Developing Community Gardens: Removing Barriers to Improve Our Society

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What Is a Community Garden?

A community garden is: a place to go . . .
To learn and educate;
To feel as part of the natural earth (the bricks and mortar are the elements of the environment that create anxiety and pessimism);
To develop a mechanism for communication, information sharing and networking;
To preserve and provide for the highest and best use of valuable resources;
To reduce the expenditure of cash for food and exchangeable materials;
To have peace of mind.
A community garden is a place to go to communicate with earth, nature and oneself.

-Lloyd A. Harding, organizer of the Forest Street Garden, Roxbury

A community garden is "[a]ny piece of land gardened by a group of people." Although there are many varieties, community gardens share one common goal of bringing people together through growing fresh, nutritious produce. Some gardens are designed to improve food security and nutrition in low income areas, while other gardens promote community engagement, cultivate relationships between neighbors, and teach the values of responsibility and hard work. Whatever the purpose of the community garden, those groups and individuals involved in its development often find that there are many barriers to overcome before the final project can come to life. Beyond the difficulties of acquiring funds and resources, community garden organizers face many legal obstacles to creating a garden. These obstacles often impede community gardens from developing in areas where they could provide great benefits to the citizenry. Local
governments can, and should, make changes to facilitate development of community gardens.

This Note examines the history of community gardens and the purposes they provide in today’s society. Section II outlines the benefits of community gardens and shows how the land is used for much more than simply providing food; it is used as a tool for stability, growth, and education. Section III surveys the various legal obstacles and issues that organizers of a community garden may encounter. These include finding and securing land, obtaining non-profit status, acquiring insurance, and making important additions to any lease for a garden. Section IV looks at how these legal obstacles affect the development of community gardens in jurisdictions across the country and analyzes ways that local governments have facilitated, or impeded, the growth of these ventures. Ultimately, in Section V, this Note offers suggestions to local governments on ways to provide invaluable benefits to the community through the use of community gardens.

II. WHAT ARE COMMUNITY GARDENS?

Community gardening has a rich history around the world. Gardens are believed to have been a central part of family life in the ancient Italian city of Pompeii and played a large role in medieval European towns.\(^3\) The idea of community gardens and the system of allotment gardens was brought to the United States from Europe.\(^4\) In early America, local governments often provided small plots of land to people for them to grow their own food as a response to poverty and unemployment.\(^5\) As a result, the gardens became associated with lower class families.\(^6\) During the Great Depression, cities made land available to the unemployed and impoverished through the Work Projects Administration (hereinafter, “WPA”), and in New York City alone nearly 5,000 gardens were cultivated.\(^7\) Prejudice diminished during the first and second World Wars when community gardens were publicized as a way for citizens to contribute to the war effort.\(^8\) It was seen as an act of patriotism for people of all classes to grow a Victory Garden.\(^9\) The WWII era Victory Garden

\(^4\) MARY LEE COE, GROWING WITH COMMUNITY GARDENING 11 (1978).
\(^5\) BOSTON URBAN GARDENERS, supra note 1, at 13.
\(^6\) Williamson, supra note 3, at 7.
\(^8\) Id.
\(^9\) Williamson, supra note 3, at 9.
In addition to health benefits from the increased consumption of fresh fruits and vegetables, working in the garden can encourage a more active lifestyle and provide adults and children with a fun way to engage in physical activity through “stretching, bending, walking, digging, and lifting tools and plants.”

B. Community Development

Community gardens have also been shown to provide the societal benefits of economic value, community pride, social change, and community development. Because these gardens can bring people of various backgrounds together, they help build a stronger community and foster a sense of social identity and spirit. Some studies have even found that the presence of community gardens increases perceived immunity from crime.

Community gardens also have a positive economic impact to their communities. Families can save significantly on the cost of fruits and vegetables by growing them in a community garden. While numbers vary on the amount saved, one national gardening survey found that the national average for savings by eating food grown from a garden is $250 per 600 square feet of garden.

In addition to cost savings, community gardens increase the property values of neighboring residences. A Milwaukee study illustrated the positive correlation between higher property value and the proximity to a community garden or park. The study found that Milwaukee “properties within 250 feet of the community gardens experienced a decline in total assessed value of $24.77 as the distance from the community gardens increases by every foot.”

