



NEW HAMPSHIRE OFFICE OF ENERGY & PLANNING
2014 Spring Conference
May 3, 2014

NEW HAMPSHIRE MUNICIPAL LAWYERS ASSOCIATION
CREAN LEGAL EDUCATION

***Agriculture, “Agritourism” & Local Land Use Controls
Developments & Guidance***

- ❖ ***Statutory Language & Legislative Policy***
- ❖ ***“Agritourism” & Determining Whether Activities Are Ancillary to Farm Operations***
- ❖ ***Selected Urban & Suburban Activities:
“Backyard Chickens,” “Front Yard Gardens,” & “Pot Bellied Pigs”***
- ❖ ***Large-Scale Agricultural Uses and Land Use Controls***

***Session 3: Urban & Suburban Agriculture – Selected Issues:
Front Yard Gardens, Back Yard Chickens & Pot Bellied Pigs***

Persons familiar with land use issues in New Hampshire undoubtedly are familiar with the assertion “I can do anything I wish with my land,” sometimes - but not always - accompanied by the modifier, “. . . as long as I don’t interfere with use of someone else’s land.” In the context of agricultural uses within urban or suburban areas, that familiar refrain might be adapted as “I have a right to keep barnyard animals anywhere I want.” The materials for this session of the seminar look at that assertion in the context of fruits and vegetables, chickens, and “pets” (here in the form of pot bellied pigs).

In a more formal sense, these topics address the matter of “urban agriculture” which, according to the American Planning Association, entails the production of food for personal consumption, education, donation, or sale, and includes associated physical and organizational infrastructure, policies, and programs within urban, suburban, and rural built environments.

Thus, for purposes of this paper and seminar, the issues are not limited to those involving large urban, fully developed areas, but also those areas where the predominant uses are residential or other non-traditional farming activities. The following provide some links to information on what several communities and organizations are looking at with respect to “urban agriculture.”¹

[Austin, Texas](#)

[Be Local Northern Colorado](#)

[Coalition for Activity and Nutrition to Defeat Obesity](#)

[Portland, Oregon](#)

[The Gardens on Spring Creek](#)

[Wheat Ridge, Colorado](#)

A. NOT NEXT TO MY HOUSE. At the heart of early land use control theory in the United States was the notion that “zoning” was a proper and appropriate technique to create land use patterns so that incompatible uses were separated. Indeed, the early case decided by the U.S. Supreme Court upholding the concept of zoning by districts² gave rise to the term “Euclidean zoning” denoting the separation of land uses. In support of this separation, the court said that a nuisance may be merely a right thing in a wrong place “like a pig in the parlor instead of the barnyard.”³ Today, modern land use theory still applies separation of uses in this traditional sense but also allows for much greater intermingling of uses. Often these uses will involve minor commercial activity or allowing a mix of housing types within the same district.

In the agricultural context, separation of uses can lie at the heart of both traditional and modern land use control issues. At least some agricultural pursuits will have effects that some individuals (e.g., neighbors) may find objectionable, such as odors, waste, noise, and traffic. One early case that demonstrates the issues, in a much larger context than the three examples to be addressed in this session of the seminar, was an Arizona Supreme Court decision in which a retirement community sought to enjoin a cattle feedlot operation which was claimed to be incompatible with and a nuisance interfering with the quiet enjoyment of the retirement

¹ All sites listed in these links were last visited on January 23, 2014. Links should open using control function.

² *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365 (1926).

³ *Ibid.*, at page 388. This language is sometimes mistakenly cited in support of a claim that land use controls have their basis in nuisance prevention. In fact, the case stands for the principle that zoning and the wider concept of land use controls are based on exercise of the governmental police power and are not limited to prevention or abatement of nuisances.

community.⁴ The case was difficult in that the feedlot predated the retirement community and normally the doctrine of “coming to the nuisance” would have precluded issuing an injunction against continued operation of the feedlot. However, in an interesting twist, the court ordered the feedlot to be moved, but it ordered the retirement community developer to pay the costs of moving. In some respects, the difficulties of applying nuisance law in this context show the benefit of having a forward-looking land use control in place that may provide some certainty in land use planning to avoid this type of situation.

