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# A Hen in the Parlor: Municipal Control and Enforcement of Residential Chicken Coops

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## **A Hen in the Parlor: Municipal Control and Enforcement of Residential Chicken Coops**

Chris Erchull\*

With poultry, as with gardens, you need the time, the patience and the knowledge to take care of the flock after you get it going. But the home supply of eggs and of broilers and fryers is a reward for a lot of the trouble that is involved. I urge everyone who can to raise poultry this year, both for the eggs and the meat.<sup>1</sup>

These words, attributed to Secretary of Agriculture Claude Wickard in 1943, were published only a few months after the landmark opinion of *Wickard v. Filburn*, where the Supreme Court held that the federal government has the authority to prevent people from producing food on their own property, even food intended only for personal consumption.<sup>2</sup>

The Locavore Movement, a modern term describing the conscious efforts to source food from nearby farms, has contributed to renewed interest in an old custom – backyard residential chicken coops. Whether participants are interested in fresh eggs, poultry, or pets, cities and towns across the country are confronting related control and enforcement issues surrounding the trend. People are embracing the practice for its purported benefits related to the environment, health, community, and nutrition. But enthusiasm should be tempered because problems arise when people raise chickens, including environmental harm, neighborhood nuisance, disease, introduction of predators, and water contamination.

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<sup>1</sup> *Backyard Poultry Flocks Help Supply Family Table*, MILWAUKEE J., Feb. 17, 1943, at 4 (quoting Sec. of Agric. Claude Wickard), available at <http://news.google.com/newspapers?nid=1928&dat=19430220&id=3pU0AAAIAIAJ&sjid=rWgFAAAIAIAJ&pg=3753,3655566>.

<sup>2</sup> 317 U.S. 111 (1942) (citing the Commerce Clause as constitutional authority for Congress to enact laws limiting food production for personal consumption).

This Article will analyze some of the regulatory approaches taken by cities and towns with a focus on how regulation can support and encourage the beneficial aspects of keeping backyard chickens while mitigating the potential harmful impact of excessive or irresponsibly managed residential chicken coops. In particular, common trends in local regulation, like limits on the number and sex of birds allowed in each residential yard, setback and structural requirements, and animal welfare requirements will be analyzed in the context of the corresponding local benefits. Additionally, this Article will discuss creative and progressive developments in modern regulatory schemes.

### **I. Popularity of Residential Chicken Coops on the Rise**

Anecdotal evidence suggests that residential chicken coops are very popular today.<sup>3</sup>

Indicators such as greater sales of chickens to residential buyers,<sup>4</sup> a large web presence of

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<sup>3</sup> There is not reliable research demonstrating the degree of increased popularity of backyard avian agricultural enterprises. “It is hard to know exactly how many people are raising urban chickens. The animals generally aren’t licensed or counted.” John Faherty, *Urban Chickens: The Latest Healthful Living Trend*, ASSOCIATED PRESS, May 12, 2009, available at <http://www.azcentral.com/news/articles/2009/05/09/20090509urbanchickens0506.html>. Attempts to discuss the increased popularity generally fail to include specific data about increases. See Jack Shafer, *Bogus Trend of the Week: Raising Backyard Chickens*, SLATE MAGAZINE (May 14, 2009), [http://www.slate.com/articles/news\\_and\\_politics/press\\_box/2009/05/bogus\\_trend\\_of\\_the\\_week\\_raising\\_backyard\\_chickens.html](http://www.slate.com/articles/news_and_politics/press_box/2009/05/bogus_trend_of_the_week_raising_backyard_chickens.html).

<sup>4</sup> According to a description out of Clarkesville, TN:

A crescendo of “cheep, cheep, cheep” fills the air as hundreds of baby chicks mill about in cages.

....

[Local chick] salesman, David C. Wallace, said he has definitely noticed an uptick in chick sales to city dwellers since the ordinance passed. “We’ve sold a lot of the little commercial chicken houses,” he said. “And a lot of people are buying six chickens just to have in town.”

Karen Parr-Moody, *Want to Raise Chicks? Backyard Coops are on the Rise*, THE LEAF CHRONICLE, Mar. 6, 2013, available at

backyard chicken enthusiasts,<sup>5</sup> and the marketing of newfangled coops<sup>6</sup> all tend to demonstrate a trend toward more urban chicken farming in the United States. Backyard chickens have even begun to appear in popular television shows.<sup>7</sup>

The surging popularity of home chicken husbandry coincides with the general growing interest in local food sourcing. As the local food movement has become embedded in our cultural landscape, showcasing people's desire to connect with their food and their communities,<sup>8</sup> residential food production in urban and suburban areas has naturally emerged as

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[http://www.theleafchronicle.com/article/20130306/LIFESTYLE/303060005/Want-raise-chickens-Backyard-coops-rise?nclick\\_check=1](http://www.theleafchronicle.com/article/20130306/LIFESTYLE/303060005/Want-raise-chickens-Backyard-coops-rise?nclick_check=1).

<sup>5</sup> "It's a national trend that has been on the rise, and although there are no reliable backyard chicken statistics, there is evidence that the practice is growing, with an estimated 44,000 subscribers to Backyard Poultry Magazine and over 15,000 members of BackYardChickens.com." Morgan Quinn, *Urban Chickens: Frugal Fad or Pricey Pastime?*, MINT.COM (Aug. 30, 2011), <http://www.mint.com/blog/trends/urban-chickens-frugal-fad-or-pricey-pastime-082011/>.

<sup>6</sup> The latest in chic designs for the high-end chicken lifestyle can get expensive: Steven Keel, the owner of Egganic Industries in Ringgold, Va., says that sales of his elaborate \$1,500 Henspaspas - low-maintenance, high-comfort homes designed for urban and suburban chickens - are up 15 percent. The McMurray Hatchery in Webster City, Iowa, reports they're sending more mail-order chicks (ranging in cost from about \$1 to \$5 per chick) to addresses in upper-class suburbs. Amanda Onion, *Chickens Become Chic Urban and Suburban Pets*, ABC NEWS (July 22, 2002) <http://abcnews.go.com/Technology/story?id=97797&page=1>.

<sup>7</sup> Martha Stewart has endorsed the practice of raising chickens as pets. Martha Stewart Video Collections, *How to Raise Chickens, Ducks, and Geese*, MARTHA STEWART.COM, at 1:40-1:50, <http://www.marthastewart.com/910350/how-raise-chickens-ducks-and-geese> ("They make very good pets. Children learn a lot from them. . . . I've come to really love having a chicken coop."). Popular reality television personality Alana Thompson, better known as *Honey Boo Boo*, has a pet chicken named Nugget. See Josh Grossberg, *Honey Boo Boo's Pet Chicken Nugget Gets PETA's Attention*, E! ONLINE (Nov. 8, 2012), <http://www.eonline.com/news/361518/honey-boo-boo-s-pet-chicken-nugget-gets-peta-s-attention>.

<sup>8</sup> See Amanda Ruth-McSwain, *Eating Green: Coverage of the Locavore Movement*, 50 J. EXTENSION 5FEA7, at 2 (2012), available at [http://www.joe.org/joe/2012october/pdf/JOE\\_v50\\_5a7.pdf](http://www.joe.org/joe/2012october/pdf/JOE_v50_5a7.pdf).

a component of the movement. In the words of one newspaper headline: “Nothing is more local than your own backyard.”<sup>9</sup>

There are almost five times as many farmers’ markets as there were just two decades ago, an increase of more than 9% per year.<sup>10</sup> People are also increasingly likely to partake in community supported agriculture (CSA) programs.<sup>11</sup> As a part of the Let’s Move initiative to battle childhood obesity, the White House has a vegetable garden “for the first time in decades.”<sup>12</sup> City schools are even teaching the value of producing and consuming home-grown food.<sup>13</sup>

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Reasons for the growth in farmers markets and demand for local products vary; however, commonly cited motives include community aspiration to become more self-sufficient and less reliant on food transportation; a desire for fresh, nutrient-rich food that does not require the amount of packaging and refrigeration; an appeal to lessen the environmental impact by saving the energy used to preserve and transfer products to supermarket shelves; and an interest in strengthening local communities by investing food dollars close to home.

*Id.* (citations omitted).

<sup>9</sup> Patricia Eddy, *Nothing is More Local than Your Own Backyard*, S.F. EXAMINER (May 2, 2008), available at <http://www.examiner.com/article/nothing-is-more-local-than-your-own-backyard>.

<sup>10</sup> USDA AGRICULTURE MARKETING SERVICE, *Farmers Market Growth*, U.S. DEPT. OF AGRIC. (last modified Aug. 3, 2012), <http://www.ams.usda.gov/AMSV1.0/ams.fetchTemplateData.do?template=TemplateS&leftNav=WholesaleandFarmersMarkets&page=WFMFarmersMarketGrowth&description=FarmersMarketGrowth>.

<sup>11</sup> See Timothy Woods, et al., *2009 Survey of Community Supported Agriculture Producers*, UNIVERSITY OF KENTUCKY COLLEGE OF AGRICULTURE: COOPERATIVE EXTENSION SERVICE, at 1 (July 2009), available at <http://www.uky.edu/Ag/NewCrops/csareport.pdf> and Steven McFadden, *The History of Community Supported Agriculture, Part II*, RODALE INSTITUTE (Feb. 2004), available at <http://newfarm.rodaleinstitute.org/features/0204/csa2/part2.shtml>.

