

Toward Sustainable Landscapes: Restoring the Right NOT to Mow

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Introduction

There are 40.5 million acres of lawn in the United States.¹ According to the EPA, the average American family uses 320 gallons of water per day, of which about 30 percent is slated for outdoor uses.² Nationwide, landscape irrigation totals nearly 9 billion gallons per day, with individual homeowner usage much higher in the arid West.³ Furthermore, water-dependent turf grass is exceedingly common. A recent study by NASA revealed that turf grass is now the single largest irrigated crop in the United States, surpassing even irrigated corn acreage.⁴ Every year, Americans use 200 million gallons of gasoline for lawn equipment, and one hour of lawn mower use emits 11 times the amount of pollution of a new car.⁵ Finally, over 70 million pounds of pesticides are applied to turf grass lawns each year in the United States, which can run off lawns and contaminate lakes and rivers.⁶ With excessive water, pesticide, and gasoline usage, many Americans are looking to cut back on the use of turf grass in their landscaping.

Given the detrimental environmental impacts that can result from traditional turf grass installation and maintenance, some have joined the “No Mow” movement, which considers alternatives to fast-growing turf lawns that require resource-intensive maintenance. A homeowner can reduce the environmental impact of turf grass by implementing No Mow in whole or in part. There are several benefits to a No Mow regime. First, No Mow reduces water usage substantially. Especially in arid western states, alternative landscaping is gaining attention and momentum for this exact reason.

¹ Milesi, Cristina, et al. "Mapping and Modeling the Biogeochemical Cycling of Turf Grasses in the United States" *Environmental Management* 36.3 (2005): 426-438.

² <https://www3.epa.gov/watersense/pubs/outdoor.html>

³ *Id.*

⁴ <http://www.isprs.org/proceedings/XXXVI/8-W27/milesi.pdf>

⁵ ENVIRONMENTAL PROTECTION AGENCY (EPA), LANDSCAPING WITH NATIVE PLANTS FACTSHEET. Available at <https://archive.epa.gov/greenacres/web/html/factsht.html>.

⁶ ENVIRONMENTAL PROTECTION AGENCY (EPA), LANDSCAPING WITH NATIVE PLANTS FACTSHEET. Available at <https://archive.epa.gov/greenacres/web/html/factsht.html>.

Second, residential development causes habitat fragmentation for wildlife, but No Mow can work to mitigate this problem by recreating more diverse natural environments. Third, there are benefits for the soil and ecosystem. No Mow reduces pesticide use and promotes native instead of potentially invasive non-native plants. Finally, No Mow reduces emissions, as fuel is no longer needed for lawnmowers and other fuel-powered landscaping equipment.

This paper analyzes legal obstacles that may prevent homeowners from implementing various forms of No Mow. Local weed ordinances and nuisance laws reinforce conformity to a suburban landscape of traditional mowed turf grass. While our research identified four different forms of No Mow policies, each presents different implementation challenges and benefits. This paper discusses each of the four forms of No Mow and how they interact with existing nuisance ordinances. We also make policy recommendations on how best to facilitate each of these forms of No Mow on the local and state level. The four forms are: (1) naturalized (unmowed) turf grass; (2) low-growing turf grasses; (3) native/naturalized landscaping without turf; and (4) edible plant production. Proper implementation of these practices in any portion of a yard can reduce the environmental impact of a traditional turf grass lawn.

We begin our paper by discussing the role of the police power and nuisance laws in the regulation of lawns to achieve health, safety, and aesthetic objectives. We also explore the prevalence of homeowner associations and their role in enforcing norms and certain aesthetics of turf grass. Then we discuss the four forms of No Mow, the opportunities and challenges for implementing each of those forms, and policy recommendations for how best to integrate them into existing nuisance regimes. Finally, we include a sample local ordinance that local governments can enact to allow various forms of No Mow and protect responsible property owners from legal action.