The act of gardening can produce immense non-economic benefits, as well. Gardeners often comment on “the sheer wonder and joy people

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21 BOSTON URBAN GARDENERS, supra note 2, at 6.
22 Id.
24 Id.
25 Id. at 21.
find in helping things grow." It can be exciting, and even therapeutic, to tend to a garden and be able to watch what develops as a result of one’s hard work.

Community gardens provide numerous community and group benefits to the entire neighborhood. Planning, executing, and caring for the garden has a unique way of bringing together diverse groups within a neighborhood to join in a common cause. The sense of unity and empowerment that a community garden creates has a ripple effect throughout surrounding neighborhoods.

C. Environmental Benefits

Gardens also have a large impact on the environment because “[e]ating locally produced foods reduces fuel consumption, carbon dioxide emissions, and a variety of other negative environmental consequences associated with the transportation of foods.” Food in the United States travels an average of 1,300 miles from farms to Americans’ plates. Because of the high cost of transporting food this distance, local food production vastly reduces greenhouse gas emissions. In addition to the negative ecological consequences caused by the food transport, lack of consumer awareness of the origin of their food represents a concern. It is difficult for individuals to comprehend the impact on the planet’s natural resources when they know nothing about how their food was produced, processed, and transported to their home. “Green vegetation itself can reduce heat island effects in urban areas, and [thus] can help to reduce the use of energy-consuming air conditioning.” According to the Environmental Protection Agency, “heat island” effect refers to built up, industrialized areas that are hotter than rural areas. Small, simple actions, like creating gardens in urban neighborhoods, can have a vast impact on the overall environment.
III. LEGAL ISSUES INVOLVED WITH DEVELOPING A COMMUNITY GARDEN

Citizens and organizations who are interested in developing community gardens encounter many obstacles along the way. Some of these challenges include locating and securing land to use for the garden, ensuring long-term preservation of the land, inciting community interest, protecting against theft and vandalism, and obtaining the necessary resources and funding.\(^\text{34}\)

A. Locating and Securing Property for the Garden

The first major challenge faced by a group attempting to develop a community garden is finding available land that will be conducive to producing a successful garden. Zoning ordinances and other land use frameworks can be used to establish gardens and ensure their success.\(^\text{35}\)

When evaluating whether a piece of land will be appropriate, it is necessary to consider factors like sunlight, shade, soil, topography, water access, visibility, and the neighborhood.\(^\text{36}\)

Once those factors have been considered, the next step is to identify who owns the property and acquire permission to use the land.\(^\text{37}\)

There are several ways to find out who owns the property in order to determine if it can be used for a community garden. The first way is to determine the parcel number used to identify the property.\(^\text{38}\)

Although not always feasible, it is ideal for a group creating a community garden to find property that can be bought and owned by the group or an individual in the group,\(^\text{42}\) due to the immense amount of time and effort that go into developing the garden.\(^\text{43}\)

Ownership also ensures long-term stability for the garden and its contributors, which can encourage


\(^{35}\) PLANNING FOR HEALTHY PLACES, supra note 34, at 4.

\(^{36}\) WASATCH COMMUNITY GARDENS, supra note 34, at 10–12.

\(^{37}\) Id. at 15.

\(^{38}\) Id.

\(^{39}\) Id.

\(^{40}\) Id.

\(^{41}\) Id.

\(^{42}\) BOSTON URBAN GARDENERS, supra note 1, at 129–130.

\(^{43}\) Id. at 129.
dedication and a greater commitment to the garden. All too often, community gardeners will work to improve, and revitalize, a piece of land in their neighborhood only to lose the site to real estate developers. Even if ownership is not possible, there are still viable alternatives to ensure stability at the garden site.

i. Use of Private Property

Organizers of a community garden should keep several considerations in mind when obtaining permission from a property owner to use their land. After explaining the benefits that community gardens provide, it is a good idea to discuss the legal aspects of the venture to the landowner. This will include a discussion regarding the lease (which should be negotiated for as long a term as possible), insurance, and, ideally, a hold harmless waiver clause.

