

PROTECTING NEW YORK CITY'S COMMUNITY GARDENS

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I. INTRODUCTION

Two of the most important assets any city possesses are housing and green space. Without relatively plentiful and affordable housing, a city runs the risk of social and economic stagnation, as well as the risk of losing population and income to the suburbs.² Green space reduces the average temperature of the urban environment,³ as well as the burdens of overcrowding, while increasing the neighborhood quality of life. In a settlement reached on September 18, 2002, the City and State of New York attempted to protect both the rights of citizens to cultivate green space and government plans to provide affordable housing to the people of New York.⁴ The settlement protected from development hundreds of gardens involved in the GreenThumb program, a venture of the department of Parks and Recreation designed to encourage the development of vacant lots as community gardens.⁵ This Note will examine the ramifications of that settlement, and explore other routes that the city might have taken to achieve

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² See generally Paulette J. Williams, *The Continuing Crisis in Affordable Housing: Systemic Issues Requiring Systemic Solutions*, 31 *FORDHAM URB. L.J.* 413, 418–26 (2004) (discussing the effects of the “affordable housing crisis” including movement from urban to suburban areas).

³ Vivian D. Encarnacion, *More Trees Please: Utilizing Natural Resources in the Urban Environmental Management of New York City*, 26 *FORDHAM URB. L.J.* 1571, 1576 (1999).

⁴ Memorandum of Agreement, Sept. 17, 2002, State v. City of N.Y., http://www.oag.state.ny.us/environment/community_gardens_agreement.pdf (last visited Mar. 22, 2003) [hereinafter *Agreement*].

⁵ See *GreenThumb Celebrates 25 Years of Greening New York City*, GREENTHUMB PRINT (GreenThumb, New York, N.Y.), Feb. 2003, at 1, available at <http://www.greenthumbnyc.org/gtprintfeb2003.pdf> (last visited May 13, 2005).

similar ends.

This Note will begin by laying out the tensions between New York City's need for affordable housing and need for community green space. These tensions led to the political and legal struggles over the fate of New York City's community gardens which will be described in Part III. Eventually these struggles resulted in the settlement mentioned above. The settlement emerged from the network of environmental quality control laws⁶ and urban zoning restrictions⁷ which serve to regulate, and often to restrict, development in New York City. In addition, its form has been affected by the political groups and interested individuals involved in advocacy and legal action promoting community gardens. This Note will discuss the settlement agreement in detail in Part IV.

Other cities have confronted the same problems of urban blight which led to the development of New York's community garden program.⁸ Those cities developed strategies for cultivating and protecting green space which illuminate both the strengths and weaknesses of the New York program. Part V of this Note will describe the experiences of other cities and compare them to New York's program.

The final segment of this Note, Part VI, will critically analyze the New York settlement by asking the following questions: Did the settlement improve the quality of life in New York? To what extent does it represent a departure from past policy? How close did it come to satisfying the demands of the parties involved? Most importantly, does the settlement stand as a model for other cities interested in allowing their citizens to transform blighted vacant lots into community green space?

Although the settlement agreement represents an admirable first attempt at the creation of an adaptable framework for negotiation, there are concrete changes that could give the City a process for more equitably evaluating the competing interests of affordable housing and community gardens that will remain relevant to the City as it continues to grow and evolve.

⁶ See N.Y. CITY CHARTER § 197 (2002); N.Y. ENVTL. CONSERV. LAW § 8-0101 (McKinney 2001).

⁷ See N.Y. GEN. MUN. LAW § 693 (McKinney 2004).

⁸ Cf. Charles P. Lord, *Environmental Justice Law and the Challenges Facing Urban Communities*, 14 VA. ENVTL. L.J. 721 (1995).

II. HOME AND GARDEN

The city of New York has faced the question of how to provide affordable housing in an urban environment for much of its history. As one of America's oldest and largest cities, New York has an elaborate history of ambitious—and often failed—attempts to regulate housing.⁹

Beginning in the early 1940s, New York encouraged the building of “Tower in the Park” developments, also known as “superblocks.”¹⁰ These developments stretched uninterrupted over multiple city blocks and consisted of high-rise residential towers cut off from the urban grid and set inside of green space. They found their roots in a utopian vision from the 1920s, best illustrated by Hugh Ferriss's *The Metropolis of Tomorrow*, of a city made up of massive, expensive, autonomous or semi-autonomous high rise blocks, linked by multilevel transportation networks.¹¹ The 1961 zoning revision encouraged, through economic incentives, the continued building of such housing, especially for lower-income residents.¹² Thus, large numbers of existing, low-income districts were demolished, and their inhabitants made to relocate, in order to construct higher density superblock projects.

A near-total failure, this attempt at urban re-engineering merely substituted high-crime urban projects for high-crime urban slums.¹³ More importantly, the superblock projects represented frozen real estate. As these projects were incapable of being redeveloped piecemeal, they were far more likely than an equivalent area of smaller lots to remain un-renovated because few players in the housing market have the capital to purchase, let alone renovate, hundreds of apartments as a block. Additionally, because all public spaces within the superblock are held in common, this has the potential to reduce the incentive of

⁹ See generally Carol Willis, *A 3D CBD: How the 1916 Zoning Law Shaped Manhattan's Central Business Districts*, in PLANNING AND ZONING NEW YORK CITY 3, 19 (Todd W. Bressi ed., 1993).

¹⁰ See Roy Strickland, *The 1961 Zoning Revision and the Template of the Ideal City*, in PLANNING AND ZONING NEW YORK CITY 48, 56 (Todd W. Bressi ed., 1993).

¹¹ See Willis, *supra* note 9, at 19.

¹² Norman Marcus, *Zoning from 1961 to 1991: Turning Back the Clock—But with an Up-To-The-Minute Social Agenda*, in PLANNING AND ZONING NEW YORK CITY 62 (Todd W. Bressi ed., 1993).

¹³ See Strickland, *supra* note 10.

individual renters within the housing block to spend time and effort improving those common areas. This arrangement thus could diminish improvements in the “social capital” which is so vital to raising the value of a neighborhood and reduce the overall quality of life for residents.¹⁴

In those few areas where superblock housing “worked,” market forces soon raised the price of housing units out of the range of many renters. Thus, while “vertical suburb” developments, such as Stuyvesant Town, may represent a vast improvement over the slums which were cleared to build them, they were at best a highly temporary addition to the affordable housing market.¹⁵ The very desirability of these “successful” developments, coupled with the cost of maintaining and improving large common spaces, soon drove up rental costs. Thus, despite the existence of many superblock developments across the five boroughs, over 400,000 New York households still pay more than half of their yearly income in rent costs.¹⁶

Recognizing the failure of the superblock model as a solution to the problem of scarce housing, recent administrations have moved away from superblock housing and towards the development of smaller scale housing units.¹⁷ The emphasis is no

¹⁴ See generally Jane E. Schukoske, *Community Development Through Gardening: State and Local Politics Transforming Urban Space*, 3 N.Y.U. J. LEGIS. & PUB. POL’Y 351, 353–57 (1999–2000) (“Social capital includes features of social organization such as networks, norms and social trust that facilitate coordination and cooperation for mutual benefit.”). The concept of “social capital” will be explored further *infra* at text accompanying note 132.

¹⁵ See Wendell E. Pritchett, *The “Public Menace” of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 YALE L. & POL’Y REV. 1, 22 (2003) (suggesting that Stuyvesant Town did nothing to alleviate New York’s wartime housing shortage, perhaps even adding to it); see generally Eric J. Sandeen, *The Design of Public Housing in the New Deal: Oskar Stohorov and the Carl Mackley Houses*, 37 AM. Q. 645, 665 (1985); ARTHUR SIMON, *STUYVESANT TOWN, U.S.A.: PATTERN FOR TWO AMERICAS* 156–57 (1970).

¹⁶ U.S. BUREAU OF THE CENSUS, 1999 NEW YORK CITY HOUSING AND VACANCY SURVEY (1999). See also, NEW YORK CITY DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT, *THE NEW MARKETPLACE: CREATING HOUSING FOR THE NEXT GENERATION* 4 (2002) [hereinafter *Marketplace*], available at www.nychdc.com/pdf/newmarketplace.pdf.

