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## **An Agricultural Law Research Article**

### **Agricultural Zoning, Bankruptcy and the Rural Homestead**

by

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## Agricultural Zoning, Bankruptcy and the Rural Homestead

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### I. Introduction

Suburban sprawl meets farmland preservation: much has been written about this phenomenon, both in the popular press<sup>1</sup> and in the scholarly journals.<sup>2</sup> In this article, I will discuss one very small part of the problem. Suppose that in reaction to fears of suburban sprawl, a county imposes an agricultural zoning regime that, among other things, prohibits the division of land into too-small parcels in order to protect its agricultural use and rural character. Suppose that a married couple, deeply in debt, live in such a county, on a farm of 350 acres subject to a zoning restriction prohibiting the division of the property into lots smaller than eighty acres. And suppose further that the laws of the debtors' state protect their homestead from creditors, irrespective of value but only up to forty acres. The question is how should a court – state or federal bankruptcy – react to this situation? How much of the 350 acres should be sheltered from creditors? And what about the zoning restriction that would not seem to allow the creation of a forty-acre free-standing homestead for the debtors?

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1. See, e.g., *Santa Clarita Journal: Shady Platform for Denouncing Suburban Sprawl*, N.Y. TIMES, Nov. 19, 2002, at A22; Stephanie Woodard, *Many U.S. Indian Tribes Venture into Aquaculture*, INDIAN COUNTRY TODAY, Oct. 14, 2002; Dennis Hevesi, *Antidotes to Sprawl Taking Many Forms*, N.Y. TIMES, Oct. 6, 2002, at 11-1; *2 Acres of Farm Lost to Sprawl Each Minute, New Study Says*, N.Y. TIMES, Oct. 4, 2002, at A19.

2. See generally, Robert A. Coulthard, *The Changing Landscape of American's Farmland: A Comparative Look at Policies Which Help Determine the Portrait of Our Land – Are There Lessons We Can Learn from the E.U.?*, 6 DRAKE J. AGRIC. L. 261 (2001); William W. Buzbee, *Urban Sprawl, Federalism and the Problem of Institutional Complexity*, 68 FORDHAM L. REV. 57 (1999); Mark W. Cordes, *Takings, Fairness, and Farmland Preservation*, 60 OHIO ST. L.J. 1033 (1999); Jeanne S. White, *Beating Plowshares into Townhomes: The Loss of Farmland and Strategies for Slowing Its Conversion to Nonagricultural Uses Spring*, 28 ENVTL. L. 113 (1998); Edward Thompson, Jr., *"Hybrid" Farmland Protection Programs: A New Paradigm for Growth Management?*, 23 WM. & MARY ENVTL. L. & POL'Y REV. 831 (1999); David L. Szlanfucht, Note: *How to Save America's Depleting Supply of Farmland*, 4 DRAKE J. AGRIC. L. 333 (1999); Neil D. Hamilton, *Plowing New Ground: Emerging Policy Issues in a Changing Agriculture*, 2 DRAKE J. AGRIC. L. 181 (1997); Allen H. Olson, *Agricultural Zoning: A Remedy for Land Use Conflicts Between Poultry Production and Residential Development in Northwest Arkansas*, 1997 ARK. L. NOTES 119; Patrick J. Skelley II, Note: *Defending the Frontier (Again): Rural Communities, Leap-Frog Development and Reverse Exclusionary Zoning*, 16 WM & MARY ENVTL. L. & POL'Y REV. 273 (1997); Jim Chen, *Get Green or Get Out: Decoupling Environmental from Economic Objectives in Agricultural Regulation*, 48 OKLA. L. REV. 333 (1995).

Part II will dispense with some preliminary matters dealing with homesteads, agricultural zoning and bankruptcy. Familiarity with the foundational principles is presumed, and the discussion will focus on the confluence of these three areas of inquiry. Part III will discuss the Seventh Circuit's case of *Matter of Lloyd*,<sup>3</sup> in which the court's approach was to order the trustee to seek a zoning variance from local authorities in order to maximize recovery for the benefit of the creditors. Part IV will show that this seemingly intractable problem, caused, at root, by those state laws that provide for homesteads of a certain acreage but unlimited in value, is a problem whose solution lies in *Lloyd*.

## II. Preliminary Matters

### A. The Homestead in Bankruptcy

Unable to decide in 1978 whether state or federal law should govern exemptions in bankruptcy, Congress equivocated. Section 522(b) allows a debtor to choose as exempt property protected under state law or to choose from among those exemptions contained in § 522(d). A married couple that petitions jointly in bankruptcy under § 302 is each entitled to his or her own exemption.<sup>4</sup> The couple must agree, however, either to use their state exemptions or their federal § 522(d) exemptions and not mix and match.<sup>5</sup>

For debtors using state law, § 522(b) has two add-ons. First, the statute incorporates by reference non-bankruptcy federal exemptions such as social security benefits,<sup>6</sup> veterans' benefits,<sup>7</sup> or civil service retirement payments.<sup>8</sup> These exemptions are contained in the § 522(d) list and so need not be add-ons for debtors claiming under federal law.<sup>9</sup> Second, debtors using state law are allowed to claim property held as tenants by the entirety "to the extent that such interest . . . is exempt from

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3. 37 F.3d 271 (7<sup>th</sup> Cir. 1994).

4. 11 U.S.C. § 522(m).

5. 11 U.S.C. § 522(b).

6. 42 U.S.C. § 407.

7. 38 U.S.C. § 5301.

8. 5 U.S.C. § 8346.

9. For example, see 11 U.S.C. § 522(d)(10)(A), that makes social security benefits exempt, and 11 U.S.C. § 522(d)(10)(B), that makes veterans' benefits exempt. Pension payments are made exempt by 11 U.S.C. § 522(d)(10)(E), but only to the extent "reasonably necessary for the support of the debtor and any dependent of the debtor," a restriction not found in 5 U.S.C. § 8346. Thus, an insolvent civil service retiree wishing to exempt a pension beyond what is "reasonably necessary" must do so by claiming his or her state law exemptions, plus his or her federal non-bankruptcy exemptions under § 522(b)(2)(A).

process under applicable nonbankruptcy law.”<sup>10</sup> This provision is understandable, given the ability of some states to accomplish with entirety law what other states accomplish with homestead law.<sup>11</sup>

In a well-known, if unusual, act of reverse supremacy, Congress then gave the states the power to “opt out” and deny their domiciliaries the protection of § 522(d) if they so chose,<sup>12</sup> as most quickly did.<sup>13</sup>

With respect to the homestead exemption, then, § 522(b) contains two possibilities, the § 522(d)(1) federal homestead exemption or the state-law homestead exemption in the state wherein the debtor was domiciled 180 days prior to the filing of the bankruptcy petition.<sup>14</sup> Debtors domiciled for the greater part of that period in opt-out states must choose the state homestead exemption.<sup>15</sup>

The § 522(d)(1) federal homestead exemption is described in the following terms:

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10. 11 U.S.C. § 522(b)(2)(B). Note that not all states totally shield entirety property from creditor process. For example, in Arkansas, a judgment lien of a creditor of one of the spouses attaches to that spouse’s survivorship interest in the property, as well as to his or her rights to half of the rents and profits from the property. See *Meadows v. Costoff*, 254 S.W.2d 472 (Ark. 1953); *Moore v. Denson*, 268 S.W. 609 (Ark. 1924); *Morris v. Solesbee*, 892 S.W.2d 281 (Ark. Ct. App. 1995). See generally POWELL ON REAL PROPERTY (Michael Allan Wolf, ed. 2001) at § 52.03[3]; 4 THOMPSON ON REAL PROPERTY, THOMAS EDITION (David A. Thomas, ed. 1994) at § 33.07(e).

11. “The effect [of the majority rule absolutely shielding entirety property from the creditors of the individuals] is to permit any amount of property to be shielded from the creditors of either spouse, a major incentive for married persons to hold property in tenancies by the entirety in such jurisdictions.” 4 THOMPSON ON REAL PROPERTY, THOMAS EDITION (David A. Thomas, ed. 1994) at § 33.07(e). See, e.g., Mo. Ann. Stat. § 513.475; *Cull v. Vadnais*, 406 A.2d 1241 (R.I. 1979). See generally, 14 COLLIER ON BANKRUPTCY (EXEMPTIONS) (Scott, ed. 1996) at Tenan-1 through Tenan-23.