A common concern is landowner liability if persons become injured on the property. Because of this concern, a hold harmless waiver clause is an important addition to a lease. In a legal sense, to “hold harmless” means “to absolve (another party) from any responsibility for damage or other liability arising from the transaction.” This clause would state that if a gardener is injured as a result of the negligence of another gardener, the landowner cannot be sued. Issues regarding the lease and the acquisition of liability insurance are discussed below.

ii. Use of Public Property

If the developer of a community garden is trying to obtain land owned by the city or county, rather than a private individual, further relevant legal considerations must be taken into account. For example, the garden proposal will often have to be approved by the city council, and, if approved, a lease will need to be negotiated. If the organization developing the garden has non-profit status, the property may be leased from the government for a nominal fee. If the organization has not obtained non-profit status, the government must rent the property for “fair market value.”

44 Id.
45 Id. at 130.
47 BLACK’S LAW DICTIONARY 608 (8th ed. 2004).
48 WASATCH COMMUNITY GARDENS, supra note 34, at 16.
49 Id. at 18.
50 Id.
51 Id.
iii. Use of Land Within Existing Parks

Another land use option may be to use land within an existing park. One potential complication from this option, however, is that “the activity of community gardening might be seen as a limited use that excludes the non-gardening segments of the public—thus privileging a segment of the public at the expense of the rest and undermining the public nature of the park system.” Because of this potential restriction, any plans for a community garden developed in a park should be as inclusive as possible in order to obtain the necessary approval from the local government.

B. Obtaining Non-Profit Status

Additional consideration in the planning process concerns the option to incorporate as a non-profit organization and apply for 501(c)(3) tax-exempt status through the Internal Revenue Service. Non-profit status “allows donors to make tax-deductible charitable donations, and thus, greatly increases a not-for-profit organization’s ability to raise funds.” Additionally, groups who have 501(c)(3) status can be granted an exemption from federal and state income taxes, and sales and property taxes, if the proper forms are filed. If the organization does not want to obtain 501(c)(3) status but still wants to be able to accept charitable donations, it may be able to apply as an “unincorporated association.”

Why would a garden group want to incorporate as a non-profit entity? If the organization becomes incorporated as a non-profit entity, it would then be recognized by the government as a “legal entity.” Having this clarification would separate the entity from the individual owners and thus protect their personal assets in the event a lawsuit was brought against the organization. Additionally, if the garden group organized as a non-profit, it would be given access to special bulk mailing rates from the

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52 Id. at 19.
53 Id.
54 WASATCH COMMUNITY GARDENS, supra note 34, at 19.
56 WASATCH COMMUNITY GARDENS, supra note 34, at 20.
57 Id.
58 Id.
59 Id.
60 Id. Liability insurance will protect the organization only to the extent determined in the insurance policy. If there is a judgment against the organization for more than the policy limits, the individual members of the unincorporated organization may be responsible for covering the difference. Id.
United States Postal Service. However, one problem to consider when making the decision of whether to incorporate as a non-profit and apply for 501(c)(3) status is the time and expense involved. Depending on the size of the garden, the budget, and the number of potential members, it may not be worth the effort that it takes to incorporate the organization. 

A topic related to non-profit incorporation is the community land trust. A person creates a trust when they give legal title and control of the property to a trustee for the benefit of a third party, called a beneficiary. The community land trust is “a private, nonprofit, tax-exempt corporation that owns and manages real estate . . . for the benefit of the community.” Community land trusts are becoming increasingly popular in growing neighborhoods and disinvested communities as a way for the community members to acquire land and provide access for neighborhood trust members. The trust is generally controlled by its members, consisting of residents and other people in the community. Additionally, the members would likely elect a Board of Directors. This Board usually contains three types of directors: “those representing resident members, those representing members who are not [Community Land Trust] residents, and those representing the broader public interest.” The idea of the trust is that control of the organization is balanced to protect the residents and the surrounding community.

Another organizational structure that could be considered when beginning a community garden is that of a limited liability company, or LLC. An LLC is recognized as a legal entity and may shield the founding members from liability in case of a lawsuit.

