

FILLING THE VOID: APPLYING A PLACE-BASED ETHIC TO COMMUNITY GARDENS

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INTRODUCTION

Environmental justice, as a social movement, has typically focused on disparate siting practices of hazardous facilities and unequal exposure to

pollution in low-income and minority communities.¹ As a result, solutions to environmental injustices tend to center on ways to halt disparate siting and prevent dangerous exposure to pollution. However, efforts to increase access to and improve the quality of environmental amenities present equally necessary and practical means of achieving environmental justice.² This is because “[i]nequitable distribution of environmental benefits is a stark example of failed democracy, environmental injustice, and even environmental racism.”³ This Note specifically examines community gardening as an amenity used to alleviate environmental injustices. The basic premise of the argument is that communities, and society as a whole, will only be able to realize the full potential of these spaces if gardens possess long-term status and, as a result, are able to thrive with permanence.

While permanence is a crucial aspect of a garden’s success in serving a community, many legal obstacles threaten the vitality of community gardens. The applicable law is currently inadequate and ineffective in promoting and protecting gardens. Instead, the law is specifically at odds with the permanence and vitality of gardens, and in many cases is simply non-existent. A wide array of policy, legal, and other problems prevent gardens from reaching their full potential.⁴ Despite such variety, this Note focuses specifically on the challenges associated with the ownership of gardens and highlights the legal issues related to property law and land ownership that threaten the vitality of community gardens. In order to promote community gardening, we must redefine how land is valued and apply an ethics of place framework to stimulate more effective thinking in this realm.⁵ Regardless of the available legal mechanisms that may

1. See Samara F. Swanston, *Environmental Justice Quality Benefits: The Oldest, Most Pernicious Struggle and Hope for Burdened Communities*, 23 VT. L. REV. 545, 547 (1999) (“[T]o date [in 1999], almost all of the scholarship and advocacy has focused solely upon environmental burdens.”); see also Alice Kaswan, *Environmental Justice: Bridging the Gap Between Environmental Laws and “Justice,”* 47 AM. U. L. REV. 221, 238 (1997) (“For example, if saving open space were to become a governmental priority over slowing pollution in urban areas, that policy choice would be to the benefit of those already living in remote areas, such as the suburbs.”).

2. In this context, environmental amenities refer to open spaces such as beaches, parks, including national, state, and municipal, gardens, green spaces, and nature generally.

3. Swanston, *supra* note 1, at 547.

4. See generally Jane E. Schukoske, *Community Development Through Gardening: State and Local Policies Transforming Urban Open Space*, 3 N.Y.U. J. LEGIS. & PUB. POL’Y 351 (2000) (discussing other legal issues of community gardening such as tax law, nonprofit law, liability concerns, and basic property law as relates to community gardens).

5. See MICK SMITH, *AN ETHICS OF PLACE: RADICAL ECOLOGY, POSTMODERNITY, AND SOCIAL THEORY* 20 (2001) (“[An ethics of place] recognizes the importance of locality and context and, at the same time, provides a language more suited to expressing the values of those forms of life associated with radical environmentalism.”).

promote community gardens, the application of a place-based environmental ethic to land use planning and decision making is needed to resolve the property ownership conundrum that threatens gardens.

This Note consists of four substantive sections. Part I supplies a general context for the topic of community gardening, outlining its basic facts and problems. Part II presents a number of property ownership mechanisms available to communities and organizations for their gardens. This section describes each ownership option along with its associated benefits and detriments. Part II also addresses policy and practical issues of property ownership and land use decisions that threaten the vitality of community gardens. Part III discusses challenges property laws pose, including traditional American perceptions of property ownership and the ways in which value is placed on gardens. This Note concludes by arguing for the application and integration of an ethic of place to land use planning and decision making.

I. BACKGROUND

A. *What is a Community Garden?*

Community gardening represents an approach to “community management of open space” that promotes public participation in environmental justice efforts and ensures an active public role in facilitating the use of space.⁶ A community garden is typically defined as a “neighborhood garden in which individuals have their own plots yet share in the garden’s overall management.”⁷ Community gardening may include a variety of activities. For example, community members may choose to grow produce, herbs, flowers, shrubs, bushes, or trees.⁸ Gardens today include “neighborhood community gardens, children’s gardens, horticultural therapy gardens, and entrepreneurial job-training gardens.”⁹ Communities do not typically own the physical property on which they

6. See Schukoske, *supra* note 4, at 357–58, 361 (citing LISA ARMSTRONG ET AL., COMMUNITY MANAGED OPEN SPACE ON VACANT PROPERTY IN BALTIMORE 2, 16–17 (1995)).

7. LAURA LAWSON, CITY BOUNTIFUL: A CENTURY OF COMMUNITY GARDENING IN AMERICA 3 (2005).

8. Schukoske, *supra* note 4, at 354–55.

9. LAWSON, *supra* note 7, at 2.

garden, but cultivation may still take place on either public or private land.¹⁰ Gardens can be owned by an institution, the public, or a private entity.¹¹

The practice of community gardening has experienced much popularity beginning as early as the 1890s.¹² Currently, approximately 18,000 community gardens have been established across the United States and Canada.¹³ For over ten years, more than 32% of the 6018 surveyed community gardens have functioned successfully.¹⁴ Moreover:

[i]n a 1996 national survey focusing on community gardening activity, cities reported that 67.4% of gardens were neighborhood gardens, 16.3% were on public housing premises, 8.2% were on school grounds, 1.4% were on mental health or rehabilitation facilities, 1.4% were at senior citizen centers, and 0.6% were part of job or economic development programs.¹⁵

Additionally, many similarities can be seen between historic and contemporary community gardening. First, social reformers historically used community gardening as a way to supply unemployed workers with land and job training.¹⁶ This mirrors today's hope that gardening will provide low-income populations with necessary skills and alleviate economic strain by supplying these same communities with low-cost food from their gardens.¹⁷

Second, like contemporary community gardening, the source of historic garden space was often vacant or abandoned lots during the 1890s.¹⁸ This type of land use has the potential to effectively reduce crime and violence.¹⁹ Third, early education reformers incorporated gardening into the classroom

10. Schukoske, *supra* note 4, at 354–55.

11. LAWSON, *supra* note 7, at 3–4.

12. *Id.* at 1.

13. American Community Gardening Association, Frequently Asked Questions, <http://www.communitygarden.org/learn/faq.php> (last visited Mar. 13, 2008).

14. See Schukoske, *supra* note 4, at 360 (citing Suzanne Monroe-Santos, *Recent National Survey Shows Status of Community Gardens in U.S.*, COMMUNITY GREENING REV., 1998, at 12, which references a recent national survey of operating gardens).

15. *Id.* at 355.

16. *Id.*

17. See Schukoske, *supra* note 4, at 356 (discussing the benefits of community gardens as self-help environmental justice for low-income neighborhoods).

18. Lawson, *supra* note 7, at 1.

19. See Schukoske, *supra* note 4, at 356 (discussing elimination of criminal activity in vacant lots through community gardening). The notion that community gardening combats violence and crime will be discussed below in Part II.B.

as a hands-on teaching strategy to combine “school subjects . . . civics and good work habits.”²⁰ This strategy continues today.²¹

Finally, akin to many social movements throughout history, the prevalence of community gardening most often coincided with periods of economic hardship as well as social and political unrest.²² During the 1970s, gardening resurfaced as communities sought solutions to a wide array of social problems including “urban abandonment,” inflation, and social conflict.²³ Communities also used gardening as a tool to promote a “new environmental ethic.”²⁴

B. Benefits of Community Gardens

Major factors that have influenced the unequal distribution of environmental amenities include “racially discriminatory zoning practices, urban renewal, discriminatory siting of noxious land uses, and the relocation of communities due to redevelopment.”²⁵ Inner cities often symbolize the result of segregation and discrimination laws that are deeply ingrained in the legal system.²⁶ One author reflects that during the redevelopment and privatization of the 1940s in Washington, D.C., “the flurry of greedy bulldozing, bidding and slapdash construction must have been dizzying.”²⁷ This time also marked the beginning of a trend that dislocated and relocated many poor and minority communities. Professor John C. Dubin insists that “[t]he failure to respect and protect the quality of the residential environment of these communities is a by-product of

20. LAWSON, *supra* note 7, at 1.

21. Pamela R. Kirschbaum, *Gardening in the Schoolyard: It's a Math, Social Studies, Science. Reading, Art . . . Kind of Thing*, COMMUNITY GREENING REV., 1999, at 2, 2–4, <http://www.communitygarden.org/learn/resources/publications.php>.

22. See LAWSON, *supra* note 7, at 1–2 (discussing garden promotion specifically during World War I and World War II).

23. *Id.* at 2.

24. See *id.* (referring to an ethic focused on promoting solid moral values and the land).

25. Schukoske, *supra* note 4, at 358 (citing Jon C. Dubin, *From Junkyards to Gentrification: Explicating a Right to Protective Zoning in Low-Income Communities of Color*, 77 MINN. L. REV. 739, 760–61, 764–68 (1993)).