Yet, the emergence of “back-to-the-earth” movements and other developments (such as the high cost of food) have led some to question whether land use should rigidly compartmentalize residential and other non-agricultural uses from those that, at least in a minor way, would involve some of the effects seen by some as being offensive or detrimental to property values. [In some respects, these same concerns arise in the context of large scale agricultural operations reviewed in session 4.]

Admittedly, some of the controversies observed in recent years are due to causes other than those just mentioned. For example, the number of individuals who oppose any form of regulation, and particularly land use regulation, if not increasing in size, at least have become more visible and vocal. Thus, several years ago, a property owner in the city of Keene planted a large vegetable garden in his front yard in protest of zoning that barred vegetable planting in that area of his property.

The emergence of front yard garden disputes was noted in a recent issue of the *American Bar Journal*⁵ which stated:

Thanks, perhaps in part, to the green thumbprint of Michelle Obama on the White House, edible home gardens are gaining popularity. But they come with an unintended consequence: front-yard garden wars.

Front yards often have better sun, so they’ve become more appealing spots for gardeners interested in growing their own food. But vegetable gardens can look shabby, and rotting vegetables can attract rodents and insects. And all of that is enough to make a property value-concerned neighbor call in the authorities.

Citing obscure blight ordinances, neighboring homeowners have sought to remove front-yard gardens via enforcement of local laws that require manicured, homogeneous front lawns.

Officials in some jurisdictions are starting to take notice.

⁴ *Spur Industries v. Del E. Webb Development Co.*, 108 Ariz. 178, 494 P.2d 700 (1972).

⁵ April 2013.

Other controversies are not hard to find and a small sampling of them⁶ includes the following issues, controversies and decisions:

- Of course, many of us have our only tiny (or maybe not so tiny) gardens that produce a few tomatoes, perhaps some lettuce, and maybe even some corn for the particularly adventurous. At what point, though, is land use approval required to do so; and, even more significantly, at what point does a garden assume a status of something other than an accessory use. One case in DeKalb County, Georgia, involved an action against a man who grew more vegetables on his vacant suburban lot than could be sold there. Other issues may arise when production exceeds household consumption and the excess is sold or even given away.
- Another criterion that may arise is whether the produce is used for home consumption or for sale or distribution to others. [One might ask whether the omni-present summer supply of zucchini available from co-workers in offices and other places of business would violate such a consumption-based limit on home gardens.]
- Raising crops on a portion of a parcel where the primary use is not agricultural led to a zoning violation in a case out of Delaware. The property, a former hotel and golf course, had been converted to a retreat and several vacant acres were planted with corn (claimed by the owner to have been an experiment to test soil suitability for agriculture and an improvement over the weeds that had been growing there.) But when authorities became aware that the corn was being sold (including an apparent posting on Craig's List) the arm of the law came down and mowed away the cornfield.
- Disposal of waste creates issues and sometimes growing of crops themselves might give rise to claimed violations of zoning's traditional bar against "creating offensive odors." In one case out of Michigan, a neighbor complained of such offensive odors from a property which, it turned out, produced a crop of medical marijuana. Similar concerns, though perhaps less intriguing, arise with respect to back-yard chickens and pot bellied pigs discussed below.

⁶ Some of the examples here and elsewhere in this paper are used with appreciation to Attorney Dwight Merriam, of Robinson & Cole, Hartford, CT, author of the annual *ZiPLers: Zoning And Planning Law Report Land Use Decision Awards* printed in THE ZONING AND PLANNING LAW REPORT, and to Attorney Sorrell Negro, also of Robinson & Cole's Hartford office, who supplied some examples to this author.

Not all front yard garden issues involve outlandish facts or claims. In fact, issues can arise from the manner in which regulations are written, particularly when applied in situations that may not have been foreseen or expected when the language was penned. In hopes of providing some guidance to those who may seek to engage in such creative writing, samples are provided for review and consideration (and without endorsement) in Appendix 1.