A final advantage of incorporation is the ability of the organization to hold title to the land or to sign a lease. Otherwise, individual members may have to take sole responsibility for the contractual obligation.

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61 Id. at 21.
62 WASATCH COMMUNITY GARDENS, supra note 34, at 21.
63 BOSTON URBAN GARDENERS, supra note 2, at 131.
64 Id.
65 Id.
67 Id.
68 Id.
69 Id.
70 Id.
71 WASATCH COMMUNITY GARDENS, supra note 34, at 20.
72 Id.
73 Id.
74 Id.
C. Acquiring Insurance

Very few community gardens are created today without having to first obtain some type of insurance coverage. There are typically two types of insurance to consider: (1) property insurance and (2) general liability insurance. Typically, property insurance covers items like tools and other communal belongings, while general liability insurance protects the organization and the owner of the property in the event that someone is injured on the land. If cost is an issue, general liability insurance is more vital to the community garden project than property insurance.

Because many community garden projects are not-for-profit ventures, the ability to pay high insurance premiums may be difficult. One way around this problem is to ask a larger organization to sponsor the community garden or to start a garden of its own. Because larger groups, like churches, agricultural organizations, or other community groups, would likely already have liability insurance coverage, it would be far less expensive for the garden insurance to be added on to their policy than it would for new developers of a garden to set up a whole new policy. The cost of the premium will generally depend on the size of the garden, the type of activities performed on the premises, the expected number of gardeners and others present at the garden on a daily basis, and other factors which may present an increased risk of liability.

While a garden located on private property likely requires insurance, one situated on public property may not require insurance. The property may be self-insured by the city, state, or county. However, because different jurisdictions have different rules, developers of community gardens should always check with local authorities before making a coverage decision. To further protect itself from liability, a garden committee may consider having all participants sign a “waiver of liability” clause.

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75 American Community Garden Association, supra note 55.
76 Wasatch Community Gardens, supra note 34, at 25.
77 Id.
78 Id.
80 Id.
81 Id.
82 Wasatch Community Gardens, supra note 34, at 25.
83 Id.
84 Id. at 23.
D. Negotiating a Lease

Once permission to use the land is acquired, a lease will be drawn up for a specified number of years. Because of the obvious complicated legal matters, a lawyer is a necessity at this stage to offer advice on what all the lease agreement should entail. Each garden site will require a unique lease with individualized considerations, meaning that several initial questions with regard to lease agreements, including the following, should be considered by organizers: a description of the land, a beginning date, the length of the lease, the procedure for lease renewal or termination (e.g. automatic renewal or renegotiation), the rental cost per year, the hours of operation, and the parties responsible for the payment of property tax. This is a non-exhaustive list of considerations, and garden developers should consult an attorney to ensure that lease terms are as favorable as possible.\(^8\)

Because of the extensive time and labor that goes into creating a community garden, organizers should attempt to maximize the term of the lease. This ensures that all of the gardeners’ hard work is not wasted if the property owner decides not to renew the lease. It may also be to the garden developer’s advantage to negotiate an “option to buy” clause in the lease, which could provide the group with the opportunity to purchase the land at a later time if the garden is successful.\(^8\)

IV. A National Perspective

Community gardens continue to flourish across the United States. According to a survey published by the National Garden Association in January 2009, 31% of all households in the country participated in some type of food gardening in 2008.\(^8\) As consumers increasingly question the origins of their food and it’s negative impact on the environment, the trend toward community gardening will likely increase. Despite the current prevalence of gardens in this country, many barriers to community garden development remain. To discover other potential problems that may arise when creating a community garden, it is helpful to examine how gardens in different states and communities have been implemented and difficulties that organizers have encountered. Even with the many challenges present, the movement continues to grow.

