Rural Property Law

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RURAL PROPERTY LAW

Alan Romero

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Although the density of human population is the primary variable that causes a place to be considered rural,\(^1\) we often think about “rural” as describing certain qualities of the land. Because of lower population, rural places are less developed, more natural, peaceful, and beautiful. We often think of the land as more important to rural lifestyles and livelihoods. It therefore seems that the law relating to real property would be especially sensitive to the character of rural land.

In writing this Article, I have searched traditional private law regarding real property — much of the subject matter found in property casebooks — looking for ways in which real property law is sensitive to the character of rural land. I have looked for areas of the law where different rules are applied to rural and urban places and areas where the same rule is commonly applied differently in rural and urban places. Predictably, almost all such differences relate to rules

concerning the use of land, rather than rules concerning ownership of land, like

title, estates, and transfers of land. Some observable differences in outcomes

seem unremarkable because they simply result from application of general, con-
sistent rules in different physical settings, without apparent patterns resulting

from the rural or urban character of the area. In this Article, I discuss five areas

of property law where the substance or application of property rules has differed

between rural and urban places: nuisance, landlord-tenant, adverse possession,

prescriptive easements, and surface water. I identify such differences in each of

those categories and argue that some are valid and some are not. Many differ-

ences are valid, appropriate responses to real differences between rural and ur-

ban places. Some differences, however, are invalid because they are based on

outdated, unwarranted, or over-generalized assumptions about rural land and

people. Other differences are invalid because they result from valuing rural uses

less than urban uses and not fully recognizing the value of rural uses. On the

other hand, I also argue that some property rules have not differed enough in

rural places, in that they have not appropriately responded to unique rural needs

or circumstances, and that they should be more sensitive to those distinctive

characteristics.

I. PRIVATE NUISANCE LAW

A nuisance is an intentional and unreasonable interference with another’s use and enjoyment of land. That general rule does not vary between rural

and urban areas. Although there are certainly relevant differences between rural

and urban areas, those differences do not require variation in the common law

nuisance rule because the rule itself requires consideration of all the relevant

circumstances in deciding whether a particular interference is unreasonable.

The relevant circumstances include the appropriateness of the challenged activity in the area, the extent and nature of the harm caused by the activity, and “the

nature, utility, and social value of the use or enjoyment invaded.” Courts must

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2 For example, landowners are strictly liable for damages resulting from removing lateral support necessary to adjacent land in its natural state, but are only liable in negligence for removing support necessary to improvements on adjacent land. See Restatement (Second) of Torts §§ 817, 819 (1989). Because rural areas are less developed, establishing strict liability may be easier in rural areas. But if so, this is not because of categorizing land as rural or urban. Regardless of the rural or urban character, courts simply consider the physical condition of the land in question, actual and hypothetical.

3 See, e.g., id. § 822 (stating that one is liable for private nuisance if “his conduct is a legal cause of an invasion of another’s interest in the private use and enjoyment of land, and the invasion is... intentional and unreasonable”).


5 Id. § 150.
balance this harm to the plaintiff against the utility of the defendant’s use to decide whether the harm is unreasonable.6

Differences between rural and urban places can greatly affect the evaluation of the harm suffered and the balancing of that harm against the defendant’s use. In fact, private nuisance law may be the best illustration of how and why differences in rural and urban settings result in different applications of property law. Nuisance law also illustrates how the common law balancing approach may result in unwanted outcomes, prompting legislative changes to the common law.

A. Character of the Area

One consideration in determining the reasonableness of interference is the character of the area where the interference occurs.7 The very same activity may be reasonable in one place but unreasonable in another place. As Justice Sutherland famously said, “A nuisance may be merely a right thing in the wrong place, like a pig in the parlor instead of the barnyard.”8 Obviously, any legal rule that directly considers whether an activity is appropriate in a particular place may result in different outcomes in rural and urban settings.9

When the challenged activity is normal and expected in a rural setting, it is unlikely to be a nuisance.10 Therefore, many cases have observed that animal smells and noises and other agricultural activities generally should be expected

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6 See id. § 151 (“In deciding whether one’s use of his or her property is a nuisance to his or her neighbors it is necessary to balance the competing interests of the landowners . . . . The unreasonable use element of nuisance . . . [requires] a determination of [the] reasonableness of use involving the balancing of the harm done to the plaintiff against the utility of the defendant’s use of his or her property . . . .”).

7 See, e.g., Morgan County Concrete Co. v. Tanner, 374 So. 2d 1344, 1346 (Ala. 1979) (“[L]ocality may be determinative in deciding whether the use of land by defendant unreasonably interferes with plaintiff’s use of his land so as to constitute a nuisance.”).


9 A similar issue may arise with interpreting covenants. For example, the parties to a covenant restricting use of land to residential purposes may intend to allow uses that are typical or expected in that particular residential area. Therefore, a residential covenant in an urban area may be interpreted to exclude horses, but a residential covenant in a rural area may be interpreted to allow horses. See Kalika v. Harvey, No. 10331, 1987 WL 488701, at *1 (Va. Cir. Ct. Aug. 21, 1987) (holding that a residential purposes covenant was not violated by keeping horses on the property “[c]onsidering the size of the lot involved, its location in a rural area adjacent to farmland and the proclivity of landowners in rural Loudoun County to have horses for recreational purposes”); cf. Becker v. Arnfeld, 466 P.2d 479, 480 (Colo. 1970) (en banc) (holding that keeping chickens violated residential covenant prohibiting animals except for pets because keeping chickens was not “normally associated with residential, family living”).

10 See, e.g., Flansburgh v. Coffey, 370 N.W.2d 127, 131 (Neb. 1985) (“The fact that a residence is in a rural area requires an expectation that the residence will be subjected to normal rural conditions, but not to such excessive abuse as to destroy the ability to live and enjoy the home, or such as to reduce the value of the residential property.”).
in rural agricultural areas, and therefore are less likely to be nuisances. For example, a Tennessee court held that a chicken house in a rural area was not a nuisance, observing that while its smell was offensive to the “city slicker” plaintiff, it did not affect the “country folk” who lived nearby. Similarly, the dust from a gravel road may be a nuisance in more urbanized places, but in a rural area it may be typical and reasonable.

On the other hand, some activities that are normal in urban areas are out of place in rural areas and are therefore more likely to be nuisances in a rural setting. For example, one court observed that urban areas are noisier, and noise is therefore more likely to be a nuisance in rural places:

The general rule as to effect of locality in determining what constitutes a nuisance applies in the case of noise. What may be a nuisance in one locality may not in another. Noises may be a nuisance in the country which would not be in a populous city. A person who resides in the center of a large city must not expect to be surrounded by the stillness which prevails in a rural district. He must necessarily bear some of the noise and occasionally feel slight vibrations produced by the movement and labor of its people and by the hum of its mechanical industries.

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11 See, e.g., Arbor Theatre Corp. v. Campbell Soup Co., 296 N.E.2d 11, 14 (Ill. App. Ct. 1973) (holding that mushroom composting operation in rural area was “suitable to the locality” and therefore not a nuisance despite substantial impairment of neighboring property’s use and enjoyment); Stottlemeyer v. Crampton, 200 A.2d 644, 647 (Md. 1964) (holding that driving cattle along public road was not a nuisance in a rural community, noting that it did not affect property owners’ use and enjoyment in any way “other than that which normally should be expected by persons living along a rural road”); Cline v. Franklin Pork, Inc., 313 N.W.2d 667, 670 (Neb. 1981) (“The fact that the residence is in a rural area requires an expectation that it will be subjected to normal rural conditions . . . .”).


13 See Neyland v. Schneider, 615 S.W.2d 285, 287 (Tex. Civ. App. 1981) (“We hold as a matter of law that defendant’s use of the roadway is not unreasonable. The two tracts of land are located in a rural farming area. Defendant’s road is not materially different from the many other caliche gravel roads in the community.”).

14 See Pruitt, supra note , at 188–89 (“[C]ourts may be more tolerant of agricultural annoyances in rural areas, but less tolerant of other irritations that interfere with the perceived rural idyll. Several states have held, for example, that while a race track is not a nuisance per se, it may constitute a nuisance per accidens under certain circumstances, as in a rural area. Many courts thus more aggressively defend rural places against nuisances, especially non-agricultural ones, suggesting that these presumptively pristine and quiet areas are especially sensitive to the loud, the smelly, and the ugly.”) (footnotes omitted).

15 Alabama Power Co. v. Stringfellow, 153 So. 629, 632 (Ala. 1934); see also Russell v. Thierry, No. CV010385198S, 2001 WL 1734441, at *2 (Conn. Super. Ct. Dec. 11, 2001) (“[P]laintiffs are subjected to noise which, by city standards, is not loud. However, in the particu-
This aspect of private nuisance law is generally a good example of how courts should and do consider the distinctive characteristics of rural places in making legal decisions. Even so, there is still a danger of erroneous or unjust application of the law to rural places resulting from stereotypes. As Lisa Pruitt observed about a wide variety of cases dealing with rural places:

[J]udges in many of these cases appear to base not only their rhetoric, but also their rulings, on stereotypes of rural people. Thus, the distinctions they draw between rural and urban are not necessarily accurate assessments or depictions of rural livelihoods, nor of the differences between rural and urban. Judicial decisions are therefore not necessarily sensitive to or reflective of rural realities.

Judges who discuss the rural and base their rulings on its legal relevance are often taking judicial notice of the consequences of being rural rather than inviting and considering hard evidence about rural people, their lifestyles, and their land.

Recognizing that an activity may be more or less objectionable in a rural area than in an urban area is good, but it is only the first step. Courts must also recognize that rural areas vary widely just as urban areas do. Courts should be specific about what attributes of an area are relevant to the dispute and should examine the evidence of those attributes in each case rather than relying

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16 See Bassett, supra note , at 963 ("Some rural areas are beautiful but others are not — just as some cities are beautiful but others are not — which requires that land use decisions be grounded in specific facts rather than generalized stereotypes. The use of stereotypes, even positive stereotypes, in legal decisions renders the stereotype an absolute — embodying the perception of the facts, serving as an analytical shortcut, and compelling a particular, predetermined conclusion. In other words, the mental shortcuts provided by rural stereotypes are so powerful as to risk 'law by stereotype' — the substitution of a stereotype for the scrutiny, reasoning, evaluation, and judgment expected in legal decisionmaking.").