The police power

States and local governments possess police power. The police power is broad and sweeping and enables state governments to “establish and enforce laws protecting the public's health, safety, and general welfare, or to delegate this right to local

governments.”⁷ In practice, police power actions often take the form of regulating private property, subject to certain due process concerns and eminent domain doctrine. As long as the actions of a state and local government are reasonably related to a legitimate governmental goal and satisfy the requirements of due process, courts are unlikely to find such actions unconstitutional. “Reasonably related” is a very low threshold for states to satisfy, and legitimate governmental goals are broadly understood by the courts. Under a “reasonably related” test, a court will assume a law is valid unless the challenger can prove that the law has no reasonable relation to the legitimate governmental goal. In the case of *No Mow*, aesthetic regulation is considered a valid goal. The Supreme Court established this in *Berman v. Parker*, and has subsequently affirmed this principle in later cases.⁸

In *Berman*, the Court established two important principles upon which aesthetic regulation of lawns can rest. First, it validated regulation based purely on visual concerns, when it stated, “It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.”⁹ In the decades since *Berman*, the Court has ruled several times to reaffirm the ability of state and local governments to regulate on the basis of aesthetics, further entrenching the *Berman* principle.¹⁰ Second, it expressed the deference given to the legislature when it uses the police power. “Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation....”¹¹ In subsequent cases, *Berman* is touted as granting state and local governments the authority to enact a whole host of legislation regulating private property for purely aesthetic reasons.

Nuisance Laws

⁷ “Police Power,” Black’s Law Dictionary (10th ed. 2014).

⁸ 348 U.S. 26 (1954).

⁹ 348 U.S. at 33, (1954).

¹⁰ See, e.g., *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978) (finding that no taking exists when New York City aesthetically regulates property owners on the basis a property’s historic status, as defined by city ordinance).

¹¹ 348 U.S. at 32, (1954).

Nuisance laws regulate private property through the police power. The common law principle behind nuisance is that private property owners should, as much as is practicable, internalize the externalities created by their property.¹² Early nuisance cases were concerned with pollution, both air and water, and a nuisance was defined and determined by courts. However, in the past century, municipalities have encoded nuisance concepts into actual legislation, defining the terms of a nuisance by statute. The majority of nuisance regulations are concerned with health and safety, although they do regulate aesthetic concerns as well.

Throughout the United States, most municipalities regulate a maximum height of turf grass somewhere between eight and twelve inches under their nuisance laws¹³. Many of these local governments cite concerns about fire safety, rodent control, noxious weeds, and dangerous refuse as the reasons for their nuisance regulations around turf grass.¹⁴ Even if aesthetic concerns were considered invalid justifications by courts (which they are not, as *Berman v. Parker* establishes), safety considerations are still valid under the police power, as there may be legitimate health and safety concerns connected to traditional turf that is left unmowed. Tall grass can become a fire hazard or attract vermin and pests.¹⁵ In cases where turf grass is determined to be a nuisance, the city can take action itself to rectify any non-compliant conditions in or on the lawn, and this is often charged to the owner of the land after the fact.

Successful Challenges

¹² See, e.g., *Campbell v. Seaman*, 63 N.Y. 568 (1876).

¹³ The USDA maintains a list of federally classified noxious weeds, as do many states. The USDA noxious weed list can be found here: <http://plants.usda.gov/java/noxious>

¹⁴ Bakersfield, CA provides: “It is unlawful and is declared a public nuisance for any person owning, leasing, occupying or having charge or possession of any property in the city to maintain such property in such manner that any of the following conditions exist thereon, except as may be allowed by Title 17 of this code: [...] D. Overgrown, dead, decayed, diseased or hazardous trees, weeds and other vegetation: 1. Likely to attract rats, vermin and other nuisances; or 2. Constituting a fire hazard; or 3. Dangerous to public safety and welfare.” BAKERSFIELD MUNICIPAL CODE, 8.27.010. Available at <http://www.qcode.us/codes/bakersfield/>.

