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Promoting the Urban Homestead: Reform of Local Land Use Laws to Allow Microlivestock on Residential Lots

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INTRODUCTION

Over the past several decades, Americans have divorced themselves from the ages-old endeavor of growing and harvesting their own food. During this era, the food system has undergone a radical change from its traditional makeup that predominated even just a few generations ago. Today, global distribution systems transport food thousands of miles before it reaches its final destination. While this model provides convenience and selection for consumers, the consolidation and centralization of food production has come at a high price. The U.S. food system is highly polluting, vulnerable to adversity, unsustainable, and, in some cases, unsafe for consumers.[1] For these and other reasons, citizens are increasingly urging their local officials to initiate regulatory and policy changes to encourage local food production on both public and private property. This Article explores some of the law and policy considerations for reforming city codes to allow for "urban homesteading" on residential city lots, focusing in particular on regulations pertaining to husbandry of microlivestock.

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1. *See generally* MICHAEL POLLAN, THE OMNIVORE'S DILEMMA: A NATURAL HISTORY OF FOUR MEALS (2006).

THE URBAN HOMESTEADING MOVEMENT

Urban homesteading is spreading rapidly in the United States as part of a worldwide movement known as relocalization, which seeks to build local resilience on several different fronts. Many new books promote and provide resources for the effort of transforming the urban or suburban yard into a food-producing lot. For example, *The Urban Homestead*[2] and *The Backyard Homestead*[3] are both excellent resource manuals for the homestead enterprise. *The Integral Urban House,* a recently reprinted classic from the 1970s, provides a detailed manual of animal husbandry.[4] Books and materials from the World War II vintage also provide instruction on chicken and rabbit husbandry.[5] Apart from how-to books, *Farm City* provides a lively narrative account of a couple engaged in urban homesteading in an impoverished area of Oakland, California.[6] Their inspiring approach takes hold in a neighborhood gripped with crime and poverty. A growing array of popular websites and blogs also promote urban homesteading. One site, *Path to Freedom*, features a family that produces fruits, vegetables, honey, goat milk, cheese, and eggs on its 0.1-acre garden in Pasadena, California.[7] The explosive growth of backyard chicken husbandry nationwide is also indicative of the popularity of this back-to-the-land strategy within city limits. As a *New Yorker* article observes, urban chicken raising is now a "movement across North America."[8]

As urban homesteading spreads, new local industries spring up to provide resources and infrastructure, and existing local businesses respond by providing the same. For example, local vendors in the Willamette Valley, such as the Coastal Farm Supply stores in Oregon and Washington, carry chicken coops and rabbit hutches in response to recent growth in urban homesteading. In addition, local garden shops and nurseries now stock a wide variety of fruit trees and other food producing plants, and also offer training sessions and other resources for the urban farmer.

Microlivestock provides an important food-producing component of the urban homestead. As the leading book *The Backyard Homestead*

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2. KELLY COYNE & ERIK KNUTZEN, THE URBAN HOMESTEAD: YOUR GUIDE TO SELF-SUFFICIENT LIVING IN THE HEART OF THE CITY (expanded & rev. ed. 2010).

3. CARLEEN MADIGAN, THE BACKYARD HOMESTEAD: PRODUCE ALL THE FOOD YOU NEED ON JUST A QUARTER ACRE! (2009).

4. HELGA OLKOWSKI ET AL., THE INTEGRAL URBAN HOUSE: SELF-RELIANT LIVING IN THE CITY (2008).

5. *See, e.g.,* PAUL W. CHAPMAN, CHICKEN RAISING MADE EASY (1943); CLAUDE GOODCHILD & ALAN THOMPSON, KEEPING POULTRY AND RABBITS ON SCRAPS (1941).

