatherers, the natives eventually developed agriculture and trade.²⁷⁰ Colonial Europeans and the native nations introduced one another to many food sources that thrive to this day.

Florida's tradition of agriculture was at a larger scale. Urban agriculture was not as common as in more urbanized states. Nonetheless, its climate allows for a wide range of agricultural products.

The Spanish Colonists introduced many aspects of modern agriculture sometime between 1513, when Ponce de Leon arrived, and in 1565, when Spain established the colony of St. Augustine.²⁷¹ The Spanish also introduced cattle to Florida. The Florida Memory Project tells us:

Florida's Andalusian/Caribbean cattle were the first in today's United States. Some scholars believe that cattle brought by the expeditions of Ponce de Leon in 1521 and Don Diego de Maldonado in 1540 escaped and survived in the wild. Organized ranching began with the founding of St. Augustine in 1565, when cattle from Spain and Cuba formed the basis of herds that fed the garrison and surrounding communities.²⁷²

Conversely, other scholars believe that early Spanish efforts to introduce beef cattle failed.²⁷³ After Native Americans drove off Ponce, DeSoto and DeLuna failed to establish a Spanish presence.²⁷⁴ Their efforts to introduce cattle succeeded only to the extent any survived when departing Spaniards abandoned them.²⁷⁵

269. *Early Human Inhabitants*, FLA. DEP'T OF STATE, <http://dos.myflorida.com/florida-facts/florida-history/a-brief-history/early-human-inhabitants/> (last visited Feb. 9, 2016).

270. *Id.*

271. Herbert John Webber, *History and Development of the Citrus Industry*, HISTORY, WORLD DISTRIBUTION, BOTANY, AND VARIETIES 1 (1967), <http://websites.lib.ucr.edu/agnic/webber/Vol1/Chapter1.htm>.

272. *Florida Cattle Ranching*, FLA. MEMORY: STATE LIBRARY & ARCHIVES OF FLA., http://www.floridamemory.com/photographiccollection/photo_exhibits/ranching/ (last visited Feb. 9, 2016).

273. Jorge R. Rey, *Florida Cracker Cattle*, UNIV. OF FLA. EDIS (Publication No. AN240), <http://edis.ifas.ufl.edu/an240>.

274. Lewis Yarlett, *History of the Florida Cattle Industry*, 7 RANGELANDS 205 (1985), <https://journals.uair.arizona.edu/index.php/rangelands/article/viewFile/11974/11247>.

275. Rey, *supra* note 273.

The Colonial Spanish, “proud of their heritage and wishing to follow the tradition of the Spanish rancho and hacienda, established four distinct areas of cattle raising”²⁷⁶ They raised beef cattle along the St. Johns River, as well as St. Augustine, Tallahassee and Gainesville.²⁷⁷ The primary purpose of the cattle raising was providing beef to the garrisons.²⁷⁸

This is consistent with Spanish colonial dictate. Charles of Spain authorized the *Recopilacion de las Leyes de Reinos de Las Indias*, which translates to the *Compilation of the Laws of the Kingdoms of the Indies* (“*Compilation*”) in 1520.²⁷⁹ The *Compilation*, as revised and finally codified in 1680, emphasized that Spanish colonial towns have “fertile soil and . . . plenty of land for farming and pasturage”²⁸⁰

The Spanish in Florida incorporated agricultural products that native populations grew. For example, they adopted the growing and trading of corn from native Appalachia and Timuqua.²⁸¹ The colonists introduced the plantation system in the St. Augustine area in the 1500s.²⁸² They grew corn, rice, sugar, and citrus for the colony and for export to Caribbean basin colonies.²⁸³

Regardless, Colonial Florida served the Spanish Crown:

Spanish settlements were highly regulated affairs. Swamps, marshes and other lands of perceived marginal use were often designated as “common” lands for all settlers to use to their benefit. Nonetheless, some marshes were used for forage and other agriculture, as well as access to riverine “highways.” Swamps were to be typically avoided as places for the erecting of towns. All towns had to conform to the typical Spanish square pattern, with the direction of the prevailing winds of especial note. Land Grants along rivers, navigable streams, and roadways were typically (although, not always) required to be two-thirds in depth and one-third in frontage, thereby giving equal access to all land owners to these royal highways of commerce and transportation. Rules regarding the layout of

276. *Id.*

277. *Id.*

278. *Id.*

279. See generally, Eric B. Kunkel, *The Spanish Law of Waters in the United States: From Alfonso the Wise to the Present Day*, 32 *McGEORGE L. REV.* 341, 366-68 (2001).

280. Axel I. Munding & Dora P. Crouch, *The City Planning Ordinances of the Laws of the Indies Revisited: Part 1: Their Philosophy and Implications*, 48 *THE TOWN PLAN. REV.* 247, 254 (1977).

281. *Plantation Culture: Land and Labor in Florida History*, *FLA. MEMORY: STATE LIBRARY & ARCHIVES OF FLA.*, https://www.floridamemory.com/photographiccollection/photo_exhibits/plantations/ (last visited Feb. 9, 2016).

282. *Id.*

283. *Id.*

the church, royal offices, streets, and other such affairs were also strictly defined in Spanish law. Only lands of practical use, generally farming, were to be granted to individuals. Spain, like England and France of the day, operated under the mercantile system developed by Colbert. This system dictated that colonies existed for the good of the mother country, and only things not produced there could be raised and exported to the homeland.²⁸⁴

The British took Spanish Florida in 1763.²⁸⁵ Colonists expanded the Spanish plantation system.²⁸⁶ While the Spanish generally built and maintained farms around St. Augustine, the British plantations went down the Atlantic coast all the way to the Indian River region.²⁸⁷ They also greatly expanded the use of African slaves to work the plantations.²⁸⁸ British plantations introduced the growing of indigo for dyes.²⁸⁹

After the Spanish took back Florida in 1783, the British attacked often, undermining beef cattle ranching.²⁹⁰ Unlike the debilitating impact of early Spanish colonists' abandonment of their cattle, many of the cattle survived and thrived.²⁹¹ They were spread among native populations, the British, a rump population among the Spanish, and the wild.²⁹²

The herds grew, as did the need for pasturage. Both Native Americans and Florida "crackers" moved southward as a result.²⁹³

The herds exploded to meet the needs of the Caribbean basin, together with markets, throughout the eastern United States.²⁹⁴ Ships provided access up and down the coast, and throughout the Caribbean,

284. Sidney F. Ansbacher & Joe Knetsch, *Negotiating the Maze: Tracing Historical Title Claims in Spanish Land Grants and Swamp and Overflowed Lands Act*, 17 J. LAND USE & ENVTL. L. 351, 368 (2002).