¹⁵ See, e.g., Kent City Code stating that homeowners must “Remove all grass and weeds attaining a height of six (6) inches, except on property zoned agricultural, and all shrubs, bushes, trees or vegetation growing or which have grown and died which are a fire hazard or are infested with caterpillars or other horticultural pests, or which otherwise constitute a menace to the public health, safety or welfare.” KENT CITY CODE, 8.07.050. Available at <http://www.codepublishing.com/WA/Kent/>.

There are examples of cases where citizens successfully challenged nuisance regulations as applied to their landscaping. Successful challenges hinge on the health and safety concerns: if a landowner has unmowed grass, but there are no noxious weeds, garbage, or vermin, they may be successful. In *Little Rock, Arkansas v. Allison*, with the help of wildlife biologists as well as the testimony of the city weed inspector, Allison showed that her garden was neither noxious nor likely to attract vermin. On this evidence, the court dismissed the nuisance citation.¹⁶ Similarly, in *City of New Berlin v. Hagar*, Hagar successfully proved that his wildlife meadow did not create any of the safety concerns behind the city's nuisance regulations. Finding no violations of the safety concerns or effect on neighboring property values, the court dismissed the violation.¹⁷ Both of these challenges are from before 1990, and it is unclear whether or not they would be successful today as there are no more recent challenges. Furthermore, discussions about the aesthetic motives of an ordinance are not included in either of these cases. Neither of these cases was ever formally published or pursued at an appellate level, so one cannot cite to them as evidence of a trend or of the successful creation of new law. It is impossible to say if such reasoning would have held if the cities had chosen to appeal the decisions or if similar decisions would be reached in other jurisdictions. Given this uncertainty and the strength of the constitutional law on the issue, these few successful challenges cannot be read to indicate a trend.

Role of Homeowner Associations

Homeowner associations (HOAs) are corporations that make and enforce rules to manage properties within a designated community. Homeowners become members upon buying a lot within the community and often pay membership fees for upkeep of common areas. There are voting procedures among members for certain decisions, but most HOAs have a board of directors that has wide authority over rulemaking and rule enforcement. The number of properties in the United States belonging to a homeowner association is significant. Some groups estimate that around 20% of homes in the country are in

¹⁶ No. 89-10401, slip op. (Little Rock Mun. Ct. 1989).

¹⁷ No. 33582 (Wis. Cir. Ct. Waukesha Cty. Apr. 21, 1976).

homeowner associations,¹⁸ and since HOA agreements can regulate landscaping for homes within their communities, these agreements are relevant to our analysis of No Mow policy options.

Few HOA agreements are made widely available, as they are private business documents. But from the few agreements or templates for agreements we were able to access, we found common provisions concerning landscaping and lawn maintenance. Notably, many of these agreements have mechanisms to prevent or abate nuisance conditions that are similar to the nuisance provisions found in municipal codes described above. These agreements use vague language, prohibiting “unkempt”¹⁹ or “unsightly”²⁰ conditions, leaving discretion to the HOA board of directors or a subcommittee within the association to define these terms. The presence of this provision may be a tool for HOAs to ensure well-manicured landscapes to maintain property values, and as such, it may have the practical effect of preventing alternative landscaping within their communities. Moreover, many of these agreements involve the creation of a committee charged with making aesthetic decisions, thus giving a small group of individuals full discretion over interpretation of the terms regulating how landscaping must be maintained.

As effective fiduciaries, the decisions of an HOA’s board of directors are subject to the business judgment rule. The business judgment rule is a presumption in court that directors of corporations are acting in good faith, with full information and in the best interest of the company when they make business decisions. By making this assumption, courts put the onus on anyone who challenges the decision of the board to prove that it was, in fact, not acting in good faith – something that is notoriously difficult to do. In effect, the rule is a sort of defense for business against liability from bad but honest decision-making.^{21,22}

¹⁸ <http://www.citylab.com/housing/2013/02/tyranny-homeowners-associations/4731/>

¹⁹ For example, the Bedford Manor Subdivision set forth by Oakbrook Communities, LLC: <https://docs.google.com/spreadsheets/d/1OAn9SzFZeNDHPWNCrjipoANLbHswHtWWtXdDP2c9JA/edit#gid=1360561226>

²⁰ For example, the Faith Hollow HOA agreement: <https://www.gwinnettcountry.com/static/departments/hoa/pdf/Declaration2.pdf>

²¹ Goldberg, Jeffrey A. "Community Association Use Restrictions: Applying the Business Judgement Doctrine." *Chicago-Kent Law Review* 64.2 (1988): 653-684

²² Gwartzman, Randolph C. "Exception to the Levandusky Business Judgment Rule: Owner and Shareholder Interests in Condominium and Cooperative Board Decisions, An." *Cardozo Law Review* 14.Issues 3-4 (1992): 1021-1044.