12. See 11 U.S.C. § 522(b)(1).

13. The on-line edition of COLLIER ON BANKRUPTCY lists thirty-four states that had opted out on the date visited, see 4-522 COLLIER ON BANKRUPTCY (15th Edition Revised) ¶ 522.01, n.2. It is easier, of course, to note the states that have *not* opted out: Connecticut, see *In re Childs*, 129 B.R. 14, 17 (Bankr. D. Conn. 1991); Massachusetts, see *In re Whalen-Griffin*, 206 B.R. 277, 280 (Bcy. D. Mass. 1997); Michigan, see *In re Heflin*, 215 B.R. 530, 531 n.2 (Bankr. W.D. Mich. 1997); Minnesota, see *In re Zimmel*, 185 B.R. 786, 791 n.3 (Bankr. D. Minn. 1995); New Jersey, see *Bank v. Schwartz* (*In re Schwartz*), 185 B.R. 479, 484 (Bankr. D.N.J. 1995); Pennsylvania, see *Kollar v. Miller* (*In re Kollar*), 176 F.3d 175, 178 n.3 (3d Cir. 1999); Rhode Island, see *Howe v. Richardson* (*In re Howe*), 232 B.R. 534, 536 (1<sup>st</sup> Cir. B.A.P. 1999); Texas, see *In re Duvall*, 218 B.R. 1008, 1016 (Bankr. W.D. Tex. 1998); Vermont, see *Parrotte v. Sensenich* (*In re Parrotte*), 22 F.3d 472, 474 (2d Cir. 1994); Washington, see *In re Andrews*, 225 B.R. 485, 488 (Bankr. D. Idaho 1998); Wisconsin, see *United States v. Ehlen* (*In re Ehlen*), 207 B.R. 179, 182 (Bankr. W.D. Wisc. 1997). New Mexico and Hawaii have apparently not opted out, but I can find no cases holding that, but see *Dominion Bank of Cumberlands, N.A. v. Nuckolls*, 780 F.2d 408, 414 n.2 (4<sup>th</sup> Cir. 1985)(Hoffman, J. concurring). New Hampshire and Arkansas initially opted out, then opted back in, see 14-0 COLLIER ON BANKRUPTCY (15th rev. ed.), Intro.02, n.9 (New Hampshire) and *In re Bradley*, 282 B.R. 430, 440 n.2 (Bankr. W.D. Ark. 2002)(Arkansas).

14. 11 U.S.C. § 522(b)(2)(A).

15. Suppose that a person domiciled in an opt-out state, say Oklahoma, petitions in a non-opt-out state, say Arkansas. The Arkansas bankruptcy court should deny such person the use of the § 522(d) list under § 522(b)(1) and the Oklahoma state opt-out law, see 31 Okla. Stat. § 1(B).

The debtor's aggregate interest, not to exceed \$15,000 in value, in real property or personal property that the debtor or a dependent of the debtor uses as a residence, in a cooperative that owns property that the debtor or a dependent of the debtor uses as a residence, or in a burial plot for the debtor or a dependent of the debtor.<sup>16</sup>

The dollar amount set as a cap on the value of the debtor's homestead automatically adjusts itself under §104 to reflect increases in the Consumer Price Index for All Urban Consumers, published by the Labor Department. Those adjustments are to be published in the Federal Register by the Judicial Conference of the United States.<sup>17</sup> The most recent adjustment sets the homestead exemption cap at \$17,425.<sup>18</sup> Such adjustments are prospective only and do not apply to cases commenced prior to the adjustment.<sup>19</sup>

Unmarried debtors are entitled to homestead protection under § 522(d)(1), unlike the homestead laws of some states.<sup>20</sup> A single debtor such as this may claim from the equity that he or she owns the amount mentioned above, and married debtors may double the amount. A debtor or debtors having less equity than this, or no equity at all, or even no homestead at all, may, under § 522(d)(5), apply some of the "unused" amount of the homestead exemption to exempt "any property."<sup>21</sup>

The federal bankruptcy homestead statute explicitly allows both real and personal property to be claimed as exempt,<sup>22</sup> thereby resolving the question, alive under the laws of some states, of whether mobile homes may be claimed as exempt homesteads.<sup>23</sup> In opt-out states, without the mention of personal property in § 522(d)(1), the question first becomes whether the debtor owns the land on which the mobile home sits and, second, whether the mobile home has become affixed to the property sufficiently to be considered an improvement. For example, in *In re Harris*<sup>24</sup> the Colorado

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16. 11 U.S.C. § 522(d)(1).

17. 11 U.S.C. § 104(b).

18. 66 Fed. Reg. 10910 (Feb. 20, 2001). The next adjustment must be done not later than March 1, 2004, see 11 U.S.C. § 104(b)(2).

19. 11 U.S.C. § 104(b)(3).

20. See, e.g. Ark. Const. art. 9, § 3.

21. 11 U.S.C. § 522(d)(5). The amount that may be transferred from the homestead to "any property" as of this writing is \$8725, due to be increased by April 1, 2004, see 11 U.S.C. § 104(b)(1). In *Martin v. Cox* (*In re Martin*), 140 F.3d 806 (8th Cir. 1998), the Eighth Circuit held, in the face of the trustee's argument to the contrary, that § 522(d)(5)'s "wild card" exemption is usable by debtors who have no homestead at all, that is to say, renters. Accord, *In re Dreyer*, 127 B.R. 587 (Bankr. N.D. Tex. 1991); *In re Austin*, 73 B.R. 75 (Bankr. D. Vt. 1987).

22. 11 U.S.C. § 522(d)(1).

23. There also are cases involving other kinds of atypical, personal property homesteads, such as houseboats, *In re Scudder*, 97 B.R. 617 (Bankr. S.D. Ala. 1989); *In re McMahan*, 60 B.R. 632 (Bankr. W.D. Ky. 1986), and over-the-road trucks, *In re Laube*, 152 B.R. 260 (Bankr. W.D. Wisc. 1993).

24. 166 B.R. 163 (Bankr. D. Colo. 1994).

Bankruptcy Court held that a skirted, anchored, wheelless mobile home attached to electric, water, and sewage systems and sitting on land owned by the debtor represented an improvement to the surface property and was therefore exempt.<sup>25</sup>

If the land on which the mobile home sits does not belong to the debtor, then the problem is a more difficult one for the courts. For example, in *In re Cobbins*,<sup>26</sup> the debtor owned and resided in a mobile home. She did not, however, own the land on which she lived; it belonged to her mother. She petitioned in Chapter 7, but, Mississippi being an opt-out state, she could not use § 522(d)(1). The debtor tried to claim the mobile home as exempt under § 522(b)(2)(A) and Mississippi state law, but the Bankruptcy Court denied the exemption under Mississippi Code Annotated § 85-3-21, the Mississippi homestead statute, and Mississippi Code Annotated § 85-3-1, which exempts certain personal property from creditor process.<sup>27</sup> The combination of the *Cobbins* court's two holdings was that the Bankruptcy Court believed that the Mississippi legislature wished to protect a mobile-home resident's pets, clothes, cars and books, but not the mobile home itself.<sup>28</sup> It is a result that other states have managed to avoid.<sup>29</sup>

In conclusion of this short recap of largely familiar territory, in most states debtors in bankruptcy are limited to the homestead exemption provided to them under state law, while in the minority of states, the debtor may choose between state homestead protection and § 522(d)(1) protection. The federal homestead is capped in value at a reasonable figure, but a married couple petitioning together may double this limit, though if one spouse takes the federal exemptions, so must the other. Unmarried debtors are entitled to a homestead under § 522(d)(1) but not under the laws of all states, and personal-property homesteads are clearly exempt under federal law but not under the laws of many states.

## B. Agricultural Zoning

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25. *Id.*

26. 234 B.R. 882 (Bankr. S.D. Miss. 1999), *aff'd sub. nom. Cobbins v. Henderson* (In re Cobbins), 227 F.3d 302 (5<sup>th</sup> Cir. 2000).

27. *Cobbins*, 234 B.R. at 887-88. Carefully reviewing the 19<sup>th</sup> Century history of the homestead law of Mississippi, the court concluded, without apparent irony, that the legislature that originally enacted the statute in 1848 did not contemplate its application to mobile homes, or did the legislatures of 1857, 1871, 1880, 1892, 1906, nor 1917. *Id.* at 884-86. In carefully relating the various legislative changes to the original 1848 statute, the bankruptcy court overlooked the amendment that expanded the protection of the statute from "every free white citizen of this state," see Ch. 62, Art. 17, Mississippi Code of 1848, to "every citizen of this state," see Miss. Code Ann. §85-3-21.