¹⁷ See Nicole Stelle Garnett, *Ordering (and Order in) the City*, 57 STAN. L. REV. 1, 36–38 (2004) (discussing recent trends in East Harlem away from superblock housing); Ray Gindroz, *City Life and New Urbanism*, 29 FORDHAM URB. L.J. 1419, 1432 (2002) (discussing HUD’s move from superblock housing projects to a “sprinkling” approach, which makes subsidized units “indistinguishable from market-rate housing”).

longer on large construction projects, but rather on neighborhood rehabilitation.¹⁸ A key element of this shift is the attempt to renovate existing degrading housing stock¹⁹ and re-integrate vacant lots which have fallen out of the marketplace and into the hands of the city through dereliction of the landowner.²⁰ The City thus attempted, during the Giuliani administration and into the Bloomberg administration, to accelerate the acquisition of land and the completion of the environmental impact assessments necessary under law to transfer ownership of that land.²¹

Much of the land targeted by the city for redevelopment was part of another city program, the GreenThumb program. Established in 1978, this program was designed to give technical and monetary assistance, as well as basic supplies, to community gardeners.²² The program uses federal money to aid those who wish to create and maintain community gardens in vacant lots in their neighborhoods.²³ These lots are usually owned by the City, and thus must be leased to the community garden organizations. Under New York law, these leases are issued renewably from growing season to growing season.²⁴ The leases contain provisions protecting the rights of the city to remove the community garden to enable development of the lot.

It is difficult to chart the path of development of community gardens in urban space. Certainly the garden in the abandoned lot is part of the way the urban landscape is envisioned in popular culture.²⁵ Visions of “garden cities” date back to the nineteenth century, though it is difficult to see the parallels between their

¹⁸ *Marketplace*, *supra* note 16, at 6.

¹⁹ *Id.* at 14.

²⁰ *Id.* at 12.

²¹ *Id.* at 8–12 (“We must free the private market to operate to meet the housing needs of New Yorkers by making more City-owned land available for residential and mixed-use development, for rezoning where appropriate, for streamlining and easy regulatory burdens, and for pursuing other ways to reduce the cost of construction.”).

²² GreenThumb, *GreenThumb Program Description*, at <http://www.greenthumbnyc.org/mission.html> (last visited May 13, 2005).

²³ TreeBranch Network, *New York’s Community Gardens: A History*, at http://www.treebranch.com/community_gardens.html (last visited Feb. 14, 2005).

²⁴ N.Y. AGRIC. & MKTS. LAW 31-h(2)(b) (McKinney 1991); *see also* Schukoske, *supra* note 14, at 365;

²⁵ Examples can be found everywhere from the musical *Rent*, to the movie *Joe’s Apartment*, to *Sesame Street*.

neat, Victorian blueprints and the sprawl of a modern American metropolis.²⁶ These early visions, however, did propose land ownership through trust,²⁷ an idea which would re-emerge in the battle over New York's urban gardens.

New York City's urban gardens represent a counterpoint to superblock planning, emerging from community action rather than as part of a state-sponsored plan. Many of the gardens scattered around New York were formed through the reaction of local tenants to the perceived degeneration of the quality of their neighborhoods.²⁸ Ground on the Green Oasis garden in Alphabet City was broken by local gardeners as a past-time for neighborhood youth and evolved into a large scale community project complete with a grape arbor, theater, and beehives.²⁹ Similarly, the community garden on Ninth Street and Avenue C was created by community members who cleared the abandoned lot and transformed it into a garden space.³⁰ What was once wasted space now includes paths, mosaic, fencing, and a small pond.³¹ Churches, community organizations, ad hoc associations of neighbors, and lone individuals have been the driving forces behind many vacant-lot greening projects in New York.³² These gardens take advantage of undeveloped space, often where derelict buildings had been torn down and where no other development had been scheduled.³³ It is important to note that, under New York City laws, where the land has been abandoned and there are no heirs, the derelict spaces reverts to the control of the City.³⁴

The Green Guerillas organization, which has played a leading role in the fights over community gardens in New York, is

²⁶ For an example of Victorian-era planning, see EBENEZER HOWARD, *GARDEN CITIES OF TOMORROW* (F.J. Osborn ed., M.I.T. Press 1965) (1898).

²⁷ *Id.* at 50.

²⁸ TreeBranch Network, *supra* note 23.

²⁹ New York City Garden Coalition, *Green Oasis Community Garden*, at <http://www.earthcelebrations.com/gardens/8cd.html> (last visited May 13, 2005).

³⁰ New York City Community Garden Coalition, *9th and C Community Garden*, at <http://www.earthcelebrations.com/gardens/9cd.html> (last visited May 13, 2005).

³¹ *Id.*

³² See THE TRUST FOR PUBLIC LAND, *NEW YORK'S COMMUNITY GARDENS—A RESOURCE AT RISK* 5–10 (2001), available at http://www.tpl.org/content_documents/nyc_community_gardens.pdf (last visited Feb. 14, 2005).

³³ *Id.* at 4.

³⁴ N.Y. ABAND. PROP. LAW § 200 (McKinney 2005).

different from other gardening organizations in the City, both in its role as the first modern community gardening organization, and in its broad emphasis.³⁵ Founded over thirty years ago, Green Guerillas provides material support and expertise to gardeners in New York, focusing on developing programs which benefit all community gardens in the city.³⁶ Green Guerillas began as a community garden organization like any other, originating to clear and green an abandoned lot at Bowery and Houston.³⁷ Working with more than 200 grassroots organizations in the city, the organization provides economies of scale that no garden working in isolation would be able to achieve.³⁸ Green Guerillas is also unique in its strong emphasis on education, sponsoring a “Youth Environmental Fellowship Program” to teach environmental awareness and community development to city youth.³⁹ Green Guerillas also acts as an information source, distributing news about issues relevant to the community garden movement and rallying gardeners to apply political pressure.⁴⁰

The community garden associations in New York, however, were not the only groups attempting to prevent the destruction of gardens in order to build low income housing. Environmental justice groups provided a good deal of legal and political firepower.⁴¹

³⁵ See generally Green Guerillas, *Helping New York City's Community Gardeners Strengthen their Neighborhoods*, at <http://www.greenguerillas.org> (last visited Apr. 1, 2004) (“Since 1973 greenguerillas [sic] has helped thousands of people realize their dreams of turning vacant rubble-strewn lots into vibrant community gardens. . . . With our help, people grow food, plant flowers, educate youth, paint colorful murals and preserve their gardens as vital community centers for future generations.”).

³⁶ *Id.*

³⁷ Green Guerillas, *What We Do*, at <http://www.greenguerillas.org/info.asp> (last visited Apr. 1, 2004).

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ See Green Guerillas, *Helping New York*, *supra* note 35.

⁴¹ See, e.g., *N.Y. City Env'tl. Justice Alliance v. Giuliani*, 50 F.Supp.2d 250 (S.D.N.Y. 1999), *aff'd*, 214 F.3d 65 (2d Cir. 2000); Anne Raver, *Hundreds Gather to Protest City's Auction of Garden Lots*, N.Y. TIMES, Apr. 11, 1999, at 33. The focus of the American environmental movement has not traditionally been on the zoning and planning of the country's urban areas, but on the protection of undeveloped land from encroachment. See Andrew Light, *The Urban Blind Spot in Environmental Ethics*, in POLITICAL THEORY AND THE ENVIRONMENT 13 (Mathew Humphrey ed., 2001). The perspective of environmental justice, however, focuses less on environmental harms than on social inequalities caused by the distribution of environmental quality as a good.

III. COURTROOMS AND AUCTION BLOCKS

In the several years after the creation of the first community garden in New York City in 1973 in lower Manhattan, both existing community organizations and newly formed community gardening groups transformed vacant lots, many of them in Manhattan's East Village, into vibrant garden land.⁴² These gardens were planned and executed fully at the community level, with no outside aid from the City.⁴³

Beginning in 1978, however, the City of New York began encouraging and supporting the creation and development of community gardens through Operation GreenThumb.⁴⁴ GreenThumb was originally part of the New York City Department of General Services, though control of the program has since been transferred to Parks and Recreation.⁴⁵ Through its Plant and People Grant program,⁴⁶ GreenThumb has provided funds and expertise for vacant land to be utilized in neighborhood revitalization efforts. Over time, the number of community gardens licensed by GreenThumb grew, until by the mid 1990s there were over 700 gardens under the GreenThumb aegis.⁴⁷

In the fifteen years or so following the creation of the GreenThumb program, there was little commercial development of vacant lots in New York City, though on those rare occasions where community garden and commercial planning interests conflicted, the commercial planners usually won.⁴⁸ With the

See generally Robert R. Kuehn, *A Taxonomy of Environmental Justice*, 30 ENVTL. L. REP. 10681 (2000). The movement thus attempts to organize local communities and empower them through environmental awareness and creation of legal rights in order to attempt to correct this power imbalance. *See* Niraja Gopal Jayal, *Balancing Political and Ecological Values*, in *POLITICAL THEORY AND THE ENVIRONMENT* 82 (Mathew Humphrey ed., 2001). Thus community gardens represent an important area of organization for the Environmental Justice Movement and groups such as the Environmental Justice Alliance spearheaded legal attempts to preserve community gardens in New York City. *See e.g.*, *New York City Environmental Justice Alliance* 50 F.Supp.2d at 250.