17 Pruitt, supra note , at 207.
on assumptions or stereotypes about the attributes of rural areas. This may come more naturally to courts in nuisance cases than other types of cases because they must consider not just the character of the locality, but also the character and extent of the intrusion. So while nuisance cases may often include stereotypical expressions of rural quiet and beauty, they will generally become more specific about the relevant attributes of the area in the course of evaluating the extent to which the specific noise or other intrusion impairs those attributes.

B. Extent of the Injury

The character and extent of the injury suffered are also relevant when determining whether an activity is a private nuisance. Courts generally have recognized that rural landowners are entitled to enjoy their property just as much as other landowners. However, when a court balances competing interests against the extent of the injury, it may seem natural and logical that if more people are affected, the injury is greater. By definition, rural areas have fewer people, and therefore in rural areas injuries would tend to be less than in urban areas. Of course, this is just one factor to consider, and a court may still find that an activity is a nuisance even though few are affected by it. After all, a private nuisance claim need not prove injury to anyone other than the plaintiff.

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18 See id. at 238 (“Instead of unthinking and unexplained endorsement of a party’s classification of a place as rural, courts should be explicit about the characteristic for which they are using the word as a proxy, e.g., scenic beauty, lack of anonymity, remoteness. Judges should then analyze the legal issue in light of that characteristic.”).

19 See, e.g., Russell, 2001 WL 1734441, at *2 (noting that “plaintiffs are entitled to be free from unnecessary noise, particularly in view of the secluded and rural environment,” and discussing evidence about when and where the noise was audible, the extent of intrusion on enjoyment of the plaintiffs’ property, and quieter alternatives for defendant’s use).

20 See AM. JUR. Nuisances, supra note 4, § 150 (“Whether a particular condition is a nuisance depends not merely on its inherent nature, but also on a consideration of all relevant facts, such as the nature and extent and nature of the harm involved . . . .”) (footnotes omitted).

21 See, e.g., Cline v. Franklin Pork, Inc., 313 N.W.2d 667, 670 (Neb. 1981) (“The fact that the residence is in a rural area requires an expectation that it will be subjected to normal rural conditions but not to such excessive abuse as to destroy the ability to live in and enjoy the home, or reduce the value of the neighboring property. A rural home and a rural family, within reason, are entitled to the same relative protection as others.”).

22 See Pruitt, supra note 1, at 179 (discussing definitions of rural places based on population).

23 See Miller v. Jasinski, 705 S.W.2d 442, 445 (Ark. Ct. App. 1986) (“Although the manner of operation of an otherwise legal activity within a predominately residential area can constitute an abatable nuisance, the chancellor expressly found that the landfill was not operated in such a manner as to cause unreasonable harm to adjacent owners and that the area in which it was located was a rural one ‘with farm lands and scattered housing.’”).

24 See Frank v. Cossitt Cement Prods., 97 N.Y.S.2d 337, 340 (Sup. Ct. 1950) (“Although only a few persons are disturbed by the nighttime operation of defendant’s plant . . . nevertheless the
This nuisance factor illustrates one of the basic problems with law and policy concerning rural places: whenever a decision is influenced by weighing how much is at stake with a particular rule, the lower density of development and population in rural areas may mean that the interest of property owners is less and therefore results in different outcomes for rural places and urban places. This may not be wrong. Maximizing net social benefits generally seems wise. But, as private nuisance law indicates, any individual property owner should have the same assurance that she can use and enjoy her property without interference, even if the interference comes from a use that may have greater economic value.

C. Relative Values of Competing Uses

Not only may the injury to rural property seem less because it affects fewer people, it may also seem more easily outweighed by the conflicting activity. In deciding whether an activity is a nuisance, courts not only consider the extent of the harm to the plaintiff, but they weigh that harm against the harm of preventing the challenged activity. This balancing considers not just the value to the individuals involved, but the social value of their activities as well.26

Furthermore, even if a court finds that a nuisance exists, it will not enjoin the nuisance if the injury to the plaintiff is small in comparison to the injury that an injunction would cause to the defendant and the public.27 Here again, the injury to rural plaintiffs may seem smaller both because there are fewer injured parties and because their land uses are less intensive and less financially valuable.28

25 See Guarina v. Bogart, 180 A.2d 557, 561 (Pa. 1962) (“The interest of a ‘single householder’ is, however, not to be treated lightly. A man’s home may no longer be his castle in the classic sense but it is still the depository of sovereign rights, one of which is the inevitable and inalienable right to peace and tranquility consistent with the rights of his neighbors.”).

26 See, e.g., Pate v. City of Martin, 614 S.W.2d 46, 47 (Tenn. 1981) (noting that a court in deciding whether an activity is a nuisance must consider, among other things, the “nature, utility and social value” of both the challenged use and the use invaded); Johnson v. Malone, No. E2001-02106-COA-R3-CV, 2002 WL 1063936, at *2 (Tenn. Ct. App. May 28, 2002) (“Regarding the ‘nature, utility and social value of the use’, the Court found that there was nothing illegal about the poultry farm, in fact, the proof was undisputed that it was an efficient, well-run operation. The proof was also undisputed that the farm served a valuable purpose for the Malones, in that it allowed them to keep and work at their farm.”).


28 See Texas Lime Co. v. Hindman, 300 S.W.2d 112, 123 (Tex. Civ. App. 1957) (“[S]ince the lime plant . . . is a lawful, useful and necessary business, and . . . it does and has contributed to the welfare and prosperity of the community in which it is located, as well as to the health and welfare of the people of the State of Texas, in that useful and necessary products are being produced, . . . the granting of an injunction . . . would be unjust, improper, inequitable and would result in an unbalancing of the equities in favor of a few individuals as against the public at large.”).
sive although necessary undertaking” may be granted only “when it could be as easily and economically carried on in some location where it would give no offense.”

Therefore, the more rural the area — that is, the fewer the residents to be offended by a use — the less likely that there is a less offensive place for the necessary activity, and the less likely the rural residents will be able to have the activity enjoined.

On the other side of the balance, more intensive uses typical of urbanization may often be much more financially valuable. Therefore, courts may be less likely to enjoin urbanizing uses in rural areas and instead award only damages. Sometimes courts have expressly justified this result on the ground that public policy favors urbanization.

This equitable rule limiting injunctive relief further favors urban uses over rural uses and effectively gives urbanizing uses the power to enter rural areas and forcibly buy the property rights of objecting rural land owners. This “balancing of equities” implements a sort of urban bias, because uses are more protected when more people are involved or land is being used more intensively. Nuisance cases should weigh other values served by less intensive rural uses, such as diversity of land uses, environmental preservation, open space, and cultural and social values, even though these values are not as readily measured in monetary terms. Rural areas and uses are valuable and worth preserving even if not as intensive and not as financially productive. Of course, values served

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29 Georg v. Animal Def. League, 231 S.W.2d 807, 809–10 (Tex. Civ. App. 1950); see also Schiller v. Raley, 405 S.W.2d 446, 447 (Tex. Civ. App. 1966) (reversing injunction against feedlot in part because the area was “a sparsely settled farming and ranching area” and the feedlot was a “useful and necessary business” that “would be subject to objection and complaint wherever it was located in the county”).

30 See Lee v. Bowles, 397 S.W.2d 923, 926–27 (Tex. Civ. App. 1965) (affirming denial of injunction against race track in rural area in part because “the public generally would benefit from the operation of this track, both from a standpoint of recreational value and as an economic asset”). Bat see Guarina, 180 A.2d at 560 (“[A] rural area is equally adaptable to the operations of a fireworks factory or a dynamite plant or even a missile testing ground. However, the sole criterion of propriety and legality for the erection and operation of any particular business is not the utilitarian value and profit-making potentials the business offers its owner but its general setting of good in the whole living panorama of society . . .”).

31 See Storey v. Cent. Hide & Rendering Co., 226 S.W.2d 615, 619 (Tex. 1950) (“Some one must suffer these inconveniences rather than that the public interest should suffer. These conflicting interests call for a solution of the question by the application of the broad principles of right and justice, leaving the individual to his remedy by compensation and maintaining the public interests intact; this works hardships on the individual, but they are incident to civilization with its physical developments, demanding more and more the means of rapid transportation of persons and property.” (quoting 31 Tex. Jur. Nuisances § 35)).

32 See Guarina, 180 A.2d at 561 (“Where justice is properly administered rights are never measured by their mere money value, neither are wrongs tolerated because it may be to the advantage of the powerful to impose upon the weak.” (quoting Appeal of Pennsylvania Lead Co., 96 Pa. 116 (1880))).

by rural uses must still be weighed against values served by competing uses, and balancing such different values may be hard. But they should still be recognized and considered.

D. Right to Farm Laws

The balancing disadvantage may be even worse for rural nuisance defendants than for rural nuisance plaintiffs. Rural uses are generally less intensive and so may be valued less. And they may cause significant external impacts on encroaching urban and suburban uses that are more intensive and have higher market value.\textsuperscript{34}

Some courts have been sensitive to this problem and protected rural uses from nuisance claims when the claimant came to the area knowing the character of the area and existing uses.\textsuperscript{35} However, it seems most modern courts take a more flexible approach to this situation and may still hold that the prior rural use is a nuisance. Courts have often justified the apparent unfairness on the grounds that the community’s “material prosperity” depends on “the continued growth and enlargement of manufacturing of diverse varieties,” or whatever the newer, more economically valuable use is.\textsuperscript{36}

Such decisions present a special risk for agricultural uses, which are often incompatible with encroaching development. In response, all states have passed “right-to-farm” laws which help protect agricultural uses from nuisance suits resulting from encroaching development.\textsuperscript{37} One common approach is to

\textsuperscript{34} See, e.g., Spur Indus., Inc. v. Del E. Webb Dev. Co., 494 P.2d 700, 704–05 (Ariz. 1972) (describing impacts of feedlot on encroaching retirement community and holding that feedlot was a nuisance).

\textsuperscript{35} See Dill v. Excel Packing Co., 331 P.2d 539, 548 (Kan. 1958) (“Plaintiffs chose to live in an area uncontrolled by zoning laws or restrictive covenants and remote from urban development. In such an area plaintiffs cannot complain that legitimate agricultural pursuits are being carried on in the vicinity, nor can plaintiffs, having chosen to build in an agricultural area, complain that the agricultural pursuits carried on in the area depress the value of their homes. The area being primarily agricultural, an opinion reflecting the value of such property must take this factor into account. The standards affecting the value of residence property in an urban setting, subject to zoning controls and controlled planning techniques, cannot be the standards by which agricultural properties are judged.”).