6. NOVELLA CARPENTER, FARM CITY: THE EDUCATION OF AN URBAN FARMER (2009).

7. Path to Freedom: The Original Modern Urban Homestead, http://www.pathtofreedom.com (last visited Feb. 7, 2010).

8. Susan Orlean, *The It Bird*, NEW YORKER, Sep. 28, 2009 (internal quotation marks removed).

notes, "The final step in completing a backyard homestead is the addition of animals for milk and meat."[9] As indicated by many books and websites on the subject, microlivestock appropriate for the typical residential urban city lot include chickens, ducks, turkeys, geese, quail, rabbits, pygmy goats, bees, and even fattening, or "finishing," a pig for a few months out of the year may be appropriate.[10] When these species are managed together, their interactions result in closed-loop production processes and synergies that build on nature's own relationships. For example, rabbits and chickens produce fertilizer for the garden, the garden produces vegetables for the family, the vegetable scraps provide food for the chickens, and the chickens produce eggs. As many authors have observed, animals are an integral part of the garden because they provide pest control and fertilizer.[11] Currently, a limited number of cities give citizens the opportunity to

farmers markets is still only a tiny fraction of overall food retail sales.[14] Many agricultural products are harvested at distant farms in Mexico, Brazil, China, or Australia, then pass through various transportation channels as they are processed, packaged, and distributed to retailers where consumers purchase them and transport them home.[15] Studies have shown that the average fresh food item has traveled between 1300 and 2000 miles before reaching the dinner plate.[16]

Because of this long-distance transport, as well as the machinery, fertilizers, pesticides, fuel, and other goods used in large-scale agricultural production, the food production system is a significant user of energy, accounting for 15.7 percent of the total national energy budget in 2007.[17] Even worse, the energy necessary to produce a given food product often greatly exceeds the caloric content of the food itself. One source estimates an input of ten kilocalories of fossil fuel energy is required for every one kilocalorie of food energy produced.[18] Moreover, long-distance transport requires elaborate packaging and often refrigeration, both of which are highly consumptive.[19] Once these packaged food products reach the post-consumer stage, municipalities are responsible for recycling or disposing of the resulting waste.

Family Economic Security

Many homeowners have turned to their own backyards for food cultivation not only to provide a safer, healthier selection of food, but also as a buffer against hard financial times. In fact, home food production is now recognized as an important economic endeavor. In her book *Depletion and Abundance*, author Sharon Astyk notes the importance of a "domestic economy" for family security in the face of an

14. LAUREN MAUL, LANE COUNTY FOOD COALITION, LANE COUNTY FOOD SYSTEM ASSESSMENT REPORT: A COMPILATION OF FINDINGS AND SUGGESTIONS FOR FUTURE RESEARCH, 12 (2003).

15. UNITED STATES DEPARTMENT OF AGRICULTURE, U.S. AGRICULTURE TRADE: IMPORTS (2009), *available at* http://www.ers.usda.gov/briefing/agtrade/imports.htm.

16. NATIONAL SUSTAINABILITY AGRICULTURE INFORMATION SERVICE, FOOD MILES: BACKGROUND AND MARTKETING (2010), *available at* http://attra.ncat.org/attra-pub/food miles.html.

17. ECONOMIC RESEARCH SERVICE, ENERGY USE IN THE U.S. FOOD SYSTEM (2010), *available at* http://www.ers.usda.gov/Publications/ERR94/ERR94_ReportSummary.pdf.

18. Robert S. Lawrence, Director, Center for a Livable Future, Johns Hopkins Bloomberg School of Public Health, Presentation: Peak Oil and Health: Impacts on Food and Agriculture (Mar. 12, 2009), *available at* http://www.jhsph.edu/bin/o/q/Lawrence_Handouts.pdf. A calorie (or gram calorie) is the amount of energy required to raise the temperature of one gram of water one degree Celsius. A kilocalorie refers to one thousand calories.

19. PATRICK CANNING ET AL., U.S. DEPARTMENT OF AGRICULTURE ENERGY USE IN THE U.S. FOOD SYSTEM 1 (2010), *available at* http://www.ers.usda.gov/Publications/ERR94/ERR94.pdf.

increasingly tenuous market economy.[20] Financial hardship and economic uncertainty leads to increased food insecurity, which is defined as the "limited or uncertain availability of nutritionally adequate and safe foods or limited or uncertain ability to acquire acceptable foods in socially acceptable ways."[21] During the period between 2006 and 2008, for example, an average of 13.1 percent of Oregon households experienced food insecurity.[22] Recent studies in California indicate that 12 percent of adults statewide are currently in food insecure households.[23] As food prices and unemployment rise, more households can be expected to pursue home food production for this reason.