285. Treaty of Paris, 1763, <http://2001-2009.state.gov/r/pa/ho/time/cp/90615/htm/>.

286. Ansbacher, *supra* note 191, at 675-76.

287. *Plantation Culture: Land and Labor in Florida History*, *supra* note 281.

288. In the First (pre-1763) Spanish colonial period, African slaves comprised about 13% of the colony, and free Blacks, about 20%. Slaves were about 65% of the British colony. The most notable exception was the Turnbull Plantation near today's New Smyrna Beach. Turnbull used, and used up Minorcans from southern Europe, many of whom left to St. Augustine. *Plantation Culture: Land and Labor in Florida History*, *supra* note 281.

289. *Id.*

290. Yarlett, *supra* note 274, at 205.

291. D.P. Sponenberg & T.A. Olson, *Colonial Spanish Cattle in the USA: History and Present Status*, 41 ARCHIVOS DE ZOOTECNIA 401, 406-407 (1992), <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.573.7604&rep=rep1&type=pdf>.

292. *Cattle and Cowboys in Florida*, EXPLORING FLORIDA, <http://fcit.usf.edu/florida/lesons/cowboys/cowboys.htm> (last visited Feb. 9, 2016).

293. *Id.*; *Plantation Culture: Land and Labor in Florida History*, *supra* note 281.

294. Sponenberg and Olson, *supra* note 291.

while railroad expansion extended market reach throughout the eastern United States.²⁹⁵

The United States' takeover of Florida only continued agriculture's dominance of the economy. Citrus, beef, and other exports expanded throughout the nineteenth century.²⁹⁶ Florida remained primarily rural, split largely between large ranches, plantations and farms, and small cracker and African American subsistence farms.²⁹⁷

The Florida Agriculture and Rural Life Digital Collection contains an expansive collection of records of colonial and early statehood agriculture.²⁹⁸ "Nevertheless, the Seminole Wars, Civil War, [and] Reconstruction took a toll on the State's development. Agricultural literature for this period is sparse and did not become significant until formal agricultural experimentation began at the State's land grant colleges."²⁹⁹

The State urbanized slowly, but its "frontier-like" agricultural model prevailed well into the twentieth century.³⁰⁰ The agricultural economy began to modernize when the New Deal brought advanced engineering, which completely altered agriculture in Florida after World War I.³⁰¹ Modern Florida agriculture features massive groves and cattle ranches, which while many have been in the same family for generations, are mechanized, engineered, irrigated, and modernized.³⁰²

Florida does not have a tradition of urban, smaller scale agriculture. Nonetheless, its large Latin population comes from various nations that enjoy long traditions of growing and selling local. Moreover, urban agriculture is an increasingly common tool to assist the state's food insecure populations.³⁰³

295. *History of Florida Agriculture*, FLA. AGRIC. MUSEUM, <http://www.myagmuseum.com/floridaagriculture.html> (last visited Feb. 9, 2016).

296. *Id.*

297. *Id.*

298. *Florida Agriculture and Rural Life Digital Collection*, UNIV. OF FLA., <http://ufdc.ufl.edu/flag> (last visited Feb. 9, 2016).

299. *Id.* (noting the prime predecessor to the University of Florida's land grant program founding in 1884, and the Florida College for Colored Students, today's Florida A&M University, land grant founding in 1891).

300. *Id.*

301. *History of Florida Agriculture*, *supra* note 295.

302. *Id.*

303. *See generally* Rivera, *supra* note 69.

X. FLORIDA NUISANCE LAW AND AGRICULTURE

While the state has expanded the basis for specific zoning ordinances, Florida zoning followed national trends in emerging from nuisance abatement.

The Florida Fourth District Court of Appeal discussed the general standard of public nuisance in the state:

To be a public nuisance, property must cause “inconvenience or damage to the public generally.” If [property is] destroyed not to prevent harm but instead to benefit an industry, it is difficult to understand how [an agency] can argue . . . that the [property] legally constituted a nuisance without any value. Property with any value cannot be deemed a nuisance, the nature of which perforce lacks that redeeming quality.³⁰⁴

Notwithstanding the above-noted definition, the Florida Supreme Court established a broader rule. An activity may constitute a public nuisance even if it meets all applicable permitting criteria: [A] public nuisance may be classified as something that causes “any *annoyance* to the community or harm to public health.”³⁰⁵ As a result, something may legally constitute a public nuisance under Chapter 823 although it may technically comply with existing pollution laws.³⁰⁶

Orlando Sports Stadium, Inc. v. State is Florida’s bellwether public nuisance decision.³⁰⁷ The case addressed a motion to dismiss a nuisance action against a property that housed drug users on a semi-regular basis.³⁰⁸ The motion alleged Florida’s public nuisance statute was unconstitutionally vague.³⁰⁹ The Florida Supreme Court held that the State enjoys broad nuisance abatement discretion: “In the exercise of its police power the State has authority to prevent or abate nuisances, for police power is the sovereign right of the State to enact laws for the protection of lives, health, morals, comfort and general welfare.”³¹⁰ Accordingly, the court held the statute was constitutional, because it “conveys a definite warning as to proscribed conduct when

304. *Dep’t of Agric. & Consumer Servs. v. Bogorff*, 35 So. 3d 84, 89 (Fla. Dist. Ct. App. 2010) (quoting *Orlando Sports Stadium, Inc. v. Florida ex rel. Powell*, 262 So.2d 881, 884 (Fla. 1972)) (holding that destruction of healthy citrus trees for the benefit of the citrus industry was compensable in inverse condemnation).

305. *Flo-Sun, Inc. v. Kirk*, 783 So. 2d 1029, 1036 (Fla. 2001) (quoting *Kirk v. U.S. Sugar Corp.*, 726 So. 2d 822, 826 (Fla. Dist. Ct. App. 1999)); see FLA. STAT. § 823.01 (2015).

306. *Flo-Sun*, 783 So. 2d at 1036.

307. *Orlando Sports Stadium, Inc. v. Florida ex rel. Powell*, 262 So. 2d 881 (Fla. 1972).

308. *Id.* at 882-83.

309. *Id.* at 884.