\textsuperscript{36} Stevens v. Rockport Granite Co., 104 N.E. 371, 373 (Mass. 1914); see, e.g., Spur Indus., 494 P.2d at 707 (holding that prior cattle feedlot was a nuisance interfering with newer retirement community).

declare by statute that properly conducted agricultural activities will not be considered nuisances to subsequently established non-agricultural activities in the area, unless perhaps the plaintiffs overcome a presumption that legal agricultural activities do not substantially adversely affect the public health and safety. These statutes thus counter the tendency of nuisance law to favor more intensive, and thus more economically valuable, uses. Of course, right-to-farm laws apply only in relatively narrow, specific circumstances, and when those circumstances are not present, the usual balancing approach of nuisance law applies.

Another statutory approach to protect agricultural uses from nuisance claims is to impose a short limitations period on nuisance actions against agricultural operations, running from the establishment of the agricultural use. The result is that once an agricultural operation has been in effect for the specified period, it cannot be held to be a nuisance regardless of the balance of values, and regardless of whether the plaintiff's use preceded the agricultural operation.

The right-to-farm laws are a precedent and model for legislative intervention to address failures of the common law to respond effectively to rural circumstances. They recognize that there are important reasons to preserve a certain class of rural uses, agricultural uses, even though the usual policy considerations reflected in nuisance law might often result in favoring nonagricultural uses. Of course, these statutes protect agricultural uses against not only

38 See, e.g., CAL. CIV. CODE § 3482.5(a)(1) (Deering 2005) (“No agricultural activity, operation, or facility, or appurtenances thereof, conducted or maintained for commercial purposes, and in a manner consistent with proper and accepted customs and standards, as established and followed by similar agricultural operations in the same locality, shall be or become a nuisance, private or public, due to any changed condition in or about the locality, after it has been in operation for more than three years if it was not a nuisance at the time it began.”); WASH. REV. CODE ANN. § 7.48.305 (West 2007) (“Notwithstanding any other provision of this chapter, agricultural activities conducted on farmland and forest practices, if consistent with good agricultural and forest practices and established prior to surrounding nonagricultural and nonforestry activities, are presumed to be reasonable and shall not be found to constitute a nuisance unless the activity has a substantial adverse effect on the public health and safety. If those agricultural activities and forest practices are undertaken in conformity with all applicable laws and rules, the activities are presumed to be good agricultural and forest practices not adversely affecting the public health and safety . . . .”); Finlay v. Finlay, 856 P.2d 183, 187–88 (Kan. Ct. App. 1993).

39 See Finlay, 856 P.2d at 189 (“Since Kansas ‘Right to Farm’ statutes are inapplicable, this case must be resolved using traditional concepts of nuisance as they relate to farmland.”).

40 See, e.g., MISS. CODE ANN. § 95-3-29(1) (2004) (“In any nuisance action, public or private, against an agricultural operation, proof that said agricultural operation has existed for one (1) year or more is an absolute defense to such action, if the conditions or circumstances alleged to constitute a nuisance have existed substantially unchanged since the established date of operation.”).

41 See, e.g., KAN. STAT. ANN. § 2-3201 (2001) (“It is the declared policy of this state to conserve and protect and encourage the development and improvement of farmland for the production of food and other agricultural products. The legislature finds that agricultural activities conducted on farmland in areas in which nonagricultural uses have moved into agricultural areas are often subjected to nuisance lawsuits, and that such suits encourage and even force the premature remov-
urbanization, but against any competing uses even if they are equally rural in character. The statutes that protect only previously existing agricultural uses are clearly intended to protect agricultural uses from urbanization, but even they do not attempt to discriminate between claims by other types of rural uses and claims by urbanizing uses. So they reflect public concern about preserving agricultural uses, not rural uses generally. But they correct some undesirable outcomes of the common law balancing approach, and they suggest a way to correct other undesirable outcomes that result from undervaluing rural uses.

E. Injury to Landscape

One particular type of injury, injury to scenic values, may not be weighed at all. A nuisance is commonly described as a substantial and unreasonable interference with the private use and enjoyment of one’s land. Ugly, inappropriate, or obstructing improvements to land certainly may substantially interfere with people enjoying their land. Yet courts have often held that aesthetic offenses cannot be nuisances. A typical case held that a lumber yard in a residential area was not a nuisance, reasoning:

[T]he law will not declare a thing a nuisance because it is unsightly or disfigured, because it is not in a proper or suitable condition, or because it is unpleasant to the eye and a violation of the rules of propriety and good taste, for the law does not cater to men’s tastes or consult their convenience merely, but only guards and upholds their material rights...

This rule applies to urban and rural properties alike, but it may especially hurt rural property owners. First, the personal and market value of rural property may be more likely to include value from the surrounding unaltered landscape. As one nuisance case acknowledged, “[u]nobstructed sunsets, panoramic landscapes, and starlit skies have inspired countless artists and authors and have brought great pleasure to those fortunate enough to live in scenic rural

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42 See Bowen, 601 So. 2d 860 (holding that right-to-farm statute barred nuisance claim by rural homeowner against cotton gin that was established after homeowner built his home).

43 See Davis v. Taylor, 132 P.3d 783, 785 (Wash. Ct. App. 2006) (“The legislature intended that the right-to-farm act be applied narrowly to protect only those farms in ‘urbanizing areas.’”).

44 See W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS § 86 (5th ed. 1984).


settings." Second, even if all property values were equally affected by the quality of the surrounding landscape, less intensively developed property might generally owe a higher proportion of its value to the landscape. In some cases, the primary appeal of undeveloped rural property may be the beauty of the surroundings. In *Rankin v. FPL Energy, LLC*, for example, one plaintiff testified that "she and her husband had purchased their land to build a home and to have a place 'for strength, for rest, for hope, for joy, for security — for release.' They had plans for building and operating a small bed and breakfast . . . ." A wind farm built nearby ruined the landscape and their plans. And finally, while zoning ordinances and other public regulations will often provide some protection against certain kinds of aesthetic offenses, such regulations are less common in rural areas.

As the passage quoted above indicates, one response to aesthetic nuisance claims has been that, even though a property’s value may be significantly affected by the surrounding beauty, the law does not protect "taste" or "convenience." This is not a good explanation for why offensive odors or sounds may be nuisances, but offensive sights may not be. Whatever differences there may be between light, sound, and odor, the potential offense is sensory. Some cases stress the physical effects that unpleasant noises and odors may have, whereas unpleasant sights might not cause the same effects. But such physical effects have not been required in order to prove that noises or odors are nuisances. The ultimate question is the same: does the undesirable sound, smell, or sight unreasonably interfere with the use and enjoyment of land?

Another explanation for denying aesthetic nuisance claims might be that unpleasant sights can be more readily avoided than unpleasant sounds or smells. But the question is not how easily the landowner can avoid the imposition, but whether that activity substantially interferes with use and enjoyment of the land. A property owner may look away, but the offensive activity may nevertheless substantially interfere with the owner’s use and enjoyment of the land. In *Rankin*, for example, the rural owners could no longer use their prop-

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48 Id. at 511.
49 *Shamburger*, 198 S.W. at 1072; see also *Dodson*, supra note , at 2 ("[M]any courts have indicated that unsightly or unaesthetic land uses cannot produce substantial interference with the use and enjoyment of another's land.").
50 See Raymond Robert Coletta, *The Case for Aesthetic Nuisance: Rethinking Traditional Judicial Attitudes*, 48 *OHIO ST. L.J.* 141, 166 (1987) (arguing that “there is no physiological reason for treating visual perceptions any differently from noise or smell”).
51 See id. at 168 ("[E]ven assuming that the potential for physical harm can sometimes distinguish noise and odor invasions, nuisance theory is not founded on physical injury.").
52 See *Dodson*, supra note , at 5 ("Perhaps part of the reason courts have treated aesthetic nuisance actions differently from other more typical nuisance cases is the fact that unpleasant sights, unlike noises or odors, can be readily avoided.").
53 See Allison v. Smith, 695 P.2d 791, 794 (Colo. Ct. App. 1984) ("[L]egitimate but unsightly activity . . . may become a private nuisance if it is . . . unduly offensive to its neighbors, particular-
erty for a bed and breakfast because it wasn’t a desirable destination anymore. Market value may be impaired because the aesthetic nuisance makes some uses no longer as desirable.54

Some courts have also rejected aesthetic nuisances because courts can’t objectively determine what is aesthetically offensive.55 But this reasoning seems to forget that an activity is not a nuisance because it is inherently objectionable, but because it unreasonably interferes with another’s land use, in light of the character of the location, the importance of the uses, and so on.56 Just as with sounds or smells, courts should not decide whether something is ugly, but whether it would substantially interfere with the enjoyment of land by a normal landowner in the area.57 The surrounding landscape certainly can substantially affect the market value of property, and such market effects can be objectively determined.58

Here, too, legislation can help protect interests that the common law may not. For examples, courts have sustained local ordinances that have preserved mountain views,59 prohibited chain link fences,60 required approval of

\[\text{ly when it is located in a residential district.}\]

See Allison, supra note , at 167 (“[V]isual dissonance can create substantial interference with an individual’s use and enjoyment of property. . . . Aesthetic dysfunctions can . . . directly affect the individual’s physical, social, and psychological well-being as much as, or even more than, other sensory intrusions.”). 54

See Allison, 695 P.2d at 795 (sustaining award of lost market value due to junk on neighboring property); Dodson, supra note , at 6–9 (arguing that diminution in property value evidences substantial interference with use and enjoyment, and citing examples).

See, e.g., Green v. Castle Concrete Co., 509 P.2d 588, 591 (Colo. 1973) (en banc) (“[A]lthough the goal of creating an aesthetically pleasing environment is clearly laudable, it is equally clear that where the accomplishment of this goal entails the restructuring of societal rights and priorities it cannot be fairly or justly done through a judicially sanctioned private condemnation without compensation under the guise of abating a nuisance. . . . Given our myriad and disparate tastes, life styles, mores, and attitudes, the availability of a judicial remedy for such complaints would cause inexorable confusion.”); Wernke v. Halas, 600 N.E.2d 117, 122 (Ind. Ct. App. 1992) (reversing finding of aesthetic nuisance, reasoning that “[a]esthetic values are inherently subjective” and courts should not be “the arbiters of proper aesthetics and good taste”); Coletta, supra note , at 146–48 (discussing cases).