⁴² *See* Tree Branch Network, *supra* note 23.

⁴³ *See id.* (noting that early community gardens flourished "by dint of hard labor and donated plants from nurseries and residents replanting their outdoor spaces").

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ GreenThumb, *The GreenThumb Plant and People Grant*, at <http://www.greenthumbnyc.org/ppg.html> (last visited May 12, 2005).

⁴⁷ *See* Tree Branch Network, *supra* note 23.

⁴⁸ *See, e.g.*, Anna Quindlen, *On West Side, No One is a Fence Straddler*,

commercial boom of the 1990s and the revitalization of many Manhattan neighborhoods, land that previously seemed of little consequence suddenly became extremely desirable for developers. Beginning in 1994, the City ceased approving new requests for GreenThumb gardens, and in 1996 moved to sell off its entire disposable land inventory.⁴⁹ Beginning in 1998, the City also began a policy of non-renewal of GreenThumb licenses, and the auctioning off of community garden land.⁵⁰ It was at this point that the City began to see large scale political and legal challenges to its plans from the community garden movement.⁵¹

There have been two attempts on the part of community groups at legal action to prevent the City from removing community gardens to make way for new housing in developing neighborhoods.⁵² In each case, a preliminary injunction was sought, and in each case the injunction was denied by the courts. The two cases, however, proceeded from radically different theories of the value of community gardens, representing two different views of urban environmentalism, and deserve to be analyzed as much for their methodology as their outcomes.

In 1997, the New York City Coalition for the Preservation of Community Gardens brought suit against the City to prevent the transfer of two blocks of community gardens—one in Alphabet City on the lower east side of Manhattan, and the other in Harlem—from the City to the New Homes Program (NHP), a sponsor designed to coordinate public funds and private builders to finance low- and middle-income housing.⁵³ The Department of

N.Y. TIMES, Oct. 14, 1981, at B3.

⁴⁹ Tree Branch Network, *supra* note 23.

⁵⁰ *Id.*

⁵¹ The fight to preserve community gardens in New York has taken many forms. Community advocates have been creative in their attempts to garner media attention, chaining themselves to public buildings, or dressing up as vegetables and insects to protest at City Hall. See, e.g., *Spitzer Sues to Block Auction of Garden Sites*, N.Y. TIMES, May 11, 1999, at B5; Jennifer Steinhauer, *Ending a Long Battle, New York Lets Housing and Gardens Grow*, N.Y. TIMES, Sept. 19, 2002, at A1. While such public displays of devotion to garden preservation make an important point about the public's desire for green space, the battle for control over the gardens would inevitably be fought in the legal and political realms.

⁵² See *New York City Coalition for the Pres. of Gardens v. Giuliani*, 670 N.Y.S.2d 654 (1997); *New York City Envtl. Justice Alliance*, 50 F.Supp.2d at 250.

⁵³ *New York City Coalition for the Pres. of Gardens*, 670 N.Y.S.2d at 657–59. The New Homes Program is jointly maintained by the New York City

Housing Preservation and Development bypassed the requirements of the State Environmental Quality Review Act (SEQRA) under a provision waiving SEQRA review for construction projects that replaced or reconstructed facilities on the same site, arguing that because the land had been used for housing before the community gardens were erected, they were merely reconstructing previously existing housing.⁵⁴

Complaining that their rights as garden owners and workers had been violated, the Coalition brought suit to stay construction until all SEQRA and City provisions had been complied with, believing that the destruction of hundreds of gardens which would result from the construction project was environmentally untenable.⁵⁵ The coalition claimed that the City misclassified the construction and mischaracterized the nature of the buildings to be erected in order to avoid SEQRA review, as well as city charter provisions regulating environmental review of new housing units.⁵⁶ The Coalition chose to work within the established environmental regulatory mechanism, hoping to use it to show that, by the City and State's own valuation system, unacceptable environmental damage would occur from the destruction of the community gardens.⁵⁷

The Coalition was roundly defeated on every aspect of their argument. The New York Supreme Court first denied the Coalition standing to sue, saying that, in the case of the Alphabet City gardens, "there is no doubt that these sites were never licensed to the gardeners and, while maintained openly for many years, the gardens were never expressly permitted by the City to be maintained on its land."⁵⁸ While the Harlem gardens were officially licensed by the city, under the GreenThumb program, the sites "exist[ed] subject to a license that was revocable by the City

Department of Housing Preservation and Development and the New York City Housing Partnership, a non-profit housing sponsor. See New York City Department of Housing Preservation and Development, *Partnership New Homes Homeownership Program*, at <http://www.nyc.gov/html/hpd/html/for-homebuyers/partnership-new-homes.html> (last visited May 16, 2005).

⁵⁴ *Id.* at 660.

⁵⁵ *Id.*

⁵⁶ *Id.* at 658.

⁵⁷ See generally, Encarnacion, *supra* note 3 (discussing the impact of the SEQRA's valuation system on community gardens).

⁵⁸ *New York City Coalition for the Pres. of Gardens*, 670 N.Y.S.2d at 659.

when it sought to recapture the sites for development.”⁵⁹ As the leases were specifically revocable at the will of the City, the court ruled that the City was merely exercising its legal right under the lease.⁶⁰ Thus, the Coalition found itself in a lose/lose situation, with no legally cognizable interest in the future of the gardens, regardless of whether or not they had obtained GreenThumb leases. Though there were hasty attempts by the Coalition to reorganize its argument in an attempt to show harm to residents of the neighborhoods immediately surrounding the gardens and to argue that this harm was legally cognizable regardless of the status of the gardeners’ leaseholds, the court found these arguments to be “unconvincing and disingenuous.”⁶¹

The Coalition’s argument concerning the exemption of the property from SEQRA review turned on an issue of the construction of the law. SEQRA was established to inject environmental considerations directly into governmental decision making⁶² by forcing a review of environmentally sensitive projects.⁶³ Governmental projects in New York State classified as “Type I” projects under SEQRA are subject to a full environmental review.⁶⁴ There are several categories of state action, however, which are distinguished as “Type II” projects, and are exempt from SEQRA regulation. Among these categories are construction projects designed for the “replacement, rehabilitation or reconstruction of a structure or facility, in kind, on the same site” unless certain threshold conditions are met.⁶⁵ The court ruled that the intervening use of the lots as community gardens was not enough to represent a fundamental change in the use of the lots, and thus the NHP’s plans to build new low-rise middle and low income housing where low-rise middle and low income housing had previously existed were within the types of action

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.* at 658 n.1.

⁶² N.Y. ENVTL. CONSERV. LAW § 8-0103 (McKinney 2004) (“It is the intent of the legislature that the protection and enhancement of the environment, human and community resources shall be given appropriate weight with social and economic considerations in public policy.”).

⁶³ *Id.* § 8-0109 (“All agencies. . . shall prepare. . . an environmental impact statement on any action they propose or approve which may have a significant effect on the environment.”).

⁶⁴ N.Y. COMP. CODES R. & REGS. tit. 6, § 617.3 (2000).

⁶⁵ *Id.* at § 617.5.

countenanced by the “Type II” distinction.⁶⁶ The Coalition urged the court to consider the entire revitalization project as a whole, and thus fundamentally different under SEQRA from the individual tenant houses that had existed on the sites before. This argument failed as the court held that such aggregation was only appropriate under the letter of the law for “Type I” actions.⁶⁷

The Coalition also asserted that the City had violated the environmental review portions of the City Charter. The Coalition argued that the project, when considered as a whole, was too large to merit an exemption under General Municipal Law § 693,⁶⁸ which exempts one to four unit dwellings from environmental review.⁶⁹ These waivers, according to the Coalition, were designed to apply only to the replacement of small-unit dwellings without commercial usage. The court’s response places great weight upon the need of the city to revitalize failing urban neighborhoods:

The history and purpose of the law suggests, then, that this section was meant to facilitate the replacement of housing on an as-is basis and in accordance with existing zoning regulations so as to restore a neighborhood as quickly and economically as possible to its original character. . . . Indeed, to require a project of the kind contemplated by this provision to be submitted to time-consuming local review, simply because of the incidental inclusion of one or two or even three, ordinary stores, is to defeat the very purpose of the waiver provided for in the section.⁷⁰

This construction of the statute is significantly looser than an initial reading would probably warrant, and the court seems to have been privileging the construction of new real estate (here characterized as restoration to the neighborhood’s “initial character”)⁷¹ over the preservation of the existing elements of the neighborhood in the balance of the interests concerned.