<sup>12</sup> *Accomplishments*, LET’S MOVE, <http://www.letsmove.gov/accomplishments> (last visited, Mar. 30, 2013).

<sup>13</sup> See, e.g., Kimberly Sutton, *Teaching Garden Promotes Education and Healthy Eating*, VILLAGER (Houston), Mar. 27, 2013, available at [http://www.yourhoustonnews.com/woodlands/living/teaching-garden-promotes-education-and-healthy-eating/article\\_25fba85f-9eff-546e-b267-439818550a55.html](http://www.yourhoustonnews.com/woodlands/living/teaching-garden-promotes-education-and-healthy-eating/article_25fba85f-9eff-546e-b267-439818550a55.html).

Most Locavores who want to produce food at home can easily set up a vegetable garden, even if it only produces a small portion of the household herbs or vegetables.<sup>14</sup> But when it comes to keeping farm animals, such as cattle and horses, agricultural areas are more appropriate than urban and suburban yards. Chickens, however, are relatively easy to maintain, requiring a small amount of yard space, and, when managed responsibly, causing minimal disturbance in residential neighborhoods.<sup>15</sup>

The benefits of keeping chickens extend further than the production of eggs and poultry for food. Beyond that, a well-planned chicken coop can serve an ecological role in a Locavore's backyard.<sup>16</sup> Chickens love to eat food scraps, which cuts back on household waste.<sup>17</sup> In exchange for scraps, they produce natural fertilizer in the form of chicken manure, reducing the demand for synthetic chemical fertilizers in home gardens.<sup>18</sup> Also, because chickens constantly peck at pests, they reduce the need for chemical pesticides.<sup>19</sup> And chickens may even take up space that would otherwise be covered with grass lawns that use water and other resources while providing no nutritional benefit. For someone who desires to eat locally and sustainably, keeping chickens may be a practical homesteading project.

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<sup>14</sup> *Id.*

<sup>15</sup> *See infra* Part II.

<sup>16</sup> Robin Ripley, *Eight Benefits of Raising Backyard Chickens*, S.F. EXAMINER (Jan. 18, 2009), available at <http://www.examiner.com/article/eight-benefits-of-raising-backyard-chickens>.

<sup>17</sup> The Daily Wag, *Feeding Scraps to the Chickens*, MARTHA STEWART.COM (Apr. 18, 2011), <http://dailywag.marthastewart.com/2011/04/feeding-scraps-to-the-chickens.html>.

<sup>18</sup> *See* Ripley, *supra* note 16.

<sup>19</sup> *Id.*

Eating eggs that are produced locally, as opposed to eggs that are shipped long distances from faraway farms, is one way Americans may help to reduce their carbon footprints, thereby reducing the impact of food production on climate change.<sup>20</sup> Keeping a residential chicken coop can serve that purpose by reducing the distance travelled by eggs.<sup>21</sup> Furthermore, industrial egg production is particularly suspect in the eyes of many consumers because of health concerns and animal rights issues, even for eggs labeled *organic*, and producing eggs at home allows for complete control over the health and well-being of the chickens.<sup>22</sup>

For some, the most compelling benefit to raising chickens at home is the presumed superior taste and nutritional content of fresh eggs from the backyard.<sup>23</sup> The nutritional value of eggs, and to some degree the flavor, is affected by the diet of the chickens producing the eggs, so a consumer can produce healthier or better-tasting eggs by controlling the diet of the hens.<sup>24</sup> Other

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<sup>20</sup> Cookson Beecher, *Help Reduce Climate Change: Eat Local*, 21Acres (Mar. 16, 2007), available at <http://21acres.onenw.org/farm-to-table/removed-documents/Help%20Reduce%20Climate%20Change%20-%20Eat%20Local.doc/view>.

<sup>21</sup> For more information about food production, food transportation, and the corresponding carbon footprint, see Gary Adamkiewicz, *Buying Local: Do Food Miles Matter?*, HARVARDEXTENSIONHUB (Nov. 19, 2012), <http://www.extension.harvard.edu/hub/blog/extension-blog/buying-local-do-food-miles-matter>.

<sup>22</sup> See Caleb Hellerman, *Egg Farming: Industrial vs. Organic*, CNN (Aug. 24, 2010), <http://www.cnn.com/2010/HEALTH/08/24/egg.safety.debate/index.html> (discussing contamination of eggs in organic and industrial settings, in addition to animal welfare issues). Concentrated Animal Feedlot Operations (better known as CAFOs) are notorious for poor treatment of animals and also for the catastrophic impact they have on the environment, including the Chesapeake Bay dead zone.

<sup>23</sup> See Ripley, *supra* note 16.

<sup>24</sup> See Joanna Lott, *Pasture-ized Poultry*, PENN STATE NEWS (May 1, 2003) (discussing research that shows eggs from pasture-fed chickens contain higher levels of certain nutrients), available at <http://news.psu.edu/story/140750/2003/05/01/research/pasture-ized-poultry>; see also Tabitha Alterman, *More Great News About Free-Range Eggs*, MOTHER EARTH NEWS (Feb./Mar. 2009) (discussing a study by Mother Earth News which shows that free-range eggs are generally

proponents would point to the relationship between access to fresh food and lower rates of obesity and other health problems.<sup>25</sup> Champions of backyard chicken cultivation boast that all of these benefits justify their commitment to the practice, but serious attention must be paid to the legitimate concerns and criticisms that have been voiced by neighborhood organizations and regulators who wish to limit the negative impact of residential chicken coops.

## II. Concerns and Criticisms

When designing regulations to address the renaissance of tending backyard chickens, cities and towns must seriously contemplate the potential harm that may come from the presence of chickens in a residential area, in addition to the concern that irresponsible, uneducated, or under-resourced chicken owners are potentially among the local chicken-raising population. Planners should take a serious look at how the municipality may be affected by these factors, especially if the practice continues to become more popular over time.<sup>26</sup>

### a. Water Contamination

Water contamination is one major problem for those who are concerned with the environmental impact of chickens in residential areas. Chickens produce manure, and if the healthier than “factory-farm eggs”), *available at* <http://www.motherearthnews.com/Natural-Health/Health-Benefits-Free-Range-Eggs.aspx#axzz2QLdgAEYy>.

<sup>25</sup> In one particular study on the correlation between health and access to grocery stores, “[t]he presence of supermarkets was associated with a lower prevalence of overweight, obesity, and hypertension.” Kimberly Morland et al., *Supermarkets, Other Food Stores, and Obesity*, 30 AM. J. PREVENTIVE MED. 333, 335 (2006), *available at* <http://deepblue.lib.umich.edu/bitstream/handle/2027.42/57754/Supermarkets%20other%20food%20stores%20and%20obesity.pdf;jsessionid=A14333BFF2BA47B51D7A1D868CED9C3E?sequence=1>.

<sup>26</sup> For a practical look at some considerations for regulating chicken coops, see *The Urban Chicken Coop Movement*, GREENLANDLADY (Apr. 15, 2010), <http://greenlandlady.com/site/business/the-urban-chicken-coop-movement/>.

manure is not properly contained, water contamination can occur in the form of runoff or percolation.<sup>27</sup> Of course, other pets also produce waste that may be harmful to surface and underground water sources, but the waste from backyard chickens is additional waste that compounds the problem, and urban and suburban residents are less experienced with managing chicken waste than the waste from dogs and cats.<sup>28</sup> Farms are better positioned to have access to technologically advanced systems for dealing with chicken manure, and they are also positioned to employ these solutions more efficiently.<sup>29</sup>

Private wells are of particular concern in residential areas. About fifteen percent of Americans get their water from private wells, and these wells are not regulated under the Safe Drinking Water Act.<sup>30</sup> It is likely that most of this water is not monitored for any type of contamination.<sup>31</sup> When chicken manure is permitted to seep into the ground, it is possible that it will contaminate any nearby sources of drinking water.<sup>32</sup>

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<sup>27</sup> See TODD BROCK, ET AL., *BUILDING CHICKEN COOPS FOR DUMMIES*, 27 (2010). “When you go to hose the place out, all that manure will be washed somewhere. Make sure ‘somewhere’ isn’t a pond, lake, stream, or other water source where pollution is an issue.” *Id.*

<sup>28</sup> See Elizabeth Ward, *Chesapeake Bay Watershed and Backyard Chickens*, *Green Risks* (Aug. 9, 2010), <http://greenrisks.blogspot.com/2010/08/chesapeake-bay-watershed-and-backyard.html>. Chicken manure “can be a source of nitrate and bacteria contamination to groundwater. . . . [B]ackyard farmers are not often versed in appropriate waste management techniques.” *Id.*

<sup>29</sup> H. Charles Goan, *Poultry Manure and Environmental Concerns*, University of Tennessee Agricultural Extension Service: Animal Science (discussing the environmental concerns and proper management of poultry manure), *available at* <http://animalscience.ag.utk.edu/poultry/pdf/aspinfo10.pdf>.

<sup>30</sup> *Drinking Water from Household Wells*, Env’tl. Protection Agency (2002), *available at* [http://www.epa.gov/privatewells/pdfs/household\\_wells.pdf](http://www.epa.gov/privatewells/pdfs/household_wells.pdf).