See Coletta, supra note , at 172–75; George P. Smith, II & Griffin W. Fernandez, The Price of Beauty: An Economic Approach to Aesthetic Nuisance, 15 HARV. ENVTL. L. REV. 53, 68–69 (1991) (“Rather than formulating the problem at hand as one of interpreting objective aesthetic standards, judges have erroneously seen their task as enforcing their own sense of the beautiful and the ugly. This misunderstanding, rather than the nature of the aesthetic, prompts judges to shun aesthetic nuisance actions. To reject the right to be free from a purely aesthetic but injurious use of land on the assumption that a judge must decide an aesthetic nuisance case solely on the basis of her own aesthetic sensibilities is clearly flawed reasoning.”). 56

See Foley v. Harris, 286 S.E.2d 186, 190–91 (Va. 1982) (stating that “discomfort and annoyance” from unsightly land uses may result in a nuisance if they are “significant and of a kind that would be suffered by a normal person in the community”); Smith & Fernandez, supra note , at 71–72.

See Smith & Fernandez, supra note , at 75–76 (discussing market valuation of the effects of aesthetic nuisances). 57

building design to preserve local atmosphere and harmony and avoid ugly or inappropriate structures, prohibited clotheslines in front and side yards, prohibited or restricted junkyards, and regulated signs. Such regulations do not make nuisance protection unnecessary, however, because they target specific aesthetic concerns rather than protecting the interest in aesthetic qualities generally. But if legislatures can prohibit particular land uses because they are aesthetically objectionable, individual owners should likewise have the right to prevent aesthetically objectionable uses that substantially and unreasonably interfere with their property use and enjoyment.

II. LANDLORD-TENANT LAW

Almost all courts have come to agree that a landlord implicitly warrants the habitability of residential premises. The nature of the lease transaction implies a promise by the landlord that the property has and will continue to have "adequate heat, light and ventilation, serviceable plumbing facilities, secure windows and doors, proper sanitation and proper maintenance."

A prominent explanation for the emergence of the implied warranty of habitability is a societal change from rural to urban. As the court in Javins v. First National Realty Corp. explained in adopting the implied warranty:

The assumption of landlord-tenant law, derived from feudal property law, that a lease primarily conveyed to the tenant an interest in land may have been reasonable in a rural, agrarian society; it may continue to be reasonable in some leases involving farming or commercial land. In these cases, the value of the lease to the tenant is the land itself. But in the case of the modern apartment dweller, the value of the lease is that it gives him a place to live. The city dweller who seeks to lease an apart-

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61 City of Smyrna v. Parks, 242 S.E.2d 73, 77 (Ga. 1978) (“Even if the ground of safety is deemed a tenuous one, however, the ordinance would not be an unwarranted exercise of police power based on aesthetics alone . . . .”).
64 E.g., State v. Jones, 290 S.E.2d 675 (N.C. 1982); Oregon City v. Hartke, 400 P.2d 255 (Or. 1965) (en banc); State v. Smith, 618 S.W.2d 474 (Tenn. 1981).
ment on the third floor of a tenement has little interest in the land 30 or 40 feet below, or even in the bare right to possession within the four walls of his apartment. When American city dwellers, both rich and poor, seek ‘shelter’ today, they seek a well known package of goods and services . . . .

Not only was a rural lease thought to be primarily for land rather than housing, the rural tenant was thought to be more capable of maintaining rented housing in a habitable condition:

It was assumed that landlords and tenants held equal bargaining power in arranging their rental agreements, and that the agrarian tenant had the ability to inspect the dwelling adequately and to make simple repairs in the buildings which possessed no modern conveniences such as indoor plumbing or electrical wiring.

This perceived difference between rural and urban tenants presumably accounts for different treatment of rural tenants in some cases. Some judicial opinions suggest that because urban conditions gave rise to the implied warranty, courts should only apply the warranty when such conditions are present. For example, one judge wrote:

While states which are considered more predominantly rural than urban have adopted an implied covenant of habitability, their adoptions are not considered “leading” decisions. In fact, it is rare to find a rural state case applying a covenant of habitability to afford a tenant relief when conditions similar to those existing in urban areas have not been demonstrated. This in no way implies that only tenants in urban areas deserve the protection of a covenant of habitability, but rather only that the conditions leading to adoption of the implied covenant in urban areas are the type of conditions which we should keep in mind in developing the proper application of the covenant in future cases.

Many states have adopted the warranty of habitability by statute. At least one of those statutes, in Tennessee, also treats rural landlords and tenants differently. Tennessee’s landlord-tenant act does not apply in counties with

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67 Id.
68 Pugh v. Holmes, 384 A.2d 1234, 1237–38 (Pa. Super. Ct. 1978); see also Javins, 428 F.2d at 1079 (“Furthermore, today’s city dweller usually has a single, specialized skill unrelated to maintenance work; he is unable to make repairs like the ‘jack-of-all-trades’ farmer who was the common law’s model of the lessee.”).
fewer than 68,000 people. The Tennessee Court of Appeals sustained this limitation, reasoning:

It is highly probable that populations are crowded into rental properties in urban areas. The Legislature has determined that there is a need for greater restrictions in landlord/tenant relationships in crowded urban areas. In addition, large metropolitan areas historically have greater numbers of residents on public assistance and in low income housing. Uniform rules are arguably needed to establish guidelines for landlord/tenant responsibilities, to provide a modicum of protection to tenants who cannot readily procure legal services, and to reduce the filing of lawsuits in already overcrowded municipal dockets.

Rural tenants' habitability claims may also be disadvantaged in several ways by the absence of building and housing codes. Building and housing code violations are commonly treated as violations, or at least evidence of violations, of the implied warranty. Such codes therefore improve the chances of a tenant bringing and winning a claim for breach of the warranty of habitability. In fact, some have suggested that breach of the implied warranty of habitability requires proof of a violation of a building or housing code, although most courts agree

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72 See, e.g., Steele v. Latimer, 521 P.2d 304, 309 (Kan. 1974) (“Building codes are common today in many urban centers throughout the United States and the modern weight of authority in this country appears to be that the minimum standards embraced within a housing ordinance, building code or other municipal regulation are to be read into and will be implied by operation of law in housing contracts.”); Boston Housing Auth. v. Hemingway, 293 N.E.2d 831, 844 n.16 (Mass. 1973) (“Proof of any violation of these regulations would usually constitute compelling evidence that the apartment was not in habitable condition, regardless of whether the evidence was sufficient proof of a constructive eviction under our old case law.”); Park West Mgmt. Corp. v. Mitchell, 391 N.E.2d 1288, 1294 (N.Y. 1979) (“Substantial violation of a housing, building or sanitation code provides a bright-line standard capable of uniform application and, accordingly, constitutes prima facie evidence that the premises are not in habitable condition.”); Hilder v. St. Peter, 478 A.2d 202, 208 (Vt. 1984) (“A substantial violation of an applicable housing code shall constitute prima facie evidence that there has been a breach of the warranty of habitability.”); Foisy v. Wyman, 515 P.2d 160, 166 (Wash. 1973) (en banc) (“While the housing code violations in and of themselves do not establish a prima facie case that the premises are uninhabitable, they are evidence which aids in establishing that the premises are uninhabitable.”).

73 See Dapkunas v. Cagle, 356 N.E.2d 575, 579 (Ill. App. Ct. 1976) (“By way of contrast, however, in the instant case plaintiff’s fifth amended complaint made no allegation of a violation of an applicable building code; nor did it even allege that a building code was in effect in Johnston City, Illinois. It can hardly be assumed, therefore, that plaintiff’s oral lease incorporated the provision of a building code just as if such provisions had been enumerated by the parties.”); Boston
that a code violation is not necessary.\textsuperscript{74} Therefore, if a community does not have an applicable building or housing code, tenants may not have any potential claim for breach of the implied warranty of habitability, or even if they do, it may be more difficult to prevail without proof of a code violation.

Furthermore, many habitability cases have reasoned that applicable building and housing codes are part of the lease. Therefore, the tenant cannot waive the warranty of habitability because it is required by the code and not just the parties’ private agreement.\textsuperscript{75} But if there is no applicable code, some courts have concluded that the implied warranty may be waived, or even that there is no implied warranty concerning uninhabitable conditions of the premises that were reasonably apparent to the tenant.\textsuperscript{76} Consequently, a tenant in a locality without an applicable code may have less protection than a tenant in a locality with a code.

Unsurprisingly, rural communities are less likely to have building and housing codes.\textsuperscript{77} Even when they do have such codes, they may be less restric-

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\textit{Housing Auth.}, 293 N.E.2d at 852–53 (Quirico, J., concurring in part) (discussing habitability cases and emphasizing breach is based on violation of applicable statutes and regulations).
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\textsuperscript{74} See Glasoe v. Trinkle, 479 N.E.2d 915, 918–19 (Ill. 1985) (reversing lower court and holding that “the implied warranty of habitability applies to all leases of residential real estate regardless of the existence of a building or housing code”); \textit{Boston Housing Auth.}, 293 N.E.2d at 844 n.16; Pugh v. Holmes, 405 A.2d 897, 906 (Pa. 1979) (stating that “the existence of housing code violations is only one of several evidentiary considerations” in an implied warranty of habitability claim).

\textsuperscript{75} See, e.g., \textit{Boston Housing Auth.}, 293 N.E.2d at 843 (“This warranty (in so far as it is based on the State Sanitary Code and local health regulations) cannot be waived by any provision in the lease or rental agreement.”).

\textsuperscript{76} See, e.g., Breezewood Mgmt. Co. v. Maltbie, 411 N.E.2d 670, 675 & n.2 (Ind. Ct. App. 1980) (holding that landlord breached implied warranty because premises violated housing code, but noting that “if parties enter into a lease outside of the purview of a local housing ordinance or code, and the premises are not substantially other than what they appear to be, this court will treat that lease agreement as it does any other contract. Thus, if a farmer rents a hovel, and a renter wants to rent it ‘as is,’ we will not interfere with the parties’ reasonable expectations by allowing the renter to subsequently file an action against the farmer for breach of certain implied warranties of habitability. . . . As long as the premises are not in a substantially different condition than they appear, this court favors upholding the reasonable expectations of the parties”).