26. See, e.g., Brett Williams, *A River Runs Through Us*, 103 AM. ANTHROPOLOGIST 409, 419–420 (2001) (describing how Washington, D.C. District Commissioners used legal means of condemnation and eminent domain to “purge[] Washington’s central core of black people” in the late 1940s).

27. *Id.*

separate land use policies, resulting in the absence of zoning protection from diverse modern-day land use threats.”²⁸

The values that Americans assign to land greatly contribute to environmental inequities such as discrimination in land use and ownership. Such values include economic status, independence, and a superior quality of life.²⁹ Throughout history, minorities were refused entrance to a variety of recreational facilities and open spaces, even parks.³⁰ Public parks and open spaces were originally created for the privileged white class to help them cope with the challenges of urban living because such places offered “physical activity, recreation, and relaxation.”³¹

In contrast, community gardens offer an abundance of benefits to all urban residents. Four overarching reasons for promoting gardens include education, social stability, economic strength, and public health.³² Community gardens encourage sustainable and positive economic development and can provide employment and educational opportunities.³³ They represent a form of greening and beautification in areas that severely lack existing open spaces, parks, and trees.³⁴ Gardening also teaches the public about nature, science, and the environment.³⁵ Community gardening increases the production of food on the local level as well.³⁶ The result is that gardening can improve diets and alleviate problems such as poor quality inner-city grocery stores and expensive food costs.³⁷ In this sense,

28. Schukoske, *supra* note 4, at 358 (quoting Jon C. Dubin, *From Junkyards to Gentrification: Explicating a Right to Protective Zoning in Low-Income Communities of Color*, 77 MINN. L. REV. 739, 760–61, 764–68 (1993)).

29. Swanston, *supra* note 1, at 550.

30. Michel Gelobter, *The Meaning of Urban Environmental Justice*, 21 FORDHAM URB. L.J. 841, 853 (1994).

31. *Id.*

32. See LAWSON, *supra* note 7, at 4–5 (discussing how to improve nutrition and psychological health).

33. See Schukoske, *supra* note 4, at 352 (discussing the benefits of the “beautification and greening” of neighborhoods); LAWSON, *supra* note 7, at 7–8 (explaining that individuals can learn practical skills associated with gardening as well as civic mindedness to cultivate a community open space).

34. See Schukoske, *supra* note 4, at 356–57 (discussing the greening of urban and minority areas historically “lacking in municipal parks”).

35. See LAWSON, *supra* note 7, at 5 (“Urban garden programs provide a participatory experience that connects people living in cities, especially children, to the soil and plant and animal life.”).

36. Schukoske, *supra* note 4, at 359–60.

37. *Id.*; see also LAWSON, *supra* note 7, at 4 (stating that the reasons behind community gardens during both World War I and the 1970s included efforts to address morale, rising food prices, and nutrition).

exposing urban populations to nature through gardening serves as a technique to advance public, “social and psychological health.”³⁸

On a larger scale, gardens promote self-respect and cooperation in under-privileged, low-income communities.³⁹ Since gardening often brings together diverse groups and individuals, community gardens are often portrayed as democratic spaces.⁴⁰ For example, gardening fosters collaboration of neighbors and nearby residents, regardless of race, age, or sex.⁴¹ This helps to build and promote community and race relations. According to Professor Schukoske, “[t]he community gardening approach promotes interaction between the diverse residents of an urban neighborhood along common interests such as beautification, local food production, personal safety, health, and group projects.”⁴²

Additionally, community gardens can reduce crime rates, especially when they are developed on previously vacant lots.⁴³ It is known that vacant lots attract violence and poor social behavior thereby intimidating residents, limiting the potential of these spaces, creating more societal disengagement, decreasing property values, and diminishing the community’s social capital.⁴⁴ However, gardens can establish “‘defensible space’—neighborhood areas in which escape routes for criminal perpetrators are limited and public range of vision is maximized to prevent illicit conduct.”⁴⁵

C. Gardening Instills an Environmental Ethic

Community gardening efforts are extremely compatible with the goals of urban environmental justice and sustainable urban development. Gardening efforts provide both practical and tangible results while contributing to a much needed paradigm shift.⁴⁶ Gardening illustrates a

38. LAWSON, *supra* note 7, at 5.

39. Schukoske, *supra* note 4, at 352, 359.

40. LAWSON, *supra* note 7, at 8.

41. Schukoske, *supra* note 4, at 357; *see also* LAWSON, *supra* note 7, at 8 (“[G]ardening [is] an activity that brings diverse groups together in mutual self-interest.”).

42. Schukoske, *supra* note 4, at 357.

43. *Id.* at 356.

44. *Id.* at 354 (defining “social capital” based on the term coined in JANE JACOBS, *THE DEATH AND LIFE OF GREAT AMERICAN CITIES* 138 (1961)). According to Professor Schukoske, “[s]ocial capital includes features of social organization such as networks, norms and social trust that facilitate coordination and cooperation for mutual benefit.” *Id.*

45. *Id.* at 356.

46. *See* DONALD SCHERER & THOMAS ATTIG, *ETHICS AND THE ENVIRONMENT* 2 (1983) (describing the current paradigm as one in which human beings assume that the environment is material to be used, have no responsibility to respect the environment, and recognize only instrumental value in

type of “environmental justice self-help” where communities take on a particular problem and solve it themselves.⁴⁷ Community gardening integrates both the law and land use policy with civil rights tactics and grassroots activism.

The positive influences of gardening extend beyond the communities which the gardens are specifically intended to benefit. Critically, gardens instill an environmental ethic, specifically the notion of an “ethic in land.”⁴⁸ Rather than valuing a garden’s parcel of land based on its potential monetary value, an environmental ethic is needed because:

[t]he ethics of [our current political] system enclose the moral world according to principles of socialization rather than sociality, that is, they are concerned with interpolating the individual into an already given social framework and promulgating a top-down set of values to be internalized rather than letting values form and operate from the bottom up by communal participation.⁴⁹

At a basic level, an ethic can be defined as “a statement of the most fundamental principles of conduct”—a way to explain “what is right and wrong in a systematic way.”⁵⁰ Further, an environmental ethic asks “not how human beings ought to behave towards other human beings but how they ought to behave with regard to nature—animals, plants, species and ecosystems.”⁵¹ Following the land ethic, a principle of thought that originated with the writings of Aldo Leopold, provides an avenue in which to relate humans to the land and all that lives upon it.⁵² By expanding the limits of community, the land ethic incorporates “soils, water, plants, and animals, or collectively: the land.”⁵³ Ultimately, a land ethic is crucial to the environment and human well-being because it “changes the role of *Homo sapiens* from conqueror of the land-community to plain member and

the environment). “Humans are conceived as controllers, dominators, and manipulators of a sphere of being with which they have no intimate relationship.” *Id.*

47. Schukoske, *supra* note 4, at 359 (“[T]he gardening ethic offer[s] communities a local, anthropocentric, cultural interaction with nature and neighbors.”).

48. MIKAEL STENMARK, ENVIRONMENTAL ETHICS AND POLICY MAKING 15 (2002) (“*Environmental ethics* is the systematic and critical study of the moral judgments and attitudes which (consciously or unconsciously) guide human beings in the way they behave towards nature.”).

49. SMITH, *supra* note 5, at 157.

50. SHERER & ATTIG, *supra* note 46, at 2.

51. STENMARK, *supra* note 48, at 15.

52. ALDO LEOPOLD, A SAND COUNTY ALMANAC 204 (Oxford University Press, 1988) (1949).

53. *Id.*

citizen of it. It implies respect for his fellow-members, and also respect for the community as such.”⁵⁴

Arguably, urban life effectively creates a divide or a detachment between urban residents and nature. As a result, it becomes harder to protect our natural resources without a connection to the environment. As one possible solution, gardens allow urban residents to reconnect with nature in a very practical and simple way—right in their own neighborhoods. Gardens require humans to work the land, which in turn enables individuals otherwise cut off from natural places to experience nature and discover what nature has to offer. Gardens have the potential to open eyes to the world “out there” and create an understanding of the role that the environment plays in all human life. The result is the realization that nature does not exist solely beyond urban communities.

In sum, gardens not only improve the quality of life for urban residents who have historically been disempowered and disenfranchised. Gardens can also reestablish a land ethic—a connection to nature—which will in turn increase the public’s understanding of the environment. Accordingly, such land ethic could promote better management and protection of natural resources and open spaces. Gardening serves a dual function. Not only could gardening re-establish a land ethic, it could also be used as a tool to turn abandoned and defunct land into something productive.⁵⁵ When people begin to experience all that the land has to offer and how they connect with it, they will be more inclined to protect the environment on a larger scale.

D. Gardens Require Permanence

This Note is based on the premise that garden permanence is crucial. For many reasons, a garden’s success cannot be fully measured in one or two growing seasons. An initial reason is simply that garden cultivation takes time; the soil must be nurtured and cultivated over time in order to reach its full potential, especially with organic gardening. As discussed earlier, the purpose of community gardening is seldom the garden itself, but rather the “agendas that reach beyond the scope of gardening.”⁵⁶ Longevity of gardens is important because “gardens have a long-term function as open space that promotes nutrition, education, household income subsidy, recreation, and psychological and environmental restoration.”⁵⁷ Moreover,

54. *Id.*

55. See generally Schukoske, *supra* note 4 (focusing on the value of community gardens to transition abandoned lots into productive spaces).