310. *Id.* (citing *Holley v. Adams*, 238 So. 2d 401 (Fla. 1970)).

measured by common understanding and practices satisfies due process.”³¹¹ While the petitioner alleged the statute did not list proscribed nuisances, the Court emphasized the fact specific nature of nuisance abatement:

It is not possible to define comprehensively “nuisances” as each case must turn upon its facts and be judicially determined. . . . It has been said that an attempt to enumerate all nuisances would be almost the equivalent as an attempt to classify the infinite variety of ways in which one may be annoyed or impeded in the enjoyment of his rights.³¹²

The *Orlando Sports Stadium* court explicated a point that we expound on below: “statutory remedies for the abatement of nuisances do not supersede existing common-law remedies.”³¹³

The Florida Third District Court of Appeal in *City of Miami v. Keshbro, Inc.* addressed when nuisance abatement constitutes a compensable taking.³¹⁴ Even though a local government has broad abatement authority, a taking occurs if the abatement goes too far.³¹⁵ The Court cited the landmark United States Supreme Court decision in *Lucas v. South Carolina Coastal Council*: “[A]s it would be required to do if it sought to restrain Lucas in a common-law action for public nuisance, South Carolina must identify background principles of nuisance and property law that prohibit the uses he now intends in the circumstances in which the property is presently found.”³¹⁶ The *Keshbro* Court concluded that an administrative order shutting down a fifty-seven unit hotel, “which use is not a nuisance at common law,” resulted in a taking.³¹⁷

Florida’s most significant modern agricultural nuisance decision was *Flo-Sun v. Kirk*.³¹⁸ Former Governor Claude Kirk led a sweeping public nuisance action against major sugar cane growers for growing, harvesting and processing cane in a manner that polluted and caused public nuisance.³¹⁹ They made similar claims against a company that allegedly disposed of sugar cane byproducts by deep well

311. *Id.*

312. *Id.*

313. *Orlando Sports Stadium, Inc. v. Florida ex rel. Powell*, 262 So. 2d 881, 884 (Fla. 1972) (quoting 66 C.J.S. Nuisances § 102 (2015)).

314. *City of Miami v. Keshbro, Inc.*, 717 So. 2d 601 (Fla. Dist. Ct. App. 1998).

315. *Id.* at 603.

316. *Id.* (citing *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1031-32 (1992)).

317. *Id.* at 604.

318. 783 So. 2d 1029 (Fla. 2001).

319. *Id.* at 1032.

injection.³²⁰ The defendants alleged that the “primary jurisdiction doctrine” applied requiring agencies with permitting jurisdiction to review the environmentally regulated activities before the judiciary could review the claims.³²¹ The defendants alleged further that Florida’s public nuisance statute, Section 823.05, had been impliedly superseded by the air and water pollution statutes found at Chapter 403, Part I of the Florida Statutes.³²²

The Florida Supreme Court held there was no implied repeal, but that primary jurisdiction applied.³²³ The Court emphasized a savings clause at Section 403.191 of the Florida Statutes, which stated Chapter 403 provided “additional and cumulative remedies” to those available in, *inter alia*, nuisance.³²⁴ It noted that a nuisance is “any annoyance to the community or harm to public health,” so a nuisance may exist even if all environmental statutes are met.³²⁵ The Court found particularly significant the Florida Right to Farm Act, which we address in more detail below in Section XVI.³²⁶ The act, found at Section 823.14 of the Florida Statutes, was enacted over a decade after the initial Chapter 403.³²⁷ The Right to Farm Act “protect[s] reasonable agricultural activities conducted on farm land from nuisance suits.”³²⁸ All of the above led the Court to hold that Chapter 403 did not repeal Florida’s public nuisance statute.³²⁹

The Court held, however, that primary jurisdiction lay with the Florida Department of Environmental Protection (FDEP).³³⁰ The Court explained the doctrine as follows:

The doctrine of primary jurisdiction dictates that when a party seeks to invoke the original jurisdiction of a trial court by asserting an issue which is beyond the ordinary experience of judges and juries, but within an administrative agency’s special competence, the court should refrain from exercising its jurisdiction over that issue until such time as the issue has been ruled upon by the agency. . . . The doctrine of primary jurisdiction enables a court to have the benefit of an agency’s experience and expertise in matters with which the court is not as familiar, protects the integrity of the regu-

320. *Id.*

321. *Id.*

322. *Id.* at 1034.

323. *Id.* at 1032, 1041.

324. *Flo-Sun v. Kirk*, 783 So. 2d 1029, 1036 (Fla. 2001).

325. *Id.*

326. *Id.*

327. *Id.*

328. *Id.* (citing FLA. STAT. § 823.14 (2001)).

329. *Id.*

330. *Flo-Sun v. Kirk*, 783 So. 2d 1029, 1041 (Fla. 2001).

latory scheme administered by the agency, and promotes consistency and uniformity in areas of public policy.³³¹

XI. FLORIDA ZONING

Florida's zoning originated in nuisance abatement similar to the national model of *Euclid*.³³² Florida courts have upheld use of strict lines between zoning districts. For example, in *City of Miami Beach v. Wiesen*, the Florida Supreme Court held that separation of powers required deference to an allegedly arbitrarily drawn boundary of a city street.³³³ The Court reasoned district boundaries had to fall somewhere, and it deferred to the municipality doing the zoning.³³⁴ Florida courts follow nationwide trends allowing zoning based on aesthetic concerns.³³⁵

The Florida First District Court of Appeal addressed the relationship between nuisance law and planning and zoning in *Windward Marina, LLC v. City of Destin*.³³⁶ The municipal comprehensive plan determined compatibility of proposed uses by, among other issues, analyzing whether the use would constitute a nuisance.³³⁷ The Court majority emphasized: "We are not unmindful of the case law that requires a local government's denial of a land development order to be based on specific criteria set forth in its duly enacted land use regulations."³³⁸ While the Court cited numerous Florida decisions that held a local government may not deny a development order on bases that are not "specifically enumerated" in the government's land use code, it emphasized:

We conclude, however, that these cases are inapplicable to the circumstances presented in this case for two reasons: (1) these decisions did not involve denials of development orders based upon findings of specific identifiable safety hazards; and (2) these decisions did not specifically address whether the term "nuisance," which has been well-defined in our law, is so impermissibly vague

331. *Id.* at 1036-37.

332. *See, e.g., City of Miami Beach v. Perell*, 52 So. 2d 906 (Fla. 1951) (striking a zoning ordinance that barred uses that were no more obnoxious than permitted uses in the district).

333. 86 So. 2d 442, 445 (Fla. 1956).

334. *Id.* at 446.

335. *City of Lake Wales v. Lamar Advert. Ass'n*, 414 So. 2d 1030, 1032 (Fla. 1982).

336. 743 So. 2d 635 (Fla. Dist. Ct. App. 1999).