\(^{85}\) Id.
\(^{86}\) Id. at 40.
A. New York

More than any other state in the country, New York seems to have the most publicized debate over the use of community gardens. The tension often lies between the government's obligation to provide services and housing for citizens, concern from environmental groups, and the lack of space in large cities. 88 In New York City Environmental Justice Alliance v. Giuliani, environmental organizations filed a class action suit seeking to keep the city and its officials from selling or clearing community garden lots. 89 The lots were initially leased through the City's "Green Thumb" program to be used for development as gardens. 90 Plaintiffs alleged that destruction of the lots would violate state and federal laws and asked for a preliminary injunction. 91 These plaintiffs argued that destruction of the gardens would have a disparate impact on minorities, violating regulations promulgated by the Environmental Protection Agency to implement Title VI of the Civil Rights Act of 1964, while defendants claimed the land was needed to "permit construction of affordable housing, facilities for medical and related services and, perhaps, retail stores." 92 The court held that while it was not in doubt that plaintiffs would suffer irreparable harm from the loss of the garden lots, they failed to show a likelihood of prevailing on their claim of disparate impact in violation of the Environmental Protection Agency's anti-discrimination regulation set out at 40 C.F.R. § 7.35(b). 93 Additionally, the court noted that plaintiffs did not dispute the city's legitimate justification for its actions, and they failed to demonstrate any less discriminatory option. 94

On September 18, 2002, the City and State of New York reached a settlement, which protected both the rights of citizens to cultivate green space in the city, as well as the right of the government to continue with plans to provide affordable housing to the citizens of New York. 95 Part of the settlement protected hundreds of gardens involved in the Green Thumb program from being destroyed by development of new residential housing. 96 The situation in New York demonstrates how, even with the intention to beautify and unite urban communities, local governments still have substantial control over land. State and local policies favoring

89 New York City Environmental Justice Alliance v. Giuliani, 214 F.3d 65, 67 (2d Cir. 2000).
90 Id.
91 Id.
92 Id.
93 Id. at 67-68.
94 Id. at 72.
95 Elder, supra note 88, at 769.
96 Id.
community gardens must be strengthened to protect the gardens from the risks.

B. Dallas, Texas

The current difficulties faced by residents in Dallas, Texas highlight the problem of local governments that claim to support community gardens, while enforcing policies that inhibit garden development. City officials initially expressed enthusiasm for Jan Worthington’s community garden proposal for her Dallas neighborhood, but later rejected her plan without providing any explanation. Other Dallas residents described similar results when attempting to convert vacant lots into community gardens, and some were even told by city officials that they could not proceed because it would be illegal.

The problem in Dallas stems from the legal ambiguity surrounding community gardens. There is no real definition of community garden in the Dallas building code. Additionally, zoning codes in Dallas have made it very difficult to set up gardens on private land. The city has an “agricultural production” land-use that is limited to plots of three or more acres, which far exceeds the lot size of the typical community garden. As a result, no land in Dallas is zoned for gardening. Despite these obstacles, some community garden organizers have found ways to succeed by creating gardens on church property. Although not allowed for “primary use,” activists have found that community gardens can exist on some properties, such as churches and schools, for “accessory use.” One reason for the ambivalence of the Dallas local government is the fact that community gardens have historically been linked to the post-1960s grassroots community organizing, which the government tends to view as trouble.

The problems in Dallas highlight the need for local laws that facilitate community gardens. Dallas officials should welcome community garden organizers with open arms, considering the city is already a non-attainment area for ozone levels under the 1990 Clean Air Act. Because gardens bring environmental benefits, they offer a partial solution to the

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97 See Schutze, supra note 87.
98 Id.
99 Id.
100 See id.
101 Id.
102 Id.
103 Schutze, supra note 87.
104 Id.
105 Id.
106 Id.
107 Id.
environmental problems found in many metropolitan areas. Changes in zoning ordinances and policies about the creation of community gardens could resolve environmental situations in Dallas and across the country.

V. WHAT CAN BE DONE TO FACILITATE THE GROWTH OF COMMUNITY GARDENS?

Barriers that make it difficult for communities to establish or maintain gardens in their neighborhoods, such as liability expenses, code restrictions, or lack of resources, can be overcome with local government engagement.