The Coalition’s case failed because it ran up against an important countervailing interest—neighborhood revitalization—at a time when New York was experiencing an economic resurgence.

⁶⁶ *New York City Coalition for the Pres. of Gardens*, 670 N.Y.S.2d at 654.

⁶⁷ *Id.* at 661–62.

⁶⁸ N.Y. GEN. MUN. LAW § 693 (McKinney 2004).

⁶⁹ *New York City Coalition for the Pres. of Gardens*, 670 N.Y.S.2d at 664.

⁷⁰ *Id.* at 665.

⁷¹ *Id.*

The next attempt at litigation against the City over the destruction of community gardens focused on a different set of rationales for the protection of community gardens in an attempt to circumvent economic arguments in favor of their destruction.

This new set of rationales was found in the confluence of environmentalism and civil rights articulated by the environmental justice movement. The facts of *New York City Environmental Justice Alliance v. Giuliani*⁷² seemed perfect for a test case utilizing the principles of environmental justice. The case centered around some 600 community gardens in the Williamsburg area occupying land which the city wished to auction off. In 1999, the city announced that the gardens would be razed and put on the auction block in order to clear the way for the construction of over 300 units of residential housing.⁷³ Initially, there were two actions brought to halt the auctions, one by Green Guerillas to protect 115 community gardens, and the other by New York City Environmental Justice Alliance (NYCEJA) to protect the entire 600 gardens.⁷⁴ Both parties were seeking injunctions to prevent the auction of garden lands by the city. After Green Guerillas made its oral arguments, the city withdrew the 115 gardens championed by the group from the auction block, so that only the NYCEJA claims were given a full trial. NYCEJA argued that the gardens to be auctioned were predominantly in minority neighborhoods and that destroying the gardens would disproportionately disadvantage those neighborhoods.⁷⁵

NYCEJA's argument invoked Title VI of the Civil Rights Act of 1964,⁷⁶ which prevents discrimination on the basis of "race, color, or national origin," in any program receiving federal assistance.⁷⁷ Title VI authorizes government agencies to create rules that further prevent discrimination.⁷⁸ The EPA rules on non-discrimination in EPA programs state: "A recipient shall not use criteria or methods of administering its program which have the effect of subjecting individuals to discrimination because of

⁷² 50 F.Supp.2d at 250.

⁷³ *Id.* at 251–52.

⁷⁴ *Id.* at 251 n.1.

⁷⁵ *Id.* at 252–53.

⁷⁶ 42 U.S.C. § 2000d (2002).

⁷⁷ *Id.*

⁷⁸ *Id.* at § 2000d-1.

their race, color, national origin, or sex.”⁷⁹ Although Title VI applies only to intentional discrimination⁸⁰ the language of the EPA regulation is not limited to de jure discrimination, but also takes into account whether the administration of a program, even if not conducted with animus towards a particular group, has “the effect of defeating or substantially impairing accomplishment of the objectives of the program with respect to individuals of a particular race, color, national origin, or sex.”⁸¹

Armed with these legal theories, along with reiterations of the SEQRA and City Charter violations found in the *Coalition* case, NYCEJA sought a preliminary injunction to prevent the City’s sale of the gardens.⁸² In order to obtain a preliminary injunction, NYCEJA had to demonstrate both that the actions of the city would cause its members to suffer irreparable harm and that there was a likelihood that NYCEJA’s action would succeed on the merits.⁸³

In an opinion from the United States District Court, affirmed on appeal to the United States Court of Appeals for the Second Circuit, NYCEJA’s request was denied.⁸⁴ The court showed some sympathy to the claim of irreparable harm, agreeing that the community gardeners would be damaged by the destruction of their work.⁸⁵ From this point, however, the analysis of NYCEJA and that of the court diverged wildly.

NYCEJA presented statistics showing the disproportionate loss of green space in minority neighborhoods as compared with white neighborhoods. Judge Schwartz, in contrast, chose to analyze the loss in terms of the opportunity cost of building new housing, much as the *Coalition* court had done. Judge Schwartz evaluated the benefits that each neighborhood would receive from development of the lots, such as new low-cost housing, community centers, medical and elder care facilities, and jobs generated by the construction projects. Against those gains, Judge Schwartz weighed the benefits lost by the community in the form of green

⁷⁹ 40 C.F.R. § 7.35(b).

⁸⁰ See *Guardians Ass’n v. Civil Serv. Comm’n*, 463 U.S. 582, 610 (1983).

⁸¹ 40 C.F.R. 7.35(b).

⁸² *New York City Env’tl. Justice Alliance*, 50 F.Supp.2d at 251.

⁸³ *Id.* (citing *Velazquez v. Legal Servs. Corp.*, 164 F.3d 757 (2d Cir. 1999)).

⁸⁴ *New York City Env’tl. Justice Alliance v. Giuliani*, 214 F.3d 65, 73 (2d Cir. 2000).

⁸⁵ *New York City Env’tl. Justice Alliance*, 50 F.Supp.2d at 252.

space, and community betterment represented by the gardens.⁸⁶ Thus, while recognizing a cognizable injury, the court stated that “it is apparent that the City is acting in the public interest”⁸⁷ through its creation of new housing, and that the benefits of building new housing outweigh the harms caused by the eviction of the gardeners.

The appeals court was even less sympathetic to NYCEJA’s arguments. The court highlighted flaws in the methodology for calculating the amounts of green space in the NYCEJA’s statistical survey.⁸⁸ NYCEJA’s measure of “green space” excluded regional parks—such as Van Cortlandt Park and Central Park—and thus presented a skewed view of the impact of the closing of community gardens.⁸⁹ Without stronger factual authority, the appeals court was unwilling to say that a recognizable harm had been demonstrated.

All of this was rendered academic, however, by the second half of the lower court’s opinion, with which the appeals court concurred. The court denied NYCEJA standing to bring an action under the EPA regulations, stating that “it is unlikely that a private right of action is available to plaintiffs,” as one is not expressly recognized in the statute.⁹⁰ Once again, over-reliance on material filed by the Green Guerillas harmed NYCEJA, as NYCEJA had submitted no additional information regarding the possibility of a private right of action and the Green Guerillas only addressed this standing issue in “only the most cursory fashion.”⁹¹ Without a private right of action under a civil rights theory, NYCEJA was forced to fall back on the same arguments made by the Coalition in the earlier case. The court dispensed with these, citing *Coalition* as precedent, and left NYCEJA with no chance of success on the merits and thus no ability to obtain a preliminary injunction.⁹²

Ordinarily this would be the end of the story. The City would

⁸⁶ *Id.* at 252–53.

⁸⁷ *Id.* at 252.

⁸⁸ *New York City Env'tl. Justice Alliance*, 214 F.3d at 71.

⁸⁹ *Id.*

⁹⁰ *New York City Env'tl. Justice Alliance*, 50 F.Supp.2d at 253; *cf.* Executive Order No. 12898 3 C.F.R. 859 (1995), *reprinted as amended* in 42 U.S.C. § 4321 (2002) (requiring federal agencies to consider issues of environmental justice, but specifically barring a private right of action in these cases).

⁹¹ *New York City Env'tl. Justice Alliance*, 50 F.Supp.2d at 253.

⁹² *Id.*

sell the gardens, development would proceed, and no balance between environmental and housing issues would be struck. Mayor Giuliani even seemed to believe that action on behalf of the gardens had run its course, opining that “the era of communism is over.”⁹³ On May 10, 1999, however, State Attorney General Eliot Spitzer filed his own suit against Mayor Giuliani and the City of New York.⁹⁴ Spitzer returned to the claim that the City had not followed proper environmental procedure in auctioning off the gardens.⁹⁵ As the State AG’s office is a state actor, Spitzer had standing under the law to make this claim. Furthermore, Spitzer alleged that several of the parks had been in existence for so long as to be considered parkland under state law, and thus could not be sold off to developers by the City despite their year-by-year leases.⁹⁶

Statements by the Attorney General that community gardens enhance the quality of life and the environment throughout New York City showed him to be far more sympathetic to community garden preservation than either Mayor Giuliani or the judges in *Coalition* and *NYCEJA*.⁹⁷ The lawsuit was an attempt to enforce balance, to make sure to “preserve as much green space as possible, while at the same time allowing for development where appropriate.”⁹⁸ As such, it represented the most serious and credible challenge yet to the plan to auction off community gardens to developers. In adopting the *Coalition* balancing test to develop his claim, Spitzer kept open possibilities for development that would not have been available had he used the line of reasoning suggested by the *NYCEJA*. Within two days, a Brooklyn Supreme Court judge issued a temporary restraining order barring sale of the gardens.⁹⁹

⁹³ Michael Saul, *500 Gardens Saved in City Housing Deal*, N.Y. DAILY NEWS, Sept. 19, 2002, at 6.