In the case of HOAs, the business judgment rule is used to defend the discretion of the board of directors to make regulations and decisions for the community. For example, in the case of *Rywalt v. Writer Corp* in Colorado, the homeowner association's decision to build a tennis court was found in trial court to be made without proper consultation or participation of members, and the court ordered the association to halt construction. However, the Colorado court of appeals reversed that decision, citing the business judgment rule, stating that the board was acting in good faith and that the courts had no authority to interfere in their decision-making.²³

In Illinois, in the case *Yorkshire Village Community Association v. Sweasy*, a homeowner challenged a regulation that prohibited "structures" on his lot, arguing that a flower box is not a structure. The court used the business judgment rule to defend the association's right to "interpret its own declaration and restrictions."²⁴

Given that the application of the business judgment rule to HOA agreements is difficult to overcome, one policy option to allow landowners in HOAs to use alternative landscaping would be a local or state preemption law that voids any HOA regulations prohibiting certain acceptable forms of alternative landscaping. Alternatively, instead of constraining the terms of the HOA, a preemption law could also constrain the way an HOA interprets its own regulations so that terms of any existing HOA agreement could not be interpreted to prevent alternative landscaping. This type of preemption already exists in California to allow for edible plant production on private property. The 2014 California Law AB-2561, "Personal agriculture: restrictions", voids any provision of the governing documents of a homeowner's association that prohibits the use of a homeowner's front or back yard for personal agriculture. The law requires landlords to allow tenants to grow edible plant crops for personal use or donation. A similar policy strategy may help states encourage alternative landscaping on private property despite HOA agreements that may prevent it.

Four Forms of No Mow

²³ Goldberg, Jeffrey A. "Community Association Use Restrictions: Applying the Business Judgement Doctrine." *Chicago-Kent Law Review* 64.2 (1988): 653-684

²⁴ Goldberg, Jeffrey A. "Community Association Use Restrictions: Applying the Business Judgement Doctrine." *Chicago-Kent Law Review* 64.2 (1988): 653-684

We have identified policy options for four forms of No Mow: (1) naturalized (unmowed) turf grass; (2) low-growing turf grasses; (3) native/naturalized landscaping without turf; and (4) edible plant production.

Naturalized (Unmowed) Turf Grass

The first type of No Mow is naturalized (unmowed) turf grass, which entails a property owner ceasing to mow their lawn all together without necessarily replacing the traditional turf grass with any other form of landscaping. This is the form of No Mow most likely to fall afoul of nuisance regulations and HOAs. Unmowed lawns raise concerns about vermin, fire hazards, noxious weeds, and refuse.²⁵ After extensive research into local ordinances, we were unable to turn up any examples of state or municipalities affirmatively allowing for this form of No Mow, most likely as a result of the legitimate safety concerns associated with such landscaping.

One family outside of Alexandria, Ohio, practices and advocates for this form of No Mow, and is being pursued by their local municipality for nuisance violations.²⁶ The town expressed fear over snakes and vermin in their lawn. The homeowner acknowledges that her lawn attracts wildlife, which is for her, the benefit of practicing No Mow. The town and her neighbors see it differently. While she continues to battle her township on this issue, the law is not on her side.