56. LAWSON, *supra* note 7, at 11 (referring to social benefits associated with gardening).

57. *Id.* at 12.

communities continue to need and benefit from the “food, income, or education” that gardens provide throughout time, be those times of stability or crisis.⁵⁸

However, even during periods of popular public support, gardens “rarely have been considered permanent.”⁵⁹ The challenge then becomes that with each new societal catastrophe or change, gardens have to be re-established from very little.⁶⁰ For this reason, although most gardens themselves are not permanent, a garden’s true success depends on its longevity.⁶¹ Some general problems created by the short-term durations of gardens include: limited financial returns due to the inability to prepare for each season; gaps in time when the public becomes interested in the project; small crop yields after the first planting; and time necessary to encourage and properly train participants unfamiliar with gardening.⁶²

Despite the various benefits of gardening and the success of many gardens in a cross-section of communities nationwide, legal problems threaten the permanence of gardens. Although legal challenges facing gardens could include liability issues, tax implications, nonprofit status, and property, this Note only focuses on property issues.⁶³ Garden space is typically developed in urban settings from vacant or abandoned lots.⁶⁴ As discussed below, communities and gardening associations often do not officially own the garden land. Instead, the land is leased from a city or municipality, used under a conservation easement or a public park land designation, privately owned, or owned by nonprofit organizations or land trusts. Regardless, none of these mechanisms serve to adequately protect garden permanence.

58. *Id.* at 11.

59. *See id.* (elaborating further that impermanence is likely due to the fact that gardens have historically functioned as responses to war, economic depression, and social crises). However, Professor Lawson also suggests that “as economic and social conditions stabilize, the garden site—usually donated—becomes more valuable for development of a different kind.” *Id.*

60. *See id.* at 12 (“[P]rograms have had to be reinvented, new land found, and new promotional campaigns developed.”).

61. *Id.* at 12 (referring to the “long-term function” of gardens).

62. *Id.* at 49.

63. *See generally* Schukoske, *supra* note 4 (discussing other legal issues of community gardening such as tax law, nonprofit law, liability concerns, and basic property law as relates to community gardens).

64. *See id.* at 351 (“Despite the prevalence of vacant land and the reality of urban blight, many communities have been successful in transforming these dangerous urban spaces into thriving community gardens.”).

II. PROPERTY OWNERSHIP THREATENS THE VITALITY OF COMMUNITY GARDENS

Garden land is legally classified and owned in a variety of ways and there are various “ownership” options available to gardening groups. A particular problem that urban communities face is the dispute over land: how it is to be used, who gets to use it, the best use for the land, how to profit from this land, and the inevitable housing concerns. Much of the dispute arises from the simple fact that urban areas are facing land quantity crises. Downtown revitalization and urban renewal efforts threaten the vitality of gardens as city planners and developers search for available land. Urban housing needs also pose general threats to community gardens and green spaces.

These were critical issues that spurred the most well-known community gardening controversy, *New York City Environmental Justice Alliance v. Giuliani*.⁶⁵ In *New York City Environmental Justice Alliance*, tensions between the need for affordable housing and open space caused the City to cease renewing garden lots and begin auctioning them off.⁶⁶ At the time, the City owned 1100 parcels comprising approximately 600 gardens that had been leased for development as gardens under the City’s “Green Thumb” program.⁶⁷ The City sought to sell some garden lots in order to “permit [the] construction of affordable housing, facilities for medical and related services, and perhaps, retail stores.”⁶⁸

Such land-use disputes involving community gardens are disconcerting because urban renewal, urban housing, and other revitalization efforts can benefit significantly from incorporating community gardens. These land uses should not be viewed as mutually exclusive. Property rights pose specific problems to the vitality of gardens located in minority and low-income populations—communities that cannot afford to purchase the garden lots. Consequently, gardens are susceptible to being purchased by the city or developers, then turned into something other than a green space. Since such land use disputes represent one of the biggest threats to the vitality of gardens, a solution is desperately needed.

65. See *N.Y. City Envtl. Justice Alliance v. Giuliani*, 214 F.3d 65, 67 (2d Cir. 2000) (requesting an injunction to prevent the city from selling or bulldozing city-owned lots).

66. *Id.*

67. *Id.* “Green Thumb” was a community development initiative that provided groups the opportunity to revitalize distressed or vacant lots into community gardens. *Id.* at 67 n.1.

68. *Id.* at 67.

A. Public Versus Private Land

The primary question when establishing a community garden involves determining its location. The community must make the initial decision whether to site its garden on public or private land, with private land representing the least preferred type of land.⁶⁹ While ownership of land offers the “greatest degree of control,” it may only “be feasible and prudent for community organizations that are firmly established.”⁷⁰ In reality, obtaining title often requires too large of an investment of resources and time for young gardening groups to supply.⁷¹ Furthermore, liens are frequently attached to the private land on which many gardening groups seek to establish communal gardens, making it difficult to transfer titles.⁷²

In contrast, as discussed below, siting gardens on public land offers several benefits, including the acquisition of free land, guaranteed public access, and strict designation of the land for gardening activity. Gardening groups leasing land exemplifies one of the most common public use techniques. However, if a city so desires, leases would allow the city to repossess the garden lots. In other words, unless a community requests a long-term contractual clause to protect their space, private garden land can undoubtedly be sold to a new owner and developed. Another public ownership example is the establishment of garden sites through park department stewardship programs. Under this option, the city can designate public parks as community gardens. Such public land designation can be difficult to achieve because it requires public and political support, as well as a knowledge of gardening.

B. Leases

Communities often utilize leasing options by transforming vacant lots into thriving gardens. Leases may be preferred because groups do not need to purchase the land and often get to lease the property for free. At the same time, gardening associations will likely face two challenges in leasing garden land. First, leases expire without the possibility for renewal, even in instances where renewal is an option. Second, leases often contain clauses

69. Jim Flint, Executive Dir. of Friends of Burlington Gardens: Strategies for Starting Sustainable Community Gardens, Workshop at Vermonters Building Solutions: People Creating Healthy Communities Conference (Nov. 11, 2006) (discussing environmental or other nonprofit organizations that purchase lots and designate them as community gardens illustrate an example of private ownership).

70. Schukoske, *supra* note 4, at 366.

71. *Id.* at 366–67. One of the main obstacles in the way of fledgling gardening groups is the need to continue to pay property taxes. *Id.*

72. *Id.* at 367.

that enable the municipality to repossess the property at any time. Addressing the first challenge, “[t]he duration of garden lot leases is specified in various authorizing laws, and ranges from as long as five years (renewable) in Seattle, to two years in Boston, to as short as one growing season under New York law.”⁷³ This presents an obvious detriment to the vitality of gardens because leases are not always renewed and certainly are not uniform. Such variety makes garden planning and crop and soil cultivation challenging.

A sub-issue related to this challenge involves covenants for lease renewals. For example, the option to renew the lease is a common covenant found in leases of real property.⁷⁴ Such covenants may be entered into after the execution of the agreement and are then held as valid and enforceable.⁷⁵ However, it is not clear in all circumstances that the courts will hold every lease renewal provision to be perpetual.⁷⁶ In contrast courts have ruled in favor of perpetual lease provisions.⁷⁷

However, courts generally disfavor covenants for continued renewal: “A renewal . . . for all time to come is the creation of a perpetuity, which is against the policy of the law.”⁷⁸ Therefore, the courts exceedingly prefer not to interpret a right to renewal as perpetual and refuse to do so unless the language of the agreement unambiguously requires such action.⁷⁹ For example, leases lasting for an “indefinite” length of time are invalid and, thus, “may be terminated at will when reasonable notice is given.”⁸⁰

As a result, a court will not grant specific performance of a covenant for perpetuity purposes unless express or clearly implied terms were

73. *Id.* at 365.

74. Jay M. Zitter, Annotation, *Sufficiency of Provision of Lease to Effect Second or Perpetual Right of Renewal*, 29 A.L.R. 4th 172, 176 (1984).

75. *Id.*; see also Andrea G. Nadel, Annotation, *Sublessee's Rights with Respect to Primary Lessee's Option to Renew Lease*, 39 A.L.R. 4th 824, 827 (1985) (“In general, provisions, covenants, agreements, or options incorporated in a lease for the renewal or extension of the lease are valid and enforceable.”).

76. See, e.g., *Winslow v. Baltimore & O.R. Co.*, 188 U.S. 646, 655 (1903) (“From the ordinary covenant to renew, a perpetuity will not be regarded as created. There must be some peculiar and plain language before it will be assumed that the parties intended to create it.”); *McLean v. United States*, 316 F. Supp. 827, 829 (E.D. Va. 1970) (“Perpetual leases are not favored in the law The intent to create a perpetual lease must appear in clear and unequivocal language, so plain as to leave no doubt it was the intention and purpose of the parties so to do. It should not be left to inference.”).

77. *Winslow*, 188 U.S. at 655; *McLean*, 316 F. Supp. at 829.

78. *Diffenderfer v. Bd. of President, etc., of St. Louis Pub. Schools*, 25 S.W. 542, 544 (Mo. 1894).