⁹⁴ *Spitzer Sues to Block Auction of Garden Sites*, *supra* note 51.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ Press Release, Office of New York State Attorney General Elliot Spitzer, Bloomberg and Spitzer Announce Agreement to Enable Construction of Affordable Housing and Preservation of Community Gardens (Sept. 18, 2002) (referring to community gardens as “a vibrant part of the City’s neighborhoods”), available at http://www.oag.state.ny.us/press/2002/sep/nyc_gardens_09_18_2002.pdf.

⁹⁸ *Id.*

⁹⁹ See *State v. City of New York*, 713 N.Y.S.2d 360 (N.Y. App. Div. 2000).

The next day, another surprising development changed the character of the debate even further. A group known as the New York Restoration Project, founded and largely financed by actress Bette Midler, offered \$1.2 million for the purchase of fifty-one of the available gardens.¹⁰⁰ Additionally, Midler's group provided a third of the \$3 million offered by the Trust for Public Land in order to purchase an additional 112 parcels of land.¹⁰¹

This abrupt combination of new financing and more powerful litigation made the situation infinitely more difficult for the builders and the City alike. Lots purchased by environmental groups would no longer be tied up by litigation, and would provide income for city coffers. Lots still slated for development might fetch a higher price from developers than could be offered by community activists or environmental advocates, but would be subject to continued litigation by a well-financed opponent, the State Attorney General's office. This new balance of power led to a compromise agreement, which at least attempted to address the issues raised by Spitzer, the City, and community garden activists.

IV. THE AGREEMENT

The memorandum of agreement reached between the City¹⁰² and State of New York in September of 2002 represents a compromise between advocates of affordable housing and proponents of urban green space. The agreement provides a workable framework to allow both sides some of the benefits for which they had fought.¹⁰³ The compromise is highly imperfect but, as Rose Harvey, the senior vice president at the Trust for Public Land commented regarding the agreement, "perfect is usually the enemy of the possible."¹⁰⁴

The agreement begins with a Section 1, which addresses the continued maintenance of the GreenThumb program. Though the section is entitled "The GreenThumb Program Shall Continue,"¹⁰⁵

(affirming grant of original and subsequent temporary restraining orders).

¹⁰⁰ See Dan Barry, *Sudden Deal Saves Gardens Set for Auction*, N.Y. TIMES, May 13, 1999, at B6.

¹⁰¹ *Id.*

¹⁰² The agreement covers all city agencies, as well as the New York City Economic Development Corporation. *Agreement*, *supra* note 4, at 4.

¹⁰³ Steinhauer, *supra* note 51.

¹⁰⁴ *Id.*

¹⁰⁵ *Agreement*, *supra* note 4, at 1.

the text merely states that it will continue “to the extent that . . . funds are appropriated for that purpose.” In effect, the section merely requires the City to inform gardeners and the State if the program is to be discontinued, mandating a sixty-day notice period “to the extent possible.”¹⁰⁶

Section 2 of the agreement does allow for expansion of GreenThumb, giving several gardens not yet registered under the GreenThumb program a chance to be protected by a GreenThumb license and the associated lease.¹⁰⁷ To protect against future claims similar to the Spitzer lawsuit, Section 3 specifies that community gardens under GreenThumb are not to be designated as parkland.¹⁰⁸

Section 4 of the agreement represents a major victory for the community garden advocates, especially in light of the *Coalition* and *NYCEJA* lawsuits, mandating review of any development of a GreenThumb site through both SEQRA and applicable New York City land use laws, regardless of the exemptions to SEQRA and the City Charter litigated in *Coalition*.¹⁰⁹ This will help to ensure a thorough airing of all environmental concerns in any future construction.

Section 5 of the agreement has received the most attention.¹¹⁰ This section of the agreement sets aside nearly two hundred gardens to be offered to the Parks Department or to community land trusts, for preservation.¹¹¹ If the gardens are offered to the Parks Department, the department has the option to preserve them as open space, or to maintain them as community gardens.¹¹² If offered to land trusts, they will be offered for “a nominal purchase price” and the land trust must also preserve the garden as a

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 1–2.

¹⁰⁸ *Id.* at 2.

¹⁰⁹ *Id.* at 3. Specifically, the agreement requires that “any such project will undergo, as required by law, review pursuant to Section 197-c of the New York City Charter (“ULURP”) and/or whichever of the following statutory procedures applies: Section 384(b)(4) of the New York City Charter, Article XI of the Private Housing Finance Law, Article 15 (“Urban Renewal Law”) or Article 16 (“UDAAP”) of the General Municipal Law, or any other law authorizing the disposition of City-owned land.”) *Id.*

¹¹⁰ See generally Tom Topousis, *Gardens are the Root of Hubbub*, N.Y. POST, Jan. 14, 2002, at 7 (describing Attorney General Elliot Spitzer’s suit against city on grounds that gardens had park designation).

¹¹¹ *Agreement*, *supra* note 4, at 3.

¹¹² *Id.*

community garden, or as open space.¹¹³ Although the City is no longer obligated to fund these gardens through GreenThumb, it has the discretion to continue to provide GreenThumb support to any gardens that have been transferred to land trust organizations.¹¹⁴ Moreover, the City is obligated to attempt to restore any damage caused to garden lots planned for preservation that are disturbed by adjacent construction projects.¹¹⁵

Much of the rest of the agreement is a victory for the City. Section 6 designates over one hundred gardens as subject to sale by the City following environmental review.¹¹⁶ In an attempt to mitigate the effects of this policy on neighborhoods, Section 6 includes a clause directing the City to offer the organization coordinating the community garden a nearby lot, if one is available, to replace the garden lost to development.¹¹⁷ This is a mixed blessing for urban gardeners, as the replacement lot will be offered as is, and it will be the responsibility of the gardener, not the city, to perform any improvements.

Section 6 also contains a public Garden Review Process, which allows prior notification to the community of any proposals to develop a garden.¹¹⁸ The review process acts as an incentive for the City and developers to negotiate with individual garden owners.¹¹⁹ If the developer and the gardener agree to preserve part of the garden lot as green space, while reserving part of it for building purposes, or agree that the developer will pay part of the cost of greening an alternate site, then the public review process will be waived, expediting building and limiting media exposure.

Section 7 of the agreement exempts another twenty eight gardens from the review process because they had already completed SEQRA and City land use review at the time of the agreement.¹²⁰ Additionally, Section 8 compels the City to provide alternate space for several gardens in the Bronx slated for development.¹²¹ Specifically, the City is required to provide

¹¹³ *Id.*

¹¹⁴ *Id.* at 4.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*, at 4–5.

¹¹⁸ *Id.* at 4–7.

¹¹⁹ *See id.* at 6.

¹²⁰ *Id.* at 7.

¹²¹ *Id.* at 8.

cleanup services and assistance with the procurement of alternate sites for these gardens.¹²²

Finally, in Section 10, the agreement contains requirements for the termination of the agreement's protection of garden lots.¹²³ Those gardens not disposed of under Sections 5, 6, or 7 and which are still subject to a GreenThumb license are given an eight-year grace period during which the City cannot take action to dispose of them without violating the terms of the agreement.¹²⁴

On the whole, the agreement is beneficial to New York City. It allows development of new housing in a city that desperately needs it, and it allows neighborhood groups, by and large, to maintain the green space they have worked to create. Most importantly, by requiring the use of SEQRA and other environmental regulations, the agreement guarantees that environmental concerns will at least be aired in any future development.

The agreement is primarily a political compromise, representing a balancing of interests. The agreement advocates neither the ecological goals of the community garden activists nor the developmental goals of the city. Instead, it allows proponents of both of those interests to proceed out of deadlock. Likely, this reflection of both sides of the issue arose from the agreement's origins in the adversarial process. It is worth considering, however, how a plan with a stronger ecological focus might have been constructed.

V. ALTERNATE VISIONS

New York is not the only city to attempt to deal with the difficulties of maintaining community gardens and promoting urban greening.¹²⁵ Other municipalities have programs to attempt to rectify urban blight, neighborhood deterioration, and health issues through the use of garden space.

Out of the thirty-eight cities for which data on community green space is available, only fifteen have initiatives to manage, improve, or regulate that green space.¹²⁶ Of these initiatives, few

¹²² *See id.*

¹²³ *Id.* at 9.

¹²⁴ *Id.*

¹²⁵ *See* Schukoske, *supra* note 14, at 389–90 for an overview of several city programs.