Pursuing this form of No Mow may directly run afoul of nuisance laws, so a new legal framework may be needed to accommodate it. One option for facilitating naturalized turf grass is to create a permit regime. Permits could be granted on the basis of assurance that no noxious weeds or refuse are present. With a comprehensive permitting regime, homeowners could engage in No Mow while a municipality's concerns over health and safety are adequately addressed. A permit regime could ensure that homes on corners or intersections adhere to a height limitation for visibility purposes. Permits could also require documentation of the type of plants to be grown in the

²⁵ The USDA maintains a list of state and federal noxious weeds, which can be found at <http://plants.usda.gov/java/noxiousDriver>.

²⁶ Sarah Baker, "My township calls my lawn 'a nuisance.' But I still refuse to mow it," Washington Post, August 3, 2015, <https://www.washingtonpost.com/posteverything/wp/2015/08/03/my-town-calls-my-lawn-a-nuisance-but-i-still-refuse-to-mow-it/>.

unmowed region. Permits would also place an affirmative duty on the homeowner to ensure no refuse or fire hazards occur, with the city retaining the right to revoke a permit upon inspection. As it does require administrative oversight from the city, some jurisdictions may be unwilling to expend any resources to set up such a program, and then subsequently enforce permit terms and conditions.

Low-Growing Grasses

As opposed to fast-growing Kentucky bluegrass or Bermuda grasses that are typically found in American manicured turf lawns, low-growing grasses are bred and blended to require little or no mowing. Further, some blends are bred to be drought-resistant and require less watering. There are different blends of low-growing grass seed mixes that are designed for and marketed towards different areas of the country, based on differences in environmental conditions. Generally, these mixes utilize fescues or bentgrasses. These are species of grass that typically grow between 3 and 6 inches tall and naturally bend or fold over to create a meadow aesthetic.^{27,28}

Low-growing grasses do not violate most nuisance ordinances, provided that the property-owner continues to maintain their lawn to control for noxious weeds. However, since low-growing grass mixes have a noticeably difference appearance than the common American lawn, they may be subject to certain HOA agreements (described above) or other aesthetic-based regulations. This No Mow option includes the use of grasses (and thus is not a far departure from the typical American lawn), but the grass species used in low-growing mixes grow in a folded, meadow-like way that looks aesthetically different from typical turf grasses. Given this difference, a policy recommendation for this option is to provide a categorical exemption from both nuisance ordinances and HOA or other aesthetic-based regulation. This type of exemption is included in our model ordinance below in Appendix A of this report.

Native / Naturalized Landscaping Without Turf - Natural Landscaping

²⁷ <http://wildones.org/download/wantnomow/wantnomow.html>

²⁸ <http://www.garden.org/subchannels/care/seeds?q=show&id=2459>

Natural landscaping refers to the practice of replacing turf grasses with an alternative yard landscape that consists predominantly of plants native to that region. This approach seeks to minimize the use of water, fertilizers, and pesticides. Natural landscaping has the potential to realize all of the environmental goals outlined at the start of this paper: reduction in water use, stormwater management, decreased habitat fragmentation for animals, etc. Other terms for natural landscaping include conservation landscaping and native gardening.²⁹

Whereas the height of low-growing grasses is fully consistent with typical nuisance laws, natural landscapes often utilize plants taller than grass height limits in those laws. The mere fact that such landscapes look different than traditional lawns to which people are accustomed might cause citizens to report them as nuisances. This means that in order to ensure natural landscaping is available to private landowners, new ordinances may need to be enacted and/or traditional nuisance laws be modified.

There are several possible policy approaches for implementing natural landscaping at a municipal level. First, an entirely new ordinance could be passed that affirmatively protects natural landscaping as a matter of right. Second, a municipality could pass a new ordinance that institutes a permitting regime for naturally landscaped yards that would otherwise violate local nuisance laws. Third, the municipality could modify the existing weed or nuisance laws in order to protect natural landscaping by right or establish a permit regime. St. Louis Park, MN, is an example of a municipality that chose to modify their vegetation laws in order to create a natural landscaping permit system.³⁰ Fourth, the municipality could modify existing nuisance and vegetation laws to remove possible legal barriers to natural landscaping without endorsing it specifically. If a municipality wants to provide the strongest legal support for natural landscaping and the most certainty to landowners who want to engage in natural landscaping projects, the municipality should protect it as a matter of right.