79. *Nat'l Home Cmty's., L.L.C. v. Friends of Sunshine Key, Inc.*, 874 So. 2d 631, 663 (Fla. Dist. Ct. App. 2004); see also Zitter, *supra* note 74, at 179 (highlighting the tendency of courts to interpret renewal clauses against perpetuity).

80. *Lund v. Arbonne Int'l, Inc.*, 887 P.2d 817, 820 (Or. Ct. App. 1994).

included in the original lease agreement.⁸¹ Furthermore, even in the rare cases where a state does not disapprove of perpetual renewals, “[p]rovisions in the lease for renewal or extension must be certain, in order to render them binding and enforceable.”⁸² Otherwise, the court will not find the lease perpetual.⁸³

Since policy reasons encourage courts to reject perpetual leases, courts commonly examine the language of a lease to determine whether the parties envisioned the lease to exist in perpetuity.⁸⁴ Courts will look for particular language to make such a determination because with regard to “the words customarily used to create a perpetual lease[,] . . . [their] presence or absence in a lease is of considerable significance to a court in deciding whether a right of perpetual renewal was intended by the parties.”⁸⁵ Several courts have concluded that specific words will trigger a perpetual lease such as “perpetual,” “in perpetuity,” “successive,” “for all time,” and “forever.”⁸⁶

In addition to the plain language of a lease, courts will also examine how a lease was actually applied.⁸⁷ To conduct such an examination, courts will perform case-by-case analyses and look at the individual circumstances of a matter to determine how parties have performed on their lease. For example, a court may conclude that a perpetuity exists and is valid in a case where the facts show that the parties consistently renewed a lease for an

81. *E.g.*, *Diffenderfer*, 25 S.W. at 544.

82. *First Nat'l Bldg. Corp. v. Harrod*, 175 F.2d 107, 109 (10th Cir. 1949) (“If we construe the rider as giving Harrods the right to renew or extend the lease ‘for any period of time they so desire’ . . . other than a reasonable time to be determined under the existing facts and circumstances, then such a provision is void for uncertainty.”) (internal quotations omitted); *see also* *Lawson v. West Virginia Newspaper Pub. Co.*, 29 S.E.2d 3, 5 (W. Va. 1944) (“While the well-established rule in this State does not disapprove perpetual renewals, the terms of a lease providing therefor, must be clear and distinct.”).

83. *Lawson*, 29 S.E.2d. at 5.

84. *See McLean v. United States*, 316 F. Supp. 827, 828–29 (E.D. Va. 1970) (requiring specific terms such as “perpetual” or “forever” to find a lease perpetual).

85. *Loneragan v. Conn. Food Store, Inc.*, 357 A.2d 910, 914 (Conn. 1975).

86. *McLean*, 316 F. Supp. at 828 (“Nowhere in the lease does the language ‘perpetual,’ ‘forever,’ ‘for all times,’ ‘in perpetuity,’ ‘successive,’ ‘endless periods,’ ‘continuous,’ ‘ever-lasting,’ or any similar words of description of the terms of the lease appear.”); *Geyer v. Lietzan*, 103 N.E.2d 199, 201 (Ind. 1952) (“[A]ppropriate and apt words ordinarily used to create a perpetual lease [include] ‘forever,’ ‘for all time,’ ‘in perpetuity,’ etc. [but not] ‘successive renewals.’”); *Loneragan*, 357 A.2d at 914 (“Nowhere in the provision appear any of the words customarily used to create a perpetual lease, such as ‘forever,’ ‘for all time,’ and ‘in perpetuity.’”).

87. *See Tipton v. North*, 92 P.2d 364, 369 (Okla. 1939) (“[T]he *conduct* of the parties to the lease shows clearly that it was their intention that the lease should be so construed as to give the right of renewal for an indefinite period at the option of the lessee.”) (emphasis added).

extended period of time.⁸⁸ Regardless, they may refuse in such instances to conclude that the parties *intended* a perpetual renewal of the lease.⁸⁹

Discussing the second challenge, some cities include in their leases the right to terminate the agreement. For example, “[t]he Adopt-A-Lot program in Baltimore, Maryland . . . provides renewable one-year leases.”⁹⁰ However, “the city reserves the right to terminate the agreement upon thirty days notice to use the lot for another public purpose, and upon five days notice in the event of complaints concerning the use of or condition of the lot.”⁹¹ Additionally, “[a]lthough Chicago permits community garden organizations to use specific sites that it has agreed not to develop for three years, the City refuses to enter into any leases with community garden groups.”⁹²

Despite these obstacles, lease agreements can be an effective tool to promote the vitality of gardens. For example, Seattle’s “P-Patch” program effectively promotes community gardening on two levels. The P-Patch program focuses on establishing additional communal gardens.⁹³ In conjunction, the program also fosters “new ‘social capital’ instead of merely preserving what communities create on their own.”⁹⁴ One reason this program exemplifies a success story is because it gives Seattle’s Department of Housing and Human Services the authority to establish five-year leases for community gardens.⁹⁵ Specifically in the Denny Triangle area of Seattle, the program’s goal is to expand to “[o]ne dedicated community garden for each 2,500 households.”⁹⁶

Municipal opinion that gardens are generally temporary in existence renders gardens especially susceptible to development and political schemes.⁹⁷ For example, while New York City’s GreenThumb Program thrived for nearly two decades, it provides an unsuccessful example of

88. See, e.g., *Gleason v. Tompkins*, 375 N.Y.S.2d 247, 250, 253 (Sup. Ct. 1975) (“Consideration must be given to the uncontroverted testimony of the parties that in their course of dealing the lease was renewed for five consecutive terms covering a period of 25 years.”).

89. See, e.g., *id.* at 253 (failing to find a perpetual lease renewal of the lease from conduct).

90. Schukoske, *supra* note 4, at 365.

91. *Id.*

92. *Id.*

93. Robert Fox Elder, Note, *Protecting New York City’s Community Gardens*, 13 N.Y.U. ENVTL. L.J. 769, 791 (2005).

94. *Id.*

95. See Elder, *supra* note 93, at 791 (discussing Seattle’s “P-Patch” program dedicated to increasing community gardens in Seattle’s 1994 Comprehensive Plan); see also CITY OF SEATTLE DEPARTMENT OF PLANNING & DEVELOPMENT, CITY OF SEATTLE COMPREHENSIVE PLAN: TOWARD A SUSTAINABLE SEATTLE 1.27 (2005) (continuing to encourage community gardens).

96. CITY OF SEATTLE, *supra* note 95, at 8.82.

97. Lenny Librizzi, *Standing Our Ground: New York City’s Embattled Community Gardens Win Reprieve*, COMMUNITY GREENING REV., 1999, at 29.

leasing community garden lots. Originally the program provided federal money to those who sought to convert vacant lots in their neighborhoods into community gardens.⁹⁸ Since New York law reverts abandoned property back to city ownership, the lots are only leased to the community organizations. Additionally, New York law merely requires these leases to contain seasonal renewal provisions.⁹⁹ Most notably, these one-year leases contain provisions allowing a city to develop the property regardless of the presence of a garden.¹⁰⁰

In 1994, New York City refused to approve new requests for gardens under the guise of the “important countervailing interest—neighborhood revitalization—[and] at a time when New York was experiencing an economic resurgence.”¹⁰¹ Additionally, in 1996 the City initiated a sale of “its entire disposable land inventory.”¹⁰² Next, in 1998, the City prohibited officials from re-issuing leases and permits granted to communities to garden under the GreenThumb program.¹⁰³ At this time, the City also began “auctioning off community gardening land.”¹⁰⁴ One of Professor Robert Elder’s major suggestions includes increasing the lease term for GreenThumb garden land “[i]n order to implement [a successful garden] policy, the standard lease for GreenThumb lots should be increased from one year to three years”¹⁰⁵ Professor Elder reasons that such implementation would “still [be] less than the time period in the Seattle ‘P-patch’ program, but well within the amount of time that it could take to get new residential construction approved in New York City.”¹⁰⁶ Additionally, three-year leases may provide the “predictability” with regards to garden permanence.¹⁰⁷ This could encourage long-term planning and activities such as planting trees, adding more groundcover, and incorporating mixed uses.¹⁰⁸

98. See Elder, *supra* note 93, at 773 (describing lease provisions that allow New York City “to remove the community garden to enable development of the lot”).

99. N.Y. AGRIC. & MKTS. LAW § 31-h(2)(b) (McKinney 2004); see also Elder, *supra* note 93, at 773.

100. See Elder, *supra* note 93, at 773 (describing lease provisions that allow a city to allow development of a community garden’s lot under New York law).

101. *Id.* at 780.

102. *Id.* at 777.

103. *Id.*

104. *Id.*

105. *Id.* at 798–99.

106. *Id.* at 799.