¹²⁶ AMERICAN COMMUNITY GARDENING ASSOCIATION, NATIONAL

are as developed or of such long standing as the GreenThumb program in New York. New York is the statistical outlier when it comes to sheer numbers of community gardens, with close to two thousand in the five boroughs, as compared to the average of only 158 per urban area.¹²⁷

One city with a notably long history of urban greening is Philadelphia. The “Philadelphia Vacant Lot Cultivation Association” has helped to organize vacant lots from as far back as 1897.¹²⁸ However, urban greening activities in the city have usually been driven by private organizations, such as Philadelphia Green, an offshoot of the Pennsylvania Horticultural Society, and have received only limited help from the city.¹²⁹ Serving a role roughly analogous to that of Green Guerillas in New York, Philadelphia Green has taken a far less confrontational approach to defending community green space. Instead of establishing gardens in underdeveloped neighborhoods, and then defending them as developers reach those neighborhoods, Philadelphia Green has begun working with the city to organize and regulate the greening of vacant lots, initiating a pilot program in which Philadelphia Green manages the efforts of community organizations to maintain vacant lots as garden space, assisted by generous funding from the City.¹³⁰

This tactic shows a slightly different emphasis than the conservationist or environmental justice attitudes adopted by New York’s community gardening advocates. Instead of preserving the physical space of the garden, Philadelphia Green works to preserve

COMMUNITY GARDENING SURVEY: 1996, at 6–7 (1998), *available at* <http://www.communitygarden.org/CGsurvey96part1.pdf>.

¹²⁷ AMERICAN COMMUNITY GARDENING ASSOCIATION, NATIONAL COMMUNITY GARDENING SURVEY: 1996, *City Profiles: Community Garden Data 1996* (1998) [hereinafter *City Profiles*], *available at* <http://www.communitygarden.org/CGsurvey96part2.pdf>.

¹²⁸ Libby J. Goldstein, *Philadelphia’s Community Garden History*, URB. AGRIC. NOTES (City Farmer, Vancouver, B.C.), Oct. 22, 1997, *at* <http://www.cityfarmer.org/Phillyhistory10.html#Philly%20History>.

¹²⁹ *See id.*; *see generally* The Pennsylvania Horticultural Society, Philadelphia Green, *PHS Makes Philadelphia Green* [hereinafter *PHS Makes Philadelphia Green*], *available at* <http://www.pennsylvaniahorticulturalsociety.org/phlgreen/index.html> (last visited Aug. 13, 2004).

¹³⁰ *See* Press Release, The City of Philadelphia, Mayor’s Office of Communications, Urban Greening and Land Stabilization Efforts Receive \$4,000,000 Boost From Mayor Street’s NTI Initiative, (Sept. 22, 2003), *available at* <http://www.phila.gov/news/pdfs/GreeneCity.pdf>.

the “social capital” represented by neighborhood green space.¹³¹ Social capital is a loose aggregation of community pride, networks, and the emotional infrastructure of the community.¹³² By working with community development corporations, Philadelphia Green attempts to ensure that the green space which has served as an important focal point for the community is maintained in one form or another.¹³³ While a noble goal, this tactic may overestimate the compliance of developers and future tenants and may underestimate the shock to social capital of a particular garden plot being bulldozed.

The City of Boston, which has over one hundred community gardens,¹³⁴ has also chosen a collaborative tactic to help preserve community green space. In this case, the coalition involved is broader, including city, state, and federal agencies, as well as community organizations and businesses, under the heading of the Greater Boston Urban Resources Partnership, or GB-URP.¹³⁵ The GB-URP, which has only existed for about ten years¹³⁶, has the advantage of having a broader mandate than GreenThumb.¹³⁷ In addition, it can provide an easier access route for community gardeners to request help from the EPA or the Department of Agriculture since both government bodies are part of the partnership.

While encouraging the development of community gardens, the GB-URP’s mission is not limited to any one form of urban greening. The GB-URP is also committed to preserving “Urban

¹³¹ See *PHS Makes Philadelphia Green*, *supra* note 129.

¹³² Shukoske, *supra* note 14, at 353–57.

¹³³ *Collaborations: The Power of Partnerships*, URB. IMPACT (Pennsylvania Horticultural Society, Philadelphia Pa.), Mar. 2002, at http://www.pennsylvaniahorticulturalsociety.org/phlgreen/ui_powerofpart.html.

¹³⁴ *City Profiles*, *supra* note 127, at 1.

¹³⁵ See City of Boston, *The Greater Boston Urban Resources Partnership*, at http://www.cityofboston.gov/environment/urban_resources.asp (last visited Mar. 24, 2003).

¹³⁶ *Id.* The GB-URP was founded on March 1, 1995.

¹³⁷ Compare *id.* (The goals of the GB-URP are described as “[a] healthier, safer, more economically sustainable, urban environment,” “[e]conomically sustainable projects and initiatives that enhance the quality of life and foster diverse community involvement through innovative agency and organization collaborations,” and “[a] teamwork approach to delivering services and mobilizing leadership in support [of] the urban environment.”) with GreenThumb, *supra* note 22.

Wilds”.¹³⁸ Urban Wilds are portions of the pre-settlement ecosystem which still survive in the greater Boston area, such as Allendale Woods or portions of Hyde Park.¹³⁹ GB-URP has coordinated efforts by both government and private entities to preserve these small patches of undeveloped land in as pristine a form as possible. Such efforts can include the planting of state-maintained gardens to beautify an urban area or an environmental cleanup to preserve environmental integrity.¹⁴⁰

While it has done much for water quality and ecological research in Boston (especially in its programs to protect local streams)¹⁴¹ and has helped to generate dialogue between neighborhoods and city government, the GB-URP program is not a panacea for the protection of urban green space. Thus far GB-URP has functioned on a modest scale and has provided no equivalent to the broad protections for community gardens guaranteed in the New York agreement. As there has been no systematic effort to commercially develop community garden space in Boston, however, any speculation as to the effectiveness of the program in preventing such development must remain only that.

What is required in urban spaces such as New York is a program that encourages an increase in urban gardens and other green spaces, creating new “social capital” instead of merely preserving what communities create on their own. Seattle’s “P-Patch” program does exactly that, granting the Department of Housing and Human Services the ability to enter into leases for the purpose of creating community gardens.¹⁴² The leases can run for up to five years, far longer than the year-by-year leases of the GreenThumb program.¹⁴³ Furthermore, Seattle is dedicated to expanding the program to “one dedicated community garden for each 2,500 households.”¹⁴⁴

¹³⁸ For a description of the program, see City of Boston, *Urban Wilds*, at <http://www.ci.boston.ma.us/parks/UrbanWilds/default.asp> (last visited Mar. 24, 2003).

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ See City of Boston, *Successes of the Partnership*, at <http://www.cityofboston.gov/environment/success.asp> (last visited Feb. 12, 2004).

¹⁴² SEATTLE, WASH., MUN. CODE tit. 3, ch. 35 § 080 (1997).

¹⁴³ *Id.*

¹⁴⁴ CITY OF SEATTLE, WASH., TOWARDS A SUSTAINABLE SEATTLE: A PLAN

Unfortunately, the reality has been quite different from this ambitious plan. P-patch currently runs forty-six gardens in the Seattle area,¹⁴⁵ far fewer than would be needed to meet the program's goal.¹⁴⁶ Part of the problem may lie in the fact that the P-patch program is controlled by an elaborate regulatory scheme, which mandates everything down to the price chargeable per plot of garden land.¹⁴⁷ These regulations make starting a garden more time consuming and expensive than it might otherwise be, and may constitute a barrier to entry.

VI. VALUING COMMUNITY GARDENS

The Philadelphia, Boston, and Seattle programs have explored structures for allocating community garden land, but have not fully explored what sort of value a city should put on that land. There are positive externalities created by community green space which we must take into account. Green space reduces the amount of nitrous oxides in the air, mitigates the effect of ultraviolet radiation, and decreases the ambient air temperature of the surrounding area.¹⁴⁸ All of these effects can be measured with at least a modicum of precision. For instance, one can measure the amount of energy saved to the city through the increase in green space.¹⁴⁹ Before beginning to design a system for balancing the issues of gardeners and developers over the long term, we should examine methods which have been used to put a value on green space.

In order to effectuate this strategy, we need to use a tool which measures urban green space with precision. This can be

FOR MANAGING GROWTH 1994–2014, at L-152 (1994); *see also* Schukoske, *supra* note 14, at 389.

¹⁴⁵ City of Seattle, Department of Neighborhoods, *P-Patch Community Gardens*, at <http://www.cityofseattle.net/neighborhoods/ppatch/locations.html> (last visited May 17, 2005).