Case Example: Montgomery County, Maryland

²⁹ A related technique is called “xeriscaping.” This is a kind of natural landscaping that focuses primarily on reducing water use. Native plants are often used.

<http://www.denverwater.org/Conservation/Xeriscape/XeriscapePlans/>

³⁰ <http://www.stlouispark.org/webfiles/file/city-code/Ch34Vegetation.pdf>

Montgomery County, Maryland, represents an interesting, and rare, case example of a municipality that strongly supports natural landscaping as a method for achieving environmental goals. But part of what makes Montgomery County particularly interesting is that their attitudes toward natural landscaping have radically evolved over time.

In the 1987 case *Montgomery County, Maryland v. Stewart*,³¹ the County issued the Stewart family a citation finding their natural landscaped lawn in violation of the County's weed ordinance.³² The Stewarts provided evidence to the court that, contrary to the County's assertions, the lawn did not contain any dangerous vermin or noxious weeds. Because they were able to demonstrate that their lawn did not threaten the health and safety of neighboring residents, the County decided to drop the charges. In response, the County modified its weed ordinance to allow meadows by right if a 15-foot land buffer was placed on all sides and if noxious weeds were controlled.³³

Over time, Montgomery County has shifted to viewing natural landscaping as an important method for managing stormwater and preventing drainage problems. In 2004, the County created a rebate program called RainScapes to encourage natural landscaping on private residential and commercial properties. The program has been lauded as highly successful, with over 50 acres of land converted to natural landscaping in its 12-year span.³⁴ RainScapes offers a direct cash rebate to private landowners who voluntarily engage in natural landscaping projects on their property that are consistent with County standards. For example, residential properties must convert at least 250 square feet to a natural landscape, and at least 75% of the plants used must be native.³⁵ The rebate can be as much as \$2,500 for residential properties and up to \$10,000 for commercial properties.³⁶

³¹ *Montgomery County, Maryland v. Stewart*, SW-87-2056 (Montgomery County, Md. Circuit Court, 1987).

³² As Natural Landscaping Takes Root We Must Weed Out the Bad Laws - How Natural Landscaping and Leopold's Land Ethic Collide with Unenlightened Weed Laws and What Must Be Done about It, 26 J. Marshall L. Rev. 865 (1993).

³³ *Montgomery County, Maryland v. Stewart*, SW-87-2056 (Montgomery County, Md. Circuit Court, 1987).

³⁴ Interview with RainScapes Program Manager Ann English, Mar. 30, 2016.

³⁵ <http://www.montgomerycountymd.gov/DEP/Resources/Files/PostersPamphlets/Conservation-Landscaping-Techniques.pdf>

³⁶ <http://www.montgomerycountymd.gov/DEP/water/conservation-landscaping.html>

Because these projects must be undertaken voluntarily, the RainScapes program has focused on compiling easily understood technical information and providing it to interested residents. The County prides itself on its simple, informative website, where residents can learn the technical details of different stormwater management and natural landscaping techniques, as well as an estimation of their costs, effectiveness, and difficulty to install. The flexibility of the program's requirements allows landowners a high degree of freedom in selecting the kind of project they feel is most desirable and suitable for their properties.

An interesting wrinkle in Montgomery County is that not all municipalities in the County have adopted the program. Two cities, Rockville and Gaithersburg, have chosen to administer their own stormwater rebate program adapted from the RainScapes model.³⁷ Both adaptations still reward conservation landscaping. Another city, Takoma Park, has opted out of the program entirely.³⁸ Even in these three cities, the County will answer natural landscaping questions for residents if they inquire.

Montgomery County's RainScapes program is a helpful example of how a local government can accommodate and encourage natural landscaping in an effective, popular, and flexible way.

Edible Plant Production

A nuisance may be merely a right thing in the wrong place—like a pig in the parlor instead of the barnyard.
- *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926).