107. *Id.*

108. *Id.*

C. Zoning

Zoning may represent a worthwhile approach to insure longevity of gardens. However, Baton Rouge's green zoning provisions, as found in its Unified Development Code, presents an unsuccessful example of community gardening incorporated into zoning ordinances.¹⁰⁹ Green zoning introduces cities to new ways of expanding the amount of their "green space, regardless of the cost."¹¹⁰ For example, the City of Baton Rouge mandates urban gardening by dictating "numbers of trees and percentage and quality of ground cover for residential properties, commercial lots, and multiple other types of land use."¹¹¹ Additionally, the Baton Rouge zoning law outlines criteria for permits and inspecting procedures, and encourages "developers to preserve existing green space by offering credits for maintaining existing large trees."¹¹²

However, this approach ignores community development strategies included in other greening programs and forces individuals to be solely responsible for greening activities.¹¹³ Another fundamental problem with green zoning is that it can only work in areas where land is still available for development.¹¹⁴ It is also highly expensive and requires solid and strict enforcement, which is often lacking.¹¹⁵

D. Municipal Ordinances

As the most common form of urban agriculture in hundreds of U.S. and Canadian cities, "[community] gardens are a function of specific municipality policies or initiatives."¹¹⁶ Such policies or initiatives may be fulfilled through parks and recreation programs, or may be included in public housing or community services departments.¹¹⁷ A number of sources

109. *Id.* at 794 ("[Baton Rouge's zoning laws for trees and groundcover] completely ignore[] the community development aspect of a program like GreenThumb, leaving all greening up to individuals.").

110. *Id.*

111. *Id.* at 794; *see also* BATON ROUGE, LA., UNIFIED DEV. CODE § 18.3 (2007) (defining landscape standards for Baton Rouge, La.).

112. Elder, *supra* note 93, at 794; *see also* BATON ROUGE, LA., UNIFIED DEV. CODE § 18.7 (2007) (providing tree preservation requirements for Baton Rouge, La.).

113. Elder, *supra* note 93, at 794.

114. *Id.* at 794-95 ("Such a plan is impractical in New York City, where little land is left to be developed.").

115. *See id.* (noting that credits or green space "would be an expensive proposition").

116. *See* Neil D. Hamilton, *Greening Our Garden: Public Policies to Support the New Agriculture*, 2 DRAKE J. AGRIC. L. 357, 366 (1997) ("The most common form of urban agriculture, which exists in hundreds of cities in the United States and Canada, is the community garden.").

117. *Id.*

such as the Department of Housing and Urban Development (HUD) provide funding for these programs to fulfill the overlying purpose of municipal policies and initiatives.¹¹⁸

Even with some funding from HUD, the risk of presenting too much regulation is one major challenge associated with municipal ordinances that protect community gardening space. This detriment can be seen with Seattle's P-Patch program. The program "is controlled by an elaborate regulatory scheme, which mandates everything down to the price chargeable per plot of garden land."¹¹⁹ As a result, such regulations make initiating a garden excessively "time consuming and expensive."¹²⁰

Cities interested in adopting a municipal ordinance to facilitate community gardening should refer to the model ordinance Professor Jane Schukoske proposed in her article, *Community Development Through Gardening: State and Local Policies Transforming Urban Open Space*.¹²¹ The model outlines ways in which local governments may implement community gardening programs.¹²² With this proposal, Professor Schukoske draws from gardening ordinances across the nation to recommend the "best practices" in successful gardening initiatives.¹²³ For example, three elements particularly useful for addressing ownership concerns include:

- (1) Assign[ing] the duty of inventorying vacant public lots and vacant private lots in low-income neighborhoods, and the duty to make that information readily accessible to the public;
- (2) Authoriz[ing] contracting with private landowners for lease of vacant lots;
- (3) Authoriz[ing] the use of municipal land for minimum terms long enough to elicit commitment by gardeners, such as five years; and provid[ing] for the possibility of

118. *Id.*

119. Elder, *supra* note 93, at 792.

120. *Id.*

121. Schukoske, *supra* note 4, at 390-92 (listing what localities should consider when creating model ordinances as well as elements from community gardening ordinances that have proven workable).

122. *Id.*

123. *Id.* at 391.

permanent dedication to the parks department after five years' continuous use as a community garden¹²⁴

With this compilation of best practices, cities do not have to experiment as much with types of gardening ordinances. Rather, they can rely on other cities' experiences to understand which garden ordinances are worth implementing.

E. State and Federal Laws

Another public use technique for setting up communal gardens involves communities utilizing state and federal land use provisions.¹²⁵ Beginning with state initiatives, some state legislation provides "clear authorization of use of public lands" for establishing community gardens and gardening as permissible public uses of state and local land.¹²⁶ Specifically, communities may find this form of legal validation for gardens in "substantive codes, . . . municipal enabling law, state government codes, and one state's state code."¹²⁷ Similarly, housing authority laws may promote community gardening by planning and incorporating garden space within new development.¹²⁸

However, state laws tend to "focus on narrow governmental interests" and place time limits on gardening projects by imposing short lease terms.¹²⁹ Additionally, these laws often do not offer effective interim uses of the vacant land used for gardening.¹³⁰ Essentially the problem is that legislators overlook the value of gardening. Policymakers should instead "realize that community gardening is consistent with social policies such as the promotion of health and welfare, environmental protection, economic development, education, youth employment, and tourism."¹³¹ In order for state laws to promote and protect gardens effectively, they must promote the longevity of gardens as well as provide technical support and aid the acquisition of material supplies.¹³²

124. *See id.* (listing twenty "best practices").

125. *Id.* at 371.

126. *Id.*

127. Schukoske, *supra* note 4, at 373.

128. *See id.* (discussing "housing projects").

129. *Id.* at 371-72.

130. *Id.* at 372.

131. *Id.*

132. *See id.* ("Provisions permitting government officials to summarily close community gardens are inconsistent with the aforementioned social policies.").

Despite the federal government's current lack of focus on gardens, federal support can also promote and protect gardens where state laws are weak. "Greeners got a painful reminder . . . in 1993, when Congress essentially eliminated funding for the U.S. Department of Agriculture's Urban Gardening Program."¹³³ Before Congress cut that funding, the program had assisted "over 150,000 low-income gardeners in 23 of the nation's cities."¹³⁴ Regardless, federal legislation offers many benefits to protecting and promoting community gardens. First, federal legislation shows widespread support for gardening, legitimizing and promoting community gardens in a way that smaller localized projects cannot.¹³⁵ Second, federal legislation may encourage more towns, cities, and states to establish gardening programs because their efforts will be shared by the federal government.¹³⁶ Lastly, federal programs provide much needed financial assistance often unavailable at the state and local levels.¹³⁷

F. Conservation Easements and Land Trusts

Conservation easements and land trusts represent the most ideal forms of property ownership of community gardens. Conservation easements illustrate a private-law property mechanism that has been used to protect gardens. A conservation easement represents "a legal agreement between a landowner and a land trust or government agency."¹³⁸ It permanently restricts certain uses of the land, but it allows the owner to continue to use her land, sell it, or pass it on to heirs.¹³⁹ Conservation easements have been used successfully to protect various types of land.¹⁴⁰

133. David Malakoff, *What Good is Community Greening?*, COMMUNITY GREENING REV., 1995, at 16, 17, <http://www.communitygarden.org/learn/resources/articles.php>.

134. *Id.*

135. See Schukoske, *supra* note 4, at 371 ("[S]tate laws generally focus on narrow governmental interests such as: providing clear authorization of use of public lands; limiting time for gardening use by establishing short lease periods; and protecting governments from tort liability for injury during such use.") Schukoske argues that such state laws fail to promote permanence and legitimization. *Id.* at 371-74.

136. See Hamilton, *supra* note 116, at 366 n.38 (citing David Malakoff, *Final Harvest?*, COMMUNITY GREENING REV., 1994, at 4.)

137. *Id.*; see also Robert Garcia et al., *Healthy Children, Healthy Communities: Schools, Parks, Recreation, and Sustainable Regional Planning*, 31 FORDHAM URB. L.J. 1267, 1288 (2004) (providing a parallel example of open spaces generally requiring "national priority" status with "adequate funding").

138. Land Trust Alliance, *Frequently Asked Questions*, <http://www.lta.org/faq> (last visited Jan. 29, 2007).

139. *Id.*

140. See *id.* (listing "coastlines; farm and ranchland; historical or cultural landscapes; scenic views; streams and rivers; trails; wetlands; wildlife areas; and working forests").

Conservation easements are either affirmative or negative. “An affirmative easement is a nonpossessory right to use land that belongs to another, while a negative easement is a restriction that the owner places on her own land to benefit another person or other land.”¹⁴¹ Community gardens illustrate a type of an affirmative easement—a right to use another’s land to grow a garden. Additionally, community garden easements do not have to be expressly written into land titles. They may be created by implication or prescription, thereby enhancing their longevity.¹⁴²

Gardens as easements appurtenant can enhance their longevity as well. In addition to express, implied, and prescriptive easements, easements can also be appurtenant or in gross.¹⁴³ Easements appurtenant “benefit[] land that the holder of the easement owns.”¹⁴⁴ Noteworthy is that easements appurtenant “run with the land” and therefore cannot be conveyed to successors without the dominant tenement.¹⁴⁵ In other words, this type of easement “cannot be transferred to a third party or severed from the land.”¹⁴⁶ In contrast, easements in gross attach to the owner of the easement instead of to the land.¹⁴⁷ Consequently, the owner of an easement in gross may transfer it without the property.¹⁴⁸ If an owner with an easement in gross for a community garden decides to sell her property, the community garden is left vulnerable to the next owner’s desired use of the property. Therefore, easements appurtenant protect community gardens more than easements in gross.