B. A CHICKEN IN EVERY POT?

Free-range chickens may be the rage of the natural/organic shopping movement, but whether chickens should be allowed next to (enraged or at least annoyed) neighbors has assumed a place of honor in looking at urban/suburban residential zoning issues. Many evenings as I am on my way to my home in Pembroke, I drive rather cautiously on a neighborhood road as I don't wish to run over chickens that seem to feel they have the right-of-way. To my knowledge, no one has complained to our town code enforcement officer – but let's hope we don't have a legislator drive unaware of their presence, as recently happened with ducks in Nashua.



It is worth noting that the policy statements in a large number of zoning ordinances in New Hampshire contain statements to the effect that the purpose of the ordinance is to maintain the rural atmosphere of the community. If the ordinance is silent or has vague language regarding the keeping of chickens (or similar animals not usually viewed as domestic pets), would such a policy statement persuade a judge as to interpretation of the ordinance, particularly in light of the policy statements reviewed in session 1 materials in this paper?

Some may favor a course that provides flexibility; others may urge that the sense of the community with respect to such a potentially divisive matter ought to be spelled out clearly in regulatory language. Often, though, the matter may become one of scale and gender; scale in the sense that a large number of fowl may present more difficult concerns and issues, and gender in the sense that roosters are more likely to annoy with their crowing than hens with their clucking.

While disputes over actively-productive chickens continue, another issue concerns the fate awaiting “senior citizen” chickens that no longer satisfy the egg-craving demands of their owners. Neighbors and others may be somewhat tolerant of chickens running amok on the streets when those chickens satisfy local appetites. But when the chickens no longer fulfill table demands, drivers and others (not to mention code enforcement officers) appear to be far less

tolerant of having to drive to avoid them on local roads. (Of course, it is not just traffic that can be of concern, as the chickens may no longer be “tended” and they may not do so well cleaning up after themselves when they become truly free range.)

The following⁷ describes how the issue of elderly, retired (and possibly abandoned) chickens is described in some collected anecdotes:

Backyard chicken farming has grown in popularity in recent years, as more urban residents turn to gardening and farming. But along with a rise in rooftop chicken coops has come the problem of unwanted and abandoned birds.

Hundreds of chickens that outlive their egg-laying potential are being abandoned at shelters across the country, reports NBC News. “They’re dumped all the time,” Farm Sanctuary’s Susie Coston told the site.

Farm Sanctuary’s three shelters currently take in at least 400 or 500 chickens annually, Coston estimated. According to NBC News, another shelter in Minnesota “has tracked a steady climb in surrendered birds from fewer than 50 in 2001 to nearly 500 in 2012.”

Animal rescue organizations often can’t handle the influx of unwanted chickens, leaving “municipal dog and cat shelters the task of taking in, housing, feeding, caring for, and inevitably killing healthy, adoptable chickens,” according to a statement from Farm Sanctuary and five other organizations.

Chickens, which can live well over 10 years, require consistent care and have their own personalities.

With the proper research and dedication, raising chickens can be a worthwhile alternative to purchasing eggs from factory farms, suggests the Humane Society of the United States. The organization recommends adopting adult chickens from shelters or retired hens from farms.

Along with the animals’ welfare, municipal regulations and sanitation are important considerations when adopting. Experts have warned that backyard poultry could become disease vectors for avian flu if the disease evolves to infect humans.

The Centers for Disease Control notes it is common for chickens and other live poultry to carry salmonella. The CDC recommends washing your hands after coming into contact with chickens, and keeping them away from children, older adults or those with weakened immune systems.

A Wisconsin city, Beloit, adopted a chicken ordinance set forth in Appendix 2.

In conclusion, as one member of the academic community stated at a recent meeting discussing agriculture commissions, a solution to the elderly, non-producing hen “problem” may be as simple as “chicken stew.”

⁷ http://www.huffingtonpost.com/2013/07/10/backyard-chickens-abandon_n_3573698.html, last visited January 15, 2014.

C. PET ME OR EAT ME? While chickens (whether living, productive, retired, abandoned, escaped, or cooked) have had their fair share of increasing notoriety, the lenses of the planning paparazzi appear to have been more clearly focused in recent years on the plight of pot bellied pigs. At issue in many disputes is whether these animals are livestock, feedstock, or domestic pets. In other words, the issue might be summarized as: “Are they pets or are they dinner?”