We consider edible plant production in terms of the ability of landowners to grow food on private property within urban residential areas. Others will refer to this land use activity as productive or edible landscaping, home fruit and vegetable gardening, and even “personal agriculture,” or urban farming. Irrespective of the nomenclature or motivation for growing food at home, the legal dilemmas facing homeowners interested in edible plant production are similar to those outlined above: municipal ordinances regulating potential nuisances and aesthetic irregularities.

³⁷ <http://www.montgomerycountymd.gov/dep/water/rainscapes.html>

³⁸ Interview with RainScapes Program Manager Ann English, Mar. 30, 2016.

Perhaps unique to edible plant production is the fervor of those both in favor and opposed to its presence in urban residential areas. While it can be assumed that the majority of property owners interested in growing food do so with little regard for local ordinances, certain municipalities have taken it upon themselves to actively prosecute gardeners whose front yards do not conform to the codes regulating neighborhood nuisances and aesthetics. Widely publicized examples of such conflict have emerged in Ferguson, Missouri;³⁹ Orlando, Florida;⁴⁰ Oak Park, Michigan;⁴¹ Tulsa, Oklahoma;⁴² Miami Shores, Florida;⁴³ and perhaps surprisingly Berkeley, California.⁴⁴ In many of these cases, property owners are fined or forced to dig up their gardens, and in some cases, municipal code enforcement officers come and mow down or remove the edible plants. Outraged citizens and city officials around the country have begun to mobilize in favor of edible plant production, sometimes adopting the term “food freedom” for their cause, and drafting municipal codes that either actively or passively permit front yard food growing.

More often than not, the same provisions of local land use law that prohibit other forms of No Mow also serve to bar edible food production, namely that grass or “vegetation” reach not more than so many inches in height. Proactive policy makers at the local level have circumvented such ordinances through a variety of means. In 2007 local officials in Sacramento, California, revised their already somewhat permissive municipal code simply by removing the restrictive subsection, which read:

(c) Vegetable and Fruit Restrictions. No more than thirty (30) percent of the landscape setback area may be devoted to the growing of vegetables and/or fruit. This limitation shall not apply to fruit trees. Fruit and/or vegetable plants shall not exceed four (4) feet in height.⁴⁵

³⁹ <http://www.nytimes.com/2012/12/20/garden/gardeners-fight-with-neighbors-and-city-hall-over-their-lawns.html>

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² <http://www.newson6.com/story/18802728/woman-sues-city-of-tulsa-for-cutting-down-her-edible-garden>

⁴³ <http://ij.org/case/flveggies/>

⁴⁴ <http://sf.streetsblog.org/2009/06/04/food-bad-lawns-good-berkeley-bureaucrats-target-transition-activist/>

⁴⁵ Removed from subsection (A) (1) of section 17.68.010, as per Ordinance No. 2007-025. *See*: <http://www.sacgardens.org/news/Proposed%20Ordinance.pdf>

Without the above restrictive provisions, the subsection “Landscape and Maintenance Requirements” is then interpreted as permitting edible plant production implicitly, reading:

The landscape may include grass, annuals, perennials, ground cover, shrubs, trees, and any design elements such as planters, rocks, mulch, or similar elements when integrated as part of the landscape.⁴⁶

Elsewhere, more explicit provisions have been crafted to allow for edible plant production. In 2010, the city of Cleveland, Ohio, updated its zoning code to provide for agriculture in residential districts. The revised code lists “agricultural uses” under those uses permitted in “a One-Family District” and under “Accessory Uses in Residential Districts.”⁴⁷ In a later section of the code, agricultural uses are regulated more explicitly and accessory uses are delineated in detail, including provisions for composting, farm stands, and the sale of produce. Importantly, one provision addresses yard maintenance:

(g) Maintenance. Any land devoted to agricultural use shall be well-maintained and shall be free of excessively tall weeds or grass. All accessory structures to an agricultural use shall also be well maintained.