28. A similar unlikely result was reached by the United States Supreme Court in *United States v. Rodgers*, 461 U.S. 677 (1983), holding that 26 U.S.C. § 6334(c) allows the federal tax lien to reach property exempt under state law and restricts the taxpayer (or tax-non-payer, to be more precise) to the federal tax-lien exemptions of 26 U.S.C. § 6334(a). *Rodgers*, 461 U.S. at 701. Section 6334(a) contains a few personal property exemptions such as furniture and clothes but contains no homestead exemption.

29. See, e.g., *In re Meola*, 158 B.R. 881 (Bankr. S.D. Fla. 1993); *contra Gann v. Montgomery*, 210 S.W.2d 255 (Tex. Ct. App. 1948).

The proponents of rural preservation have been creative, and the techniques of farmland protection are many, varied, and controversial.<sup>30</sup> The overall goal is to keep rural land rural, even at the

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30. Much has been written about agricultural zoning. See *generally* Farmland Information Library, [www.farmlandinfo.org](http://www.farmlandinfo.org); AMERICAN FARMLAND TRUST, *SAVING AMERICAN FARMLAND: WHAT WORKS* (1997) (hereinafter *Saving American Farmland*); ROBERT R. WRIGHT & MORTON GITELMAN, *LAND USE* 1242-59 (5th ed. 1997); LINDA A. MALONE, *ENVIRONMENTAL REGULATION OF LAND USE*, Ch. 6 (2001); ROBERT E. COUGHLIN, ET AL., *THE PROTECTION OF FARMLAND: A REFERENCE GUIDEBOOK FOR STATE AND LOCAL GOVERNMENTS* (undated U.S. Government Publication). For useful bibliographical materials, see Sally J. Kelley, *et al.*, *Agricultural Law: A Selected Bibliography*, 2000, 54 ARK. L. REV. 317 (2001); Sally J. Kelley, *Agricultural Law: A Selected Bibliography*, 1996-1999, 53 ARK. L. REV. 495 (2000); Sally J. Kelley, *et al.*, *Agricultural Law: A Selected Bibliography*, 1985-1992, 19 WM. MITCHELL L. REV. 481 (1993). More particularly, see Lawrence D. Spears & Karen Paige, *Protecting Rural Lands: A Market-Based, Efficient, and Culturally Appropriate Strategy Using Rights of First Refusal and the Nonprofit Sector*, 8 HASTINGS W.-N.W. J. ENVTL. L. & POL'Y 235 (2002); David L. Szlanfucht, Note: *How To Save American's Depleting Supply of Farmland*, 4 DRAKE J. AGRIC. L. 333 (1999); Edward Thompson, Jr., "Hybrid" Farmland Protection Programs: A New Paradigm for Growth Management?, 23 WM. & MARY ENVTL. L. & POL'Y REV. 831 (1999); Mark W. Cordes, *Takings, Fairness, and Farmland Preservation*, 60 OHIO ST. L.J. 1033 (1999); Jeanne S. White, *Beating Plowshares into Townhomes: The Loss of Farmland and Strategies for Slowing Its Conversion to Non-Agricultural Uses*, 28 ENVTL. L. 113 (1998); Alexander A. Reinert, Note, *The Right to Farm: Hog-Tied and Nuisance-Bound*, 73 N.Y.U.L. REV. 1694 (1998); Shelby D. Green, *The Search for a National Land Use Policy: For the Cities' Sake*, 26 FORDHAM URB. L.J. 69 (1998); Patrick J. Skelley II, Note, *Defending the Frontier (Again): Rural Communities, Leap-Frog Development and Reversed Exclusionary Zoning*, 16 VA. ENVTL. L.J. 273 (1997); Neil D. Hamilton, *Feeding Our Future: Six Philosophical Issues Shaping Agricultural Law*, 72 NEB. L. REV. 210 (1993); Corwin W. Johnson & Valerie M. Fogleman, *The Farmland Protection Policy Act: Stillbirth of a Policy?*, 1986 U. ILL. L. REV. 563. For treatments of the problems particular to individual states, see David J. Harmon, Comment, *Problems and Opportunities for Progressive Comprehensive Land Use Planning in Richland County, South Carolina after McClanahan v. Richland County Council*, 54 S.C. L. REV. 837 (2003); Wendy K. Walker, Note: *Whole Hog: The Pre-Emption of Local Control by the 1999 Amendment to the Michigan Right to Farm Act*, 36 VAL. U.L. REV. 461 (2002); Thomas B. McNulty, Comment, *The Pennsylvania Farmer Receives No Real Protection From the Pennsylvania Right to Farm Act*, 10 PENN ST. ENVTL. L. REV. 81 (2001); Mark R. Rielly, Comment: *Evaluating Farmland Preservation Through Suffolk County, New York's Purchase of Development Rights Program*, 18 PACE ENVTL. L. REV. 197 (2000); John M. Hartzell, *Agricultural and Rural Zoning in Pennsylvania: Can You Get There from Here?*, 10 VLL. ENVTL. L.J. 245 (1999); Nyran Rasche, *Protecting Agricultural Lands in Oregon: An Assessment of the Exclusive Farm Use Zone System*, 77 OR. L. REV. 993 (1998); Sean F. Nolon & Cozata Solloway, Comment, *Preserving Our Heritage: Tools to Cultivate Agricultural Preservation in New York State*, 17 PACE L. REV. 591 (1997); Brian W. Ohm, *Towards a Theory of Wisconsin Regulatory Takings Jurisprudence*, 4 WS. ENVTL. L.J. 173 (1997); Lawrence W. Libby, *Farmland Protection for Illinois: The Planning and Legal Issues*, 17 N. ILL. U. L. REV. 425 (1997); Philip J. Tierney, *Bold Promises But Baby Steps: Maryland's Growth Policy to the Year 2020*, 23 U. BALT. L. REV. 461 (1994); Sam Sheronick, *The Accretion of Cement and Steel onto Prime Iowa Farmland: A Proposal for a Comprehensive State Agricultural Zoning Plan*, 76 IOWA L. REV. 583 (1991); Timothy Jay Houseal, Comment, *Forever a Farm: The Agricultural Conservation Easement in Pennsylvania*, 94 DICK. L. REV. 527 (1990); Sandra A. Hoffman, Note, *Farmland and Open Space Preservation in Michigan: An Empirical Analysis*, 19 U. MICH. J.L. REF. 1107 (1986); Susan A. Kidd, *Vermont Executive Order 52 – Can Vermont Practice What It Preaches?*, 11 B.C. ENVTL. AFF. L. REV. 665 (1984). For comparative studies, see Michael Pickles, *Implementing Ecologically Sustainable Development in China: The Example of Heilongjiang Province*, 14 GEO. INT'L ENVTL. L. REV. 577 (2002); Robert A. Coulthard, *The Changing Landscape of America's Farmland: A Comparative Look at Policies Which Help Determine the Portrait of Our Land – Are There Lessons We can Learn from the EU?*, 6 DRAKE J. AGRIC. L. 261 (2001); Jeffrey Patterson, *Testing the Partnership Model for Growth Management*, 7 PAC. RIM L. & POL'Y 721 (1998); Terence J. Centner, *Preserving Rural-Urban Fringe Areas and Enhancing the Rural Environment: Looking at Selected German Institutional Responses*, 11 ARIZ. J. INT'L & COMP. LAW 27 (1994).

cost of fettering private property rights and decreasing property values.<sup>31</sup> Some of the techniques reported are state executive orders requiring state agencies to work to conserve farmland,<sup>32</sup> state urban growth management plans,<sup>33</sup> state or county comprehensive planning,<sup>34</sup> agricultural and cluster zoning,<sup>35</sup> so-called mitigation ordinances,<sup>36</sup> directed assessment and tax-relief,<sup>37</sup> right-to-farm laws,<sup>38</sup>

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31. See *Saving American Farmland*, *supra* note 30:

Regulatory strategies are [] controversial. Growth management laws and [Agricultural Protective Zoning] ordinances restrict private property rights and may reduce the market value of farmland. This is particularly troubling for farmers and ranchers whose entire net worth consists of equity in land. While many farmers and ranchers support the goals of farmland protection, they often speak out against regulatory approaches as unfair solutions to problems that affect whole communities. Farmers and ranchers are most likely to support growth management programs and APZ ordinances if they are implemented when agricultural land values are stable, or if they are used in conjunction with incentive-based strategies that provide some compensation for the restrictions being imposed. *Id.* at 17.