337. *Id.* at 637.

338. *Id.* at 638.

that it cannot be utilized by a local government in determining whether to deny approval for a proposed development.³³⁹

The *Windward Marina* majority emphasized *Prior v. White*,³⁴⁰ where the Florida Supreme Court stated a common law nuisance is anything “which either annoys, injures, or endangers the comfort, health, repose or safety of the citizen, or which unlawfully interferes with or tends to obstruct, or in any way render unsafe and insecure other persons in life or in the use of their property.”³⁴¹

Judge Benton’s dissent in *Windward Marina, LLC* must be noted. Judge Benson focused on the proposed marina use’s compliance with the land use code, but for the “broad and nebulous exception” of an *ad hoc* nuisance determination.³⁴² He emphasized: “A nuisance explicitly permitted by a zoning ordinance is a contradiction in terms.”³⁴³ Regardless, nuisance abatement underlies and is inextricably intertwined in Florida land use and zoning.

XII. FLORIDA’S MODERN COMPREHENSIVE PLAN LAW

Florida’s modern growth management system began with the Task Force on Regional Management in 1971.³⁴⁴ Governor Reubin Askew asked the task force to generate a report and suggested legislation creating a statewide growth management framework.³⁴⁵ The task force convened immediately after Vermont passed its own State Land Use and Development Act of 1970.³⁴⁶ The Vermont act provided a model that Florida followed, and expanded upon.

Commentators explain why much larger Florida would use Vermont as a template:

Vermont and Florida share certain characteristics that help explain their pioneering roles. Both states have economies that rely heavily on outdoor vacationing and tourism, which in Florida is oriented toward the coast and in Vermont is focused toward the mountains. Both states underwent significant population growth, which re-

339. *Id.* at 639.

340. 180 So. 347 (Fla. 1938).

341. *Id.* at 355 (quoted in *Windward Marina*, 743 So. 2d at 639).

342. *Windward Marina, LLC v. City of Destin*, 743 So. 2d 635, 641 (Fla. Dist. Ct. App. 1999) (Benton, J., dissenting).

343. *Id.*

344. JOHN M. DEGROVE, *LAND, GROWTH & POLITICS* 109-10 (1984).

345. *Id.*

346. 1969 Vt. Laws 250; see DEGROVE, *supra* note 344, at 65-98.

sulted in widespread development and fears that the quality of each state's natural environment was at risk.³⁴⁷

The Vermont act "strongly influenced" the American Law Institute's 1975 Model Land Development Code, which in turn influenced later revisions in Florida.³⁴⁸

Vermont's 1970 legislation required developers to apply to a regional "Environmental District Commission" for any project of ten or more acres or ten or more residential units.³⁴⁹ The applicant had to demonstrate compliance with local and regional land use plans.³⁵⁰

The 1972 Florida legislature split the Vermont tasks in half. One act, the Florida Environmental Land and Water Management Act³⁵¹ created "Development of Regional Impact (DRI)" regulation.³⁵² The DRI statutes created a special level of local, regional, and state review for statutorily established projects that were so large that they were presumed to have "regional impact."³⁵³ These statutes implemented rules promulgated in 1973 and specified which twelve categories would be impacted by the statutes and at what intensity and density development constituted DRIs.³⁵⁴

Another aspect of that act was the creation of "Areas of Critical State Concern" program in chapter 380.³⁵⁵ The 1972 act allowed the state planning agency to designate various kinds of resources as so regionally significant that they merited special protection.³⁵⁶ Of significance to this article, the 1972 act listed regionally significant farmlands as eligible for designation.³⁵⁷ The statute lists only those material and manmade resources that are eligible for listing.³⁵⁸ Farm-

347. James H. Wickersham, Note, *The Quiet Revolution Continues: The Emerging New Model for State Growth Management Statutes*, 18 HARV. ENVTL. L. REV. 489, 513 (1994) (citing DEGROVE, *supra* note 344, at 65-68, 101-06; ROBERT G. HEALY & JOHN S. ROSENBERG, *LAND USE AND THE STATES* 41-43, 126-31 (2d ed. 1979)).

348. *Id.* at 512.

349. See Comm. to Save Bishop's House, Inc. v. Med. Ctr. Hosp., Inc., 400 A.2d 1015 (Vt. 1979) (discussing the interpretation of the statutory thresholds).

350. Wickersham, *supra* note 347, at 514 (citing the act).

351. 1972 Fla. Laws 1162 (current version at FLA. STAT. § 380.012-.12 (2015)).

352. FLA. STAT. § 380.06 (2015).

353. See generally, Joseph Van Rooy, *The Development of Regional Impact in Florida's Growth Management Scheme: The Changing Role in Regionalism*, 19 J. LAND USE & ENVTL. L. 255 (2004).

354. Thomas G. Pelham et al., *Managing Florida's Growth: Toward an Integrated State, Regional and Local Comprehensive Planning Process*, 13 FLA. ST. U. L. REV. 515, 565 (1985) (citing then-existing FLA. ADMIN. CODE ANN. r. 27F-2 (1973)).

355. *Id.* at 518.

356. FLA. STAT. § 380.05 (1973).

357. FLA. STAT. § 380.05 (2015).

358. *Id.*

lands are not listed today.³⁵⁹ The Florida Supreme Court struck the rule as an invalid delegation of legislative authority.³⁶⁰ The 1979 Legislature amended the act in response, adopting standards that reach today.³⁶¹

The second act of consequence in 1972 was the Florida State Comprehensive Planning Act (“The State Comprehensive Planning Act”).³⁶² This act required the generation of a state comprehensive plan.³⁶³ The 1975 legislature buttressed the 1972 legislation by passing the Local Government Comprehensive Planning Act (“the LGCPA”).³⁶⁴ The 1975 act did not require local plans to be consistent with the state plan once the latter was finalized.³⁶⁵ Nonetheless, the twice-head of the Florida State planning agency described the LGCPA as “at the time constitut[ing] the strongest piece of local planning enabling legislation ever enacted in this country, requir[ing] every local government in Florida to adopt a comprehensive plan in accordance with detailed statutory requirements by 1979.”³⁶⁶

The LGCPA’s most significant step was the consistency mandate. The act required local governments to ensure that all future local government legislative “land development regulations,” such as zoning codes, and “development orders,” such as site-specific rezoning’s, variances, and site plans, were “consistent” with the mandatory local comprehensive plan.³⁶⁷ The act did not, however, contain criteria for local plans to meet, nor a plan map requirement.³⁶⁸ Further, and significant to our tale, the state land planning agency enjoyed only advisory authority over local plans.³⁶⁹

While the State adopted an advisory State Comprehensive Plan³⁷⁰ and required the various regional planning councils to adopt their own regional plans,³⁷¹ Governor Bob Graham initiated the next major step when he formed the Environmental Land Management

359. *Id.*

360. *Askew v. Cross Key Waterways*, 372 So. 2d 913 (1978).