<sup>31</sup> *Id.*

<sup>32</sup> See BROCK, *supra* note 27. “And if your home draws its water from a well, the chicken housing should be (at the very least) 50 feet away to prevent contamination of the well water.” *Id.*

A municipal code can ease the concerns of private well users by implementing precautions to avoid contamination, like a mandatory distance between a coop and a private water source,<sup>33</sup> or perhaps a required run-off control system or a vegetation buffer.<sup>34</sup> The manure output of most residential chicken coops is minimal, with six chickens producing about the same amount of waste each year as one dog,<sup>35</sup> and overall, raising backyard chickens may *reduce* water contamination problems by reducing the demand for eggs from larger agricultural operations where manure may have a severe impact on water quality.<sup>36</sup> With the aid of proper regulation and responsible coop maintenance, a property owner need not fear that water from her private well will be contaminated by chicken manure.

#### **b. Noise, Odor, and Aesthetics**

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<sup>33</sup> See BROCK, *supra* note 27 (recommending a distance of at least fifty feet).

<sup>34</sup> See *Smart v. Sokolski*, 2009 WI App 77, 319 Wis. 2d 233, 769 N.W.2d 572 (suggesting that run-off control systems and vegetable buffers can prevent groundwater contamination by livestock manure).

<sup>35</sup> Six hens will produce between 137 and 480 pounds of manure per year. BRIE MENJOULET, *Urban Chicken Manure Management*, UNIVERSITY OF MISSOURI EXTENSION, at 7, available at [http://extension.missouri.edu/webster/backyardchickens/UrbanChickenManureManagement-BrieMenjoulet-\(ScreenVersion\).pdf](http://extension.missouri.edu/webster/backyardchickens/UrbanChickenManureManagement-BrieMenjoulet-(ScreenVersion).pdf). According to the EPA and the USDA, a “typical dog excretes . . . 274 pounds [of waste] per year.” UNITED STATES DEPT. OF AGRIC., *Composting Dog Waste*, at 1 (2005), available at <ftp://ftp-fc.sc.egov.usda.gov/AK/Publications/dogwastecomposting2.pdf>.

<sup>36</sup> There is even an argument to be made that backyard chickens improve water quality: Chicken keeping is likely to represent a net improvement in water and runoff issues rather than the opposite. Issues of manure runoff from egg-producing chickens are associated with huge factory-style egg farms that generate tons of manure each day in a very concentrated area. For those of us who wish to continue to eat eggs in a sustainable fashion, low-density backyard chicken keeping is the solution to runoff issues, not the problem.

*The Brief on Chickens*, Urban Farm Living (Jun. 2012), <http://www.urbanfarmliving.com/the-brief-on-chickens/#Water>.

Other private nuisance issues can pose problems as well. If coops are not kept clean, there is the potential for noxious odors emanating from the yard.<sup>37</sup> The potential for excessive noise is of particular concern if roosters are allowed to live in residential areas, and possibly even when only hens are present if there is insufficient space between the coop and the surrounding homes.<sup>38</sup>

Hens do not generally present a significant noise problem.<sup>39</sup> Some argue that even roosters do not create a substantial noise problem in a residential area.<sup>40</sup> Barking dogs can be just as loud

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<sup>37</sup> The smell of chicken waste should not pose a problem where the coop is properly cleaned: “If you pile pine shavings 2 to 3 inches deep in the coop and clean it out every month or two and compost it, it's not going to smell,” says Penn State poultry expert Phillip J. Clauer. In some cities, including Seattle, Austin, and Atlanta, chicken owners arrange coop tours to show off what good neighbors chickens are. Denise Foley, *Frequently Raised Objections to Backyard Hens*, ORGANIC GARDENING, available at <http://www.organicgardening.com/learn-and-grow/frequently-raised-objections-backyard-hens>.

<sup>38</sup> See *Brief on Chickens*, *supra* note 36, at Appendix E.

Laying hens—at their loudest—have about the same decibel level as human conversation (60 to 70 decibels). Hens are so quiet that there have been cases of family flocks being kept for years without the next door neighbors knowing it. To some, noise is a concern with roosters and their pre-dawn heralding of sunrises. Many urban codes ban roosters, or only allow them to be kept with special permits. The noise level of a rooster’s crow is about the same as a barking dog; 90 decibels. But there are ways to keep roosters quiet throughout the night. Many folks regard crowing as a pleasant sound.

*Id.*

<sup>39</sup> *Id.*

<sup>40</sup> Patricia Foreman, *7 Myths About Urban Chickens*, MCMURREY HATCHERY BLOG (Jan. 25, 2011) (“The noise level of a rooster’s crow is about the same as a barking dog, 90 decibels. But there are ways to keep roosters quiet throughout the night. Many folks regard crowing as a pleasant sound.”), available at <http://blog.mcmurrayhatchery.com/2011/01/25/the-7-false-myths-about-urban-chickens-myths-2-and-3/>; *The 6 Silliest Arguments Against Backyard Chickens*, MY PET CHICKEN BLOG (July 20, 2012) (“[R]oosters can be loud, sure—about as loud as a barking dog.”), available at <http://blog.mypetchicken.com/2012/07/20/the-6-silliest-arguments-against-backyard-chickens/>.

as roosters, if not louder.<sup>41</sup> Other neighborhood noise problems are often tolerated by residents within a community, including the noise from lawn mowers,<sup>42</sup> garbage trucks,<sup>43</sup> and even other birds.<sup>44</sup> Residents in a community generally accept that some level of noise pollution is a requisite part of living in a neighborhood, and if the additional sound caused by roosters is insubstantial, then perhaps it should not be of particular concern to planners just because the noise is unusual or unexpected. However, roosters are a peculiar source of noise in that they tend to crow early in the morning on a daily basis.<sup>45</sup> Bans on roosters in residential areas are common,<sup>46</sup> but some rooster owners claim that it is possible to limit how often, how early, and

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<sup>41</sup> *What is Noise Hazard in the Veterinary Practice?*, SAFETY VETS, (Oct. 14, 2012) (“Although it will vary from one breed to another, as well as one animal to another, noise level from a barking dog can reach 80-90 decibels.”) (citing PHILIP J. SEIBERT, JR., *THE VETERINARY SAFETY & HEALTH DIGEST* (2000)), <http://www.safetyvet.com/osha/noise.htm>.

<sup>42</sup> Lawn mowers register from about 85-90 decibels. *Sound Ruler*, NATIONAL INSTITUTE ON DEAFNESS AND OTHER COMMUNICATION DISORDERS (Feb. 9, 2011), [http://www.nidcd.nih.gov/health/education/decibel/pages/decibel\\_text.aspx](http://www.nidcd.nih.gov/health/education/decibel/pages/decibel_text.aspx).

<sup>43</sup> Garbage trucks are as loud as 100 decibels. *Id.*

<sup>44</sup> Birds from a distance of ten feet produce about 55 decibels. *Decibel Chart*, NETWELL NOISE CONTROL (last visited, Apr. 13, 2013), <http://www.controlnoise.com/decibel-chart/>. Some birds, like crows, can be much louder, and can create a perpetual nuisance while protecting a nest or experiencing duress in a residential area. See Ellen Blackstone, *Crow Parents, Fearless Defenders*, BIRDNOTE (Jun. 2011) (listen to the audio recording to hear loud crows protecting a nest), available at <http://birdnote.org/show/crow-parents-fearless-defenders>.

<sup>45</sup> In fact, new research suggests that roosters crow each morning based on circadian rhythms or “internal clocks,” rather than based on the first rays of light at dawn. Jane Lee, *How a Rooster Knows to Crow at Dawn*, NATIONAL GEOGRAPHIC DAILY NEWS (Mar. 18, 2013), available at <http://news.nationalgeographic.com/news/2013/03/130318-rooster-crow-circadian-clock-science/>.

<sup>46</sup> Notable exceptions in large cities include Austin, San Antonio, and Waco, Texas. Residents are permitted to own one rooster each in Miami, Florida and in Los Angeles, California. Marty Toohey, *As Backyard Coops Abound, Neighbors Seek Remedy for Rooster Noise*, STATESMAN.COM (Mar. 12, 2010), <http://www.statesman.com/news/news/local/as-backyard-coops-abound-neighbors-seek-remedy-f-1/nRrFP/>.

how loudly the birds crow.<sup>47</sup> Others suggest a ban on adult roosters would be more prudent, because it allows the use of adolescent male birds, which are capable of fertilizing eggs for reproduction but have not yet developed the ability to crow; these roosters can be sold or slaughtered for meat before they reach top volume as adults.<sup>48</sup>

Aesthetics usually pose difficult problems in terms of regulation, and chicken coops are no exception, but regulations can ensure that general standards are met in the construction of coops.<sup>49</sup> Chicken coops that are designed to be aesthetically compatible with suburban residential areas are available from companies such as Williams-Sonoma®,<sup>50</sup> but designer coops can be very expensive.<sup>51</sup> A planning board will face similar obstacles when drafting aesthetics regulations for other residential structures besides chicken coops.

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<sup>47</sup> See *Keeping Roosters – Quietly and Responsibly*, Suburban Homesteading (Jul. 23, 2010) (claiming that by blocking sunlight, rooster owners can reduce the level to which roosters disturb neighbors), <http://www.suburbanhomesteading.com/keeping-roosters-%E2%80%93-quietly-and-responsibly/barn>.