32. A state executive order that directs all state agencies to avoid taking actions that would result in the conversion of farmland to non-farm use may strike one as nothing more than a headline-getting broad statement of public policy, and some have been little else. Others have been more effective, *see generally id.* at 29-30, noting that Massachusetts Executive Order 193 and Michigan Executive Order 1994-4 have been effective.

33. A noted threat to farmland is, of course, urban and suburban sprawl. A handful of states have sufficiently aggressive urban growth management laws to merit the approval of The American Farmland Trust, *see generally Saving American Farmland*, *supra* note 30, at 30, (discussing the laws of Hawai'i, Maryland, New Jersey, Oregon, Vermont, and Washington State).

34. "Comprehensive planning" is the term used for a regulatory scheme that allows various local governmental bodies to act together in their planning efforts, *see generally id.* at 31-32.

35. The difference between agricultural protection zoning, or APZ, and cluster zoning is that the former specifically designates land on which agriculture is the preferred, or only, appropriate use, while the latter merely allows or requires that residences be grouped closely together in order to protect the surrounding open land. *See generally id.* at 32-33.

36. Mitigation ordinances require developers who are converting farmland to other uses to mitigate the damage by permanently protecting other land from such development. *See generally id.* at 33 (discussing ordinances of Davis, California, and King County, Washington).

37. These terms refer to attempts by state and local governments to make farming a more economically viable activity reducing, or giving credit against, real estate taxes when the land is used for agricultural purposes. *See generally id.* at 34.

38. Right-to-farm laws protect farmers from nuisance suits brought by city *qua* country folks whose sensibilities are offended by the realities of modern agriculture. Every state has one. *See generally id.* at 34-35.

conservation easements,<sup>39</sup> transfer development rights (“TDRs”),<sup>40</sup> agricultural districting laws,<sup>41</sup> and various combinations of some or all of these.<sup>42</sup> Most of the effective governmental activity seems at present to be at the state, county, and local levels, though some federal attempts at farmland preservation have been attempted.<sup>43</sup>

Here we are interested in zoning as it affects the homestead in bankruptcy. *Saving American Farmland* shows twenty-four states with Agricultural Protective Zoning (“APZ”) regulations as of 1997,<sup>44</sup> though as mentioned above, the reference is to local ordinances, not state-wide statutes.<sup>45</sup> While APZ speaks of “*agricultural protective*” zoning, it should be noted that farmers themselves often oppose such zoning as it restricts the ways in which they may use their own land and tends to keep property values at lower levels than in unzoned areas. Some states, in fact, place restrictions on governmental “takings” as a means of controlling the tendency of local governments to pass APZ plans.<sup>46</sup>

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39. As the name “easement” suggests, these devices are private, voluntary agreements between landowners that prohibit or require only certain uses for the encumbered land. See *generally id.* at 35-36.

40. Similar to mitigation programs, TDRs allow landowners to transfer to another, unencumbered plot of land the restrictions that exist on the land proposed to be developed. TDR programs, usually at the local level, provide for a flexibility that some zoning programs do not have, but they protect the quantity of farmland *in toto*, not in particular. See *generally id.* at 37.

41. Agricultural districts are a kind of voluntary zoning where farmers are permitted to opt-in to a district where agricultural uses are protected in exchange for certain benefits such as differential assessments and tax exemptions. See *generally id.* at 37-38.

42. See *generally id.* at 39.

43. See, e.g., The Farmland Protection Policy Act of 1981, Pub. L. No. 97-98, 95 Stat. 1341 (1981), codified as amended at 7 U.S.C. §§ 4201-09 (1981); The Farms for the Future Act of 1990, 7 U.S.C. § 4201 (note) (1991) and The Federal Agricultural Improvement and Reform Act of 1996, Pub. L. No. 104-127, 110 Stat. 888 (1996), codified as amended at 7 U.S.C. § 7201 (Supp. II 1996). See also 26 U.S.C. § 2032A (2000), which allows special lower estate tax valuations of land for ongoing farm businesses; *but see* Martin D. Begleiter, *Material Participation under Section 2032A: It Didn't Save the Family Farm But It Sure Got Me Tenure*, 94 DICK. L. REV. 561 (1990).

44. California, Colorado, Florida, Hawai'i, Idaho, Illinois, Indiana, Iowa, Kansas, Maryland, Michigan, Minnesota, Montana, Nebraska, North Dakota, Ohio, Oregon, Pennsylvania, South Dakota, Utah, Virginia, Washington, Wisconsin, and Wyoming.

45. *Saving American Farmland* surveyed the field and found in the neighborhood of 700 local APZ ordinances in the 24 states listed in footnote 44. This is a little misleading, however, for 62 percent of all these ordinances were found in Wisconsin, and 75 percent in Pennsylvania and Wisconsin together. The managers of the survey admit, however, that their research probably understated the true numbers, due to spotty response to the survey. See *Saving American Farmland, supra* note 30, at 51. Given that these are local ordinances being researched, and knowing how difficult it is to research local ordinances, one can hardly fault the managers for doing the best they could with the survey.

46. Zoning, of course, is not always, or even often, a constitutional “taking” requiring just compensation. See *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365 (1926). However, states may be more protective than the Constitution requires, and these state statutes require compensation in those cases where the Constitution does not find a “taking.” See *generally, Wright & Gitelman, supra* note 30, at 771-

While there are many different kinds of APZ regimes, some generalities can be made. There are two principal schemes: one is to directly restrict the use of land toward or away from agriculture; the other is to indirectly affect land use by restricting lot size. The first scheme usually involves the designation of certain prime agricultural land, often by using a scientific measure of soil quality. Sometimes an area made up of less-rich soil will be designated as less-protected lands suitable for, but not strictly limited to, agricultural use. In prime areas, the APZ may forbid any kind of activity other than farming, plus living areas for those doing the farming. In sub-prime areas, agriculture may be protected by restricting the use to agriculture-related activities such as grain storage or animal evisceration.<sup>47</sup>

More common are restrictions on rural lot size in order to control the density of development, and these APZ regimes are varied as well.<sup>48</sup> The most straightforward of these restrictions merely creates a large minimum lot size, perhaps twenty, forty or as much as 160 acres, perhaps in conjunction with an agricultural use restriction or perhaps not.<sup>49</sup> The problem with such straightforward limitations is that they may lead to a proliferation of small “ranchettes,” suitable for a grazing companion animal or two but not for agriculture in the true sense of the term. This phenomenon has become a curse to some in Colorado, where counties are prohibited from regulating lots smaller than thirty acres.<sup>50</sup>

More sophisticated density restrictions are called “area-based allowances,” and are either “fixed” or “sliding scale.”<sup>51</sup> As an example of a fixed area-based allowance scheme, *Saving American Farmland* gives an ordinance from Lancaster County, Pennsylvania, that provides for one non-farm lot for every fifty acres, subdivided from the “parent” tract, and of at least one, but not more than two, acres. As an example of a sliding-scale area-based allowance, the same source gives an ordinance from Clinton County, Indiana, that allows more non-farm lots to be divided off of larger “parent” tracts than may be divided off of smaller ones. These sliding-scale schemes tend to concentrate the non-farm uses of property into quite dense sub-divisions, leaving large blocks of undivided farm land, thereby avoiding the ranchette problem.<sup>52</sup>

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96. *Saving American Farmland* lists twenty states with “takings” statutes, with little overlap with the states with the strongest APZ trends. See *Saving American Farmland*, *supra* note 30, at 51.