An easement may last as long as the time period of any possessory estate.¹⁴⁹ For example, “an easement can be in fee simple (perpetual duration), or for life, or for a term of years.”¹⁵⁰ If successfully established, a conservation easement will effectively ensure garden permanence. Such permanence is a major reason why a conservation easement is most often

141. DANIEL P. SELMI & JAMES A. KUSHNER, *LAND USE REGULATION* 435 (2d ed. 2004).

142. See WILLIAM B. STOEBUCK & DALE A. WHITMAN, *THE LAW OF PROPERTY* 445 (2000) (“[An implied] easement arises initially by implication in the grantor’s conveyance.” [Such apparent use is] ‘necessary’ to the use of the part to which it would be appurtenant.”). Stoebruck and Whitman further state that prescriptive easements, or adverse possession, are acquired by “actual, open, notorious, hostile, ‘continuous,’ and ‘exclusive’ use of another’s land.” *Id.* at 451.

143. SELMI & KUSHNER, *supra* note 141, at 435 (2d ed. 2004).

144. *Id.*

145. *Wisconsin Ave. Properties, Inc. v. First Church of Nazarene of Vicksburg*, 768 So. 2d 914, 918 (Miss. 2000).

146. *City of Anaheim v. Metro. Water Dist. of S. Cal.*, 147 Cal. Rptr. 336, 339 (1978).

147. *Id.* at 767.

148. *Id.* at 768.

149. JESSE DUKEMINIER & JAMES E. KRIER, *PROPERTY* 790 (5th ed. 2002).

150. *Id.*

implemented to pass land to future generations.¹⁵¹ Because easements generally “run with the land,” they commit all owners—prior and successive—to following the parameters outlined by the easement.¹⁵²

Easements are attractive techniques to conserve open space because they can effectively limit future growth and development.¹⁵³ However, specific property laws governing easements make utilizing the mechanism challenging for gardening groups.¹⁵⁴ Because establishing conservation easements requires “a willing grantor,” communities often find it difficult to create such protection for their gardens.¹⁵⁵ When faced with this obstacle, land trusts can provide viable options.

A land trust is defined as a not-for-profit organization that “hold[s] title to land in perpetuity” specifically to benefit the public interest.¹⁵⁶ Land trusts accomplish this conservation goal “by undertaking or assisting in land or conservation easement acquisition, or by its stewardship of such land or easements.”¹⁵⁷ Land trusts may acquire such land in a variety of ways. For example, “[l]and trusts can purchase land for permanent protection, . . . accept donations of land or the funds to purchase land, accept a bequest, or accept the donation of a conservation easement”¹⁵⁸

There are several advantages to owning community gardens through land trusts. First, land trusts work intimately with local communities as is particularly necessary for cultivating and fostering community gardens.¹⁵⁹ Second, as non-profit organizations, land trusts are able to take advantage of numerous tax exemptions making them more economically feasible to maintain in the long-term.¹⁶⁰ Lastly, because land trusts are independent organizations, they can make independent decisions without the restraints that often limit and delay public agencies.¹⁶¹ While conservation easements and land trusts provide some of the best techniques to ensure permanent garden status, private ownership rather than public is generally undesirable when considering the principles and purposes of community gardening.

151. Land Trust Alliance, *supra* note 138. “Whether the easement is donated during life or by will, it can make a critical difference in the heirs’ ability to keep the land intact.” *Id.*

152. *Id.*

153. *Id.*

154. Schukoske, *supra* note 4, at 371 (“[I]n distressed urban neighborhoods property owners have often neglected and abandoned their properties and these owners cannot be located.”).

155. *Id.*

156. *Id.* at 360–61, 369 (noting that such conservation purposes include the protection of natural, scenic, and open-space areas, as well as maintenance of areas for food or timber production).

157. Land Trust Alliance, *supra* note 138.

158. *Id.*

159. *Id.*

160. *See id.* (listing two tax benefits of land trusts, which include “income or gift tax savings”).

161. *Id.*

Moreover, as this Note will discuss, these ownership mechanisms cannot be realistically applied to all gardening situations.

III. THE PROBLEM: VALUING CREATES A BARRIER TO GARDEN PERMANENCE

A. The Role of Land Value: Traditional American Perspectives on Property Ownership

Even with all the available property mechanisms, community gardens remain threatened because none of these strategies ensure garden permanence. An underlying reason for this challenge involves the meaning of property and the related classical notions of American perceptions of property and land ownership. While such modes of thought must be reframed, such a feat would require drastically altering the concepts upon which America was founded. The notions and laws regarding property ownership threatening the permanence of community gardens have been instilled in American society since the country's inception. Thus, our options to protect and increase community gardens are currently limited to the mechanisms based on ownership described previously.

Realistically, we cannot, nor should we, disregard or purge these mechanisms. In order to apply these mechanisms most effectively to community gardens, we need to reframe the context in which they are used. A related issue is that we tend not to value undeveloped land; that is to say, it is not worth anything unless we can build on and profit from it.¹⁶² Such a way of valuing land poses a barrier to the vitality and longevity of garden space.

B. The Challenge in Measuring the Benefits of Community Gardens

Another problematic issue with protecting community gardens is that the "high ideals" placed on garden benefits "rarely can be documented or verified."¹⁶³ An overarching threat to gardens is the notion that hard data on greening is needed before policy makers can give gardens legal protection and support.¹⁶⁴ Arguments in favor of plants, vegetables, trees, and green

162. See generally *Johnson v. Mc'Intosh*, 21 U.S. (8 Wheat.) 543, 586 (1823) (establishing the principle that land left as wilderness is considered waste).

163. LAWSON, *supra* note 7, at 11.

164. Malakoff, *supra* note 133, at 17 (quoting Roger S. Ulrich and Russ Parsons of Texas A&M University).

spaces “usually make little impression on financially-pressed local or state governments, or on developers concerned with the bottom line.”¹⁶⁵ Furthermore, “[t]he tendency to layer multiple agendas on gardens makes achievable objectives difficult to ascertain, much less prove to a skeptical land developer or policy maker.”¹⁶⁶ Additionally, “[p]oliticians, faced with urgent problems such as homelessness or drugs, may dismiss plants as unwarranted luxuries.”¹⁶⁷ In other words, the abstract nature of a garden’s benefits makes it easy for people in different positions to value gardens differently.¹⁶⁸ While numerous benefits to gardening have been mentioned, many are hard to measure in the traditional sense with numbers, charts, and graphs. It is apparent that in order to promote garden permanence, we need a system of measurement capable of convincing lawmakers to protect gardens adequately.

One suggestion for measuring the value of community gardens is to use American Forest’s CITYgreen GIS-based software program.¹⁶⁹ Through analyzing various types of environmental information, this software measures the amount of plant life in urban areas.¹⁷⁰ CITYgreen determines the value of green space by indicating how such spaces can decrease energy costs, maintain fluctuating and harsh temperatures, and improve air quality.¹⁷¹ The program reframes the way the public and decision makers view cities by presenting it as an ecosystem.¹⁷² However, CITYgreen cannot be successfully used in all urban areas due to impracticalities.¹⁷³ While CITYgreen should not be entirely discounted, we need something more ground breaking—something that begins to solve the root of the problem.

165. *Id.*

166. LAWSON, *supra* note 7, at 11.

167. Malakoff, *supra* note 133, at 17 (quoting Roger S. Ulrich and Russ Parsons of Texas A&M University, researchers studying “why people have positive responses to plants and green spaces”).

168. LAWSON, *supra* note 7, at 11.

169. Elder, *supra* note 93, at 793 (asserting that CITYgreen represents a useful tool for measuring urban green space precisely).

170. *See id.* (“CITYgreen combines aerial photography and urban surveying to create detailed images of cover in urban areas.”).

171. *Id.*

172. *Id.* at 793–94 (“It looks at a city as an ecosystem, with the amount, concentration, and quality of its green space changing living conditions in ways that are not immediately apparent to the casual observer.”).

173. *See id.* (“For New York City to cultivate enough new green space to substantially improve health might require such an initial outlay of expenditures on new greenery and parkland as to be impractical.”).