Freedom of Food Choice

Other homeowners may be motivated by a desire to take responsibility for producing as much of what they eat as possible. As author Michael Pollan notes in *The Omnivore's Dilemma*, the industrialized meat and dairy industry imposes deplorable conditions on animals raised for food.[24] Factory farms that hold and manage thousands of pigs or dairy cows pollute valleys and waterways with appalling amounts of manure, as thoroughly documented in David Kirby's *Animal Factory*.[25] Responsible animal husbandry on private property is a viable alternative to this industrial system. In fact, some predict

> that in the coming years urban livestock is going to become more and more common, because the current situation with our food is just untenable.... If you raise and slaughter your own meat you'll know the animal was raised in the best conditions imaginable—with air and sunlight and stimulation and healthy food.[26]

20. SHARON ASTYK, DEPLETION AND ABUNDANCE: LIFE ON THE NEW HOMEFRONT 118 (2008); *see also* SHARON ASTYK & AARON NEWTON, A NATION OF FARMERS: DEFEATING THE FOOD CRISIS 39 (2009) ("It is easy in our vast agricultural system to imagine that someone will always produce what is needed and make sure we get it. But as we've seen, that system has already begun to fall apart. However, we have become so disconnected from agriculture that most Americans simply don't fully grasp the relationship between farming and food in any meaningful sense.").

21. Economic Research Service, United States Department of Agriculture, Food Security in the United States: Measuring Household Food Security, http://www.ers.usda.gov/Briefing/FoodSecurity/measurement.htm (last visited Apr. 7, 2010).

22. UNITED STATES DEPARTMENT OF AGRICULTURE, HOUSEHOLD FOOD SECURITY 21 (2008), *available at* http://www.ers.usda.gov/Publications/ERR83/ERR83b.pdf.

23. *Id.*

24. POLLAN, *supra* note 1.

25. *See generally* DAVID KIRBY, ANIMAL FACTORY: THE LOOMING THREAT OF INDUSTRIAL PIG, DAIRY, AND POULTRY FARMS TO HUMANS AND THE ENVIRONMENT (2010).

26. COYNE & KNUTZEN, *supra* note 2, at 132–33.

Potential for Urban Farming

With grass lawns covering over twenty-five million acres across the United States, urban and suburban families have a wealth of opportunity to engage in urban homesteading in some fashion.[27] In Eugene, Oregon, there is a flourishing victory garden movement, modeled after the WWII victory garden strategy, that has generated hundreds of new gardens across Eugene's major neighborhoods, including low-income ones. Homeowners are planting gardens and mini-orchards, raising chickens, and finding other ways to make productive use of their land to enhance their family food security and broaden food choice. By lifting restrictions on food production on private, residential land, and empowering the cadre of landowners eager to put their backyards to productive use, cities and communities can take advantage of the enormous leveraging opportunities and public resource savings potential that exist. Average homeowners can meet nearly all of their meat and dairy nutritional needs by maintaining microlivestock that are now recognized accoutrements of the full-fledged urban homestead.[28] While some cities already allow various types of microlivestock, others are too restrictive to allow for meaningful animal husbandry and individual choice.

Reforming local land use or municipal codes to allow citizens to manage a broad variety of microlivestock would advance many city policies, without the expenditure of public revenue, simply by leveraging landowner initiative. Given the myriad benefits of local food production, a city policy that allows people to make productive use of their property in this manner falls squarely within the traditional values of American property law.

PROPERTY LAW: A NEW BALANCING TEST FOR USES OF PRIVATE PROPERTY

A municipal land use code determines what uses an owner can make of his or her property. Governed by policy choices that reflect the overriding needs of the community, it must be a dynamic set of rules that responds to change. The most basic duty of city government, which may be exercised through its land use authority, is to provide for the essential welfare of its citizens.