47. See *id.* at 56-58.

48. See generally Linda A. Malone, ENVIRONMENTAL REGULATION OF LAND USE 6:27-31 (2001).

49. See *id.* at § 6:27.

50. See *Saving American Farmland*, *supra* note 30, at 49.

51. See Malone, *supra* note 48, at § 6:29-30.

52. See *Saving American Farmland*, *supra* note 30, at 58-61.

Of particular importance is the question of re-zoning and the issuance of variances.<sup>53</sup> As Professors Wright and Gitelman succinctly write: “The universal standard for granting a variance from the literal terms of the zoning ordinance is hardship.”<sup>54</sup> As the same two scholars recognize, however, a term like “hardship” is subject to considerable interpretation and “defining that term has been anything but simple for the courts.”<sup>55</sup> Given the two broad categories of APZ mentioned above – land use restrictions and lot size restrictions – two kinds of variances are expected: (1) those in which permission is sought for a non-conforming, non-agricultural use, and (2) those in which permission is sought for a sub-division of land to a smaller size than the minimum rural lot size.

Most of the discussion in *Saving American Farmland* concerns variances seeking non-conforming, that is, non-agricultural use, and most of the discussion in *Wright & Gitelman* concerns parties seeking relief from use restrictions. Under APZ, agricultural use restrictions implicate the scientific measure of the soil’s suitability for farming, so the argument usually becomes whether the land itself is still tillable acreage.<sup>56</sup> Those kinds of variances, as it turns out, have few implications for our present interest in homesteads in bankruptcy and may be passed over with a mere mention. Of more interest to the present discussion are those apparently less common situations where variances are sought from APZ minimum lot size restrictions.

It is likely that the paucity of decisions relating to variances from APZ minimum lot sizes is due to the commonly stated first requirement of the “hardship” test for entitlement to a variance, namely that the hardship be “caused by unique physical circumstances of the property for which the variance is sought.”<sup>57</sup> For example, it is easier to see how a deterioration in soil quality could provide a basis for a variance from an agricultural-use restriction,<sup>58</sup> but it is more difficult to see how the “unique circumstances of the property” would require a sub-division into smaller-than-permitted lot sizes.

Occasionally such relief may be granted, not at the behest of the landowner but the bankruptcy trustee.<sup>59</sup> The problem arises when land subject to APZ restrictions is claimed to be a homestead

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53. Practically speaking, it appears that the greatest threat to APZ regimes comes not from the issuance of variances but from annexation by one local government of land zoned by another. Typically, a city or suburb sprawling onto agricultural land presently zoned by a county will annex as it grows, and, once annexed, the land will be zoned residential by the municipality, trumping the old agricultural zoning by the county. See *id.* at 65-66. Most growth-minded state laws prefer the power of the expanding municipality to that of the county. See *id.* The only remedy, other than a state-wide reformulation of city-county power, lies in comprehensive planning where various local governments work together using various planning techniques, to balance the conflicting forces. See *id.* at 31-32, 54-55; Wright & Gitelman, *supra* note 46, at 263-331.

54. Wright & Gitelman, *supra* note 30, at 835.

55. *Id.* See *Kellogg v. Schreiber* (In re *Kellogg*), 197 F.3d 1116 (11th Cir. 1999) and discussion *infra* at note 109).

56. See *Saving American Farmland*, *supra* note 30, at 65; *Wright & Gitelman*, *supra* note 30, at 835-37.

57. *Larson v. Zoning Board of Adjustment of the City of Pittsburgh*, 672 A.2d 286, 421 (Pa. 1996).

58. It is commonly stated that the “hardship” not be created by the party seeking the variance. See *id.*

59. *Matter of Lloyd*, 37 F.3d at 271.

exempt from creditors in bankruptcy. Suppose the land owned by the debtor is too large for bankruptcy homestead purposes but that a small homestead would violate the applicable APZ minimum lot size restrictions. Who wins – the creditors of the debtor who are seeking the land, or the debtor’s neighbors who wish to preserve the agricultural nature of the area?

Before answering that question, we must turn our attention briefly to the phenomenon in some states of measuring homesteads by area, not value.

### C. Homesteads Based on Area, Not Value

No property was exempt from judgment at the common law.<sup>60</sup> Hence, the protection of certain properties from creditors is the work of legislators or constitution drafters, not judges or chancellors.<sup>61</sup> Traditionally, too, the debtor’s homestead was thought worthy of specific and often greater protection than other real or personal properties.<sup>62</sup> Thus, every state has some kind of protection of the abode from the reach of creditors.<sup>63</sup> This protection of homeowners has economic consequences, intended or not, and renters, mobile-home owners, and others not fortunate enough to own an estate to call “home” get no help from the traditional real property homestead.<sup>64</sup> A quadriplegic renter who needs his

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60. David G. Epstein & Steve H. Nickles, DEBT 33 (1994).

61. I recognize the theoretical nature of this observation and do not claim that never does a judge find a non-appealable way to protect some property of the debtor not protected by statute or constitution. Perhaps the clearest example of this regards the question of whether a father’s obligation to pay child support to his ex-wife is reachable by the wife’s creditors. Some statutes explicitly make support entitlements exempt, see, e.g., 11 U.S.C. § 522(d)(10)(D); Cal. Civ. Proc. Code § 703.140(b)(10)(D); S.C. Code Ann. § 15-14-30(10)(D). The similarity of these citations shows the various states allowing the federal § 522(d) list to influence their state laws. But even without a statute specifically making support exempt, one can easily imagine a judge finding the garnishment of the father to be against public policy. See *Andrews v. City Nat’l Bank*, 349 So.2d 1 (Ala. 1977). The majority in *Andrews* held that an ex-husband’s obligation to pay alimony could be garnished by the creditors of his ex-wife. Justice Jones dissented, writing, “alimony is not merely a debt . . . . Thus, an obligation owed by a spouse through alimony is a higher and more serious obligation than a mere debt. Its sole object is for the continued support of the former spouse and it is not a property settlement.” *Id.* at 3 (Jones, J. dissenting).

And a second informal observation: When the Eighth Circuit held in *In re Holt*, 894 F.2d 1005 (8th Cir. 1990), that Arkansas’s statutory personal property exemptions could not be raised in bankruptcy, Arkansas debtors without homesteads had no exemptions at all, other than \$500 and their clothes. At the next available legislative opportunity, the General Assembly repealed the Arkansas opt-out statute and opted back in, thereby allowing Arkansas debtors to use the exemptions found in the § 522(d) list. However, between the time that *Holt* was decided and the General Assembly opted back in, it was understood that the Arkansas bankruptcy judges were allowing a reasonable amount of property to be exempt, notwithstanding the temporary absence of any statutory basis for the exemptions. This was done without fuss, without written opinion, and without appeal, so quietly that now, a decade and more later, it is difficult to show that it ever happened.

62. See David G. Epstein, *et al.*, BANKRUPTCY 8 (1993).

63. *Id.* See also 14 COLLIER ON BANKRUPTCY (15th ed. 1998).

64. See, e.g., *Cobbins*, 234 B.R. at 882, *aff’d sub nom.* (holding that the debtor’s mobile home sitting on land owned by her mother was not exempt under Mississippi’s homestead law).

expensive powered wheelchair to get around would likely prefer a more flexible exemption scheme than many states provide.<sup>65</sup>

Typically, when a state sets out to protect a homestead, it does so only up to a maximum value, sometimes stated with dollar-wise precision,<sup>66</sup> or occasionally set more flexibly at a “reasonable” amount.<sup>67</sup> A minority of states, however, protect the debtor’s or debtors’ homestead with respect to a minimum acreage, often distinguishing between urban homesteads, with generous but still lot-sized minima and rural homesteads with substantial acreage protected.<sup>68</sup> It is these homesteads, limited in acreage but unlimited in value, that create the kind of high-profile scrutiny that we have seen in recent years.<sup>69</sup> At the same time, they are often the kinds of legislative protections that are most vigorously defended by local politicians.<sup>70</sup> Thus, while a large segment of the public may think it is inconceivable that a debtor in bankruptcy can remain living in a million-dollar home, it has shown itself to be a very difficult state of affairs to change.

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65. “Professional prescribed health aids” are exempt under § 522(d)(9), if the wheelchair-bound debtor resides in a state that has not opted out of the federal exemptions under § 522(b)(1).

66. See, e.g., Alaska Stat. § 09.38.010(a)(\$54,000); Ariz. Rev. Stat. Ann. § 33-1101 (\$100,000); Conn. Gen. Stat. § 52-352b(t)(\$75,000); N.D. Cent. Code § 26.1-15.1-18 (\$80,000); Ohio Rev. Code Ann. § 2329.66(A)(1)(b)(\$5000); S.C. Code Ann. § 15-41-30(1)(\$5000); Tenn. Code Ann. § 25-2-301 (\$5000); Utah Code Ann. § 78-23-3 (\$10,000); W.Va. Const. art 6, § 8 (\$15,000); Wyo. Stat. § 1-20-101 (\$10,000).