Perhaps it is a bit overly simplistic, but one analysis suggests that the classification can be reasonably simple: if it is not a pet and not a wild animal then it must be a farm animal, which means it is for dinner. Pot belly pig advocates assert that they are not good eating and they are not wild, so they must be domesticated animals, i.e., pets. They also assert that the pigs carry fewer germs than even dogs or cats (so they are not a health risk) and they are much quieter than most any dog. They also assert that opposition to pigs as pets often may arise not from planners or local officials, but from some animal rights groups who may think that keeping pot belly pigs from becoming legalized will somehow further their cause in getting people to not eat meat.

Some more examples, again derived from the *ZiPLers*⁸ of recent years:

- The Manchester, Connecticut zoning board overturned a code enforcement officer’s effort to have a pot bellied pig removed from property, based on a finding that “There is no definition in the Town zoning regulations regarding the types of animals considered to be livestock or the types of animals considered to be domestic pets.”
- While pot bellied pigs seem be the topic *de jour*, other animals have raised questions as to whether they are domestic, livestock, or something else, including:
 - Pigeons (the racing, not the street type);
 - Rabbits (a large number kept by a magician, who was required to have a disaster plan in case a hurricane or other calamity and to have an itinerary for animals taken out of town);
 - Ducks (distinguishing between pets and those raised for commercial purposes);
 - Miniature donkeys;
 - Rehabilitation activities for abandoned and injured animals.

Again, without endorsing the language and merely as an example, Appendix 3 contains language from the code of Riverside, California, regarding the keeping of pot bellied pigs.

⁸ See note 6, above.

Session 4: Large Scale Agriculture and Local Land Use

In 2013, the Town of Dunbarton, NH, made the newspapers, as its planning board struggled with reviewing a proposed very large organic egg farm. Traffic, noise, waste disposal, pollution, and odor were among the factors commanding the board's attention. In some respects, these concerns are not dissimilar to those that may arise when considering issues associated with front yard gardens, back yard chickens, and pot belly pigs – though, naturally, the scale of concerns is escalated. Ultimately, Dunbarton rejected the application citing insufficient information provided by the applicant in response to concerns raised by the board, the abutters, and the public. As of the time this paper is written, the property owner has appealed that action to Superior Court, and a hearing has been scheduled for later this month. Excerpts from selected documents as posted on the Town of Dunbarton website are included in Appendix 4, while excerpts from the Court petition and answer are included in Appendix 6.

As each situation involving large scale agricultural operations (like big box business siting) will raise different issues in different communities, no single methodology for review and analysis and decision-making will fit all instances. However, a review of some processes in other instances may be of some utility.

The following summary of a 2013 Pennsylvania case⁹ describes a situation which may arise in dealing with a proposal for housing animals, (in this case chickens).

Dale and Kay King have owned two adjoining parcels in Latimore Township, Pennsylvania, on which they have operated chicken houses since the 1960s. Since the 1990s, the Kings' chicken operation took place in five chicken houses which were capable of raising 24,000 to 34,000 chickens each. Zoning on the properties, prior to 2008, was agricultural conservation, which allowed chicken houses as a permitted use. The parcels' zoning was amended in 2008, when the Township adopted a new zoning ordinance which specifically excluded "the development of new or expansion of existing Concentrated Animal Operations" from the agricultural zone covering the Kings' property.¹⁰

Three of the chicken houses, located on the Kings' smaller parcel, also encroached on a portion of the larger parcel. When the Kings sought to sell the chicken houses in April 2009, they were required to obtain Township approval restructuring the boundary lines between the parcels in order to eliminate the encroachment issue. Thus, the Kings submitted an add-on lot subdivision application, seeking to restructure the parcels such that two small portions of the large parcel would be added to the small parcel. The Township did not vote to approve the subdivision request until 2010.

⁹ *Latimore Township v. Latimore Township Zoning Hearing Board*, 58 A.D.3d 883 (Pa. Comm. Ct. 1/4/13). The opinion can be accessed at:

http://scholar.google.com/scholar_case?case=16943875599587594770&hl=en&as_sdt=2&as_vis=1&oi=scholar.