<sup>48</sup> Adult roosters are forbidden in Hopewell Township, New Jersey, but young males are permitted until they reach an age where they begin to crow. Furthermore, males are allowed on residential property for a limited period of time (five consecutive days, ten days total per year) for fertilization purposes. Residential Animal Agriculture Subcommittee, *Frequently Asked Questions Regarding “Standards for Keeping Chickens,”* HOPEWELL TOWNSHIP GENERAL ORDINANCES, at 2 (May 3, 2011), [http://www.hopewelltp.org/FAQ\\_Standards\\_for\\_Keeping\\_Chickens.pdf](http://www.hopewelltp.org/FAQ_Standards_for_Keeping_Chickens.pdf).

<sup>49</sup> See TOWN OF CARY, NORTH CAROLINA, BACKYARD CHICKENS AND POTENTIAL REGULATIONS, STAFF REP. NO. PL12-021 (Apr. 9, 2012) (“[M]inimal, basic construction standards should be considered for coops. Aesthetic standards are difficult to establish and enforce.”), available at [http://www.townofcary.org/Town\\_Council/Agendas\\_\\_\\_Minutes/Staff\\_Reports/PL12-021.htm](http://www.townofcary.org/Town_Council/Agendas___Minutes/Staff_Reports/PL12-021.htm).

<sup>50</sup> See, e.g., *Alexandria Chicken Coop & Run*, WILLIAMS-SONOMA (last visited, Apr. 13, 2013) (advertising chicken coops that range in price from \$600 to \$1,500), <http://www.williams-sonoma.com/products/alexandria-chicken-coop/>.

<sup>51</sup> See Anne Marie Chaker, *Backyard Farming Gets Fancy*, WALL STREET JOURNAL (Jan. 29, 2013), available at <http://online.wsj.com/article/SB10001424127887323375204578271740933991354.html>; see also, *supra* note 6 and accompanying text; *infra* note 69 and accompanying text.

### c. Disease and Public Health Risks

In addition to these neighborhood concerns, there are additional health-related concerns that might be of consequence to municipalities seeking to regulate residential chickens. A bacteria commonly found in chicken feces, Salmonella, can be very dangerous to human beings, and the more birds there are in a particular area, the more likely the infection will spread.<sup>52</sup> It is very important that people who come into contact with chickens take precautions to make sure they do not become infected by Salmonella.<sup>53</sup> Some believe that it is far safer to keep chickens in a residential setting, however, because Salmonella is far more likely to spread in an industrial production setting.<sup>54</sup>

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<sup>52</sup> *Keeping Backyard Poultry*, CENTERS FOR DISEASE CONTROL AND PREVENTION (Apr. 23, 2012), available at <http://www.cdc.gov/features/salmonellapoultry/>.

<sup>53</sup> *Id.*; see also Nancy Shute, *Backyard Chickens: Cute, Trendy Spreaders of Salmonella*, NPR THE SALT (Mar. 24, 2013), <http://www.npr.org/blogs/thesalt/2013/03/24/175057536/backyard-chickens-cute-trendy-spreaders-of-salmonella>.

<sup>54</sup> The argument is that keeping a large number of chickens contained in a small area allows the infection to spread quickly:

[H]igh numbers of salmonella cases from eggs and poultry are linked to the effects of factory farming. Chickens raised for meat are crammed tightly into warehouses that hold as many as 20,000 chickens, while the chickens raised for eggs live in sheds that can hold 100,000 birds and are often packed in battery cages with five to 10 other birds. Factory farms often contain huge amounts of feces and fecal dust produced by the birds, along with rat droppings and flies, and certain strains of salmonella can pass to the chicken if their food comes in contact with the fecal matter. In order to try to stem off the flow of disease within their flocks, farmers regularly feed the poultry antibiotics, which can lead to antibiotic-resistant strains of salmonella: in 2011, 107 people were sickened and one killed from an antibiotic-resistant strain of salmonella in turkey.

Katie Valentine, *Thanks to Factory Farming, Backyard Eggs are Still a Better Choice than Store-Bought Ones*, THINKPROGRESS.ORG (Mar. 26, 2013), <http://thinkprogress.org/health/2013/03/26/1771251/backyard-eggs-factory-farming/?mobile=nc>; see also Natalie Berkhout, *Salmonella Thrives in Cage Housing*, WORLDPOULTRY (Jun. 14, 2010) (“It is likely that the type of housing that layer hens are kept in influences the occurrence of infection. This appears to be in the advantage of flocks that are reared in alternative housing systems in comparison to cage systems.”),

Another major health concern is the potential for an avian flu epidemic in the United States, which may develop and spread very quickly if birds are kept in a large number of backyards across the country.<sup>55</sup> In fact, there are significant limitations and even outright bans in place on residential chickens in many parts of the world for this reason.<sup>56</sup>

Many other public health risks are concerns for residential areas with backyard chickens. Any cases in which the food chickens eat, the water they drink, or the land where they live is contaminated with a pollutant can cause the eggs they produce to be contaminated as well. Pollutants may include pesticides, metals, or other toxic materials. For example, studies have shown that eggs from urban chicken coops in New York City are often contaminated with lead.<sup>57</sup> This should worry anyone who eats eggs produced by backyard chickens in an area that may be contaminated, especially if children may end up consuming the eggs.<sup>58</sup>

#### **d. Animal Welfare**

For people and for local governments who are concerned with animal welfare, particularly with the treatment of domesticated animals in a residential area, problems related to the appropriate treatment of residential chickens must be addressed, including abandonment, abuse,

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<http://www.worldpoultry.net/Breeders/General/2010/5/Salmonella-thrives-in-cage-housing-WP007481W/>.

<sup>55</sup> *Fowl Play: The Poultry Industry's Central Role in the Bird Flu Crisis*, Grain (Feb. 26, 2006), <http://www.grain.org/article/entries/22-fowl-play-the-poultry-industry-s-central-role-in-the-bird-flu-crisis>.

<sup>56</sup> *Id.*

<sup>57</sup> Julie Scelfo, *Worries About Lead Found in City-Sourced Eggs*, N.Y. TIMES (Oct. 8, 2012), available at <http://www.nytimes.com/2012/10/10/dining/worries-about-lead-for-new-yorks-garden-fresh-eggs.html>

<sup>58</sup> *Id.*

neglect, and protection.<sup>59</sup> Urban and suburban residents are often unaccustomed to keeping livestock as pets, and they are often unfamiliar with the appropriate way to handle the animals. It is very difficult for behavior in relation to backyard chickens to be monitored. Additionally, regulations often forbid roosters in an attempt to limit the noise impact of chicken coops.<sup>60</sup> When a chicken owner comes into possession of a rooster when they are forbidden, especially in cases where slaughter is not permitted, it is not an easy task to find a new home for him. It leads to many cases where birds are abandoned or destroyed simply because of their sex.<sup>61</sup> Proper medical care for sick chickens is expensive, as with any pet, and often veterinary care is neglected.<sup>62</sup> A history of abuse against chickens, specifically the notorious cockfighting scandals

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<sup>59</sup> See *Backyard Chicken Flocks: Is it Really a Good Idea?*, ANIMAL PLACE, <http://animalplace.org/1newweb/backyard.html>.

<sup>60</sup> See *supra* Part II.b.

<sup>61</sup> See Kim Severson, *When Problems Come Home to Roost*, N.Y. Times (Oct. 22, 2009), available at [http://www.nytimes.com/2009/10/23/dining/23sfdine.html?\\_r=1](http://www.nytimes.com/2009/10/23/dining/23sfdine.html?_r=1).

[W]ith increased chicken popularity comes a downside: abandonment. In one week earlier this month, eight were available for adoption at the Oakland shelter and five were awaiting homes at the San Francisco shelter. In Berkeley, someone dropped four chickens in the animal control night box with a note from their apologetic owner, said Kate O'Connor, the manager.

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"It's a fad," said Susie Coston, national shelter director for Farm Sanctuary, which rescues animals and sends them to live on farms in New York and California. "People are going to want it for a while and then not be so interested." She said that farm animal rescue groups field about 150 calls a month for birds, most of them involving chickens — especially roosters.

"We're all inundated right now with roosters," she said. "They dump them because they think they are getting hens and they're not."

Some chicken owners buy from large hatcheries, which determine the sex of the birds and kill large numbers of baby roosters, because most people want laying hens. But sexing a chicken is an inexact science. Sometimes backyard farmers end up with a rooster, which are illegal in most cities.

*Id.*

<sup>62</sup> *Id.* ("[Sharon Jones, a Berkeley chicken coop owner,] has not taken [her chickens] to the vet because of the high cost, but she goes to workshops and searches out cures on the Internet.").

that have been an issue in modern times, are even more reason for concern.<sup>63</sup> These issues are not easily addressed in a way that mitigates harm while still encouraging the practice of raising chickens, but the animal rights challenges beg for a serious solution. Education is often the best tool against mistreatment of animals, and ideally cities and towns where chickens are popular will help to educate people about the appropriate treatment of chickens.<sup>64</sup>

#### **e. Introduction of Predators**

In addition to the potential danger from human abuse, chickens are susceptible to a wide range of natural predators. The presence of chickens in a residential area may have the effect of attracting these predators. Currently, there is not sufficient research that demonstrates the impact of backyard chickens on the populations of predators in residential areas, although some scientists are looking closely at the issue.<sup>65</sup> Like other pets, chickens are vulnerable to predators, but there is not any evidence that they are any more susceptible than other pets if they are well-protected within a secure coop.<sup>66</sup>

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<sup>63</sup> See generally Veronica Hirsch, *Legal Protections for the Domestic Chicken in the United States and Europe*, ANIMAL AND LEGAL HISTORICAL CENTER (2003), available at <http://www.animallaw.info/articles/dduschick.htm>.