67. See, e.g., Wis. Stat. Ann. §§ 815.20, 990.01 (stating that homestead is the property “reasonably necessary for its use as a home . . .,” not less than one-quarter acre, nor more than forty acres and only to the extent of \$40,000).

68. See, e.g., Ark. Const. art. 9, §§ 3, 4 and 5 (urban homestead is one-quarter acre; rural homestead is eighty acres); Fla. Const. art. X, § 4 (urban homestead is one-half acre; rural homestead is 160 acres); Iowa Code Ann. § 561.2 (urban homestead is one-half acre; rural homestead is forty acres); Kan. Stat. Ann. § 60-2301 (urban homestead is one acre; rural homestead is 160 acres); S.D. Codified Laws § 43-314 (urban homestead is one acre; rural homestead is 160 acres); Tex. Const. art. 16, §§ 50, 51 (urban homestead is one acre; rural homestead is 200 acres). Some states set minimum acreage homesteads but place a maximum value on the property, see, e.g., Minn. Stat. Ann. §§ 550.37(9), (16) and (22)(urban homestead is one-half acre, up to \$200,000; rural homestead is 160 acres, up to \$500,000); Miss. Code Ann. §§ 85-3-21, 23 (homestead is 160 acres, up to \$75,000); Neb. Rev. Stat. § 40-101 (homestead is 160 acres, up to \$12,500).

69. See, e.g., Editorial, *Save the Millionaires*, WASH. POST, Apr. 30, 2002, at A18; Editorial, *Millionaire’s Loophole*, WASH. POST, Apr. 23, 2002, at A16; Dave Zweifel, *Bankruptcy Can’t Touch These Mansions*, CAPITAL TIMES(Madison, WI.), Apr. 5, 2002, at 8A; *Enron Chief, Other Top Executives Shield Homes against Creditors*, CHATTANOOGA TIMES FREE PRESS, Feb. 15, 2002, at A2; Katie Fairbanks & Bruce Nichols, *Execs’ Mansions Would Be Shielded; In a Bankruptcy, Texas’ Homestead Exemption Would Protect Home*, DALLAS MORNING NEWS, February 7, 2002, at 1D.

70. See, e.g., Henry B. Gonzales, *The Texas Homestead: The Last Bulwark of Liberty*, 26 ST. MARY’S L.J. 339 (1995). Mr. Gonzales is the late United States Representative from the 20th District of Texas. See also *Washington Notebook*, HOUS. CHRON., Nov. 14, 1999, at A25 (Senator Kay Bailey Hutchinson, a Republican, and Ken Benson, a Democrat, urged that Congress exempt Texas from any restriction on homesteads in bankruptcy); Dan Morgan, *GAO: ‘Homestead Exemption’ Aids Well-Off Few; Bush, Texas Officials on Record as Opposing Move to Limit Bankruptcy Shelter*, WASH. POST, July 18, 1999, at A6 (Then-governor George W. Bush opposed any cap on homestead exemptions).

Beyond this high-profile difficulty with the unlimited homestead exemptions that some states have, there is another problem brought directly to bear by APZ and other zoning restrictions on lot size. That is to say, sometimes these generous homestead exemptions threaten to become even more generous if the debtor lives in a place where zoning regulations prohibit a lot size as small as the maximum homestead allowed by law. In town, this usually happens when a debtor entitled to, say, a quarter acre of urban homestead lives in a sub-division covenanted to allow no lot smaller than a half acre.<sup>71</sup> The leading cases on this situation are *O'Brien v. Heggen (In re O'Brien)*<sup>72</sup> and *Englander v. Mills (In re Englander)*,<sup>73</sup> in which the Eighth and Eleventh Circuits, respectively, ordered the homesteads sold and the proceeds divided between the trustee (on behalf of the unsecured creditors) and the debtors, with the debtors getting the value attributable to one quarter acre of land and to the house itself. The trustee recovered that portion of the proceeds attributable to the rest of the land at an unimproved price.<sup>74</sup>

In the rural situation, private contractual restrictive covenants are uncommon, and here the conflict is directly between the interests of the landuse regulators in keeping the property largely undivided by placing substantial minima on lot size, and the interests of the creditors of the debtor, who insist on keeping the debtor's exemptions within the limits set by the law. Something must give, as a case from the Seventh Circuit indicates.

### III. *Matter of Lloyd*: Homestead and APZ in Conflict

The Seventh Circuit confronted the conflict between lot size and land use restrictions of APZ and homestead claims in *Matter of Lloyd*.<sup>75</sup> Faye W. Lloyd was a psychotherapist and horse breeder who owned 113 acres of land in an area zoned "exclusively agricultural" in the Township of Empire in Fond du Lac County in east-central Wisconsin.<sup>76</sup> There was no house built on this land, so it was not Dr. Lloyd's permanent residence,<sup>77</sup> but she apparently boarded and bred horses there.<sup>78</sup> "In earlier

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71. It is not uncommon in these situations for the zoning ordinances to duplicate the sub-division's restrictive covenants.

72. 705 F.2d 1001 (8th Cir. 1983).

73. 95 F.3d 1028 (11th Cir. 1996) (per curiam).

74. See Robert Laurence, *Attacking the Acquisition and Forcing the Sale of an Indivisible Arkansas Homestead*, 55 ARK. L. REV. 473 (2002).

75. *Matter of Lloyd*, 37 F.3d at 271.

76. *Id.* at 272-73.

77. The Seventh Circuit's opinion does not mention it, but I am informed by the trustee in the case that Dr. Lloyd had parked a rather run-down house trailer on the property prior to the date of petition, and that at least one room of that trailer was suitable for habitation.

78. *Matter of Lloyd*, 37 F.3d at 273-74.

years,”<sup>79</sup> she had taken crops off the land, but at the time of her bankruptcy she was participating in the Conservation Reserve Program.<sup>80</sup>

When Dr. Lloyd petitioned in bankruptcy court and claimed the 113 acres as a homestead under Wisconsin law, the first issue for the bankruptcy court was whether the claim was invalid because she did not permanently reside on the property. Under the so-called “snap-shot” theory of bankruptcy, both the property of the estate under § 541 and the debtor’s exemptions under § 522 are determined on the date of petition,<sup>81</sup> and it takes a rather generous bankruptcy judge or special circumstances to hold vacant land to be a homestead, though such cases are not unknown.<sup>82</sup> This

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79. *Id.* at 274.

80. *Id.* The Conservation Reserve Program, 16 U.S.C. §§ 3801, 3831-3836; 7 C.F.R. § 1410.3(a)-(c), is a federal farm program that encourages owners of highly erodible land, defined by 16 U.S.C. § 3801(a)(9)(A), to retire the land from production, in exchange for cash compensation in the nature of rent. See, e.g., *Sanders Land & Cattle Co. v. Dep’t of Agric.*, 49 Fed. Appx. 211 (10th Cir. 2002).

81. Section 541 states that “[t]he commencement of a case under section 301, 302 or 303 of this title creates an estate.” 11 U.S.C. § 541(a)(emphasis added). Section 522 is less emphatic, but makes reference to “property of the estate,” which, under § 541(a) is set as of the date of petition. 11 U.S.C. § 522(b). Section 522(b)(2)(A) refers to “. . . State or local law that is applicable *on the date of the filing of the petition* at the place in which the debtor’s domicile has been located for the 180 immediately preceding the date of the filing of the petition . . .” 11 U.S.C. § 522(b)(2)(A)(emphasis added).

82. See, e.g., *In re Crippen*, 36 B.R. 7 (Bankr. E.D. Mo. 1983), in which the court denied homestead status to unimproved vacant land without utility service. To be distinguished are cases such as *In re Herr*, 197 B.R. 939 (S.D. Fla. 1996) in which the debtor’s previous home was destroyed by fire, or, as in *Herr*, by a hurricane, and not yet rebuilt at the time of the bankruptcy petition. Most of the cases discussing the exempt status of vacant land are actually addressing the question of whether vacant land may constitute *part* of a homestead, most often in the situation where a legitimate homestead lies contiguous to land belonging to the debtor, who has subdivided the land for development. See, e.g., *Fifty v. Nickless (In re Fifty)*, 293 B.R. 550 (B.A.P. 1st Cir. 2003); *In re Allman*, 286 B.R. 402 (Bankr. D. Ariz. 2002); *In re Edwards*, 281 B.R. 439 (Bankr. D. Mass. 2002); *In re Coin*, 241 B.R. 258 (Bankr. S.D. Fla. 1999). The results are not always consistent, compare, e.g., *In re McCain*, 160 B.R. 933 (Bankr. E.D. Tex. 1993)(adjoining vacant land was not exempt) *with* *Matter of Bradley*, 960 F.2d 502 (5th Cir. 1992)(the opposite).