\textsuperscript{77} See Pugh, 405 A.2d at 906 n.3 (noting that many small boroughs and townships had not adopted housing codes); Robert B. Keiter, The Law of Fire: Reshaping Public Land Policy in an Era of Ecology and Litigation, 36 ENVTL. L. 301, 364 (2006) (noting the “historic rural resistance to zoning and other land-use restrictions”); Eric Damian Kelly, Fair Housing, Good Housing or Expensive Housing? Are Building Codes Part of the Problem or Part of the Solution?, 29 J. MARSHALL L. REV. 349, 350–51 (1996) (noting studies indicating that smaller cities are less likely to have building codes, and counties are less likely to have building codes than cities); Kathryn Hake, Comment, Is Home Where Arkansas’s Heart Is?: State Adopts Unique Statutory Approach to Landlord Tort Liability and Maintains Common Law “Caveat Lessee,” 59 ARK. L. REV. 737, 738 (2006) (“Not all Arkansas cities have housing codes, and there are no housing codes in rural, unincorporated areas.”).
In some states, smaller communities do not even have the power to adopt such codes. For example, the West Virginia Code gives only counties with a population of 45,000 or more the power “to adopt building and housing codes establishing and regulating minimum building and housing standards for the purpose of improving the health, safety and well-being of its citizens.”

But even if rural towns and counties have the power to adopt such codes, they are less likely to have done so, perhaps because of lack of resources for adopting such codes, less pressure from tenants, or even their own assumption that such things aren’t needed in a small community because people can work things out better on their own without legal help.

But the warranty of habitability should be applied just as readily to rural landlords as urban landlords. Even if contrary assumptions about rural tenants were once true, today rural tenants who rent houses are expecting and depending upon habitable homes just as much as urban tenants. There is no reason to think rural home renters have more practical skills to inspect and repair the home either.

In some ways, the need and justification for the implied warranty may be even greater in rural settings. The implied warranty of habitability has been explained as an assumption about the parties’ expectations, but many courts have held that the warranty cannot be waived, regardless of whether tenants know what they are waiving. Prohibiting even a knowing waiver emphasizes that the warranty is based not just on parties’ intentions, but also on a public policy to ensure decent housing—the policy reflected in building and housing codes. Today, rural housing is more likely to be substandard than urban hous-

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78 See Katherine MacTavish, Housing Vulnerability Among Rural Trailer-Park Households, 13 GEO. J. ON POVERTY L. & POL’Y 95, 97 (2006) (“[R]ural zoning and housing codes are notoriously more lax than city codes.”).

79 W. VA. CODE § 7-1-3n(a) (2009); see also Teller v. McCoy, 253 S.E.2d 114, 121 (W. Va. 1978).

80 See Pruitt, supra note , at 236 (“Tenants in [rural] states now more often rent a home in which to live rather than fields in which to grow crops. The average tenant no longer has the practical skills needed to inspect and repair his dwelling. Judges must respond to these reali-

81 See, e.g., Javins v. First Nat’l Realty Corp., 428 F.2d 1071, 1079 (D.C. Cir. 1970) (“Since a lease contract specifies a particular period of time during which the tenant has a right to use his apartment for shelter, he may legitimately expect that the apartment will be fit for habitation for the time period for which it is rented.”).

82 See, e.g., 1 MILTON R. FRIEDMAN, FRIEDMAN ON LEASES § 10.101, at 498 & n.18 (2d ed. 1983).

83 See, e.g., Javins, 428 F.2d at 1079–80 (noting, among other reasons for the implied warranty, the “increasingly severe shortage of adequate housing” and that “poor housing is detrimental to the whole society, not merely to the unlucky ones who must suffer the daily indignity of living in a slum”); Pines v. Perssion, 111 N.W.2d 409, 412–13 (Wis. 1961) (“To follow the old rule of no implied warranty of habitability in leases would, in our opinion, be inconsistent with the current legislative policy concerning housing standards . . . . Permitting landlords to rent ‘tumbledown’
ing. Furthermore, even if some continue to believe that rural tenants have more practical skills to make their housing more habitable themselves, it takes more than skills to repair and maintain housing. It takes money for tools and materials too, and as a group, rural renters may have a harder time affording tools and materials because they spend an especially high percentage of their income on housing. So to whatever extent we impose the warranty of habitability on landlords to help ensure decent housing, the need may be even greater in rural areas. To whatever degree implied warranty protection is less available to rural tenants, it seems to be another example of the law being influenced by rural assumptions and stereotypes rather than rural realities. But perhaps to some degree it also reflects lack of attention to rural needs and issues.

III. ADVERSE POSSESSION

Adverse possession law generally is sensitive to real differences between rural and urban places. Although the list of elements varies, acquiring title by adverse possession generally requires actual, open, notorious, hostile, exclusive, and continuous use for the adverse possession period. The application of most of these elements has differed between rural and urban places. Oddly, however, some courts seem to recognize how certain rural qualities may

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85 “Even though the federal government considers spending 30 percent of household income on housing to be ‘affordable,’ 65 percent of non-metropolitan homeowners and 79 percent of non-metropolitan renters spend more than that amount.” Craig Anthony (Tony) Arnold, Ignoring the Rural Underclass: The Biases of Federal Housing Policy, 2 STAN. L. & POL’Y REV. 191, 204 n.14 (1990); id. at 193 (“An alarming 32 percent of poor non-metropolitan renters and 22 percent of poor non-metropolitan homeowners spend more than 70 percent of their income for housing.”); cf. Housing Assistance Council, Rural Housing Data Portal, http://216.92.48.246/dataportal (last visited Feb. 28, 2010) (reporting 1999 and 2003 data showing a higher percentage of rural poverty than urban poverty).

86 Some might argue that building and housing codes would injure rural tenants by making housing more expensive or less available. See generally Rosser, supra note .

affect the possessor’s conduct, but overlook or disregard how those same qualities may likewise affect the title owner’s conduct.

A. Actual Possession

Actually possessing land may differ between urban and rural settings. The adverse possession claimant must have done more than simply use the property; she must have possessed it as an owner would have possessed it. But a rural landowner may use the land differently than an urban landowner. The court therefore must consider the character of the land in deciding whether a possessor has acted as an owner. As one court put it:

Because every piece of property is unique, each adverse possession case must be decided in light of its own unique circumstances. Much depends on the location, the character, and the use to which the land in question may reasonably be put. Those specific manifestations of possession and ownership exhibited by a claimant which would support a finding of title by adverse possession in a populous and highly developed area are not the same as those which would support such a finding where the property is sparsely populated farmland.

Many courts have reasoned that rural land may be used less intensively than developed urban land and have therefore held that less substantial physical activities constitute actual possession of rural land. Courts have found a variety of less substantial acts to be sufficient possession of undeveloped rural land, although generally in combination, including: grazing animals, clearing animals;9 clearing

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88 See, e.g., Howe v. Natale, 451 A.2d 1198, 1200 (Me. 1982) (“Possession is established when the evidence shows an actual use and enjoyment of the property which is in kind and degree the same as the use and enjoyment to be expected of the average owner of such property.”).
89 Harris v. Lynch, 940 S.W.2d 42, 45 (Mo. Ct. App. 1997).
91 See Clark, 654 N.E.2d at 1186–87 (“From the time Aukerman took possession, he has continuously repaired and upgraded the fence. Aukerman purchased cattle, which grazed in the pasture and sheltered in the wooded area near the fence. Aukerman improved the disputed area by installing drain tiles, bulldozing the brush, and planting hay. We agree with the trial court that
brush; using timber, sand, or other products of the land; recreational use; and clearing boundaries and posting signs. But certainly some cases have held such activities insufficient to constitute possession. The essential question is whether the possessor used the land as an owner would use such land.

B. Continuous and Uninterrupted Possession

The adverse possession must also be continuous and uninterrupted. Here, too, courts recognize that “[t]he nature of possession sufficient to meet this requirement depends on the character of the property.” The possessor does not have to be continuously present on the property. The essential ques-
tion is whether the claimant has possessed the land with the kind of continuity one would expect of an average owner of such property.\textsuperscript{101}

Large tracts of undeveloped rural land might typically be used only for pasturing animals during certain seasons; therefore, one who uses the land in such a way has “continuously” possessed the land.\textsuperscript{102} Likewise, visiting the land a few times each year to inspect it, clean it, and maintain barricades may be sufficiently continuous possession.\textsuperscript{103} Occasionally cutting timber and hunting have been held to be sufficiently continuous possession of wild lands suitable for such uses.\textsuperscript{104}

C. Exclusive Possession

Similarly, adverse possession must be “exclusive,” but owners of undeveloped rural property may exclude others less than urban landowners do. The owner of undeveloped rural property, for example, might not fence the property. There are fewer potential intruders, and having others occasionally ride horses across a pasture, for example, may do no injury at all.\textsuperscript{105} Some have also suggested that rural owners are more likely to allow others to use their land out of rural custom or neighborliness.\textsuperscript{106} Whatever the reasons, if the evidence indicates that an adverse possessor of rural property allowed others to use the land


\textsuperscript{102} See, e.g., Cooper v. Carter Oil Co., 316 P.2d 320 (Utah 1957) (holding that pasturing sheep for three weeks a year was sufficiently continuous). But see Reeves v. Porta, 144 P.2d 493, 496 (Or. 1944) (holding that “occasional pasturing of cows upon a piece of brushy wilderness” was not sufficiently continuous to give notice to title owner).

\textsuperscript{103} See Linck, 559 P.2d at 1052–53; Secret Cove, L.L.C. v. Thomas, 862 So. 2d 1010, 1019 (La. Ct. App. 2003) (“The Thomases did not occupy the disputed property or any part of it on a continuous basis during these years; however, possession does not require them to inhabit the property or be constantly present on it... The evidence shows continuity of their possession during the years in question by clearing the underbrush, maintaining the road alongside the levee, and developing the campground area.”); Ray, 666 N.E.2d at 536 (“[P]laintiffs’ actual summertime use for a full month each season, coupled with their repeated acts of repelling trespassers, improving, posting, and securing of the property in their absences throughout the statutory period, demonstrated their continuous dominion and control over, and thus possession of, the property.”).