<sup>64</sup> For a complete set of regulations regarding the appropriate treatment of animals, which can be adopted in the animal control laws of any city or town, see *Standards of Care for Chickens*, Chicken Run Rescue (Apr. 7, 2009), <http://www.brittonclouse.com/chickenrunrescue/STANDARDS%20OF%20CARE%208309.pdf>.

<sup>65</sup> One particular project was initiated at the North Carolina Museum of Natural Science, in conjunction with the Wildlife Program of North Carolina State University. See *A Study of Backyard Predators*, THE GREAT CHICKEN COOP STAKEOUT (last visited, Mar. 31, 2013), <http://chickencoopstakeout.wordpress.com/about/>.

<sup>66</sup> It is reasonable to assume that the diversity of predators will not change because of the introduction of chickens, but it is unclear whether the number of those predators may increase. It is probably safe to assume that if the chickens do not provide a food source for the predators (because they are safely secured), then there will not be a significant increase in the number of predators. Regulations should require that chickens be protected by a secure coop.

## f. Food Justice

For most families, backyard chicken coops do not result in cost savings.<sup>67</sup> There are many expenses, including startup and maintenance costs, which make it difficult to recoup financial benefits that outweigh the outlay. Compliant coops, quality feed, and permit fees can all be expensive.<sup>68</sup> There is also a particular segment of chicken coop owners who express finer tastes and spend far more money than they could ever hope to save on eggs.<sup>69</sup> Ordinances that shut out roosters and prohibit on-premises slaughter make it even harder to earn back the investment for those who would raise chickens to save money on food production.<sup>70</sup> This criticism is especially poignant when considered in light of the fact that for many of the urban farming pioneers of the past few decades, food was produced at home out of necessity because supermarket costs were too high.<sup>71</sup> Because of the expenses associated with adhering to municipal regulations, many residents may find that they cannot afford to participate in a movement to produce their own

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Chickens, if left unprotected, are vulnerable to predators. But as the predators of chickens are the same as those of the wild rabbits, squirrels, chipmunks, small birds, and other local wild prey animals already present in our community, they do not themselves attract predators to the area. Coyotes, for instance, are seen more often when they take a cat or small dog than when they take a rabbit. But the presence of chickens does not attract predators to the area; predators are already here.

*See Brief on Chickens, supra note 36.*

<sup>67</sup> *See Quinn, supra note 5.*

<sup>68</sup> *Id.*

<sup>69</sup> *See Chaker, supra note 51.*

<sup>70</sup> *See Marianne Kirby, Co-Opting the Coop, BITCH MAGAZINE (2012), available at <http://bitchmagazine.org/article/co-opting-the-coop>.*

<sup>71</sup> *See Pha Lo, When Eating Organic Was Totally Uncool, SALON.COM (Jan. 6, 2011) (recounting the author's childhood in a neighborhood of refugee-immigrants in Sacramento, growing food and raising chickens for subsistence), [http://www.salon.com/2011/01/07/hmong\\_urban\\_farmers\\_ext2011/](http://www.salon.com/2011/01/07/hmong_urban_farmers_ext2011/).*

food.<sup>72</sup> Governmental efforts to regulate backyard chickens must balance the need to protect neighborhoods from potential harm against the responsibility to protect the interests of the people who stand to benefit the most from being able to produce food at home.

### **III. Municipal Codes: Legal Considerations and Developments**

Municipalities across America must address the need for up-to-date schemes for regulating backyard chickens, if they have not done so already, in consideration of the issues analyzed above. Every state grants broad authority to its cities and towns, allowing for the development of creative and localized solutions to the regulatory challenges facing communities.<sup>73</sup> Communities have used numerous tools to combat some of the potential negative consequences of residential chicken coops. At an earlier point in our nation's history, there were no municipal regulations on chickens at all, but different approaches have evolved over time. Contemporary efforts to craft prudent legislation for backyard chickens range from accessory use zoning to health code regulations, from vague and open-ended ordinances to outright bans. The potential impact on a community will vary depending on certain characteristics of the municipality. These factors

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<sup>72</sup> The Food Justice Movement is an attempt to connect the goals of sustainable agriculture with the idea that every person has an equal right to eat. See Kate Meals, Comment, *Nurturing the Seeds of Food Justice: Unearthing the Impact of Institutionalized Racism on Access to Healthy Food in Urban African-American Communities*, 15 SCHOLAR: ST. MARY'S L. REV. & SOC. JUST. 97, 111-12 (2012) (“[T]he food justice analysis embraces the concept that every person has a right to healthy and safe food, and that any risks or benefits related to food should be distributed fairly. Central to food justice is adequate access to food.”).

<sup>73</sup> Of course, cities and towns are limited to the authority granted to them by, and not preempted by, the state. Most states have enacted *Right to Farm* legislation. In the narrowest application, this implies that on land zoned for agricultural uses, residents are not restricted from producing food for sale. More broadly, a Right to Farm act may be interpreted to allow homeowners in residentially zoned areas to produce food for personal consumption. The federal government may also preempt the rights of a municipality to regulate food production. See *Wickard v. Filburn*, 317 U.S. 111 (1942) (citing the Commerce Clause as constitutional authority for Congress to enact laws limiting food production for personal consumption).

include population density, the sources of public and private drinking water, the presence of wildlife, the per capita income and income distribution of the local residents, the culture of the town or city, and the resources available to the municipality for enforcement. There is not one specific approach that can adequately balance all concerns facing a community; the correct response will utilize multiple regulatory tools. If future chicken coop regulation is going to be successful in meeting the needs of diverse communities with varied characteristics, municipalities must develop innovative approaches, providing creative solutions to aid in the responsible management of residential poultry enterprises.

**a. Historical Responses to Residential Chicken Concerns**

Prior to the advent of zoning laws in the United States, chicken coops were virtually unregulated on private property. While large-scale egg and poultry production became the norm in the beginning of the twentieth century, allowing for the shipment of fresh eggs and poultry without the need for a flock at home,<sup>74</sup> the birth of modern municipal regulation was also underway.<sup>75</sup> Even before the decline in popularity of backyard coops, residents who were harmed by irresponsible care of chickens had legal recourse in the form of nuisance claims. But zoning regulation provided a way for municipalities to protect residents preemptively: a homeowner need not bring a lawsuit if nuisance-related injury can be prevented before there is a problem.

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<sup>74</sup> See Pat McKnight, *Urban-chicken History*, URBANFARMONLINE.COM (last visited June 3, 2013), <http://www.urbanfarmonline.com/urban-livestock/chickens/chicken-history.aspx>; see also John Steele Gordon, *The Chicken Story*, Vol. 47 Iss. 5 AMERICAN HERITAGE (Sept. 1996) (describing the advent of the commercial chicken industry).

<sup>75</sup> See generally Martha A. Lees, *Preserving Property Values? Preserving Proper Homes? Preserving Privilege?: The Pre- Euclid Debate over Zoning for Exclusively Private Residential Areas, 1916-1926*, 56 U. PITT. L. REV. 367, 370-77 (providing background on the development of modern municipal ordinances).

### i. Nuisance Claims

Before zoning laws protected neighborhoods from problems related to raising chickens, private nuisance actions were available to any party with a claim against neighboring chicken coop owners who caused injuries.<sup>76</sup> For example, one could succeed on a nuisance claim that a neighbor contaminated a private water source with animal manure,<sup>77</sup> but the success of the claim likely depends on showing that there is actual contamination and that reasonable precautions to avoid contamination were not taken by the chicken coop operator.<sup>78</sup> A homeowner is at a distinct disadvantage if there is no regulatory mechanism for preventing the contamination

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<sup>76</sup> *Id.* at 371 (“The common law of nuisance, which serves to separate noxious land uses from non-offensive ones, and restrictive covenants, deed provisions limiting or prohibiting certain land uses, were used to control development throughout the nineteenth century.”).

<sup>77</sup> *See* *Ball v. Nye*, 88 Mass. 582, 584 (1868) (holding, in an exceptionally brief opinion reprinted below, that someone who knowingly contaminates the water supply of a neighbor with animal manure is liable for damages under a nuisance claim).

To suffer filthy water from a vault to percolate or filter through the soil into the land of a contiguous proprietor, to the injury of his well and cellar, where it is done habitually and within the knowledge of the party who maintains the vault, whether it passes above ground or below, is of itself an actionable tort. Under such circumstances the reasonable precaution which the law requires is, effectually to exclude the filth from the neighbor's land; and not to do so is of itself negligence. In the present instance, there was no pretence of a sudden and unavoidable accident which could not have been foreseen or guarded against by due care. The percolations appear to have been constant, and their existence to have been known to the defendant. The instructions asked for by his counsel were liable to mislead the jury, and those given were exactly accurate and appropriate to the case.