¹⁴⁶ To meet the program's goal, Seattle requires 220 community gardens, assuming a Seattle population of approximately 550,000. *See* U.S. Census Bureau, *Fact Sheet: Seattle City, Washington 2003*, at http://factfinder.census.gov/servlet/ACSSAFFacts?_event=&geo_id=16000US5363000&_geoContext=01000US%7C04000US53%7C16000US5363000&_street=&_county=seattle&_cityTown=seattle&_state=04000US53&_zip=&_lang=en&_sse=on&ActiveGeoDiv=&_useEV=Y&pctxt=fph&pgsl=160 (last visited May 12, 2005).

¹⁴⁷ *See* SEATTLE, WASH., MUN. CODE tit. 3, ch. 35 § 060 (1997).

¹⁴⁸ Encarnacion, *supra* note 4, at 1574–75.

¹⁴⁹ *Id.*

done simply by tabulating the number of square feet of land zoned for parks and gardens, but this would both ignore harder-to-measure green areas (such as trees lining sidewalks) and over-represent park land, not all of which is green. Fortunately, survey and analysis tools such as CITYgreen¹⁵⁰ are available to accurately measure the amount of plant life in urban areas.

CITYgreen combines aerial photography and urban surveying to create detailed images of green cover in urban areas.¹⁵¹ Benefits such as the dollar value in energy savings, the improvement in temperature, and the air quality can then be calculated with precision.¹⁵² CITYgreen has been used to plan new developments in Kansas City, Missouri,¹⁵³ and to advocate the preservation of existing open space in Fairfax, Virginia.¹⁵⁴

The program has also been used to protect urban green spaces. In Indianapolis, Keep Indianapolis Beautiful, a local nonprofit, was able to argue that the energy benefits gained by maintaining local green space would significantly offset lost profits from development.¹⁵⁵ CITYgreen thus illuminates the shared interests of the city and community organizations in preserving green space. As policymakers and courts will balance a city's interests in the construction of affordable housing in a particular location with the loss of green space in that location, anything that allows us to more accurately understand the monetary costs of the tradeoff should lead to more equitable decisions.

CITYgreen also tells us something more basic, and more important, about urban environmentalism. It looks at a city as an ecosystem, with the amount, concentration, and quality of its green

¹⁵⁰ See American Forests, *About CITYgreen* [hereinafter *About CITYgreen*], at <http://www.americanforests.org/productsandpubs/citygreen/about.php> (last visited Apr. 12, 2004).

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ See American Forests, *Environmentally Conscious Development*, at http://www.americanforests.org/productsandpubs/citygreen/stories_kansas_city.php (last visited May 12, 2005).

¹⁵⁴ See American Forests, *Making a Case for Tree Preservation*, at http://www.americanforests.org/productsandpubs/citygreen/stories_fairfax.php (last visited May 12, 2005).

¹⁵⁵ See American Forests, *Spurring Community Action*, at http://www.americanforests.org/productsandpubs/citygreen/stories_indianapolis.php (last visited May 17, 2005). For more on Keep Indianapolis Beautiful's conservation activities, see Keep Indianapolis Beautiful, *KIB Programs*, at <http://www.kibi.org/programs/index.htm> (last visited Apr. 1, 2004).

space changing living conditions in ways that are not immediately apparent to the casual observer.¹⁵⁶ When one begins to consider the advantages of urban greening, in such terms, the interests of the city and the neighborhood begin to converge. Both have an interest in lower power usage, both have an interest in cleaner air, and both have an interest in lower emissions. Furthermore, the city and neighborhood's interest in urban greening can be measured in monetary terms. This makes developing a common plan of action, and analyzing the costs and benefits of such a plan, all the more easy.

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.¹⁵⁷ Some municipalities have adopted radical plans for increasing their total green space, regardless of the cost. Baton Rouge, Louisiana, for example, includes green zoning provisions in its Unified Development Code.¹⁵⁸ Instead of providing for urban gardening, Baton Rouge has effectively mandated it. The zoning and development rules mandate numbers of trees and percentage and quality of ground cover for residential properties, commercial lots, and multiple other types of land use.¹⁵⁹ While beneficial, this approach completely ignores the community development aspect of a program like GreenThumb, leaving all greening up to individuals.

The Baton Rouge Unified Development Code also provides for permits and inspection requirements to ensure that green space is maintained.¹⁶⁰ Furthermore, the Code gives an incentive to developers to preserve existing green space by offering credits for maintaining existing large trees found on the property to be developed.¹⁶¹

Such a plan is impractical in New York City, where little land

¹⁵⁶ See *About CITYgreen*, *supra* note 150.

¹⁵⁷ For example, one proposal to establish 500 more acres of community gardens in New York proposed by the nonprofit group, the Parks Council, would cost the city \$195 million over 10 years. David Gonzalez, *Vacant Lots, Except for Red Tape: New York Tries to Improve Management of 14,000 Parcels*, N.Y. TIMES, Oct. 8, 1993, at B1.

¹⁵⁸ BATON ROUGE, LA., UNIFIED DEV. CODE § 18 (2003).

¹⁵⁹ *Id.* at § 18.3.

¹⁶⁰ *Id.* at § 18.7.

¹⁶¹ *Id.* at § 18.4.

is left to be developed. While the City could consider mandatory green space in new development, this would be an expensive proposition and is unlikely to be implemented any time soon. Nationally, there have been attempts to motivate cities to conserve and expand green space through accreditation processes. The National Arbor Day Foundation's "Tree City" program uses just this approach.¹⁶² By meeting specific guidelines for conservation, a municipality is able to advertise itself as an Arbor Day Foundation accredited "Tree City."¹⁶³

Unfortunately, such a program is only as good as the publicity that it can generate. As there is no great cachet in the Foundation's imprimatur, the program provides no real incentive for cities to increase their funding. What is needed is a tool that will allow a city to, with a relatively small outlay of funds, generate large amounts of urban green space.

It is at this point that the community gardening movement comes into the analysis. The next section will examine how community gardening rules can be used to provide large amounts of urban green space, at far less cost than would otherwise be required.

VII. MOVING FORWARD

Looking at the tactics employed by other urban areas illuminates possibilities for improvement in the state of community gardening, and of green space management in general, in New York City. In the GreenThumb Program, New York has a program which has encouraged and helped to maintain a community of green spaces.¹⁶⁴ That mechanism has remained as strong and vibrant as it is because of the willingness of nonprofit and community groups to put pressure on developers in the interest of preserving community garden space.¹⁶⁵ So much effort has

¹⁶² See The National Arbor Day Foundation, *Tree City USA*, at <http://www.arborday.org/programs/treecityusa.html> (last visited Apr. 1, 2004).

¹⁶³ See The National Arbor Day Foundation, *Tree City Standards*, at <http://www.arborday.org/programs/TreeCityStandards.cfm> (last visited May 17, 2005).

¹⁶⁴ See generally GreenThumb, *supra* note 22.

¹⁶⁵ See, e.g., Green Guerillas, *Speak Up: The Future of 114 Community Gardens Hanging in the Balance—Do Your Part to Help Save Them*, at <http://www.greenguerillas.org/speakup.asp?id=49> (last visited Apr. 1, 2004) (Green Guerillas attempt to rally the public to help influence the environmental review process of the 114 gardens slated for immediate review under the

been spent attempting to secure the future of New York's gardens, however, that a nuanced plan to regulate and promote them—while also protecting the needs of developers—has yet to fully develop.

New York City has no rules or regulations providing for the planting of trees.¹⁶⁶ This is emblematic of a systemic difficulty in New York's urban planning. If the City clarifies its overall policies for the creation of green space, it could then find a way to integrate the community gardens into those policies.¹⁶⁷ This would have the double advantage of allowing the City to better exploit the talents of community garden groups, while saving the city the time and energy that would be lost in political battles with those groups.

The City could begin by setting target amounts of green space. Such a target could be computed by estimating the health benefits, property value increases, and savings from cooler air attributable to green space, then computing the rough cost per-acre of installing that green space.¹⁶⁸ Once the appropriate studies have been done, and a series of benchmarks calculated, the city should look to community gardens as at least one way of meeting them. Community gardens have several advantages over simple zoning restrictions which make them attractive to urban planners. They exist on land that otherwise would represent economic waste: a vacant lot which the city has repossessed for tax purposes does no good to anybody during the period in which it is allowed to lie fallow. They are also relatively cheap, as much of the material could be bought by the community and all of the labor could be performed by community members.¹⁶⁹

Currently, the GreenThumb program is passive, existing to license and aid community gardens which have already been established. The City of New York has ranged from aggressively anti-community garden under Mayor Giuliani to grudgingly accepting of community gardens under Mayor Bloomberg. In order to obtain the full advantages of urban greening, however, the City should accept and encourage community garden building. If

settlement agreement).