In *Peoples’ State Bank v. Stenzel (In re Stenzel)*, 301 F.3d 945 (8th Cir. 2002), the debtor owned outright five acres on which he lived and had a remainder interest in another 155 acres on which his mother lived as the life tenant and which she had leased to a third-party farmer. When Stenzel petitioned, he claimed all 160 acres as exempt. The bankruptcy court allowed the claimed exemption, the B.A.P. reversed, and the Eighth Circuit reversed again and remanded to the bankruptcy court for further factual findings:

[T]he relevant question of fact is one the Bankruptcy Court did not answer – whether the 155-acre parcel is part of the “land upon which [Stenzel’s house] is situated.” To answer that question, the Minnesota cases require a fact-based determination of whether Stenzel used the 155-acre parcel for farming purposes in such a way that the two parcels were “occupied and cultivated as one piece or parcel of land, on some part of which is located the [debtor’s] residence.”

*Id.* at 949 (quoting *Brixius v. Reimringer*, 112 N.W. 273, 273 (Minn. 1907) and citing *Denzer v. Prendergast*, 126 N.W.2d 440, 444-45 (Minn. 1964)). Judge Kornmann concurred in the remand but stressed how unlikely he thought it would be that Stenzel had the requisite intention when the land was under lease to a third party and where, in fact, Stenzel had not even been aware of his remainder interest in the 155 acres at the time of his

should be especially true in a state such as Wisconsin, whose exemption statute expressly requires that the property be “selected by a resident owner and occupied by him or her.”<sup>83</sup> Other states are more generous and provide for exempt status for property intended in the future to be a homestead.<sup>84</sup> Over the trustee’s objection, the bankruptcy court in *Lloyd* in an unpublished opinion allowed the exemption, perhaps based on the presence of a trailer with a furnished, candlelit bedroom. This determination was not appealed by the trustee.

In Wisconsin, “[t]he word ‘homestead’ means the dwelling and so much of the land surrounding it as is *reasonably necessary for use of the dwelling as a home*, but not less than one-fourth acre, if available, and not exceeding 40 acres,”<sup>85</sup> and not exceeding \$40,000 in value.<sup>86</sup> Thus, it was necessary for the bankruptcy court to determine whether Dr. Lloyd was a farmer, as such a determination is relevant to how much land would be “reasonably necessary” for her to keep exempt. The court determined that she was not a farmer and granted her a three-acre homestead. She was then ordered to choose her three acres, and the remainder of the land was ordered sold, with the proceeds to go to the estate.<sup>87</sup>

However, Dr. Lloyd’s land was zoned “exclusively agricultural” and could not be divided into parcels smaller than thirty-five acres. If complied with, these zoning regulations would have resulted in Dr. Lloyd’s having a thirty-five-acre homestead, when the state’s grant to her was only for a “reasonable” homestead, determined by the bankruptcy court to be only three acres. In order to prevent this result, the bankruptcy court then ordered the trustee to seek a change in the zoning classification to designate Dr. Lloyd’s chosen three-acre parcel as “residential.”

The fact that the bankruptcy court found that only three acres of the real property was Dr. Lloyd’s homestead, even without a house built upon it, and that she was not a farmer put Dr. Lloyd and the court on the horns of a dilemma. Zoned “exclusively agricultural,” three acres was too small a lot to permit a house to be built there, and if Dr. Lloyd could not build her house then, as the Seventh Circuit recognized, the very essence of a “homestead” would disappear.<sup>88</sup> However, if the property were re-zoned “residential,” then Dr. Lloyd might not be able to use the land for her “agricultural” use of breeding and boarding horses, as she intended. Had the house already been built, the trustee could have sought merely a variance from the minimum “agricultural” lot size, and Dr. Lloyd and her horses could have lived on the three acres.

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petition.

83. Wis. Stat. § 815.20(1).

84. See, e.g., Mass. Gen. Laws Ann. ch. 188, § 1 (emphasis added): “An estate of homestead to the extent of \$300,000.00 in the land and buildings may be acquired pursuant to this chapter by an owner or owners . . . who occupy or *intend to occupy* said home as a principal residence.”

85. Wis. Stat. § 990.01(13)(emphasis added).

86. Wis. Stat. § 815.20(1).

87. *Matter of Lloyd*, 37 F.3d at 274.

88. *Id.*

The bankruptcy court resolved this dilemma by ordering the trustee to seek a variance from the “exclusively agricultural” zoning of Dr. Lloyd’s property to “residential.” Sought and granted, this variance allowed her three-acre homestead to be split off and become susceptible to having a house built on it. The other 110 acres were sold to Dr. Lloyd’s neighbor for \$93,000, and it was over the exempt status of this money that the appeal was made.<sup>89</sup>

On appeal, Dr. Lloyd’s representative<sup>90</sup> argued that it was an abuse of discretion for the court to order that re-zoning be sought and that the homestead protection, plus the zoning ordinance, required that Dr. Lloyd be granted a 35-acre homestead.<sup>91</sup>

The Seventh Circuit rejected this argument and affirmed as follows:

Other bankruptcy courts have addressed the problem of exemptions being in tension with state law or local law. Where a homestead exemption is a state constitutional right, that right may not be denied or frustrated by a zoning change brought about by local government. On the other hand, where state law limits the size or value of a homestead exemption, bankruptcy courts have been unwilling to increase the size of the homestead in order, ostensibly, to comply with local zoning laws [citation to *Englander v. Mills (In re Englander)*<sup>92</sup>omitted] . . .

The bankruptcy court sought to grant Lloyd a homestead exemption. It determined an appropriate amount of land to which she was entitled. This is a finding that we will not reverse absent clear error. It then exercised its equitable powers to ensure that the exemption was usable for the purpose of constructing a residence. The bankruptcy court here could have ordered the sale of the entire parcel and awarded Lloyd certain proceeds of the sale, [citation to *O’Brien v. Heggen (In re O’Brien)*<sup>93</sup> omitted] but instead it allowed her to stay on the land. By authorizing a relatively simple change in the zoning, the bankruptcy court could grant Lloyd an adequate homestead and at the same time give due consideration to the interests of the creditors by exempting only enough property to meet Lloyd’s entitlement. The court carefully adhered to the prescriptions of the Code and did not overstep the bounds of its very considerable equitable

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89. “As an initial matter, when a party challenges a bankruptcy court’s order authorizing the sale of estate property to a good faith purchaser, it must obtain a stay pending appeal or the appeal becomes moot once the sale is made.” *Id.* at 273. However, because under Wisconsin law the proceeds of a homestead remain exempt, see Wis. Stat. § 815.20, the Seventh Circuit found the case not to be mooted out by the sale to the neighbor. It is as authority for this mootness proposition that the *Lloyd* case is commonly cited, *cf.*, e.g., *Licensing by Paolo v. Sinatra (In re Gucci)*, 105 F.3d 837 (2d Cir. 1997).

90. *Matter of Lloyd*, 37 F.3d at 273. She was technically *pro se*, but the court appointed *amicus* for her.

91. *Id.*

92. *Englander*, 95 F.3d at 1028.