C. Merging Politics and Environmental Ethics

The problem facing community gardens is rooted in how law and policy value land and the environment in general. Thus, an alternative solution is to incorporate environmental ethics even more into policy decisions and public debate. This will provide an adequate outlet to assess the value of gardens and the need to promote their permanency. Many scholars within the field of environmental ethics disagree about how exactly to value the environment—intrinsically or instrumentally. For example, Professor Eugene Hargrove, who argues strictly for intrinsic valuing of the environment, asserts that “instrumental values seem to inevitably reduce to economic values; thus, environmental values don’t stand a chance because aesthetics or moral respect can’t compete with other utilitarian goods in the marketplace.”¹⁷⁴ However, this line of thinking only functions to disengage citizens from publicly debating environmental values and policy as well as participating in the democratic process.¹⁷⁵ As a result, Professor Bob Pepperman Taylor suggests that a discussion of intrinsic values must be brought into the public debate.¹⁷⁶ Promoting discussion of intrinsic values stimulates dialogue between all parties that is “entirely compatible with, even critical to, the building of human communities committed to . . . [a] mutual moral ground.”¹⁷⁷

A major reason explaining the general “bifurcation of politics and ethics” is the argument that effective political participation, policy formation, and a stable democracy can only be achieved through the process of rational policy making dominated by cost-benefit analysis, risk assessment, and other forms of rationalism.¹⁷⁸ The effect of such an approach, however, ultimately ignores the implied values ensconced in the so-called objective strategies.¹⁷⁹ This effect impedes desperately needed dialogue that could propose different approaches to measure the benefits of community gardens. Without dialogue, we are prevented from moving past existing value approaches and developing new techniques that protect

174. Bob Pepperman Taylor, *On Intrinsic Value and Environmental Ethics*, in *THE MORAL AUSTERITY OF ENVIRONMENTAL DECISION MAKING: SUSTAINABILITY, DEMOCRACY, AND NORMATIVE ARGUMENT IN POLICY AND LAW* 79, 81 (John Martin Gilroy & Joe Bowersox eds., 2002).

175. *Id.* at 81–83.

176. *Id.* (“[I]f we think of intrinsic value not as a trump, but as a name for a certain kind of moral respect for the natural world that recognizes its (nature’s) value beyond human advantage, . . . [I] would suggest that it is a rich and important part of our common moral traditions.”).

177. *Id.* at 86.

178. See Joe Bowersox, *The Legitimacy Crisis in Environmental Ethics and Politics*, in *DEMOCRACY AND THE CLAIMS OF NATURE* 71 (Ben A. Minteer & Bob Pepperman Taylor eds., 2002). (discussing ideas posed by Christopher Foreman).

179. *Id.* at 80–81.

gardens and open spaces effectively. The fact that objective strategies do not acknowledge the intrinsic values in effect precludes discovery of flaws in these imperfect tools.

In response to this dilemma, Professor Joe Bowersox calls for a "deliberate democracy" that will allow society to begin debating and challenging its "conceptions of the world (our visions of our collective future) and facilitate the combination of our individual wills into a common enterprise."¹⁸⁰ He further asserts that when considering that ethics and politics both encourage

human behavior to achieve individual and collective ends, and given the dangerous consequences of avoiding normative argument over such things as relative worth of species . . . or the equity effects of the siting of a hazardous waste incinerator, we must recognize that it is time for us . . . to get over the unnecessary bifurcation of the two.¹⁸¹

Instead of allowing political decision making to rely so heavily on science and economics, we must force values to surface as "the explicit subject of politics and the conscious starting point for all policies."¹⁸² Otherwise, development will almost always take priority over community gardens and open spaces.

IV. A SOLUTION: APPLYING A PLACE BASED ETHIC TO LAND USE PLANNING AND DECISION MAKING

Fundamentally, the problem is that the law fails to promote gardens because it lacks an adequate context within which to evaluate gardens. Community gardens are falling into ruin despite the effort that went into their establishment and the attempts to protect them through use of legal mechanisms. The ordinances are proving unsuccessful, the leases are expiring, states fail to enact statutes that adequately protect and recognize gardens, and the federal government replaced its program specifically aimed to create community gardens.¹⁸³

180. *Id.* at 86.

181. *Id.* at 84.

182. *Id.*

183. The cancelled federal program is the USDA Urban Gardening Program that ended in 1993. Malakoff, *supra* note 133, at 16-17. Even though the federal government funds programs that often include community gardens, a federal program specifically for gardens no longer exists. *See, e.g.*, Press Release, U.S. Dep't of Housing & Urban Dev., 70 Elderly Colorado Residents To Get "New" Homes for

As an initial attempt to resolve issues that threaten garden permanence, communities can apply a number of grassroots strategies and other innovative techniques to protect their gardens. Grassroots solutions are critical when considering the current state of the law. For example, reflecting on the situation in New York City, “[t]his crisis points out the need for community gardeners to organize in their communities to gain popular and political support for the preservation of gardens.”¹⁸⁴ Furthermore:

[t]his is an important era for community gardening. Community gardeners and garden supporters have to be ready to work with their city councils, community planning boards and mayor’s offices to do community-based planning and policy making that includes community garden as an important component of permanent neighborhood open space.¹⁸⁵

But how are communities to do this? The answer: We need to shift our thinking.

A. Community Gardens Require an Ethics of Place

We are at a clear divide in the environmental movement. Thus, one strategy involves working toward implementing a fundamental paradigm shift, which is best accomplished by reframing the issue. However, given the current rigid legal structure, a creative approach could prevent the continued loss of gardens and to cultivate a dialogue of values so critical to the task of promoting garden permanence. For a creative approach, we must look beyond traditional legal theory, techniques, and even mainstream environmental thought. This approach consists of ways to encourage and promote the legal protection of green space, including gardens, by recognizing the value gardens have within an ethics of place. Then, we can apply that value to land-use planning and decision making. An ethics of place will provide an invaluable method to measure the benefits of gardens by creating the dialogue missing from current discussions regarding gardens.

A discussion of place has much to offer in promoting garden permanence. First, such a discussion confers “a position of renewed respect

Christmas (Dec. 23, 2003), available at <http://www.hud.gov/local/co/news/2003-12-23.cfm> (describing new elderly housing partially funded by HUD which includes a community garden as an amenity).

184. Librizzi, *supra* note 97, at 29.

185. *Id.*

by specifying its power to direct and stabilize [society], to memorialize and identify us, to tell us who and what we are in terms of *where we are*.”¹⁸⁶ Since place surrounds us, it also forces us to acknowledge our immediate environments: “the enviring subsoil of our embodiment, the bedrock of our being-in-the-world.”¹⁸⁷ As Professor Casey argues, until we become aware of this field of thought and begin reflecting on and questioning what place involves and what it means to be in a particular place, “our own lives will continue to be as disoriented and displaced, as destabilized and dismaying as we know them to be at this . . . moment.”¹⁸⁸

An ethics of place applies relativism, as well as contextual and holistic approaches, to analyzing problems and questions.¹⁸⁹ Such approaches create an awareness of context and force us to understand where things come from and how they connect to each other.¹⁹⁰ As a result, adopting an ethics of place is particularly important because, as Professor Smith explains: “[a]n ethics of place might make explicit the links [] recognized between social and economic relations, land, locality, and ethics.”¹⁹¹ By reconnecting moral and physical spaces, this ethic weakens the current ethical status quo.¹⁹²

Bioregionalism offers a classic example of recognizing the role of place. Bioregionalism highlights the idea that humans are molded and influenced by more than their immediate surroundings and culture.¹⁹³ Rather, the various places and resources upon which humans depend play crucial roles in shaping individuals and the way they exist in the world.¹⁹⁴ Thus we must come to learn about and understand “the immediate specific place where we live” and the limits of that place’s natural resources.¹⁹⁵ However, in inquiring about places we must be careful not to discount the role of culture in shaping place, which a bioregional perspective seems to

186. EDWARD S. CASEY, *GETTING BACK INTO PLACE: TOWARD A RENEWED UNDERSTANDING OF THE PLACE-WORLD*, at xv (1993).

187. *Id.* at xvii.

188. *Id.*

189. See SMITH, *supra* note 5, at 193 (discussing the social theories of Pierre Bourdieu, which apply a similar form of relativism). According to Bourdieu, we must “apply to the social world the relational mode of thinking that is that of modern mathematics and physics, and which identifies the real not with substances but with relations.” *Id.* at 193 (citing PIERRE BOURDIEU, *IN OTHER WORDS: ESSAYS TOWARDS A REFLEXIVE SOCIOLOGY* 125 (1990)).

190. *Id.*

191. *Id.* at 156.

192. *Id.* at 152.

193. *Id.* at 213 (citing Michael Vincent McGinnis, *A Rehearsal to Bioregionalism*, in *BIOREGIONALISM* 1, 4 (Michael Vincent McGinnis ed., 1999)).

194. *Id.* at 213.

195. *Id.*

do.¹⁹⁶ Such caution is necessary because place encompasses more than the characteristics of any particular region.¹⁹⁷ Instead, under an ethics of place framework, places are all different: “each is a specific set of interrelationships between environmental, economic, social, political and cultural processes.”¹⁹⁸ In sum, within an ethics of place, we must reconsider how we define “place” to include interrelationships.

An ethics of place is particularly useful in bringing about the changes in land-use planning and decision-making needed to protect the longevity of community gardens. Primarily, it forces us to assess how we form opinions and assign values.¹⁹⁹ This ethical framework increases the potential to develop an adequate way to measure the benefits of gardens. By examining the “interplay of the individual, culture, and nature,” a place-based ethic calls for “an ethical, rather than an instrumental, relation to the natural world.”²⁰⁰ Furthermore, an ethics of place only occurs by “fusing” one’s surrounding natural and cultural environments in a way that is ethical without seeking “to colonize or appropriate nature.”²⁰¹

B. Finding Wilderness in the Home

In order for long-term policy to change, a dialogue must be sparked discussing the role of nature in human life and, likewise, the role of humans in nature. Essentially, we need to look to other realms of thought for support, such as philosophy, environmental studies, and sociology to incorporate the meaning and role of place into policy. We must acknowledge the role that humans and gardens can play for each other, as well as the role that the establishment of a garden can play in protecting nature. In doing so, this will improve quality of life on a grander scale. The mutuality of this relationship must be seen in order for society and policy to advance to a point where it is possible to promote gardens, open space in general, and the quality of life for the disenfranchised. “[P]eople should always [] be conscious that they are part of the natural world, inextricably tied to the ecological systems that sustain their lives. Any way

196. *Id.* at 213–14.