¹⁰ Author's Note: Compare this rezoning to the retirement community coming to the feedlot "nuisance" in the *Del Webb v. Spur Development* case, see n. 4.

In July 2010, the Township issued revocation notices to the Kings, claiming that the chicken houses were nonconforming uses which had been abandoned. The Kings timely appealed the revocations, claiming that they had never abandoned the use and that the chicken houses were a preexisting nonconforming use. Hearings were held in September 2010 before the Zoning Hearings Board, at which time the Township again asserted that the use had been abandoned. The Kings acknowledged that the last flock of chickens had been removed from the parcel in April 2009, in preparation for the sale of the properties, but that the removal of the chickens was related to the Kings' efforts to sell the property, not their intention to abandon the use, and that the delay in sale was attributable, at least in part, to the Township's actions in delaying action on the subdivision request. Further, the Kings noted that a prospective purchaser had been engaged in repairing the chicken houses continuously since April 2009. The Zoning Hearings Board decided in favor of the Kings, holding that chicken houses are permitted uses under the 2008 zoning ordinance, and declining to address the question of abandonment of use. The Township appealed to the Pennsylvania Court of Common Pleas. Without gathering any additional evidence, the Court of Common Pleas upheld the Zoning Hearings Board's decision. The Township here appeals.

On appeal, the Court was asked to determine whether the Zoning Hearing Board had made an error in interpreting the Township's 2008 zoning amendment to allow the Kings' chicken houses as a permitted use. After noting that it was required to pay considerable deference to the Zoning Hearing Board's interpretation of the code, the Court held that the exclusion for new or expanded Concentrated Animal Operations did not apply to the Kings' chicken houses, since they had existed continuously since the 1960s and since the Kings did not seek to expand them. Thus, the general provision that allowed the "raising or keeping of livestock" as a permitted use in agricultural zones must apply to the Kings' chicken houses, and the Kings' chicken operation must be allowed as a permitted use, according to the court.

The Township attempted to argue that its new definition of "agriculture" in the amended code required that the Kings' chicken houses be classified as Concentrated Animal Operations, not merely as agriculture or the "raising or keeping of livestock." Further, the Township argued that the new code barred the chicken houses on the Kings' property because existing, unexpanded Concentrated Animal Operations were not listed as a permitted use in any zone in the Township, and further that the specific exclusion quoted by the courts was inserted for any new or expanded Concentrated Animal Operation to disallow these uses as supplemental uses. However, the Court held that such an interpretation was not clear from the language of the new code. The Court held that the alleged ambiguity in the amended code still required an interpretation in favor of the Kings, requiring that the Zoning Hearings Board decision be upheld.

One question may arise here as it does with many land use proposals: Is the proposal properly regulated via land use controls under zoning or under site plan review? The answer, in best lawyerly fashion is: "It depends!" Traditional "Euclidean" zoning focuses primarily on where certain uses might be allowed along with specification of dimensional requirements (e.g., lot size and frontage) for properties based on their location in particular zones. In such a scheme, then, zoning would decide whether a use was permitted or not, while site plan review would address how a permitted use (or one allowed as a special exception or variance) would be implemented.

Newer approaches in land use controls focus less on categorical separation of uses and more on effects or impacts of uses (sometimes called impact zoning or performance standards zoning (as in RSA 674:21). Thus, a large agricultural use may or may not be permitted as a matter of right in particular areas, but may also be allowed as a conditional use subject to review of particular effects of the land use.

Seemingly, there is no “right” or “wrong” way to permit or prohibit a large scale agricultural use, though it appears that, on both the national and state levels, land use controls are increasingly being adopted with an eye toward recognizing the issues associated with historical evidence of the conversion of agricultural land to other non-farm uses.

CONCLUDING COMMENTS.

It is safe to say that state legislatures and local governments across the country will continue to adjust their views toward agriculture and land use controls. Certainly, as evidenced by this seminar, litigation also will shape the landscape in this arena. One valuable resource for anyone seeking information on litigation on this topic is Professor Patty Salkin’s *Law of the Land Blog* which summarizes decisions by topic, including those on agriculture, and is available at: <http://lawoftheland.wordpress.com/category/agricultural-uses/> (last visited on January 23, 2014).