*Id.*

<sup>78</sup> *See* *Smart v. Sokolski*, 2009 WI App 77, 319 Wis. 2d 233, 769 N.W.2d 572.

After seeing evidence of runoff, the department advised the Sokolskis to graze their animals away from a pond that straddles both properties. The Sokolskis entered into a program to install a runoff control system and to maintain a vegetation buffer. The court found that these efforts “appear to have adequately addressed the issues of potential well contamination and water runoff. There is no evidence upon which the court can conclude that something more or something different should be required of the Sokolskis to address those issues.”

*Id.*

before it happens, and when a community relies solely on the court system for enforcement against common nuisances, there is a cost to judicial efficiency. For these reasons, nuisance claims are often an inadequate and inefficient regulatory response. Also, monitoring water quality may be prohibitively expensive, so many homeowners may never even be aware that their drinking water supply has become contaminated. Private nuisance claims are a powerful tool for an injured property owner, but a preemptory system of regulation can alleviate the pressure on the court system and can be useful to preventing injury in the first place.

## ii. Early Municipal Ordinances

Regulating nuisances through municipal ordinances became commonplace during a period when raising agricultural animals in neighborhoods was considered an unsanitary “pig in the parlor,” inappropriate for residential areas.<sup>79</sup> In 1917, the town of Van Buren, Arkansas, had enacted an ordinance prohibiting the act of allowing chickens to roam freely.<sup>80</sup> The ordinance was challenged as being beyond the power of the municipality because it did more than regulate an activity that is always a nuisance; it went so far as to declare a *per se* nuisance of “the running at large of fowls,” which is only a nuisance when harm is caused to people within the town.<sup>81</sup> The ordinance was upheld,<sup>82</sup> as were other similar ordinances of the time.<sup>83</sup> Since this time,

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<sup>79</sup> The New Mexico Supreme Court, for example, upheld an ordinance from 1939 that banned livestock in residential areas. *See Mitchell v. City of Roswell*, 111 P.2d 41, 43 (N.M. 1941) (“We would be reluctant to disagree with Roswell's local authority . . . regarding the reasonableness of its public health regulations, and will not do so unless it is plain and palpable that there is no real or substantial relation between the ordinance and its object.”).

<sup>80</sup> *See Merrill v. City of Van Buren*, 125 Ark. 248 (1916) (upholding the municipal ordinance), *available at* <http://opinions.aoc.arkansas.gov/weblink8/0/doc/203589/Electronic.aspx>.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 255 (“The question is whether the city has the power by ordinance to prevent the running at large of these fowls over the premises of others, and we think it possesses this right, and that

municipal regulators have developed a variety of regulatory tools that help cities and towns to control nuisances, and now those tools are used to control the keeping of chickens in residential areas.

### **b. Contemporary Regulation of Residential Chicken Coops**

In cities and towns across the country, an amalgam of approaches attempt to ensure that chicken coops are managed responsibly without causing harm to residents. Some of these approaches can be effective when carefully crafted to meet the needs of the municipality, while some approaches fail to provide clear guidance to those who wish to raise chickens at home.

#### **i. Accessory Uses**

Chicken coops are commonly regulated as accessory uses. A typical zoning ordinance will define an accessory use as:

A use which is customarily incidental and subordinate to the principal use of a structure or lot, or a use which is not the principal use, but which is located on the same lot as the principal structure, provided said accessory use is permitted in that District under this Ordinance. Accessory uses shall be interpreted as not exceeding forty (40) percent of the area of the total use of the structure and/or lot on which is located.<sup>84</sup>

Chicken coops are not automatically considered a proper accessory use unless specified as such in a zoning ordinance; because the local food movement has only emerged in recent decades,

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the ordinance in question is a valid exercise of the right given to cause any nuisance to be abated.”).

<sup>83</sup> See, e.g., *Adams Bros. v. Clark*, 224 S.W. 1046, 1050 (Ky. 1920) (upholding a similar ordinance in Smithland, Kentucky).

<sup>84</sup> NORTHAMPTON, MA., ZONING DEFINITIONS, CODE § 350-2 (2013), available at <http://ecode360.com/13265306>.

town laws that have been in place did not contemplate residential chicken coops as a customary accessory use, and so municipal regulations must specifically address chicken coops before they will be permitted *as of right*.<sup>85</sup>

Typically, any accessory structure is under the authority of a building commissioner. The office of the commissioner can provide a city or town with an effective tool to control backyard chickens. The municipality may wish to require permits and inspections in the event that the operation of a residential chicken coop has generated complaints. In this manner, the city may guard against many of the environmental and other harms that are potentially caused by the backyard chickens, including requiring minimum space allocations, minimum setback requirements from dwellings, and minimum construction standards. The construction standards may be crafted to provide adequate safeguard against predators in addition to sanitary, aesthetic, and animal welfare concerns that may be of concern to a particular community.<sup>86</sup> Regulation of the size and setbacks of chicken coops provides solutions to some of the concerns that arise in neighborhoods, but other regulatory measures are required in order to ensure responsible backyard chicken management.

## **ii. Pets**

In some city or town codes, chickens will appear under a section regulating *pets*. It is appropriate to include all animal regulations in the same part of the code to help residents find the information when contemplating the applicable local requirements, but generally, chickens

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<sup>85</sup> De Benedetti v. River Vale Twp., Bergen County, 21 N.J. SUPER. 430 (App. Div. 1952).

<sup>86</sup> Among other specifications, it is recommended that a coop provide at least “four square feet per bird if birds are able to roam freely during the day, and at least ten square feet per bird if they are permanently confined.” THE MY PET CHICKEN GUIDE TO CHICKEN CARE, Chapter 5, <http://www.mypetchicken.com/backyard-chickens/chicken-care/chapter-5-chicken-coop-requirements.aspx>.

are not considered pets in the same way that dogs and cats are.<sup>87</sup> Usually, licensing requirements for pets do not extend to chickens, and when they do, usually not to individual birds.<sup>88</sup>

In some cases where the regulations are particularly permissive, the regulation of pets may provide helpful restrictions on how residents are allowed to maintain chickens on their property. The town of Amherst, New Hampshire, for example, explicitly allows its residents the “right to farm” in its zoning ordinance.<sup>89</sup> Effectively, all residents may take part in any type of food production without limitation.<sup>90</sup> The ordinance with respect to domestic animals specifically mentions poultry, however, and provides general animal control regulations for pet birds.<sup>91</sup> Therefore, a city or town that wishes to permit inhabitants of residential areas to produce their own food can still regulate for animal welfare by characterizing the livestock as pets under the municipal code. By regulating chickens as pets, a municipality can address issues of abuse, abandonment, and neglect.

### iii. Health Code

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<sup>87</sup> See *Lawrence v. Zoning Bd. of Appeals of Town of N. Branford*, 158 CONN. 509, 514 (1969) (upholding a zoning board decision that chickens and goats are farm animals and do not fit within the definition of *accessory uses* contemplated by the town ordinance).

<sup>88</sup> Bremerton, VA requires that residents obtain a license to have chickens, but individual chickens do not need to be licensed separately. *Animal Licensing*, CITY OF BREMERTON OFFICE OF THE CITY CLERK (last visited Mar. 31, 2013), <http://www.ci.bremerton.wa.us/display.php?id=1134>.

<sup>89</sup> TOWN OF AMHERST, NH, ZONING ORDINANCE, § 3.12, *available at* <http://amherstnh.gov/wp-content/uploads/2010/09/Sec-A-Zoning-Ord-2013.pdf>.

<sup>90</sup> *Id.*

<sup>91</sup> TOWN OF AMHERST, NH, DOMESTIC ANIMALS ORDINANCE, *available at* <http://amherstnh.gov/wp-content/uploads/rulesandregulations/DomesticAnimalOrdinance2005.pdf>.

The health code of a city or town provides another way to regulate backyard chickens. The emphasis on health may have benefits to the public, but also might fall short in terms of many residential concerns, like noise and animal control regulation. Cities and towns should coordinate health regulations with zoning and animal control regulations. Every municipality should consider, based on its particular geographic and demographic needs, whether annual inspections for compliance with health regulations are necessary. Where there is potential for great harm, specifically in highly populated areas where many residents have backyard chickens, annual inspections may be appropriate if not cost prohibitive.<sup>92</sup> Health regulations can help to mitigate the threat of water contamination, in addition to the potential for the spread of disease that may be spread by backyard chickens.

#### **iv. Vague Regulations and Bans**

Some cities and towns choose not to regulate backyard chickens at all, with zoning ordinances that fail to define whether accessory uses may include chicken coops.<sup>93</sup> Homeowners

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<sup>92</sup> In this respect, the Board of Health in Amherst, MA, has distanced itself from regulating chickens:

The Amherst Board of Health sees no significant risk to human health from properly maintained livestock or poultry facilities that might be implemented, by right, under the proposed changes to the bylaw. It is our understanding that the Municipal Animal Inspector has the authority under current state law (M.G.L. 129, Section 7) to address the health and well being of domestic animals and to insure that these facilities are properly maintained. As a result, we do not see a need for Board of Health regulations regarding livestock and poultry.