¹⁶⁶ Encarnacion, *supra* note 3, at 1580.

¹⁶⁷ The Philadelphia community gardens program, discussed *supra*, note 129, is an example of this tactic.

¹⁶⁸ This might include the lost tax revenue of leaving the land undeveloped. See *infra* note 170 and accompanying text.

¹⁶⁹ See e.g., Green Guerillas, *What We Do*, *supra* note 37.

the City were to give existing neighborhood and community groups incentives to garden vacant space, up to a certain optimal amount per neighborhood determined by the survey of environmental benefits, then the City could reap the benefits of increased greening at little cost to the City itself.

The difficulty with this plan, of course, lies in the cost to the City in tax revenues lost by not developing a plot of garden land, which could outweigh the benefits of maintaining even low-cost community garden land in its place.¹⁷⁰ When this is the case, there seems to be no incentive for the City to allow for community green space. Thus, while those gardens already protected by the agreement would remain, there would be no incentive for the City to license new gardens. While more green space could be created with zoning restrictions similar to those in Baton Rouge, this kind of regulation would be expensive and politically difficult, and would still not address the problem of derelict land lying fallow in the lengthy time before development can take place.¹⁷¹

The key to solving this problem lies in an understanding of the nature of housing construction in New York City. The process of merely obtaining approval to build, let alone construct, new housing in the City is an Olympian task requiring huge outlays of time, labor, and capital.¹⁷² The New York City building code is

¹⁷⁰ The Giuliani administration's proposal in 1999 to auction off community gardens demonstrates this tradeoff. The plan was seen by the administration as "an opportunity to expand the tax base and cash in on the city's surging real estate market." David Lefer, *Gardens Flap Growing: Giuliani to Auction 126 Plots*, N.Y. DAILY NEWS, Feb. 21, 1999, at 26. See also Adrian Higgins, *Seeds of Community are Sowed in Public Gardens*, WASH. POST, June 1, 2002, at H9 (Defending Mayor Giuliani's move to auction off 115 community gardens, "[c]ity officials said the land should be returned to the tax rolls and used for housing."); Peter Bowls, *AG Joins Garden Suit*, NEWSDAY (New York), May 11, 1999, at A25 ("The Giuliani administration has contended the land auction will return to the city's tax rolls property that was abandoned years ago. The 115 plots are among about 750 lots across the city being used as community gardens."). Garden advocates in turn responded that while "the land is valuable," community gardens are "important too." Lefer, *supra*.

¹⁷¹ See *infra* Part V; BATON ROUGE, LA., UNIFIED DEV. CODE § 18.1, 18.7 (2003).

¹⁷² For an exhaustive catalogue of the myriad difficulties faced by contractors in New York, see JERRY J. SALAMA ET AL., FURMAN CENTER FOR REAL ESTATE AND URBAN POLICY ET AL., REDUCING THE COST OF NEW HOUSING CONSTRUCTION IN NEW YORK CITY: 2005 UPDATE (2005), available at http://www.law.nyu.edu/realestatecenter/CREUP_Papers/cost_study_2005/NYC_HousingCost2005.pdf (last visited May 17, 2005).

Byzantine; complying with it can take a great deal of time.¹⁷³ SEQRA review alone can take several years,¹⁷⁴ and land use review can take months and must wait until the project is greenlighted by the Department of City Planning.¹⁷⁵ Additionally, the reluctance of the New York City Department of Buildings staff to make decisions at every level has led to dramatic slow-downs in the planning process.¹⁷⁶

Given this, we can see that there is a substantial period of time between the point where planning for a construction project begins, and the point where work on that project actually starts. This is more than enough time for the city to locate another vacant lot for any garden which must be moved. The cost of moving the garden would be minimal as compared to the process of approving and constructing new real estate, and should be borne by the City (which will be able to offset the move through tax revenue from the new development). The GreenThumb licenses should be rewritten to guarantee new garden space in undeveloped lots, as close to the original garden as possible, to any community gardening organizations which might be moved to make way for development. In order to avoid shunting all gardens to underdeveloped neighborhoods, the proximity of the next available vacant lot suitable for transformation into a community garden should be considered as a factor in the environmental review mandated by the Agreement.¹⁷⁷ If there are other vacant lots within the same neighborhood area, the City could defray the cost of moving the community garden from one location to the next, allowing for both the continued existence of the garden and the addition of new housing space. Upon moving the garden, the city would issue a new lease to the gardeners, making sure that the new location is not completely transient.

In order to implement such a policy, the standard lease time for GreenThumb lots should be increased from one year to three

¹⁷³ *Id.* at 86 (“To call the current New York City Building Code cumbersome and obtuse is charitable. The misinterpretations and confusion that this 1,000 page code generates lead to extraordinary delays and increased costs. . .”).

¹⁷⁴ *See id.* at 49–52.

¹⁷⁵ *Id.* at 63–65.

¹⁷⁶ *Id.* at 92 (“The fear of making the wrong decision and being punished therefore or being accused of being corrupt has led employees to not make decisions or to deny request in the hope that someone at the next level will decide the substantive issue.”).

¹⁷⁷ *See generally infra* section IV.

years, still 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.¹⁷⁸ A three-year lease gives the predictability for community gardeners to plant trees, increase groundcover, and generally plan a community garden as a long-lasting, mixed use green space.

With this change in the leasehold policy, coupled with the environmental review process mandated in the Agreement, the City would have the foundation of a workable permanent policy towards community gardens. Such a policy would encourage the continued creation of community garden space, while having no serious adverse impact upon the production of new affordable housing space in New York.

VII. CONCLUSION

City planning is a utopian process, by its nature more concerned with what a city could be than with what it is at the moment.¹⁷⁹ Whether a meticulously planned “Garden City,” labyrinthine zoning regulations, or business incentives for development, the concept of city planning involves attempting to impose an ideal order upon a large and chaotic system.¹⁸⁰ Any straightforward plan for a “tree city” or “garden city” is thus doomed to failure.

GreenThumb represented an attempt to modify the existing urban planning structure to account for a new development, the growth of community gardens. The program was created, however, in an era of weak demand for new construction, and now must itself be modified to take into account the economic realities of New York City in the twenty-first century.

The protests and court battles leading up to the agreement between the City and the State Attorney General’s office represented an attempt at striking a new balance between the interests of developers and gardeners, between the desire for affordable housing and the desire for community controlled green

¹⁷⁸ See SALAMA ET. AL., *supra* note 172, at 75–83 (detailing the procedure and time costs of getting permit approval for new residential construction in New York City).

¹⁷⁹ See generally Amy Mandelker, *Writing Urban Spaces: Street Graphics and the Law as Postmodern Design and Ordinance*, 3 WASH U.J.L. & POL’Y 403 (2000).

¹⁸⁰ See Willis, *supra* note 9, at 9.

space and the social and environmental benefits which come with it.¹⁸¹ The battle between gardeners and developers cannot be portrayed in simple terms. There is no easily definable “right” or “wrong” side. Both affordable housing and community green space are societal goods, but both require the same scarce resource, urban land. By relying on a theory of rights that placed an absolute value upon green space, the plaintiffs in the *Coalition* weakened the appeal of their arguments. Likewise, the plaintiffs in *NYCEJA* weakened their case by examining the inequitable distribution of green space in the city without acknowledging an inequitable distribution of affordable housing. On the other hand, by insisting on a right to dispose of green space automatically, the Giuliani administration spent money, time, and goodwill on a similarly absolute stance.

It was only when the debate moved from confrontation to compromise that a solution could be achieved. That solution, the Agreement, is best seen as a stopgap measure, a holding action until the City can find a new balance that acknowledges the needs of both gardeners and developers.

This Note has set forth a few suggestions for modifying the agreement to make it functional over the long term. These suggestions—increasing the lease term for GreenThumb, financing the relocation of community garden space, and taking into account the practicality and desirability of relocation in the mandated environmental review—are offered in an attempt to create a framework that addresses the needs of community gardeners, city officials, and real estate developers. This solution would not be cost free for any group, but would provide a balance of their interests designed to attempt to ensure that both development and community green space can coexist in the same neighborhood.

The attempt to balance the interests of developers and community gardeners can be a no-lose situation: both groups offer important goods representing improvements to urban communities. Communities are ever-changing, and different times will require a different balance of green land and housing space. By making the Agreement an adaptable framework for negotiation, instead of a simple apportionment of land, the goal is to create a process by which these competing worthy interests can be evaluated in light of what balance is best for the citizens of New York over time.

¹⁸¹ See discussion *supra* Section III.