\textsuperscript{104} See, e.g., Monroe v. Rawlings, 49 N.W.2d 55, 56 (Mich. 1951).

\textsuperscript{105} See Remund v. Stroud, No. 23264-2-II, 1999 WL 512505, at *5 (Wash. Ct. App. July 16, 1999) (stating that “a true owner of pasture, as a matter of neighborly accommodation, would permit a neighboring landowner to occasionally ride horses,” and therefore was not inconsistent with exclusive possession).

in ways that are consistent with the possessor’s assertion of ownership, such permissive use by others should not defeat an adverse possession claim.\textsuperscript{107}

\section*{D. Open and Notorious Possession}

The possession must also be open and notorious, meaning that it must be sufficiently apparent to give the record owner actual or constructive notice that someone else is claiming ownership of the land.\textsuperscript{108} Only some courts have recognized that, while the character of undeveloped rural land may suggest that less substantial acts constitute actual possession, the character of undeveloped rural land also suggests that courts should require those acts of possession to be more visible and apparent than possession of urban land in order to give constructive notice to the record owner.\textsuperscript{109}

If adverse possession of undeveloped rural land may be less intensive and less continuous than adverse possession of urban land, record owners of such rural land would have to be more diligent in monitoring their property than urban owners in order to detect such possession. Furthermore, even greater effort may be required when the land is forested, remote, or otherwise difficult to monitor.\textsuperscript{110} And while monitoring such rural lands may be significantly more difficult, owners of such lands may have good reasons to actually monitor the land less than urban owners. If record owners do not live on the land because it

\textsuperscript{107} See Lynn v. Soterra, Inc., 802 So. 2d 162, 167–68 (Miss. Ct. App. 2001) (holding that claimants exclusively possessed property despite allowing others to use road and noting that “[a]dverse possession of ‘wild’ or unimproved lands may be established by evidence of acts that would be wholly insufficient in the case of improved or developed lands”).

\textsuperscript{108} See, e.g., Appalachian Reg’l Healthcare, Inc. v. Royal Crown Bottling Co., 824 S.W.2d 878, 880 (Ky. 1992) (stating that the open and notorious element “requires that the possessor openly evince a purpose to hold dominion over the property with such hostility that will give the nonpossessor owner notice of the adverse claim”); Flowers v. Roberts, 979 S.W.2d 465, 469–70 (Mo. Ct. App. 1998) (“The reason the law requires that possession be ‘open and notorious’ is to afford the owner reasonable notice, either actual or constructive, that an adverse claim of ownership is being made by another.”).

\textsuperscript{109} See Flowers, 979 S.W.2d at 471 (“The fact that the land in question is wild, undeveloped and covered in woods and hills in no way lessens what is required to satisfy the element of possession being ‘open and notorious’ and, indeed, may very well increase it.”).

\textsuperscript{110} See Luttrell v. Stokes, 77 S.W.3d 745, 749 (Mo. Ct. App. 2002) (“Given that the wilderness nature of the land may make it more hidden from public view, actions one takes in an effort to be open and notorious and put a reasonable property owner on notice that an adversarial claim of ownership is being made may need to be above and beyond those necessary to meet that element for non-wilderness property.”); Moore v. Dudley, 904 S.W.2d 496, 498 (Mo. Ct. App. 1995) (“[T]he disputed land was covered in woods and hills and no extensive clearing or development of the land ever occurred. The trial court’s interpretation of open and notorious may take into account the rough and wooded nature of the land. The trial court had sufficient evidence to conclude the possession was not open and notorious to the extent necessary to establish adverse possession.”); Carnevale v. Dupee, 853 A.2d 1197 (R.I. 2004) (reversing trial court’s holding that adverse possession of rural land was not open and notorious because dense vegetation obscured title owner’s view of possessor’s fence and mowing on land).
is undeveloped, recreational, or seasonal, for example, they may have less practical reason to care about intrusions by trespassers. Such intrusions interfere less with their use and enjoyment and perhaps don’t interfere at all. Even if the intrusions are harmful, the land will likely be much less valuable than urban land, so the owners have less financial incentive to take action against trespassers. For the same reason, record owners have less incentive to diligently inspect the property or protect against invasions.

Although courts certainly should apply adverse possession doctrine with sensitivity to the circumstances of the trespasser’s possession, courts should likewise apply the doctrine with sensitivity to the circumstances of the record owner’s conduct. Although lesser acts of possession may indeed indicate an assertion of ownership of undeveloped rural land, even a reasonably diligent owner might not be aware of such activities on the land. One court therefore reasoned:

> Improvements sufficient to apprise the true owners of adverse possession of wild lands must substantially change the character of the land. Where the land remains ‘wild’ after the improvements are completed, no owner should be held to notice of the improvements. Acts which are consistent with sporadic trespass are insufficient to apprise a reasonably diligent owner of any adverse claim.\(^{111}\)

Some cases seem to recognize how the rural character of land may affect a possessor’s use the land, but disregard or minimize how the rural character of land may affect what a reasonable record owner would be aware of.\(^{112}\) For example, the Supreme Court of Rhode Island held that maintaining a fence and regularly mowing were sufficient acts of ownership of rural land and that they were sufficiently open and notorious, despite the trial court’s finding that dense vegetation practically prevented the record owners from seeing the fence or mowed area.\(^{113}\) The court reasoned simply that the record owner is charged with knowledge of whatever is done openly on the land, without consideration


\(^{112}\) See, e.g., Alaska Nat’l Bank v. Linck, 559 P.2d 1049, 1053 (Alaska 1977) (“[A]s with the other elements of adverse possession, to determine what constitutes sufficient notoriety we must consider the character of the land. We cannot expect the possessor of uninhabited and forested land to do what the possessor of urban residential land would do before we charge the record owner with notice.”); Dowdell v. Campbell, 2008 WL 2468719, at *3 (Ky. Ct. App. June 20, 2008) (holding that maintaining fence and fence line, hunting, riding an ATV, clearing walking trails, storing items, and posting “no trespassing” signs were actual, open and notorious possession of wooded rural land); Clark v. Ranchero Acres Water Co., 108 P.3d 31, 36 (Or. Ct. App. 2005) (“The test of open and notorious use, however, is whether the adverse possession claimant is making use of the disputed area in ways that are consistent with the ordinary use of that property. It does not concern whether defendant’s use of its own property is such that it might not notice.”).

\(^{113}\) Carnevale, 853 A.2d at 1200.
of whether a reasonable record owner would have discovered the activity. The resulting impression is that one may establish adverse possession of undeveloped rural lands more easily, with less intensive and less frequent use. But courts should also consider the character of the land and the record owner’s use of the land in deciding whether the adverse possession was sufficient to give notice to a reasonable owner. If so, proving actual possession of undeveloped rural lands may be easier, but proving that possession is open and notorious, and therefore actually prevailing in an adverse possession claim, may be harder.

If the purpose of adverse possession is to encourage capturing value from land, then this might be an undesirable approach. Possessors making good use of land would have a harder time acquiring title. But viewing adverse possession in such a light itself may reflect a sort of urban perspective, that more intensive uses are more desirable and should be encouraged and protected. As one court observed, such “wild” lands might be more valuable if they are left open for others to use without fear of losing title to an adverse possessor:

To allow adverse possession based upon such acts would encourage landowners to fence and post their wild land to prevent usurpation by their neighbors. Public policy favors open use of wild lands by the public. The law relating to adverse possession of wild lands ought not force landowners to avoid the risk of losing their land by denying their neighbors the use and enjoyment of the forest.

Furthermore, if the purpose of adverse possession is not to reward productive use of land by the trespasser, or even to maximize land value, but simp-
ly to settle titles and achieve repose when owners aren’t responsibly watching over their land, courts should consider what a reasonable owner of the type of land in question would do, both in observing invasions and in responding to them.

E. Hostile Possession

“Hostile” possession means possession that indicates a claim of ownership inconsistent with the owner’s title. Hostile possession is often contrasted with possession by permission of the owner, which will not support an adverse possession claim. Courts have reasoned that some acts of possession that would be hostile in urban settings are not hostile in rural settings because in certain rural settings owners presumably consent to some kinds of uses by others while urban owners presumably do not.

One example of such a distinction is to presume that owners of wild and uncultivated land implicitly give permission to others to use the land in its wild state, even though the same acts of possession would be presumed to be hostile if the land were improved. This presumption is more prominent in prescriptive easement cases, which I discuss below. But some adverse possession cases have also reversed the usual presumption of hostility in such circumstances. These cases reason that owners of such land implicitly give permission to such use because it does not impair the owner’s interest in the property in any way and sometimes also because the land isn’t worth much. The presumption is based on a factual generalization about wild lands and their owners and so raises the risk of legal decisions based on stereotypes and assumptions rather than facts. The presumption certainly makes it harder for one to prove adverse possession of wild land, but that may be a good thing because of the difficulties the

120 Cf. Klass, supra note (arguing that the owner of wild lands may reasonably intend simply to conserve the land, and therefore may monitor and respond in light of that intention).
121 See, e.g., 3 AM. Jur. 2d Adverse Possession § 43 (2010) (“The requirement for adverse possession that the possession be hostile does not require ill will or malice, but an assertion of ownership adverse to that of the true owner and all others. . . . Hostile possession must be such as to import a denial of the owner’s title or oust the owner from the land.”).
122 See, e.g., Hovendick v. Ruby, 10 P.3d 1119, 1122 (Wyo. 2000) (“[I]f a claimant’s use of the property is shown to be permissive, then he cannot acquire title by adverse possession.”).
125 See, e.g., Town of Manchester v. Augusta Country Club, 477 A.2d 1124, 1130 (Me. 1984) (“This rule is predicated on the notion that such use by the general public is consistent with, and in no way diminishes, the rights of the owner in his land.”); Littlefield v. Hubbard, 128 A. 285, 288 (Me. 1925) (reasoning that “open, uninclosed character of the land” and its “trifling value” suggest that owner permitted use by public).
title owner faces in monitoring such land. If properly applied, the presumption lightens the burden on owners while still allowing possessors to rebut the presumption by proving the land was not so wild, that the owner reasonably would not have implicitly permitted the possessor’s particular actions on the property, and so on. 126

Animal grazing cases may be another example of an urban-rural distinction. Surely if someone consistently turned out his animals to feed on developed, urban or suburban land, without asking permission, that would indicate hostile possession. But many cases have held that doing so on unenclosed rural land is insufficient to obtain title by adverse possession. 127 Although their explanations vary, the best explanation seems to be that such possession is not inconsistent with the title owner’s rights because, given the nature of the land, the title owner implicitly consents to such possession.