Report to Town Meeting, Article 9. Zoning Amendment – Accessory Livestock or Poultry (Planning Board), at 3 (Oct. 2010), *available at* <http://ma-amherst3.civicplus.com/DocumentCenter/Home/View/3957>.

<sup>93</sup> *See, e.g.*, TOWN OF AMHERST ZONING ORDINANCE, *supra* note 89. Many municipalities and even state governments are adopting *Right to Farm* acts, and the town of Sedgwick, Maine, has adopted the first ever Food Sovereignty Ordinance. This type of ordinance allows residents to pursue residential food production, free from any restraint. David Gumpert, *Here's a Way to Eliminate the Regulators and the Lawyers, and Build Community at the Same Time*, THE COMPLETE PATIENT (Mar. 8, 2013), <http://www.cornucopia.org/2013/03/heres-a-way-to-eliminate-the-regulators-and-lawyers-and-build-community-at-the-same-time-organize-and->

with residential chicken coops are free to interpret accessory uses to include backyard chicken coops, but when the ordinance does not guarantee that right, the building commissioner may find that housing chickens in a backyard is not a customary use in connection with a residence.<sup>94</sup>

Other zoning ordinances may be clear that raising chickens is a customary accessory use in a residential area, but may not be clear about the terms of that use, leaving residents to guess about the appropriate limitations: number of chickens, required size of coop, required distance from the home and from neighboring property, or the permissibility of roosters. The town of Upton, MA, explicitly allows for “the keeping of . . . poultry . . . principally for personal enjoyment or household use.”<sup>95</sup> Homeowners are free to build accessory chicken coops, but they may come

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declare-food-sovereignty-like-sedgwick-maine/. In Sedgwick, the ordinance even exempts residents from following state and federal law, but it is a controversial decision that promises to create significant tension between the town and other superseding regulatory bodies.

<sup>94</sup> It is likely that raising chickens for personal food production will not be considered a farming or agricultural use, and therefore will more likely be considered an accessory use:

The mere fact that a use is agricultural in character, a vegetable garden for example, does not convert the land into a farm. In assessing whether property is a farm, it is entirely appropriate to consider the scale of the activity. Applying the ordinance to the undisputed facts, we conclude that the defendants' stabling of their three horses does not constitute a farm and, accordingly, is not an agricultural use within the meaning of the ordinance.

Simmons v. Zoning Bd. of Appeals of Newburyport, 60 MASS. APP. CT. 5, 7 (2003).

But if a challenger can show that raising chickens is not a commonplace practice in the municipality, or that the keeping of pet chickens is not appropriate because of small lot size or exceptionally proximate neighbors, then it may not qualify as an accessory use. *Id.*

<sup>95</sup> TOWN OF UPTON, MA, ZONING BYLAW § 3.2.2(3), *available at* [http://www.upton.ma.us/Pages/UptonMA\\_webdocs/townbylaw/Zoningbylaw](http://www.upton.ma.us/Pages/UptonMA_webdocs/townbylaw/Zoningbylaw). Author Lauren Scheuer has raised chickens at her home in Upton and even published a book about her experience. LAUREN SCHEUER, *ONCE UPON A FLOCK: MY LIFE WITH SOULFUL CHICKENS* (2013); *see also* Jennifer Lord Paluzzi, *Upton Author's Memoir Chronicles Life Among Her Chickens*, MILLBURY DAILY VOICE (Mar. 1, 2013), *available at* <http://millbury.dailyvoice.com/neighbors/upton-authors-memoir-chronicles-life-among-her-chickens>.

across resistance if neighbors complain that there are too many chickens or that they are not housed properly.

Other cities and towns have outright bans on residential chicken coops. In Boston, the municipal code prohibits the ownership of “any live fowl or other farm animals” unless permitted by the Division of Health,<sup>96</sup> and the Division of Health only grants permits to licensed food establishments.<sup>97</sup> Essentially, all residential chicken ownership is precluded in Boston.<sup>98</sup> This approach denies residents the many benefits of raising backyard chickens.<sup>99</sup> A complete ban is one way for a municipality to protect residents from the harmful impact of irresponsible practices in raising chickens, but the ban is difficult to enforce and might have the effect of encouraging the *unregulated* ownership of chickens.<sup>100</sup> An outright ban may be an irresponsible municipal approach.

Similarly, vague regulations do not foster a culture of responsible chicken ownership and stewardship. An ideal ordinance in a small suburban town like Upton or a major metropolis like Boston will clearly inform residents of their responsibilities with regard to backyard chickens, and will also provide a mechanism for monitoring and enforcing its provisions. A limit on the

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<sup>96</sup> BOSTON, MASS., MUNICIPAL CODE, Ch. 16, § 1.8A, *available at* [http://www.amlegal.com/nxt/gateway.dll/Massachusetts/boston/cityofbostonmunicipalcode?f=templates\\$fn=default.htm\\$3.0\\$vid=amlegal:boston\\_ma](http://www.amlegal.com/nxt/gateway.dll/Massachusetts/boston/cityofbostonmunicipalcode?f=templates$fn=default.htm$3.0$vid=amlegal:boston_ma).

<sup>97</sup> *The Division of Health Inspections*, CITYOFBOSTON.GOV (last visited Mar. 31, 2013), <http://www.cityofboston.gov/isd/health/>.

<sup>98</sup> Matt Rocheleau, *Boston Denies Backyard Chicken-Raising Request; Councilor to Explore Issue Further*, BOSTON.COM (Jul. 12, 2011), [http://www.boston.com/yourtown/news/roslindale/2011/07/boston\\_denies\\_chicken-raising.html](http://www.boston.com/yourtown/news/roslindale/2011/07/boston_denies_chicken-raising.html).

<sup>99</sup> *See supra*, Part I.

<sup>100</sup> *See* Rochelau, *supra* n.98. Ms. Karp housed her chickens for a year before being notified by animal control officials that she is in violation of city law.

number of chickens allowed in a residential coop, in addition to guidance about coop maintenance, could benefit the town of Upton by protecting the health of town residents and the chickens' right to humane treatment. A revision to Boston's zoning code could allow a small number of hens to be kept in residential plots with sufficient space for a compliant coop, and could require a permit for installing a coop, which would allow city officials a way to keep track of and monitor residents who raise chickens.

#### **v. Slaughter Provisions**

Another way that many cities and towns restrict backyard chicken operations is to ban the slaughter of livestock on residential property or to enact strict requirements for mobile slaughterhouses<sup>101</sup> that keep the improper and unsanitary slaughter of chickens from occurring on residential property.<sup>102</sup> There are some benefits to a community by disallowing slaughter in residential districts, like preventing inexperienced urban dwellers from engaging in unsanitary or otherwise inappropriate practices.<sup>103</sup>

#### **vi. Building Permits**

Under most zoning ordinances, a building permit will be required for erecting a chicken coop as an accessory use. This requirement may mean that a building or health inspector will visit the home after the coop is built to ensure compliance. This kind of mandatory inspection may have

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<sup>101</sup> Marcia Passos Duffy, *Going Mobile: Poultry Slaughterhouse Rolls into Vermont*, FARMING MAGAZINE (Feb. 2009) ("There's always been small mobile slaughterhouses that cater to backyard poultry operations in Vermont and elsewhere."), available at <http://www.farmingmagazine.com/article-2801.aspx>.

<sup>102</sup> See Jaime Bouvier, *Illegal Fowl: A Survey of Municipal Laws Relating to Backyard Poultry and A Model Ordinance for Regulating City Chickens*, 42 ENVTL. L. REP. NEWS & ANALYSIS 10888, 10895 (2012) (citing NEIGHBORS OPPOSED TO BACKYARD SLAUGHTER, <http://noslaughter.org> (last visited Mar. 30, 2013)) (justifying bans on slaughter by concerns about sanitation and the exposure of children to gruesome practices).

<sup>103</sup> *Id.*

a chilling effect on keeping backyard chicken coops, because the permits will often cost some money, and may in fact be very expensive for a municipality to implement, especially where inspections are routine. Property owners may feel vulnerable and wish to circumvent the law, in particular people in low-income areas or people who may otherwise believe they may be in violation of local regulations.

Often, the permitting fee is relatively inexpensive, especially in relation to the costs associated with building a chicken coop.<sup>104</sup> Regulators will not typically perform inspections on every chicken coop in more populous cities and towns, responding with a site visit only when there are complaints sufficient to warrant inspection. This approach is less invasive than inspecting every yard that applies for a permit, and will be less expensive to implement for both residents and the municipality.

Concerns regarding the harmful potential impacts of urban and suburban backyard chickens have been addressed with a variety of approaches in different cities and towns, and no model ordinance would encompass the ideal choices for every municipality. Considerations such as population, culture, socioeconomics, wildlife and ecology, and health concerns should all inform the decisions of regulatory bodies.

### **c. New Regulatory Approaches for a Growing Practice**

#### **i. Planning**

The preparation of a thorough report can aid the lawmakers in a city or town that wishes to update its regulation of backyard chicken coops. The planning board in the city of Manchester,

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<sup>104</sup> In Northampton, MA, the permit fee is \$25.00. *Accessory Structure Permit Application*, CITY OF NORTHAMPTON (last visited Mar. 31, 2013), <http://www.northamptonma.gov/building/uploads/listWidget/9935/Noho%20Shed%20Permit%20App.pdf>.