361. Ch. 79-73, Laws of Florida.

362. 1972 Fla. Laws 1072 (current version at FLA. STAT. § 186 (2015)).

363. *Id.*

364. 1975 Fla. Laws 794 (current version at part II of FLA. STAT. § 163).

365. *Id.*

366. Pelham, *supra* note 354, at 518.

367. FLA. STAT. §§ 163.3194, 163.3201 (1983).

368. *Id.*

369. Environmental Land Management Study Commission (“ELMS I”) Final Report at 18; Pelham, *supra* note 354, at 541, 543.

370. 1978 Fla. Laws 814, 816.

371. 1980 Fla. Laws 1370 at 1372, 1375.

Study Committee (“ELMS I”). ELMS I addressed coastal management and DRIs, but most significantly to this article, ELMS I recommended a tiered system of state agency, regional and local plans.³⁷² The 1984 Legislature passed the State and Regional Planning Act,³⁷³ which imposed all but the local plan requirement.³⁷⁴ The 1985 Legislature took the next step.

A full assessment of the 1985 Growth Management Act is well beyond the scope of this article. Nonetheless, the definitive explication is found in a 1985 Florida State University Law Review article by Tom Pelham, Bill Hyde and Robert Banks.³⁷⁵ The 1985 Growth Management Act expanded various land use programs.³⁷⁶ Its broadest impacts were mandating “elements” and land use map for each local government’s plans and requiring each such plan to be consistent internally and with state planning standards.³⁷⁷ The act required regional and state review of the plan and most of its amendments.³⁷⁸ Among the local government development orders that had to be consistent with the state, regional, and local planning requirements were building permits, rezonings, special exceptions, variances, plats, and site plans.³⁷⁹ Section 163.3161(5) of the Florida Statutes stated the relationship succinctly: “[A]dopted comprehensive plans shall have the legal status set out in this act and . . . no public or private development shall be permitted except in conformity with comprehensive plans, or elements or portions thereof, prepared and adopted in conformity with [the Growth Management Act].”³⁸⁰

Tiered planning was, and has remained, the Florida model for many years.³⁸¹ However, the Great Recession, combined with a strong Republican majority of the legislature and pro-business Governor Rick Scott, caused a global review of Florida’s top down planning process. The leadership chafed particularly at Tom Pelham, the Florida Department of Community Affairs Secretary, and his aggressive enforcement

372. ELMS I Report, *supra*, note 369 at 1-4.

373. 1984 Fla. Laws 116.

374. See generally Robert Rhodes & Robert Apgar, *Charting Florida’s Course: The State and Regional Planning Act of 1984*, 12 FLA. ST. U. L. REV. 583 (1984).

375. Pelham, *supra* note 354.

376. 1985 Fla. Laws 207.

377. *Id.* at 211.

378. *Id.* at 215.

379. See e.g., codified version of FLA. STAT. § 163.3194 (2016); see also, *Machado v. Musgrove*, 519 So. 2d 629 (Fla. Dist. Ct. App. 1987) (applying the consistency method).

380. FLA. STAT. § 163.3161(5) (2015).

381. Wickersham, *supra* note 347, at 520 (citing *DEGROVE*, *supra* note 344, at 94-97, 124-29, 174-75).

of what he perceived to be the dictates of the Growth Management Act.³⁸²

The 2011 Legislature blew up much of Chapter 163 of the Florida Statutes, shifting much responsibility back from state level to local planning. Senate Bill 2156 eliminated the Department of Community Affairs and in its place created the Department of Economic Opportunity. The new agency's mission statement showed the change from centralized planning to a pro-business goal:

The mission of the Department of Economic Opportunity is to assist the Governor in working with legislative leaders, state agencies, business leaders, and economic development professionals to formulate and implement clear and consistent policies and strategies to promote economic opportunities for all Floridians. The challenge for the Department is to integrate the state's economic development goals and policies, workforce development, community planning and development, and affordable housing.³⁸³

The heart of the changes lay in H.B. 7207, adopted as Chapter 2011-139, 2011 Florida Laws. That massive bill eliminated all but four mandatory public infrastructure "concurrency" requirements for new development. Remaining were sanitary sewer, potable water, solid waste and stormwater. Prevailing mandatory requirements for transportation, schools, parks and recreational facilities became optional for local governments. The act loosened population based land use plan caps, and focused more on having the market decide. Section 163.3177 of the Florida Statutes incorporated some of the less controversial aspects in the former statute and implementing rules, but H.B. 7207 repealed the state's minimum criteria rules that had vexed many developers and local governments. The act also reemphasized comprehensive plan amendment processing. It limited greatly state agency comments and appellate opportunities.

Of significance to our issues, the 2011 act created a new Section 163.3248, which established Florida's current "Rural Land Stewardship" (RLA) process. Rural and agricultural areas that were 10,000 acres or greater, outside of municipalities and designated urban service areas, could establish themselves as "sending areas" with "stewardship credits."³⁸⁴ The property's credits could be transferred to

382. See, e.g., Craig Pittman, *Powerful interests checkmated Florida's growth management agency*, TAMPA BAY TIMES (May 21, 2011, 4:53 PM), <http://www.tampabay.com/news/powerful-interests-checkmated-floridas-growth-management-agency/1171063>.

383. S.J. Res. 2156: Governmental Reorganization (Fla. 2011).

384. *Id.* at (2), (7) – (8).

“receiving areas” for developing mixed-use densities and intensities.³⁸⁵ The process requires a plan amendment that establishes the sending and receiving areas and establishes the available credits.³⁸⁶ The statute requires state review of the whole RLA, followed by local ordinance establishing the receiving area’s development rights.³⁸⁷

XIII. FLORIDA’S LOCAL GOVERNMENT HOME RULE

Urban agriculture, by its nature, affects municipalities’ more than unincorporated areas. Florida’s municipalities enjoy home rule powers that aid them in creative zoning and permitting. Article VIII, section 2, of the Florida constitution states in pertinent part:

(b) Powers. Municipalities shall have governmental, corporate and proprietary powers to enable them to conduct municipal government, perform municipal functions and render municipal services, and may exercise any power for municipal purposes except as otherwise provided by law . . .³⁸⁸

Section 166.021, Florida Statutes, implements the constitutional provision:

PART I: GENERAL PROVISIONS

166.021. Powers . . .

(1) As provided in s. 2(b), Art. VIII of the State Constitution, municipalities shall have the governmental, corporate, and proprietary powers to enable them to conduct municipal government, perform municipal functions, and render municipal services, and may exercise any power for municipal purposes, except when expressly prohibited by law. . . .