IV. PRESCRIPTIVE EASEMENTS

Like adverse possession, obtaining a prescriptive easement requires open and hostile or adverse use of another’s land. Most courts ordinarily presume that open use of another’s land is hostile, under a claim of right, and therefore the servient owner must prove otherwise, that it was permissive, in order to defeat the prescriptive easement claim. 128 But many cases have reversed this presumption when the claimed easement is a right-of-way over unfenced rural property, reasoning that the owner has implicitly given permission to others to pass over the property. 129 As one court explained, “the owner of such land in

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126 See D’Angelo, 868 A.2d at 243 (finding sufficient evidence that land was not wild and uncultivated, and therefore presumption of permission did not apply).

127 See Harris v. Lynch, 940 S.W.2d 42, 45 (Mo. Ct. App. 1997) (holding that allowing animals to access defendant’s wooded land did not constitute adverse possession).

128 See, e.g., Gusheroski v. Lewis, 167 P.2d 390, 393 (Ariz. 1946) (“Where the claimant has shown an open, visible, continuous, and unmolested use of the land of another for the period of time sufficient to acquire title by adverse possession, the use will be presumed to be under a claim of right, and not by license of the owner. In order to overcome this presumption, thereby saving his title from the encumbrance of an easement, the burden is upon the owner to show that the use was permissive.”); RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 2.16 cmt. g (2000) [hereinafter RESTATEMENT OF PROPERTY] (“The majority of American states apply a presumption that an unexplained, open or notorious use of land, continued for the prescriptive period, is adverse . . . ”).

129 See England v. Ally Ong Hing, 459 P.2d 498, 505 (Ariz. 1969) (presuming permission for cattle to graze on large, unenclosed tract of land, stating that “it is a matter of common knowledge that the owners do not object to persons passing over them for their accommodation and convenience”); Du Mez v. Dykstra, 241 N.W. 182 (Mich. 1932) (“[W]hile use alone may give notice of adverse claim of inclosed premises, the weight of authority is that it raises no presumption of hostility in the use of wild lands. This distinction is in recognition of the general custom of owners of wild lands to permit the public to pass over them without hindrance . . . . The tacit permission to use wild lands is a kindly act which the law does not penalize by permitting a beneficiary of the act to acquire a right in the other’s land by way of legal presumption, but it requires that he bring home to the owner, by word or act, notice of a claim of right before he may obtain title by
many instances will not be in position to readily detect or prevent others from crossing over his land, and, even if he did, he might not enter any objection because of a desire to accommodate others and because such usage resulted in no immediate damage to him.” One court also suggested that this reversed presumption furthers a public policy apparently unique to rural areas, “to advance friendly relations, good neighborliness and sociability between people living in sparsely settled or rural areas.” Therefore, because the use is not hostile, even a long period of use will not result in a prescriptive easement enforceable against the owner of the property.

Although such use alone may not indicate hostility, as long as the servient owner knows of the hostile claim, the owner should object within the permitted time period. Even so, the presumption of permission means that those who pass over unfenced rural land must do more to obtain a prescriptive easement. It isn’t enough to pass over the property openly without interruption for a long time, as an easement owner would do. The user would have to otherwise communicate hostility to the servient owner, such as by substantially altering the land in using the easement or directly expressing hostile intent to the servient owner.

The result of this reasoning seems to disadvantage the most deserving claimants. A user who doubts the status of her claim might consider the need to communicate it clearly to the servient owner in some way other than simply using the easement. But if the servient owner never disputes the user’s right to pass over the land, the user who does not doubt her claim of right may never have reason to demonstrate her belief to the servient owner. The result is that those acting entirely in good faith, with no reason to think they need to express

prescription.”


132 These same reasons may account for some state statutes that require posting signs in rural areas in order for an entry to be a trespass. See N.Y. ENVTL. CONSERV. LAW § 11-2111 (McKinney 2005).

133 See Becker v. Thompson, No. 262214, 2006 WL 1408417, at *3 (Mich. Ct. App. May 23, 2006) (“Defendants argue that plaintiff’s use of the two-track was not hostile because, as its placement was on undeveloped, wooded land, permissive use is presumed. ‘Hostile’ merely means use that is inconsistent with the rights of an owner. Testimony established that defendant’s predecessor in interest was fully aware of plaintiff’s use of the property, believing that the property was plaintiff’s and that plaintiff held it under a claim of right. ‘This establishes hostility.’”) (internal quotation omitted); Jicarilla Apache Tribe, 862 P.2d at 440 (affirming that use of rural land was not permissive when title owners “knew or reasonably could have known of the public’s use”); Scholes v. Post Office Canyon Ranch, Inc., 852 P.2d 683, 685–86 (N.M. Ct. App. 1992) (holding that passage over a large parcel of unenclosed land is still presumed adverse if the use of the land should be apparent to the title owner).
hostile intent, will never acquire a durable right over unfenced rural land just by
long use, unlike their urban counterparts. Because the use is presumed permis-
sive rather than hostile, their use will never ripen into a prescriptive easement.

Similarly, some courts have reasoned that rural landowners are more
likely to permit the public generally to cross their property, and therefore ac-
quiescence in such use by the public is less likely to imply an offer of dedication
to the public.\textsuperscript{134}

Leaving rural property unfenced does not necessarily mean that the
owner invites the world to pass back and forth over her property. There are
many reasons an owner might not fence her property. A court should not rely
on such generalized assumptions about rural landowners, but should consider
the evidence before the court in the specific case. The lack of a fence alone is
ambiguous and should not be sufficient evidence on its own to disprove hostili-
ty.

V. SURFACE WATER

Courts have applied versions of three different rules for resolving dis-
putes between owners who alter the natural drainage of diffuse surface water
and owners whose property is injured by that alteration. The common enemy
rule allows landowners to alter the drainage of surface water without any liabili-
ty, although the rule has often been qualified in various ways.\textsuperscript{135} The civil law
rule, on the other hand, makes a landowner strictly liable for harm caused by
altering the drainage of surface water.\textsuperscript{136} Between these two extremes, the rea-
sonable use rule allows a landowner to alter the drainage of surface water unless
it causes unreasonable harm to other land.\textsuperscript{137}

The civil law rule seems to discourage development of land because al-
most any land improvement will alter surface drainage and possibly result in
liability.\textsuperscript{138} Of course, as the California Supreme Court observed, California’s
growth does not seem to have been impeded by its application of the civil law

\textsuperscript{134} See Jicarilla Apache Tribe, 862 P.2d at 439–40 (indicating that presumption of permission
applies to claims of public easements as well); Bradford v. Nature Conservancy, 294 S.E.2d 866,
875 (Va. 1982) (“[W]hat may amount to a dedication in an urban area will not serve the same
purpose in a rural one.”). The government also may be less likely to want to assume responsibili-
ty for maintaining a rural road, so the government cannot implicitly accept the offer of dedication
by use, but must expressly accept the dedication. See E.S. Chappell & Son, Inc. v. Brooks, 450
S.E.2d 156, 158 (Va. 1994); Bradford, 294 S.E.2d at 875.

\textsuperscript{135} See, e.g., Mitchell v. Mackin, 376 So. 2d 684, 685 (Ala. 1979).

\textsuperscript{136} See, e.g., id. at 686.

\textsuperscript{137} See, e.g., Enderson v. Kelehan, 32 N.W.2d 286, 289 (Minn. 1948).

\textsuperscript{138} See Keys v. Romley, 412 P.2d 529, 533 (Cal. 1966) (en banc) (“The civil law rule, if strictly
applied, admittedly has some tendency to inhibit improvement of land, since almost any use of the
property is likely to cause a change in the natural drainage which may justify complaint by an
adjoining landowner.”).
rule. But because of the perception that the civil law rule inhibits development, the civil law rule has been more common in rural places, as the Supreme Court of Alabama observed:

The adoption of the Civil Law Rule by Alabama is no doubt a result of the fact that at that time the state was predominantly agrarian and that rule is best fitted to an agrarian society which assumes land as remaining in a natural or near natural state. On the other hand, the Common Enemy Rule is better fitted for the development of cities and towns and was thus adopted by those jurisdictions more urban in nature. Some courts, including Alabama courts, have therefore reasoned that, while the civil law rule should apply in rural places, a version of the reasonable use rule or the common enemy rule should apply in urban places. The civil law rule is commonly defended as preserving the natural rights of landowners, because some land naturally is subject to drainage from other land. But in urban areas, these courts have suggested, the land is only suitable for develop-

139 See id. at 535.
140 Mitchell, 376 So. 2d at 688.
141 See Kay-Noojin Dev. Co. v. Hackett, 45 So. 2d 792, 794 (Ala. 1950) (noting general rule in Alabama that, while civil law rule applies outside of incorporated towns, within incorporated towns an owner may build structures to deflect surface water that would naturally drain onto his land); Woods v. Inc. Town of State Centre, 85 N.W.2d 519, 525 (Iowa 1957) (“It must be recognized that there is a different rule applicable to urban and rural lands pertaining to the disposal of surface water. Clearly, in rural territory one may acquire a prescriptive right across another’s land by discharging surface water artificially-collected or directed upon the other’s property. In such cases the original act is not excusable but is wrongful from the start.”); Vill. of Trenton v. Rucker, 127 N.W. 39 (Mich. 1910) (“Treating this case as falling within the rural rather than the urban, class, there is no difficulty in holding that the defendant is bound . . . to receive the flow of surface water from the adjacent higher land, coming in substantially its natural amount and condition.”); Stone v. Weese, No. 8989, 1979 WL 207551, at *3 (Ohio Ct. App. Feb. 14, 1979); Lunsford v. Stewart, 120 N.E.2d 136, 136–37 (Ohio Ct. App. 1953); First Lady, LLC v. JMF Props., LLC, 681 N.W.2d 94, 97–98 (S.D. 2004) (reaffirming application of civil law rule to rural property and reasonable use rule to urban property); Mulder v. Tague, 186 N.W.2d 884, 889 (S.D. 1971) (acknowledging application of civil law rule to rural areas, but adopting reasonable use rule for urban areas); cf. Sumitomo Corp. v. Deal, 569 S.E.2d 608, 611–12 (Ga. Ct. App. 2002) (applying civil law rule despite developer’s argument that it “stifles . . . converting raw, rural land to modern urbanized development”); Westbury Realty Corp. v. Lancaster Shopping Ctr., Inc., 152 A.2d 669, 672 (Pa. 1959) (noting that the usual state rule would allow higher owner to reasonably alter drainage without liability, but holding that a shopping center in a rural area is not a reasonable or natural use, and therefore developer was liable for damage from alteration).