The primary reason land use codes are unduly restrictive as to animal husbandry is because they are still geared towards maintaining a sharp distinction between rural and urban life. Cities have generally prohibited microlivestock because they are legally considered "farm

27. *See* Lawn Institute, FAQs, http://www.thelawninstitute.org/faqs/?c=183313.
28. *See, e.g.*, COYNE & KNUTZEN, *supra* note 2.

animals."[29] This distinction, however, runs counter to the growing interest of citizens in making full use of their privately owned property to provide for healthy food and family self-sufficiency.

The urban homesteading movement breaks down distinctions between farm and city life, drawing both individual and community value from productive use of property within city borders. A new set of microlivestock breeds provides opportunities for creating farm value on backyard lots without intruding upon neighboring properties. Accordingly, city officials nationwide should consider revising their land use codes to relax restrictions on urban microlivestock.

Such code reform remains compatible with the nuisance framework that imbues land use codes. A nuisance is a "substantial and unreasonable interference with the use or enjoyment of land."[30] Determining whether a nuisance exists requires a balancing test between potentially conflicting property uses. The balancing test precludes only activities that cause "substantial harm," and even then restricts the use only if the social utility of the activity does not outweigh its harm.[31] Through application of this test, nuisance law has always sought to promote productive use of property.

At the same time, property owners do not have a legitimate expectation to a perfect existence of their own design. Neighbors do cause constant irritations of one sort or another, whether it be loud stereos, barking dogs, wind chimes, or smelly tobacco smoke. But these intrusions generally do not rise to the level of harm that justifies a regulatory prohibition. The same guiding principle should inform city officials in revising land use codes for urban homesteading. New uses of property invoked by modern concerns should be prohibited only if they rise to the level of substantial harm to neighbors, and only if such uses are not justified by the social value of the action.

Microlivestock generally cause no substantial harm to neighboring properties. As the popular book *The Integral Urban House* explains:

> Most municipal ordinances restricting livestock were made to protect urbanites from the smell, noise, flies, and general nuisance-causing behavior associated with farm animals in the city that are managed as

29. For example, in Eugene, Oregon, the municipal code does not distinguish microlivestock from farm animals at all. Indeed, the section that currently allows for rabbits and fowl in residential areas is titled "Farm Animals Allowed." EUGENE, OR., CODE § 9.5250(1) (2010).

30. JOSEPH SINGER, PROPERTY LAW: RULES, POLICIES, AND PRACTICES 271 (Aspen 4th ed. 2006).

31. *Id.* ("'[N]uisance is a substantial and unreasonable interference with the plaintiff's use and enjoyment of his property.'" (citation omitted)); *id.* at 278 ("The *Restatement (Second) of Torts* §826(a) defines land use as 'unreasonable' when the 'gravity of the harm outweighs the utility of the actor's conduct.'").

> if they were still on the farm. Systems must be constructed that allow small livestock to be raised compatibly with these urban sensibilities.[32]

An increasing array of urban homestead books and websites provide information on strategies that maximize compatibility between food production and neighborhood concerns.[33] Where there is the possibility of substantial harm through noise, odor, or sanitation problems, existing general code provisions provide ample authority to city officials to abate the activity. Of course, if all else fails, property owners can file a nuisance lawsuit in court.

Applying the classic nuisance test to various types of microlivestock husbandry, the social utility side of the equation has changed markedly in recent times. In view of the concerns outlined above, there is heightened value on urban homesteading as an important endeavor for community food security and sustainability. The many co-benefits of raising diverse sources of food on urban homesteads also weigh heavily in the balance. These include public health benefits, decreased amounts of packaging, a reduced public recycling burden, pollution-free and antibiotic-free food choices, responsible husbandry of animals, and, in many cases, an enhanced sense of neighborhood community. Shifting appropriately to reflect the changing conditions of society, the social utility balancing test generally supports use of urban private property for microlivestock.