New Hampshire prepared a progressive report for the benefit of the city legislators.<sup>105</sup> It includes a draft of an ordinance that regulates chickens as a *specific use* permitted as of right, and is entitled “The Keeping of Chickens as Pets.”<sup>106</sup> In addition to specifically requiring compliance with the regulations regarding “Cruelty to Animals,” the draft legislation includes a minimum lot size, a limit of six hens, a prohibition on roosters, a prohibition on slaughtering, and standards for coop construction.<sup>107</sup> Also included in the report is a comparison of the regulation of backyard chickens in several New England municipalities.<sup>108</sup> Multiple complete municipal ordinances related to chicken coops are also included for reference,<sup>109</sup> followed by another complete report that was prepared by the Town of Cary, North Carolina.<sup>110</sup>

Notably absent from the report is the inclusion of setback requirements from private water sources. This is in contrast with the regulations for the City of Bremerton, Washington, which requires coops to “be set back one hundred (100) feet from any public or private well.”<sup>111</sup>

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<sup>105</sup> See *Agenda*, MANCHESTER, NH COMMITTEE OF ADMINISTRATION/INFORMATION SYSTEMS, at 28 (Feb. 19, 2013), available at [http://www.manchesternh.gov/website/Portals/2/Departments/city\\_clerk/agendas\\_and\\_minutes/admin\\_info\\_systems/2013-02-19\\_ADMINISTRATION\\_WITH\\_ATTACHMENTS.PDF](http://www.manchesternh.gov/website/Portals/2/Departments/city_clerk/agendas_and_minutes/admin_info_systems/2013-02-19_ADMINISTRATION_WITH_ATTACHMENTS.PDF).

<sup>106</sup> *Id.* at 29.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 32. This comparative chart provides a look at the details of regulations in several municipalities, including required minimum lot size, maximum number of chickens allowed, the question of whether roosters are allowed, and the question of whether permits are required. The population of each municipality is included to help explain the differences. *Id.*

<sup>109</sup> *Id.* at 33-45.

<sup>110</sup> *Id.* at 46-54.

<sup>111</sup> BREMERTON, WA MUNICIPAL CODE, Ch. 7.06 (2012), available at <http://www.codepublishing.com/wa/Bremerton/html/Bremerton07/Bremerton0706.html#7.06>.

Bremerton also requires its residents to renew licenses on an annual basis, thereby affording the municipality an opportunity to monitor and review the regulatory compliance of the applicant.<sup>112</sup>

Comprehensive planning allows municipalities the opportunity to develop regulations that are closely tailored to the needs of the community. By studying what potential problems the city or town may face because of local backyard chickens, and by learning from the collective wisdom of municipal legislators across the country, a municipal ordinance can find the optimal balance between encouraging a practice that provides many benefits to resident families and ensuring that citizens are responsible in how they participate.

## **ii. Education and Exams**

Today, typical urban and suburban residents do not generally have experience with raising animals for agricultural production. Fortunately, for anyone who hopes to keep a healthy flock of chickens at home, many educational workshops are available to help people learn.<sup>113</sup> The town of Hopewell, New Jersey, has provided residents with a brief guide on responsible backyard chicken management,<sup>114</sup> but municipalities can do more to be involved with educating

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<sup>112</sup> *Id.*

<sup>113</sup> Examples include *Count Your Chickens* in Hendersonville, North Carolina, hosted by the Environmental and Conservation Organization; *Backyard Chicken Workshop* in Geyserville, California, hosted by Nick Rupiper and Preston Farm & Winery; and *Suburban Homesteading* in South Brunswick, New Jersey, hosted by the Rutgers Cooperative Extension. See *ECO to Hold Backyard Chicken Rearing Workshop*, MOUNTAINXPRESS (June 4, 2013), <http://www.mountainx.com/article/50408/ECO-to-hold-backyard-chicken-rearing-workshop>; *Backyard Chicken Workshop*, WELCOME TO GEYERSVILLE (May 17, 2013), <http://geyserville.towns.pressdemocrat.com/2013/05/photos/backyard-chicken-workshop>; *Rutgers 'Suburban Homesteading' Classes Help Residents Embrace Garden State Roots*, MYCENTRALJERSEY.COM (June 5, 2013), <http://www.mycentraljersey.com/article/20130605/NJNEWS/306050025/Rutgers-Suburban-Homesteading-classes-help-residents-embrace-Garden-State-roots>.

<sup>114</sup> Residential Animal Agriculture Subcommittee, *Frequently Asked Questions Regarding "Standards for Keeping Chickens,"* HOPEWELL TOWNSHIP GENERAL ORDINANCES, at 2 (May 3, 2011), [http://www.hopewelltp.org/FAQ\\_Standards\\_for\\_Keeping\\_Chickens.pdf](http://www.hopewelltp.org/FAQ_Standards_for_Keeping_Chickens.pdf).

citizens who would like to know more about keeping chickens at home. It is not unusual for states to require education for participation in certain activities, like driving,<sup>115</sup> caring for foster children,<sup>116</sup> or holding professional licenses.<sup>117</sup> To some people, compulsory adult education may seem to be an abuse of municipal authority, but it is settled that states have the right to compel education before permitting certain activities.<sup>118</sup> Municipalities could condition licenses to raise chickens on education requirements, thereby encouraging responsible chicken coop management and disseminating information about local laws. The cost to residents of taking required courses could be offset by contributions by the municipality or by the elimination of licensing fees. Mandatory education is likely more cost effective than enforcement where residents are not knowledgeable about raising chickens or about local laws.<sup>119</sup>

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<sup>115</sup> See, e.g., TEX. TRANSP. CODE ANN. § 521.1601 (West, 2010) (mandating drivers education for first-time adult drivers license applicants).

<sup>116</sup> See, e.g., Wash. Admin. Code § 388-148-0520 (2001) (requiring training for foster parents).

<sup>117</sup> See generally John S. Roth, *Is Mandatory Continuing Legal Education Valid Under the United States Constitution? Verner Vision and the Rationally Related Competence Connection-A Fortiori or A Lot of Alliteration?*, 11 WHITTIER L. REV. 639, 640 (1989) (discussing the constitutionality of state requirements for continuing professional education).

<sup>118</sup> See *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972) (There is no doubt as to the power of a State, having a high responsibility for education of its citizens, to impose reasonable regulations for the control and duration of basic education.); *but cf.* Martin H. Redish & Kevin Finnerty, *What Did You Learn in School Today? Free Speech, Values Inculcation, and the Democratic-Educational Paradox*, 88 CORNELL L. REV. 62, at Part I.B (2002) (insisting that there is a constitutional limit to the degree to which a state can compel adult education).

<sup>119</sup> Such an endeavor by a municipality would necessarily be experimental. It is impossible to know if education would be a cost-effective form of regulation. See Robert S. Alder R., *Cajolery or Command: Are Education Campaigns an Adequate Substitute for Regulation?*, 1 YALE J. ON REG. 159, 184 (1984) (suggesting that policymakers tend to believe educational programs are not as costly as they are in actuality, calling into question the effectiveness of educational programs in place of regulatory measures).

Alternatively, for residents who are experienced or knowledgeable, municipalities could test citizens who wish to bypass educational requirements. Again, compulsory examinations for adults may seem unusual, but it is not unprecedented. For example, the state of California requires residents to pass a firearms safety test before they can acquire a license to carry a gun.<sup>120</sup> A program that ensures citizens are well-educated on responsible practices and familiar with local regulations will benefit from higher levels of compliance and reduced enforcement costs. Municipalities in the future might want to follow the example of Hopewell, New Jersey, and implement regulatory schemes that incorporate education and testing into the licensing procedures for citizens who keep chickens in residential areas.

#### **IV. Conclusion**

General zoning ordinances have provisions that address sound, noise, and aesthetics nuisances on behalf of residents, and also animal welfare and health concerns. Even where there is not any legislation limiting chicken ownership, these rules still apply. In towns like Amherst, New Hampshire, general regulations are deemed sufficient, and limitations are considered an undue violation of the local right to produce food.

Many places have structural requirements for coops, as well as limits on number and sex of chickens. These limitations may be appropriate for some communities, but they create barriers to entry for people of little economic means. It can be cost-prohibitive to build a compliant coop, and permit costs can also prevent certain people from being able to afford to follow the law when raising backyard chickens. The complete ban on roosters can be harmful to families who wish to use roosters for meat or for breeding, making it even less likely that raising chickens will

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<sup>120</sup> CAL. PENAL CODE § 31640 (West, 2012).

be cost-effective. Prohibitions on slaughtering chickens also reduce the economic benefits that accompany chicken cultivation.

Regulations are often insufficient in protecting water quality for people who live in places where private groundwater sources are common. Furthermore, it is not common for cities to take initiative in educating the public about proper care and management of a residential chicken coop. Efforts to ensure residents know how to mitigate problems related to noise and efforts to instruct residents on sanitary and safe slaughtering processes may be preferable to regulatory limitations in communities where chickens are raised as an affordable way to improve the family diet. Progressive measures to these ends would enable families to engage in the practice of raising chickens while minimizing harm to residential areas. As the practice of raising backyard chickens becomes more common, municipalities will benefit from developing robust plans for addressing community concerns and maximizing access to residents eager to engage in this form of local food production.