142 See, e.g., Mitchell, 376 So. 2d at 686; Dekle v. Vann, 182 So. 2d 885, 887 (Ala. 1966) (“As to lands outside a municipality, our decisions have adopted the civil law rule, that is the inferior heritage or lower surface is doomed by nature to bear a servitude to the superior in that it must receive the water that falls on and flows from the higher land.”); Keys, 412 P.2d at 532 (“The rule finds its justification in the concept that those purchasing or otherwise acquiring land should expect and be required to accept it subject to the burdens of natural drainage.”).
ment, which inevitably alters surface drainage.\textsuperscript{143} Therefore, these courts have applied a rule that allows some or all development without liability for the inevitable alteration of drainage.

But land development in rural areas alters drainage just as much as land development in urban areas. Maybe these courts have treated urban and rural areas differently because they believe that development in urban areas is more valuable or important. If so, that seems clearly indefensible. A rural landowner has the same interest as an urban landowner in productively using property.\textsuperscript{144} One court noted that when land in an area has been developed, the civil law rule may create an “onerous burden of proof as to what the natural conditions were or would be if not altered.”\textsuperscript{145} And in some cases, rural development may more easily avoid harm to neighboring land because there may be more space and alternatives. But this is certainly not true for all rural development; rural development may be on smaller parcels of land just as in urban places. Rather than applying different rules to urban and rural places because of such concerns, courts can just consider the actual circumstances of the parties and the properties involved. Alabama decisions, for example, eventually arrived at this conclusion. The Supreme Court of Alabama, noting the state’s traditional distinction between rural and urban areas, reasoned that “the interest of progress and development, under some circumstances,” would permit a higher landowner to alter surface drainage in a rural area without liability, as long as the owner acts prudently and does not increase the amount of water flowing onto lower neighboring property.\textsuperscript{146}

Similarly, California has continued to apply the civil law rule to all property, rejecting a rural-urban distinction, but it has recognized that the civil law rule may be “unnecessarily rigid and occasionally unjust, particularly in

\textsuperscript{143} See Keys, 412 P.2d at 533 (“[S]ome courts normally applying the civil law rule have suggested that it is not adaptable to the needs of urban communities, where the primary use of land is the erection of structures which are likely to interfere with natural drainage, and accordingly those courts have adopted common enemy or modified common enemy rules in cases involving such land.”); Mulder, 186 N.W.2d at 888 (“As any change in grade, level, or topography might affect natural drainage, the civil law rule cannot reasonably be strictly applied in urban areas. To do so would prevent the proper use, development, improvement, and enjoyment of considerable urban property. Also the reason for the rule disappears in areas where adequate artificial drains and storm sewers are provided.”).

\textsuperscript{144} Cf. Carland v. Aurin, 53 S.W. 940, 941 (Tenn. 1899) (“We are unable to see any difference in principle between the reciprocal rights and duties of adjacent urban proprietors and those of adjacent rural proprietors, and hence we do not think it wise to apply one rule to city lots and a different rule to agricultural lands.”).

\textsuperscript{145} Keys, 412 P.2d at 535; see also City of Englewood v. Miller, 392 P.2d 591, 592–93 (Colo. 1964) (holding that city had not proved that surface water would have naturally drained across defendant’s property in the absence of previous alterations of the land by the city itself).

\textsuperscript{146} Mitchell, 376 So. 2d at 687 (quoting Vinson v. Turner, 40 So. 2d 863, 864–65 (Ala. 1949)). The court had previously refused to consider applying the common enemy rule to rural subdivisions, stressing the importance of definite and predictable property rules. See Dekle, 182 So. 2d at 887–88.
heavily developed areas.” Therefore, California cases hold that, while the party altering the natural drainage will ordinarily be liable when both parties have acted reasonably, in some cases an owner may reasonably alter drainage without liability when “the utility of the possessor’s use of his land outweighs the gravity of the harm which results from his alteration of the flow of surface waters.”

The reasonable use rule, or modified versions of the civil law and common enemy rules, can and should include consideration of such circumstances, including the necessity for the alteration, reasonable alternatives, and so on. The relevant circumstances may include the rural or urban character of the land and whether the development is typical in such an area. However, reasonable use decisions have also said the court should weigh the value of the use of the drained land against the harm to the other land. Such a balancing test, like in nuisance cases generally, may result in inadequate protection for less intensive uses in rural settings. Courts applying the reasonable use rule, or modified versions of the civil law and common enemy rules, should not simply favor the more intensive, more valuable use at the expense of the less intensive use. As the New Jersey Supreme Court observed:

147 Keys, 412 P.2d at 535.
148 Id. at 537.
149 See, e.g., Mitchell, 376 So. 2d at 689; Enderson v. Keehan, 32 N.W.2d 286, 289 (Minn. 1948) (“[A] landowner, acting in good faith, may drain his land of surface waters and cast them as a burden upon the land of another, although such drainage carries with it some waters which would otherwise have never gone that way but would have remained on the land until they were absorbed by the soil or evaporated in the air, if (a) There is a reasonable necessity for such drainage; (b) If reasonable care be taken to avoid unnecessary injury to the land receiving the burden; (c) If the utility or benefit accruing to the land drained reasonably outweighs the gravity of the harm resulting to the land receiving the burden; and (d) If, where practicable, it is accomplished by reasonably improving and aiding the normal and natural system of drainage according to its reasonable carrying capacity, or if, in the absence of a practicable natural drain, a reasonable and feasible artificial drainage system is adopted.”); Bohemian Brethren Presbyterian Church v. Greek Archdiocesan Cathedral of Holy Trinity, 405 N.Y.S.2d 926, 928 (Sup. Ct. 1978) (“As the demands of the community grow more complex, principles which have the attractiveness of simplicity no longer satisfy the competing and varying social needs. . . . The growth of urban areas, as well as other ecological and socio-economic factors affecting waters rights, have riddled the common enemy and the civil law approaches with numerous exceptions.”); First Lady, LLC v. JMF Props., LLC, 681 N.W.2d 94, 99 (S.D. 2004).
150 See Westbury Realty Corp. v. Lancaster Shopping Ctr., Inc., 152 A.2d 669, 672 (Pa. 1959) (“Even though the shopping center is developed in a rural section, the center has all of the characteristics of an urban development. This requires new attitudes, both on behalf of the developers as well as the court. While the owners of higher lands have the right to have the water flowing from their lands discharged in a natural watercourse upon the lower lands, and while the upper lands may increase the flow through the natural and reasonable use of the lands, a large shopping center development in a rural area . . . cannot be considered a natural use of the land. . . . Rather, it is an artificial use of the land for which the developers must make the proper accommodation so as not to place the burden of the increased flow upon the servient tenement.”).
152 See supra Part I.C.
It is, of course, true that society has a great interest that land shall be developed for the greater good. It is therefore properly a consideration in these cases whether the utility of the possessor’s use of his land outweighs the gravity of the harm which results from his alteration of the flow of surface waters. But while today’s mass home building projects . . . are assuredly in the social good, no reason suggests itself why, in justice, the economic costs incident to the expulsion of surface waters in the transformation of the rural or semi-rural areas of our State into urban or suburban communities should be borne in every case by adjoining landowners rather than by those who engage in such projects for profit. Social progress and the common wellbeing are in actuality better served by a just and right balancing of the competing interests according to the general principles of fairness and common sense which attend the application of the rule of reason.153

VI. CONCLUSION

These examples of rural-urban differences in the substance and application of property law illustrate several themes and issues. First and most obvious, rural places have distinctive characteristics that courts should consider in applying certain general rules. Nuisance cases consider whether an activity is appropriate in its surroundings. Adverse possession cases recognize that owners of some rural lands may use land less extensively, exclusively, and continuously. But sometimes courts do not appropriately recognize or consider those distinctive characteristics. Most courts, for example, seem to under-appreciate the significance of aesthetic injuries in some rural settings. Many courts also fail to consider differences in how title owners would reasonably act in some rural settings, allowing adverse possessors to satisfy elements of the claim with lesser acts, but not recognizing that title owners would likewise reasonably be less aware of trespasses on some rural lands.

In some cases, insensitivity to rural realities seems to result from assumptions and stereotypes about rural places. Nuisance cases may assume rural places are quiet and beautiful. Some judges may continue to believe that rural tenants need less assurance of habitability or less protection from landlords. Some surface water cases seem to indicate a belief that rural development isn’t as important as urban development and that rural land is undeveloped land. Some courts apply different surface water rules to urban and rural places, based on over-generalized assumptions about their characteristics, rather than considering the actual circumstances of the property at issue. Adverse possession and prescriptive easements uncritically presume that owners of undeveloped or un-

153 Armstrong, 120 A.2d at 10.
enclosed rural land intend to permit others to possess and use their land. Better attention to the realities of the land would help address both the mistakes of insensitivity and stereotyping.

Even when courts are aware of rural realities, they may undervalue rural uses. Nuisance cases, for example, may balance competing uses without even considering environmental, open space, land use diversity, and social values that less intensive rural uses may serve. Courts generally refuse to consider the value of the surrounding landscape even though that may be an important part of the value and use of rural land. And any time a rule calls for balancing use values, such as nuisance and surface water rules, there is the risk that rural uses, being less intensive, will lose in the balance to more intensive, urbanizing uses.

When courts and traditional property rules do not sufficiently recognize rural values, legislative action may more directly decide the extent to which such values should be protected in relation to other values. Right-to-farm laws, for example, have surely provided greater protection to agricultural uses than would a simple change in nuisance doctrine to weigh agricultural uses more heavily in the balance against encroaching uses. Aesthetic regulations may specifically protect certain types of aesthetic values. Legislation might likewise be appropriate to authorize and adopt building and housing codes in rural places and to adopt surface water rules. But legislation obviously will not and cannot address all of the ways that courts must consider rural circumstances. Courts must evaluate the realities of the land in individual cases and consider the value of rural uses.