Revising the land use code to expand such use of private property will have tradeoffs. Some homeowners will undoubtedly object. But the objections of a few must be analyzed carefully to determine if they are truly suffering substantial harm, and, if so, whether such impacts warrant abandoning the strategy of urban food production to create a more secure, resilient community for the rest of the citizenry. A private property owner does not have the right to invoke the regulatory arm of local government for every irritation or as a means to resist a cultural shift toward self-sufficiency. In any event, the objections of one homeowner must be balanced against the rights of the other homeowner to make productive use of his or her private property. Nevertheless, the city must have in place basic safeguards against excessive noise, disruption, smell, or disease caused by raising any animals within city limits.

LOCAL ORDINANCES

Most, but not all, city ordinances set limits on the number of animals that a property owner can have on a given residential lot. The restrictions are often bundled together with specifications as to lot sizes and setbacks. Ordinances vary considerably in this respect. Animals are often grouped

32. OLKOWSKI, *supra* note 4, at 252.
33. *See* discussion *supra*.

together in certain categories, such as fowl, and an overall limit imposed, thereby allowing the homeowner to allocate the types of animals within the allowance. Some cities, such as Portland, Oregon, have taken the approach of aggregating goats, rabbits, and various types of fowl into one category; Portland sets a total limit of three before a permit requirement is triggered.[34] In our view, this approach of grouping different animals, despite their unique benefits and impacts, is somewhat arbitrary and overly restrictive. Moreover, it defeats the objective of using animals in synergy on an urban homestead. Rabbits, for example, occupy very little space and are kept within a hutch, adding no real cumulative impact to the fowl kept on site. On the other hand, chickens and turkeys have separate sorts of impacts because of their size. Consequently, we would recommend establishing separate categories and limits for chickens, turkeys, geese, ducks, rabbits, bees, goats, and pigs. Seattle, Washington, has taken roughly this approach, though it aggregates all fowl.[35]

Other policy choices must be addressed in conjunction with local land use reform, including requirements of physical structures and enclosures, sanitation, permits, inspections, neighbor notice and consent, animal "harvest" and management, commercial activity, and possible revision of general nuisance provisions. There is no one-size-fits-all approach to resolving the inevitable debates that will occur in deciding how each of these areas will be addressed in a particular locale, but there are good reasons to avoid overly burdensome regulation. For example, should a city require microlivestock owners to hold a permit? Portland, Oregon, and Cleveland, Ohio, chose to require permits, but most cities do not.[36] In our view, a permit system does not provide protections that are not already provided by general nuisance provisions. Moreover, a permit system would strain local government resources and potentially discourage homeowners from keeping microlivestock, particularly those who would do so primarily for financial reasons.

CONCLUSION

Protecting the private property rights of local citizens to make productive use of their property can be an important part of any municipal strategy to meet community sustainability and resilience objectives.[37] Local governments can capitalize on private property

34. PORTLAND, OR., CODE § 13.05.015(E) (2010) ("A person keeping a total of three or fewer chickens, ducks, doves, pigeons, pygmy goats or rabbits shall not be required to obtain a [permit].").

35. SEATTLE, WASH., CODE § 23.42.052 (2010).

36. *See, e.g.*, PORTLAND, OR., CODE § 13.05.015 (2010); CLEVELAND, OHIO, CODE § 347.02(i).

37. Modern food policy should be aimed at other areas as well. Public places and schools should be utilized to the maximum extent possible to create edible landscaping and community gardens. Local small-scale commercial food production should be incentivized. This includes

owners' energy and innovation to promote food security, healthier outcomes, and family self-sufficiency. To do so, however, cities will have to revise land use codes to allow a broader array of home food production, including husbandry of microlivestock.

Ideally, such code revisions would be addressed right away, as there is typically a significant lag time between effecting regulatory change and engendering the desire for food production on urban homesteads. Meanwhile, families and households must create the necessary infrastructure and educate themselves on proper care and feeding of microlivestock. Regulatory change should be encouraged nationwide to begin the process of building expertise in managing microlivestock in residential neighborhoods.

encouraging the development of small chicken farms and dairies, as well as inducing farmers to produce important staple crops of high protein beans, grains, and edible seeds. This is the focus of Willamette Valley's Bean and Grain project. *See* http://www.mudcitypress.com/beanand grain.html.