A. Creation of Municipal Community Garden Programs

A municipal program can facilitate development of existing gardens and encourage new ones. The Seattle Department of Neighborhoods’ “P-Patch” program is managed in conjunction with the non-profit group P-Patch Trust, and provides sixty-eight gardens throughout the city.¹⁰⁸ The group focuses on several community based programs, including community gardening, market gardening, youth gardening, and community food security.¹⁰⁹ The P-Patch community gardeners extend benefits beyond their own neighborhoods by providing fresh vegetables and produce to Seattle food banks and other programs.¹¹⁰ The program “protects the longevity of community gardens by acquiring land with open space funds” and “provides advocacy, outreach, and educational programs to P-Patch gardeners.”¹¹¹ By developing a program through the local government to develop and preserve community gardens, the city of Seattle has shown its citizens that it is invested in their well-being and concerned about the positive aspects associated with these gardens.

B. Create a Municipally Funded Not-For-Profit Organization to Support Community Gardens

While Seattle’s P-Patch program was a cooperative venture between the municipal government and a nonprofit group, other areas utilize alternate structures. NeighborSpace is a nonprofit operating out of

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¹⁰⁹ Id.
¹¹⁰ Id.
Chicago that "helps community groups protect and secure their community
garden or park from potential development, and . . . works in concert with
many private and public partners to preserve and expand community
managed open space in Chicago." NeighborSpace acts as a land-trust for
community gardens and accepts liability for onsite risks. "Since 1996,
NeighborSpace has acquired more than 50 sites throughout Chicago for
preservation as community garden space." The organization works in
partnership with the "City of Chicago, Chicago Park District, the Forest
Preserve District of Cook County, as well as other nonprofit organizations
and community groups." NeighborSpace works with groups that have
developed open areas and offers assistance when necessary. If a group
becomes concerned about ownership issues and their site's future, they can
turn to NeighborSpace and, essentially, apply to have their site acquired.
NeighborSpace reviews the application for feasibility, long-term viability,
and environmental integrity of the property, and if the application is
accepted, the property is purchased. NeighborSpace uses long-term
management agreements, where applicants agree to become "NeighborSpace Garden Leaders.” In addition, a local nonprofit, or other
community group, committed to the site will sign on as the "NeighborSpace
Community Organizational Partner.”

C. Allow Zoning for Community Gardens

The problems in Dallas are evidence of garden creation and zoning
issues that many localities face. There are, however, fairly simple ways
that local governments can resolve these problems. The city of Boston has
"established a specific community garden category that can be zoned as a
sub-district within an open space zoning district.” Community garden
supporters can petition local governments to change zoning ordinances in
order to provide a separate category for community gardens.

113 NeighborSpace, How We Do It, http://neighbor-space.org/howwedoit.htm (last visited
Feb 13, 2010).
114 Local Government Commission, supra note 111.
115 NeighborSpace, supra note 112.
116 NeighborSpace, supra note 113
117 Id.
118 Id.
119 Id.
120 Id.
D. "Provide an Easily Accessible Inventory of all Vacant Public/Private Lots and Open Space"\textsuperscript{122}

Local governments can assist the creation of community gardens by providing an inventory of vacant lots and open space in the municipality that could be used for gardens. In New York City, "Open Accessible Space Information System Cooperative (OASIS NYC) is a collaboration of federal, state, city, nonprofit and private organizations that provide online maps of all open space in New York City to help enhance the stewardship of open space."\textsuperscript{123} The USDA Forest Service and Natural Resources Conservation Service were crucial to the development of OASIS NYC and acted as the founding partners and funders of the project, with the local and state departments assisting in data provision and information services necessary for continued operation.\textsuperscript{124} Programs such as OASIS NYC support the creation of community gardens by allowing any interested party to easily access this information.

VI. CONCLUSION

Local governments should encourage the growth and development of community gardens because of the benefits that gardens bring to neighborhoods. This can be achieved through the creation of municipal garden programs, use of zoning ordinances, and through the promotion and support of existing community gardens. Furthermore, because development and maintenance of community gardens can involve complex legal issues, they provide an excellent way for lawyers to get involved in their communities and offer pro bono services. As shown above, the benefits of community gardens are felt far beyond the individual gardeners, and have a positive impact on the surrounding communities and the environment as a whole.

\textsuperscript{122} Local Government Commission, supra note 111.
\textsuperscript{123} Id.
\textsuperscript{124} Id.