(4) The provisions of this section shall be so construed as to secure for municipalities the broad exercise of home rule powers granted by the constitution. It is the further intent of the Legislature to extend to municipalities the exercise of powers for municipal governmental, corporate, or proprietary purposes not expressly prohibited by the constitution, general or special law, or county charter and to remove any limitations, judicially imposed or other-

385. *Id.* at (2), (5) – (6).

386. *Id.* at (2), (5).

387. *Id.* at (5), (7).

388. FLA. CONST. art. VIII, § 2 (Although ROBERT L. NABORS, *FLORIDA HOME RULE GREEN BOOK 29* (2011) notes that the 1975 Florida Constitution Review commission inserted a sentence stating that municipalities “shall have the power of self-government,” the legislature deleted it.).

wise, on the exercise of home rule powers other than those so expressly prohibited.³⁸⁹

Nabors points out two general limitations to municipal home rule. First, a municipality may exercise powers that are concurrent with state government authority, provided that state law controls where a conflict exists.³⁹⁰ One Florida Court explained the following conflict rule:

An ordinance which supplements a statute's restriction of rights may coexist with that statute . . . whereas an ordinance which countermands rights conferred by statute must fail.³⁹¹

The other limitation is that the local government must act with a "valid municipal purpose."³⁹² *City of Boca Raton v. Gidman*,³⁹³ framed the two part test as follows:

[W]henever a municipality exercises its powers, a two-tiered question should be asked. Was the action undertaken for a municipal purpose? If so, was that action *expressly* prohibited by the constitution, general or special law, or county charter?³⁹⁴

Of course, *Euclid* creates a virtually *per se* standard supporting zoning as a general municipal power. The general Florida standard for finding a municipal purpose is a recitation of police power authority. In *Ormond Beach v. County of Volusia*, for example, Florida's Fifth District Court of Appeal stated that a municipal purpose must "be needed for the health, morals, safety, protection, or welfare of the city."³⁹⁵

The Community Planning Act opened the door for the incorporation of greater flexibility in local government plans and zoning codes. By eliminating the need for the state to sign off on most comprehensive plan amendments, local governments are free to employ creative planning tools to better adapt their development regulations to local needs. A number of municipalities have responded to citizen demand for

389. FLA. STAT. § 166.021(1)(4) (2011).

390. ROBERT L. NABORS, FLORIDA HOME RULE GREEN BOOK 48 (2011) (citing *City of Miami Beach v. Rocio Corp.*, 404 So. 2d 1066, 1070 (Fla. Dist. Ct. App. 1981)).

391. *City of Miami Beach v. Rocio Corp.*, 404 So. 2d 1066, 1070 (Fla. Dist. Ct. App. 1981).

392. NABORS, *supra* note 390, at 49; *State v. City of Sunrise*, 354 So. 2d 1206, 1209 (Fla. 1978).

393. 440 So. 2d 1277, 1280 (Fla. 1983).

394. *Id.*

395. 535 So. 2d 302, 304 (Fla. Dist. Ct. App. 1988).

looser zoning districts by amending their zoning codes to allow for backyard chickens and gardens.³⁹⁶

XIV. FLORIDA'S RIGHT TO FARM ACT

Florida's Right to Farm Act is found at Section 823.14 of the Florida Statutes. That statute was passed in 1979.³⁹⁷ As originally passed, the statute stated:

No commercial agricultural or farming operation, place, establishment, or facility, or any of its appurtenances, or the operation thereof, shall be or shall become a nuisance as a result of changed conditions in and around the locality of such agricultural or farming operation, place, establishment, or facility, if such agricultural or farming operation, place, establishment or facility has been in operation for 1 year or more and if it was not a nuisance at the time it began operation. This section, however, shall not apply whenever a nuisance injurious to health, as defined in chapter 386 [Florida Statutes] results from the operation of any such agricultural or farming operation, place, establishment, or facility or any of its appurtenances.³⁹⁸

The statute has been amended several times, most significantly in 1982. Today, it states the following legislative purpose:

[E]ncouragement, development, improvement, and preservation of agriculture will result in a general benefit to the health and welfare of the people of the state.³⁹⁹

The Florida Attorney General has summarized the basis for the act as follows:

The Legislature . . . recognizes that agricultural activities conducted on farmland in areas that are becoming urbanized are potentially subject to nuisance lawsuits and that such suits may

396. For instance, after a concerted effort by a group of local residents, the city of Jacksonville recently established a pilot program allowing up to 300 permits for backyard hens, which became permanent in COJ Ord. 2015-337-E, codified at s. 656.421, 422, COJ Zoning Code. Orlando has a similar program which was recently extended for an additional year. *See, e.g.*, Orlando Florida Chicken Ordinance www.backyardchicken.com; Jeff Weiner, *Orlando's "urban chickens" can stick around another year*, ORLANDO SENTINEL (June 13, 2015, 12:10 PM), <http://www.orlandosentinel.com/health/os-urban-chickens-orlando-program-renew-20150613-story.html>. Other Floridian locales have moved beyond pilot programs and adopted ordinances that allow backyard chickens in residential districts. *See, e.g.*, 5.27-282.28, Tampa Municipal Code.

397. FLA. STAT. § 823.14(2) (1979) amended by FLA. STAT. § 823.14(2) (2015).

398. *Id.*

399. FLA. STAT. § 823.14(2) (2015).

encourage or force the premature removal of farmland from agricultural use.⁴⁰⁰

XV. AGRICULTURAL ZONING IN FLORIDA

Protection of agricultural production through zoning has been a long-time concern in Florida. For example, James Wershow wrote in 1960 of tools to protect Florida's farmlands.⁴⁰¹ Wershow focused on the more traditional concerns of growth encroaching on productive rural lands over taxation, and complaints by those "moving to the nuisance."⁴⁰² He concluded:

Anything other than positive action through rural zoning will invite unguided urban encroachment. Rural zoning works at the very source of the problem by separating agricultural from non-agricultural uses. The desirable degree of separation varies with the locality; the use of particular zoning tools will be guided by local objectives.⁴⁰³

Wershow's concerns were prescient. Florida in 1960 was experiencing "unprecedented population growth."⁴⁰⁴ Let us put that in perspective. The 1960 Florida Census population was 4,951,560, ranking tenth in the nation.⁴⁰⁵ The population nearly doubled from 2,821,000 in 1950,⁴⁰⁶ which in turn was about fifty percent higher than the 1940 population of 1,897,414.⁴⁰⁷ Today, Florida's population is about twenty million, ranking third nationally.⁴⁰⁸ The population has truly exploded, growing over tenfold since just before World War II. The pressure to feed this massive-scale population growth is self-evident.