While it stalled in the state House of Representatives in 2012, Georgia attempted to enact a “Right to Grow Act,” which would have paralleled the right to farm legislation that is prevalent in most states. Georgia’s proposed bill listed as its purpose, in the short title:

[T]o preempt certain local ordinances relating to production of agricultural or farm products; to protect the right to grow food crops and raise small animals or honeybees on private property so long as such crops and animals or the products thereof are used for human consumption by the occupants, gardeners, or raisers and their households and not for commercial purposes.⁴⁸

⁴⁶ *Id.*

⁴⁷ Section 337.02 and Section 337.23, City of Cleveland Zoning Code. *See*: http://cccfoodpolicy.org/sites/default/files/resources/337-02_urbanagricultureinresidential.pdf

⁴⁸ *Id.*

In effect, this bill would have limited local government authority over the use of private property to produce edible plants as well as livestock for personal consumption, which was likely the origin of many critiques. In the absence of this bill, there is a wide variety of county and municipal regulations for edible plant production, including what amounted to a ban on growing more than a few vegetables (whatever was construed to fall under “crop production”) even in the backyard of certain private residences within DeKalb County.⁴⁹

Another example of state intervention on behalf of urban residential food growing is a far-reaching California law, successfully passed in 2014. California AB 2561 concerns “personal agriculture,” which according to the law is defined as “a use of land where an individual cultivates edible plant crops for personal use or donation.”⁵⁰ This law does not preempt local government authority over regulating personal agriculture, but rather in effect preempts the reach of two other groups: landlords and HOAs. Landlords are required to permit tenants to engage in edible plant production, so long as portable containers are used and a variety of conditions met. Although this approaches a different regulatory framework and set of issues than most No Mow land uses, the law is notable for its reach into individual landlord-tenant relations. The second dimension of AB 2561 reaches so far as to actually neutralize certain provisions within HOA governing documents. The law reads:

Any provision of a governing document, as defined in Section 4150, shall be void and unenforceable if it effectively prohibits or unreasonably restricts the use of a homeowner’s backyard for personal agriculture.⁵¹

It goes on to clarify that:

This section shall not prohibit a homeowners’ association from applying rules and regulations requiring that dead plant material and weeds, with the exception of straw, mulch, compost, and other organic materials

⁴⁹ As of 2012, the DeKalb County ban on “crop production” applied to one residential zone (R-85) but no longer appears to be in effect. See: <http://www.gainesvilletimes.com/archives/63548/> and <http://www.atlantamagazine.com/dining-news/a-guy-a-garden-and-an-anti-veggie-zoning-code/>

⁵⁰ http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201320140AB2561

⁵¹ *Id.*

intended to encourage vegetation and retention of moisture in the soil, are regularly cleared from the backyard.⁵²

While the California and Georgia laws do not seem easily replicable for many states, and although they are not directly applicable to most No Mow land uses, they do demonstrate the potential for state preemption of restrictive local regulations of private property. In contrast, the ordinances enacted for Sacramento and Cleveland demonstrate pathways for local governments to allow landowners a legal departure from mowed turf-grass conformity. Growing food tends to elicit more personal and impassioned cases for landowner rights, but regardless of the policy and legislative strategy, advocates for other No Mow land uses might benefit from examining the rhetoric and organization of the “food freedom” movement and other proponents of edible plant production within urban residential zoning districts.

Conclusion

Our review finds that the police power of states and localities over private property remains quite strong. To effectively enable property owners to deviate from the traditional norm of a landscape of mowed turf, it may be necessary or useful to consider revisions to common local nuisance and weed control ordinances to facilitate various forms of No Mow. Above, we outline four types of No Mow, each with specific policy recommendations. Naturalized (unmowed) turf grass may best be allowed with a conditional permitting regime. Low growing grasses and native/naturalized landscaping without turf could both be facilitated with a categorical exemption from application of nuisance ordinances, as long as weed control remains unchanged. Edible plant production should be regulated separately from the other forms, whether at the local or state level, and as such may allow for the provision of rights to landowners, as well as tenants, that are even farther-reaching. Homeowners associations can likewise restrict No Mow; a local or state preemption law could remedy these types of aesthetic restrictions.

⁵² *Id.*