93. *O’Brien*, 705 F.2d at 1001.

powers. Of course, if the rezoning itself were improper under state or local law, the zoning decision of the Township could have been appealed.<sup>94</sup>

The two citations omitted from this quotation are worthy of short discussion. In *O'Brien*, James O'Brien petitioned in bankruptcy and claimed his residence as exempt. The homestead consisted of 40,000 square feet of land (or about one acre) and 4400 square feet of house, subject to a zoning ordinance restricting lakefront lot size to a minimum of 40,000 square feet.<sup>95</sup> Minnesota has a statutory homestead exemption based on area rather than value, with one-half acre protected from creditors.<sup>96</sup> Mr. O'Brien designated his one-half acre of homestead as Parcel A, leaving the remainder of the land as Parcel B, landlocked and not severable from the homestead without violating the zoning ordinance.<sup>97</sup>

The bankruptcy court ordered the entire property sold for \$535,000 and used the proceeds first to retire a valid mortgage for \$204,000. The court then divided the remainder, with \$72,880 for the trustee and \$258,120 for the debtor.<sup>98</sup> The debtor was not satisfied that this division was just and appealed, arguing that only a nominal \$1000 should go to the trustee.<sup>99</sup>

*Englander* is a similar case from the Eleventh Circuit. The case arose in Winter Park, Florida, where, again, the debtor owned property too large to be claimed as a homestead but unable to be subdivided due to municipal zoning ordinances.<sup>100</sup> Citing *O'Brien* as authority, the circuit court affirmed the bankruptcy court's decision to force the sale of the entire property and divide the proceeds between the debtor and the estate.<sup>101</sup>

*Kellogg*<sup>102</sup> is another Eleventh Circuit case that draws *Lloyd*, *O'Brien*, and *Englander* together. Mr. Kellogg, a Palm Beach debtor, petitioned in Chapter 7 and claimed as his homestead 1.3 acres, or about 52,000 square feet, of oceanfront property. The Florida homestead exemption is only one-half acre, regardless of value,<sup>103</sup> but Mr. Kellogg's property was zoned so that the minimum lot size was 60,000 square feet. After some skirmishing with his first bankruptcy lawyer, Mr. Kellogg and his second lawyer argued that they should be given time to seek a variance from the Palm Beach zoning ordinance that seemed to prohibit the subdivision of his land. The bankruptcy court refused the

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94. *Matter of Lloyd* at 275

95. *O'Brien*, 705 F.2d at 1002.

96. Minn. Stat. Ann. § 510.02.

97. *O'Brien*, 705 F.2d at 1002.

98. *Id.*

99. *Id.* at 1003.

100. *Englander*, 95 F.3d at 1029.

101. *Id.* at 1032.

102. *Kellogg*, 197 F.3d at 1116.

103. Fla. Const. art. X, § 4(a).

continuance and ordered the property sold, with the proceeds of the sale to be split between the debtor and the estate.<sup>104</sup>

The Eleventh Circuit's stated reason for denying Mr. Kellogg the right to seek a zoning variance was that the homestead status of the property was determined as of the date of petition under the "snapshot" theory; thus, Mr. Kellogg must have sought his variance before petitioning.<sup>105</sup> This holding, then, is contrary to *Lloyd*, in which the trustee was instructed to seek the variance post-petition for the benefit of the estate.<sup>106</sup>

*Lloyd* is the earlier case, and the opinion seems to anticipate the Eleventh Circuit's objection to the late seeking of the zoning variance. The Seventh Circuit knew it was creating an extraordinary remedy, and it addressed the problem as follows:

The trustee is the representative of the estate, and is charged with liquidating the property of the estate as expeditiously as is compatible with the best interests of the parties in interest. The bankruptcy court's equitable powers, found in 11 U.S.C. § 105, enable the court to issue any order, process, or judgment that is necessary or appropriate to carry out provisions of the Code. These powers may be exercised only within the confines of the Bankruptcy Code. The bankruptcy court does not have free-floating discretion, to create rights outside the Code, but the court may exercise its equitable powers in a manner consistent with the Code.

The bankruptcy court sought to grant Lloyd a homestead exemption. It determined an appropriate amount of land to which she was entitled. This is a finding that we will not reverse absent clear error. It then exercised its equitable powers to ensure that the exemption was usable for the purpose of constructing a residence. The bankruptcy court here could have ordered the sale of the entire parcel and awarded Lloyd certain proceeds of the sale, but instead it allowed her to stay on the land. By authorizing a relatively simple change in the zoning, the bankruptcy court could grant Lloyd an adequate homestead and at the same time give due consideration to the interests of the creditors by exempting only enough property to meet Lloyd's entitlement. The court carefully adhered to the prescriptions of the Code and did not overstep the bounds of its very considerable equitable powers. Of course, if the rezoning itself were improper under state or local law, the zoning decision of the Township could have been appealed.<sup>107</sup>

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104. *Kellogg*, 197 F.3d at 1121.

105. *Id.* The opinion in the *Kellogg* case has an air to it of impatience with an obstreperous debtor, and it could be that the court's *unstated* reason for affirmance was that Mr. Kellogg had tried the bankruptcy court's patience and that the appellate court understood the earlier court's frustration. Note, too, that while it was the trustee who sought the zoning variance in *Lloyd*, it was the debtor in *Kellogg*.

106. *Matter of Lloyd*, 37 F.3d at 275.

107. *Id.* (citations and internal punctuation omitted).

Between *Lloyd* and *Kellogg* on the issue of whether the bankruptcy court may order a post-petition request for a zoning variance, *Lloyd* seems to be the better result for the reasons stated. Debtors who seek a re-zoning of the property as the preferred remedy to an overly large homestead would be well-advised to seek the same prior to petitioning, thereby removing a large amount of uncertainty in the bankruptcy case.

The Eleventh Circuit denied Mr. Kellogg the right to seek a variance from the Palm Beach zoning ordinance on technical grounds. In *dicta* contained in a footnote, the court expressed its opinion on the likelihood of such a variance's being granted in a short discussion that harkens back to the rules mentioned above for departures from a zoning regime<sup>108</sup>:

Even if Kellogg were allowed to seek a variance after filing his petition, the record shows no grounds for it to have been granted. To receive a variance, Kellogg must show the following: (1) his land suffers from special conditions and circumstances peculiar to it alone; (2) the special conditions and circumstances do not result from Kellogg's actions; (3) granting the variance will not confer on Kellogg any special privilege not given to other property in the same district; (4) denying the variance would work "unnecessary and undue hardship" on Kellogg; and (5) the variance granted is the minimum possible to allow the reasonable use of his land. See Palm Beach Code § 134-201(a). Kellogg bears the burden of proving the above conditions apply.

When a landowner acquires the land with knowledge of the zoning restrictions, he cannot cry 'hardship.' More to the point, "when the owner himself by his own conduct creates the exact hardship which he alleges to exist, he certainly should not be permitted to take advantage of it." [H]ardship will not justify a variance when it is "one of mere economic disadvantage," particularly when [it is] self-created[.] Because the record shows only that Kellogg's hardship was monetary and self-created, he would not have met his burden of showing he was entitled to a variance. This is not to say that the Trustee or a subsequent purchaser could not obtain a variance, but only that the record does not show that Kellogg could receive a variance in these circumstances.<sup>109</sup>

It is the final sentence of this footnote that pulls *Lloyd* and *Kellogg* back into consistency. Not only does the Eleventh Circuit make direct mention that the trustee may be able to seek the variance that Mr. Kellogg was not permitted to seek, but more fundamentally, the sentence shows that the ultimate authority with respect to zoning variances lies with the local zoning authorities, and it is they who will determine whether the interests of the community and the debtor's neighbors are advanced by permitting some flexibility in the local ordinances. If not, then *O'Brien* controls, and the protection of the estate comes through the sale of the entire property, zoned as it is, and division of the proceeds.

#### IV. Conclusion

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108. See Wright & Gitelman, *supra* note 30, at 835.

109. *Kellogg*, 197 F.3d at 1121, n.4 (citations to Florida authority omitted). In an earlier discussion of these issues, see Laurence, *supra* note 74, at 535-39. I observed that the Eleventh Circuit did not discuss the seeking of the variance, thereby ignoring the *dicta* in footnote 4 of *Kellogg*.

Conflicting interests clash when suburban sprawl meets farmland preservation meets debtor relief and creditor protection. There are the usual bankruptcy conflicts: trustees seek to maximize the estate for the benefit of the unsecured creditors, while debtors, legitimately if aggressively, seek to maximize their exemptions. Added to this are the usual land use conflicts: landowners seek to retain maximum control of their own property, even while objecting to their neighbors' freedom of action, and local regulatory bodies act to advance the interests of the community at large. As is ever the case, the insolvency of one of the parties upsets the expectations of those who have come to deal with the insolvent one. *Matter of Lloyd* takes a reasoned view of these complexities and works an equitable solution. And, as the Seventh Circuit explained, if the local authorities had denied the variance, then the interests of the community would have controlled and the interests of the debtor and creditor would have been resolved, as in *O'Brien*, by selling the property and dividing the proceeds.

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