400. Fla. Op. Att'y Gen. 2006-07, 2006 WL 584547.

401. James S. Wershow, *Agricultural Zoning in Florida - Its Implications and Problems*, 13 U. FLA. L. REV. 479 (1960).

402. *Id.* at 480-81.

403. *Id.* at 481.

404. *Id.* at 491.

405. U.S. BUREAU OF THE CENSUS, CENSUS OF THE POPULATION: 1960: CHARACTERISTICS OF THE POPULATION (1961).

406. U.S. BUREAU OF THE CENSUS, CENSUS OF THE POPULATION: 1950: CHARACTERISTICS OF THE POPULATION (1951).

407. U.S. BUREAU OF THE CENSUS, CENSUS OF THE POPULATION: 1940: CHARACTERISTICS OF THE POPULATION (1941).

408. Table of Population Estimates by State, U.S. CENSUS BUREAU, <http://www.census.gov/quickfacts/chart/PST045214/00,12>.

At the same time, Florida remains an agricultural giant. The state has about 47,500 commercial farms, on 9.25 million acres.⁴⁰⁹ It is second in the value of vegetable production, and first in production values for numerous fruits and vegetables.⁴¹⁰ Florida ranks twelfth in beef cows.⁴¹¹ The state exports more agricultural products than all but six states.⁴¹²

Even though Florida's agriculture base remains strong in the face of sprawl, many residents do not benefit. Food insecurity is pervasive, particularly as urbanizing populations have less access to reasonably priced and healthy food sources. This is especially so in downtowns. The AARP and the University of Central Florida recently conducted a survey that estimated over 17 percent of Floridians are food insecure.⁴¹³ Agricultural lands regulation must protect food production and distribution at the large scale and the local level.

Florida has used tools to protect agriculture as well as facilitating its conversion. One such example is the "Agricultural Enclave."⁴¹⁴ "Agricultural Enclave" legislation created one of Florida's more sweeping and controversial agricultural property rights mechanisms.⁴¹⁵ The intent behind enclave legislation was to curtail urban sprawl by allowing agricultural lands that were surrounded by development to convert to residential, commercial, or industrial uses.⁴¹⁶ The goal makes sense, but the controversy involves concerns over whether it undermines protection of productive agricultural lands.⁴¹⁷ The Enclaves preemption of local regulation puts more pressure on local governments to protect and to foster other agricultural lands within their jurisdictions.

409. *Fla. Agriculture Overview & Statistics*, FLA. DEP'T OF AGRIC. & CONSUMER SERVS., <http://freshfromflorida.com/Divisions-Offices/Marketing-and-Development/Education/For-Researchers/Florida-Agriculture-Overview-and-Statistics> (last visited Feb. 23, 2016).

410. *Id.*

411. *Id.*

412. *Id.*

413. AMY M. DONLEY ET AL., *THE EXPERIENCE OF FOOD INSECURITY: AN AARP/UCF SURVEY OF ADULT FLORIDIANS 3* (Nov. 2014), http://www.aarp.org/content/dam/aarp/research/surveys_statistics/general/2014/Experience-of-Food-Insecurity-An-AARP-UCF-Survey-of-Adult-Floridians-AARP-res-gen.pdf. Ten questions were used to determine food insecurity. They all dealt with whether there was enough food for the household. *Id.* at 4.

414. FLA. STAT. § 163.3164(4) (2016).

415. *See generally*, Sidney F. Ansbacher & Michael T. Olexa, *Florida Nuisance Law and Urban Agriculture*, 89 FLA. B. J. 28 (2015).

416. FLA. STAT. § 163.3162(1) (2016).

417. *See generally*, Rodney L. Clouser, *Issues at the Rural-Urban Fringe: Florida's Agricultural Enclave Law*, U. FLA., <http://ufdc.ufl.edu/IR00004196/00001>.

The 2004 legislature passed SB 1712, the first enclave bill, with only six dissenting votes, and presented it to Governor Jeb Bush. A broad coalition of public interest and planning groups opposed the bill.⁴¹⁸ They supported the underlying basis for the bill, but claimed the bill's language was too broad. Florida's American Planning Association Chapter President asserted:

Unfortunately, SB 1712 is too broadly written, its terms so vaguely defined, and has [sic] no size limitation provided for the enclave, that rather than achieving the intended purpose, it will encourage the premature conversion of hundreds of thousands of acres of agricultural lands and promote urban sprawl, at great inefficient cost to local governments and with potential damage to the natural environment.⁴¹⁹

Governor Bush vetoed SB 1712. His veto message stated his fear that farmers would be tempted to "cash out" productive lands for development, thereby undermining prudent land use and fostering sprawl.⁴²⁰ The Governor argued that agricultural land use conversions present local, not state-wide decisions.⁴²¹

The veto caused predictable responses. Agricultural interests expressed dismay and renewed interest in passing similar legislation in the following session. Agriculture Commissioner Charles H. Bronson stated, "This veto mean that best and highest use for agland has been relegated to the agricultural designation, which carries the lowest value."⁴²² Commissioner Bronson's interpretation was consistent with arguments that many opponents to SB 1712 emphasized.⁴²³

The legislature revisited the issue in 2005. The bill, S.B. 716, would allow enclave land owners to upzone or obtain plan amendments if at least 75 percent of the parcel was enclosed by urban uses. It also would have "deemed" comprehensive plan amendments to eliminate

418. See, e.g., Letter from Joe Bell, as President of the Florida Chapter of the American Planning Association, in Sidney F. Ansbacher & Michael T. Olexa, *Florida Nuisance Law & Urban Agriculture*, 89-JAN. FLA. B. J. 28 (2015).

419. *Id.* It is noteworthy that Bell implies that agriculture has a greenspace and natural resource benefit in alleging that conversion has a "potential" to "damage . . . the natural environment."