197. *Id.* at 215.

198. *Id.* at 215 (citing GILLIAN ROSE, *FEMINISM & GEOGRAPHY: THE LIMITS OF GEOGRAPHICAL KNOWLEDGE* 41 (1993)).

199. *Id.* at 218 (“[An ethics of place] calls us to be aware of the *context* or our evaluations.”).

200. *Id.* at 218–19.

201. *Id.*

of looking at nature that encourages us to believe we are separate from nature . . . is likely to reinforce environmentally irresponsible behavior.”²⁰²

One avenue through which to accomplish a reframing is, as Professor William Cronon proposes, to find a way—or ways—to make ourselves at “home” in the wilderness.²⁰³ Constructing wilderness as our “home” will allow for wilderness’s importance to manifest itself. He states that:

we need to discover a common middle ground in which all of these things, from the city to the wilderness, can somehow be encompassed in the word “home.” Home, after all, is the place where finally we make our living. It is the place for which we take responsibility, the place we try to sustain so we can pass on what is best in it (and in ourselves) to our children.²⁰⁴

Further, Professor Iris Marion Young provides a useful way in which to define home; a “home . . . is *personal* in a visible, spatial sense.”²⁰⁵ Essentially, “[t]he home displays the things among which a person lives, that support his or her life activities and reflect in *matter* the events and values of his or her life.”²⁰⁶ A place becomes a home only as it acquires meaning through its connection with one’s sense of self. Home “enacts a specific mode of subjectivity and historicity” where a person comes to feel settled “through the process of interaction between the living body’s movement to enact aims and purposes and the material things among which such activities occur.”²⁰⁷

Thus, we would have to make wilderness our home by seeing ourselves and our identity reflected in it. Professor Edward Casey insists that we must recognize how the natural world enters our dwelling in “built places *from the edges*.”²⁰⁸ Humans are primarily orienting themselves within buildings that appear cut off from nature.²⁰⁹ As a result, “[o]nce our bodies are comfortably ensconced in buildings, we simply tend to close out the

202. William Cronon, *The Trouble with Wilderness; or, Getting Back to the Wrong Nature*, in UNCOMMON GROUND: TOWARD REINVENTING NATURE 69, 87 (William Cronon ed., 1995).

203. *Id.* at 69 (“[W]ilderness presents itself as the best antidote to our human services, a refuge we must somehow recover if we hope to save the planet.”).

204. *Id.* at 494.

205. Iris Marion Young, *House and Home: Feminist Variations on a Theme*, in FEMINIST INTERPRETATIONS OF MARTIN HEIDEGGER 252, 270 (Nancy J. Holland & Patricia Huntington eds., 2001) (emphasis added).

206. *Id.* at 269.

207. *Id.* at 269–71.

208. CASEY, *supra* note 186, at 148.

209. *Id.* at 147.

larger world of nature.”²¹⁰ Regardless of human association with built places, the natural world continues to exist: “*it remains around us* as a mute presence tacitly waiting to be acknowledged.”²¹¹

Associating gardens with the home can effectively accomplish this important recognition, but without needing to fully “move outside the city limits and into the margins of built place.”²¹² Nature can be effectively acknowledged by connecting it with the home because “[h]omemaking consists in the activities of endowing things with living meaning, arranging them in space in order to facilitate the life activities of those to whom they belong, and preserving them, along with their meaning.”²¹³ Furthermore:

[t]he work of preservation entails not only keeping the physical objects of particular people intact, but renewing their meaning in their lives The preservation of the things among which one dwells gives people a context for their lives, . . . gives them items to use in making new projects, and makes them comfortable.²¹⁴

Expanding on this idea, Professor Casey states that “more than comfort is at issue in the elective affinity between houses and bodies: *our very identity is at stake*.”²¹⁵ Since humans often identify themselves by and with the places where they dwell, we have much to gain from incorporating gardens into the concept of the home.

The concept of “[w]ilderness gets us into trouble only if we imagine that this experience of wonder and otherness is limited to the remote corners of the planet, or that it somehow depends on pristine landscapes we ourselves do not inhabit.”²¹⁶ Professor Cronon provides an example of comparing a tree in the garden to a tree in an ancient forest, where “[t]he tree in the garden is in reality no less other, no less worthy of our wonder and respect.”²¹⁷ This analogy suggests that “we abandon the dualism that sees the tree in the garden as artificial—completely fallen and unnatural—and the tree in the wilderness as natural—completely pristine and wild.”²¹⁸

210. *Id.*

211. *Id.* at 148.

212. *Id.*

213. Young, *supra* note 205, at 272.

214. *Id.* at 273–74.

215. *Id.* at 120.

216. Cronon, *supra* note 202, at 88.

217. *Id.*

218. *Id.* at 88–89.

Rather, humanity or society has a responsibility “for both, even though we can claim credit for neither.”²¹⁹

The “challenge is to stop thinking of such things according to a set of bipolar moral scales in which the human and the nonhuman, the unnatural and the natural, . . . serve as our conceptual map for understanding and valuing the world.”²²⁰ In contrast, we must appreciate the entire “natural landscape that is also cultural, in which the city, the suburb, the pastoral, and the wild each has its proper place.”²²¹ Professor Cronon relates such concepts to his discussion of home. As discussed previously, Professor Cronon describes home as a place in which we can accomplish a middle ground and foster the existence of wilderness along with all others places such as the city and the suburb.²²² Most importantly, “if we acknowledge the autonomy and otherness of the things and creatures around us— . . . label[ed] with the word ‘wild’—then we will at least think carefully about the uses to which we put them, [or] ask if we should use them at all.”²²³

C. Associating Gardens with the Home

Gardens pose an excellent compromise to the challenge of bringing together the built and natural world allowing us to fully recognize the benefits of nature. Although gardens are so-called “built places,” they primarily consist of natural objects. Edward Casey articulates the significance of gardens well. He reflects that “[e]ven if I am not yet in wilderness, in a garden I am in the presence of things that live and grow, often on their own schedule.”²²⁴ Moreover, we must not discount the value of these “special places.”²²⁵ Although gardens do not tend to provide the typical “practical service[s], they are not merely ephemeral or superficial in status.”²²⁶

219. See *id.* at 89 (“The tree in the garden could easily have sprung from the same seed as the tree in the forest.”).

220. *Id.*

221. *Id.*

222. See *id.* at 89 (“Wildness (as opposed to wilderness) can be found anywhere: in the seemingly tame fields and woodlots of Massachusetts, [or] in the cracks of a Manhattan sidewalk.”).

223. *Id.*

224. CASEY, *supra* note 186, at 154 (reflecting that gardens are intermediaries “between the completely constructed and the frankly wild”).

225. *Id.* (“When I [Professor Casey] stand in a garden . . . I have become marginal, halfway between the sacred and the profane, yet I have somehow gained a very special place to be.”).

226. *Id.* Professor Casey provides examples of places and cultures that gave more significance to gardens than the places in which the people resided. In particular, gardens “are the primary forms of landscape architecture and have been important presences from the time of ancient Mesopotamia and early China until the present moment.” *Id.*

In sum, by looking at gardens from the perspective of place, these spaces have much to offer. Generally, gardens are important to society because they “exhibit a range of relations between the naturally given and the intentionally cultivated.”²²⁷ Gardens have a particular capacity for illustrating such relationships. Compared to “domestic or institutional buildings,” gardens do not “exclude or ignore the natural world.”²²⁸ Moreover, according to Professor Casey, gardens carry three important lessons that should be incorporated into policy discussions. First, gardens reflect a close relationship “between mood and built place.”²²⁹ Second, within this relationship, gardens can teach communities about the “expanded building potential of certain material elements.”²³⁰ Such material elements are most easily defined as “landscape architecture,” including ground, wood, water, and rocks.²³¹ Lastly, gardens offer a sense of dwelling through the experience of spending time in them.²³²

CONCLUSION

The value of gardens can no longer be denied. We must establish an effective way of measuring the benefits of community gardens in order to promote their longevity. Ordinances, leases, legislation, and private mechanisms will all work much better if society begins to recognize the role that these gardens play in lives of urban communities and beyond. This can best be accomplished by reframing the issue and incorporating a dialogue of environmental ethics into land-use planning and decision-making. We can ensure such a paradigm shift by engaging in a discussion of the meaning of place in society.

227. *Id.* at 168.

228. *Id.*

229. *See id.* (“We go to a garden expecting to feel a certain set of emotions, and this expectation is not merely a subjective matter but is based on our perception (and memory) of the structure and tonality of the place.”).

230. *Id.* at 169.

231. *Id.* (emphasis omitted).

232. *Id.* at 169–70.