420. Richard Grosso & Robert Hartsell, *Old McDonald Still Has A Farm: Agricultural Property Rights After the Veto of S.B. 1712*, 79 FLA. B. J. 41 (2005), <http://www.floridabar.org/DIVCOM/JN/JNJournal01.nsf/8c9f13012b96736985256aa900624829/c60455b09e9ed16585256fb3006d1378?OpenDocument>.

421. *Id.*

422. *Jeb Bush Springs a Surprise*, THELEDGER.COM (July 12, 2004), <http://www.theledger.com/article/20040712/NEWS/407120393?p=1&tc=pg> (quoting Charles Bronson, Florida Agriculture Commissioner).

423. See, e.g., Letter from Joe Bell, *supra* note 418.

statutorily defined enclaves as steps “to prevent urban sprawl.” Environmentalist and local governors said the enclave legislature would encourage growth. The agricultural and private property proponents reiterated their position that fragmented agricultural lands were no longer viable as natural resources or productive lands. These proponents argued that opponents of enclave legislation wanted farmlands to act as everyone else’s greenspace.⁴²⁴

The Senate Environmental Chair, Paula Dockery, suggested that the state’s failure to fund a previous act exacerbated the issues behind the 2005 enclave legislation.⁴²⁵ She noted that the state adopted the Rural and Family Lands Protection Act in 2001, but never funded it.⁴²⁶ The Act was designed to authorize the state to buy conservation easements to preserve farmland.⁴²⁷ Florida Commissioner of Agriculture Charles Bronson gave the Agriculture and Resource Conservation Assessment of the Act⁴²⁸ to the Governor, the House Speaker and Senate President. The highlights were:

- Florida continues to lose valuable agricultural lands to urban development at an alarming rate.
- Florida’s rural land base has experienced a fivefold increase in urban conversion from 1964 to 1997.
- This increase in urban land use resulted in the loss of nearly five million acres of valuable agricultural lands during this period.⁴²⁹

The University of Florida projected another 1.3 million acres lost in the next 10 years.⁴³⁰ The program therefore focuses on maintaining the integrity and function of working agricultural landscapes and ensuring opportunities for viable agricultural activities on working agricultural lands.⁴³¹ We discuss this act further in the next section. Nonetheless,

424. *Nectow v. City of Cambridge*, 277 U.S. 183, 188-89 (1928).

425. Lloyd Dunkelberger, *Enclave Bill Gets Ahead, Has Opposition*, THELEDGER.COM (Apr. 26, 2005), <http://www.theledger.com/article/20050426/NEWS/504260397>.

426. *Id.*

427. S.B. 1922, 2001 Leg., Reg. Sess. (Fla. 2001) (codified at Fla. Stat. §§ 570 .70 and 570.71).

428. *Rural and Family Lands Protection Program*, FLA. DEP’T OF AGRIC. & CONSUMER SERVICES, http://www.floridaforestservice.com/forest_management/rural_family_lands_in_dex.html (last visited Mar. 1, 2016) (quoting CHARLES H. BRONSON, COMMISSIONER OF FLA. DEP’T OF AGRIC. & CONSUMER SERVICES DIV. OF FORESTRY, AGRICULTURE AND RESOURCE CONSERVATION ASSESSMENT (Dec. 2001), http://www.freshfromflorida.com/content/download/4589/29304/RFLPP_assessment.pdf).

429. BRONSON, *supra* note 428, at 3, 14.

430. *Id.*

431. *Id.*

its legislative and administrative findings demonstrate the dystopia caused by legislative efforts to simultaneously protect productive agricultural lands from rampant conversion and facilitate conversion of otherwise productive lands that urban sprawl fragments. In addition to the universal economics pressures that underlie urban farms in most locales, Florida's efforts to stem the tide of lost productive farmland foster conversion of small but increasing patches of urban core to feed residents.

The 2006 Florida Legislature and Governor agreed at last on enclave legislation. H.B. 1015 passed as Florida Laws 2006-255. Amendments to the Agricultural Land and Practices Act at Section 163.3162 of the Florida Statutes, allow the owner of a statutorily defined agricultural enclave to apply for a comprehensive plan amendment.⁴³² A landowner adjacent to industrial, commercial or residential lands could apply.⁴³³ Further, after good faith negotiations between enclave owners and the local government, the local government "[must transmit the plan amendment application] to the state land planning agency for review."⁴³⁴ The language applied "regardless of whether the local government and owner reach consensus on the land uses and intensities of use"⁴³⁵

CONCLUSION

Home rule authority should be used to create flexible mixed use districts that foster urban agriculture. Nuisance authority is less viable to impede community gardens, farms and farmers markets in busy urban cores. TDRs and site-specific cluster regulations that intensify uses in one location and create greenspace elsewhere are ideal tools to facilitate urban agriculture.

Florida's local governments can mitigate past nuisances by developing creative ways to facilitate production of Brownfields. One of the authors is active in a not-for-profit that coordinated with the City of Jacksonville, Florida Department of Environmental Protection and other entities to use one Brownfields site for crops. The owner agreed to place two feet of clean soil on top of the existing soil and to farm only within the top layer.

Additionally, hydroponic and aquaponic farming is a practical use of urban sites. Those two forms of farming use nutrient-laden

432. FLA. STAT. § 163.3162 (4) (2006).

433. FLA. STAT. § 163.3162(5) (2006).

434. FLA. STAT. § 163.3162 (4)(b) (2006).

435. *Id.*

water, rather than soil, to grow plants or plants and fish respectively. Water-based farming makes good use of Brownfields as well as impermeable urban surfaces. It is therefore ideal for use in urban cores.

Euclidian zoning aimed to solve zoning issues during a time when growth seemed infinite. As LaCroix argues, nobody desires stagnation. The cure is growth. The type of growth, however, remains a contentious debate. Land use law in this country emphasizes on development and its management. Most of our modern land use structure is designed around this concern. "The use of this same regulatory structure to manage shrinkage and de-urbanization, rather than growth and urbanization, runs contrary to this practice."⁴³⁶

Urban agriculture requires legal flexibility and adaptive planning. This "smart growth" is difficult to comprehend because it seems to combat a consumerist society. Yet, urban farms tackle stagnation by improving the local economy and promoting sustainable urban growth that are "a goal in themselves, not as a holding strategy until it is time for residential or commercial building construction."⁴³⁷ Such urban growth does not remain vulnerable to a national market, but provides a reliable product in constant demand. Such production does not occur at the cost of environmental degradation, but revitalizes the urban environment.

436. LaCroix, *supra* note 26, http://scholarlycommons.law.case.edu/cgi/viewcontent.cgi?article=1058&context=faculty_publications.

437. *Id.* at 236.
