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A Room of One's Own? Accessory Dwelling Unit Reforms and Local Parochialism

Margaret F. Brinig* and Nicole Stelle Garnett**

In a recent paper, Peter Ganong and Daniel Shoag blame land use regulations for slowing the convergence of per capita incomes between states.¹ Between 1880 and 1980, per capita incomes of wealthier and poorer states converged dramatically.² In 1940, for example, the per capita income of Connecticut was 4.37 times higher than the per capita income in Mississippi; in 1960, it was 2.28 times higher; by 1980, the ratio had fallen to 1.76.³ Since 1980, however, rates of income convergence have slowed substantially, leaving macroeconomists puzzled.⁴ Ganong and Shoag posit an intriguing and plausible explanation: the enactment of increasingly stringent land use regulations in wealthier states has slowed inter-state migration by pricing lower-income workers out of the housing markets in states with higher per capita incomes.⁵

Ganong and Shoag's study is a recent, and particularly intriguing, iteration in a long line of academic critiques of land use regulations' exclusionary effects. For decades, academics, policy makers and judges have lamented land use regulations' exclusionary effects and have encouraged, cajoled, and demanded that law makers adopt reforms that aim to minimize them.⁶ The received wisdom, however,

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1. See Peter Ganong & Daniel Shoag, *Why Has Regional Income Convergence in the U.S. Declined?* 2 (Harvard Kennedy Sch. Faculty Research, Working Paper No. RWP12-028, 2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2081216.

2. See *id.*

3. *Id.*

4. See *id.* at 2-3.

5. See *id.* at 3-4.

6. For example, the U.S. Department of Housing and Urban Development maintains a "regulatory barriers clearinghouse" designed to promote policies that minimize regulatory impediments to affordable housing. See *Regulatory Barriers Clearinghouse*, HUD.gov, <http://www.huduser.org/portal/rbc/home.html> (last visited June 30, 2013).

is that these critiques and reforms have failed to materially alter either the price effects of land use regulations or their resulting exclusionary effects. The explanation for why, after decades of withering criticism, the American system of land use regulation has proven so stubbornly resistant to meaningful reform can be found in a straightforward application of public choice theory: to borrow from criminal law, state law vests local governments with the means, motive, and opportunity to enact costly and exclusionary land use regulations. Not only do local officials jealously guard their authority to regulate land uses—which is arguably their most significant power⁷—but the majoritarian nature of local government politics (outside of large cities) leaves elected officials susceptible to the demands of homeowners who view costly and exclusionary land use regulations as a form of home-value insurance.⁸ As a result, even “successful” regulatory reform efforts (for example, growth controls and inclusionary zoning programs) can impose hidden costs that themselves carry the risk of exclusion.⁹

This Article examines a relatively recent entrant into the world of land use reform that holds the potential to reduce the exclusionary impact of local land use regulations favoring single family homes without imposing hidden regulatory costs that themselves undercut the purpose and benefits of the reform itself. Over the past decade, a number of local governments have amended land use regulations to permit or encourage the construction of so-called “accessory dwelling units” (ADUs) in residential (especially single-family) neighborhoods. ADUs, which are also referred to as accessory apartments, secondary units, or granny flats, are small, independent living quarters on single-family lots (usually equipped with kitchen and bathroom facilities).¹⁰

7. See Richard Briffault, *The Local Government Boundary Problem in Metropolitan Areas*, 48 STAN. L. REV. 1115, 1139 (1996).

8. See LEE ANNE FENNELL, *THE UNBOUNDED HOME* 26–40 (2009); WILLIAM A. FISCHEL, *THE HOMEVOTER HYPOTHESIS* 51–61 (2001); Lee Anne Fennell, *Homes Rule*, 112 YALE L.J. 617, 630–36 (2002).

9. See Robert C. Ellickson, *The Irony of Inclusionary Zoning*, 54 S. CAL. L. REV. 1167, 1184–85 (1981) (arguing that inclusionary zoning will drive up housing prices for those who do not receive the subsidy); Nicole Stelle Garnett, *Trouble Preserving Paradise?*, 87 CORNELL L. REV. 158, 163–65 (2001) (reviewing the debate over price effects of growth controls); see also *infra* notes 31–36 and accompanying text (discussing “corrective devices” which “might have the perverse effect of further driving up housing prices”).

10. For example, the ordinance in La Habra, California, notes that a “‘secondary dwelling unit’ means any residential dwelling unit which provides complete independent living facilities on the same parcel where one and only one, legal single-family residence exists and includes the permanent provisions for living, sleeping, eating, cooking[,] and sanitation in compliance with the development standards established

ADUs have been commonplace in some jurisdictions for many decades. While those that predate zoning laws are legally permitted to operate as valid “non-conforming uses” (in other words, they are entitled to operate despite zoning restrictions); many others have been constructed in violation of local land use regulations.¹¹ Since zoning laws frequently segregate apartments and single-family homes, and almost always prohibit their co-location on a single residential parcel,¹² reforms authorizing ADUs are necessary to bring these existing ADUs into regulatory compliance and to encourage the construction of more.¹³

Measured in terms of the raw number of reform measures enacted, the campaign to secure legal reforms permitting accessory dwelling units appears to be a tremendous success. Nine states have passed legislation enabling these reforms, and three states have enacted even more potent legislation mandating them.¹⁴ Still other state statutes use a “carrot” approach, provide low interest loans, tax relief, grants, relief from filing fees, or suggest ready-to-enact model ordinances.¹⁵ The American Planning Association has promulgated a “model act” to guide local ADU reforms. At the local level, hundreds of municipalities have adopted laws permitting ADUs, either in response to state legislation or independently.¹⁶

in [the code].” LA HABRA, CAL., CODE § 18.14.030 (2013), *available at* <http://qcode.us/codes/lahabra>.

11. See ROBERT NEUWIRTH, PRATT CENTER FOR COMMUNITY DEV. & CHAYA COMMUNITY DEV. CORP., NEW YORK’S HOUSING UNDERGROUND: A REFUGE AND RESOURCE 1 (2008), *available at* <http://prattcenter.net/sites/default/files/publications/Housing%20Underground.pdf> (claiming there are 114,000 apartments that are unaccounted for, making up the city’s housing underground).

12. For example, Pleasant Prairie, Wisconsin zoning law provides, “accessory structures shall not be used as a dwelling unit.” PLEASANT PRAIRIE, WIS., CODE § 420-30(B) (2012), *available at* <http://ecode360.com/9345468>.

13. See SAGE COMPUTING, INC., U.S. DEP’T OF HOUSING AND URB. DEV. & OFFICE OF POLICY DEV. AND RESEARCH, ACCESSORY DWELLING UNITS: CASE STUDY 1–2 (2008), *available at* <http://www.huduser.org/portal/publications/adu.pdf>.

14. See CAL. GOV’T CODE § 65852.2 (West 2013) (mandating); FLA. STAT. § 163.31771 (2013); HAW. REV. STAT. § 46-4(c) (2011); MD. CODE ANN., HOUS. & CMTY. DEV. § 4-926 (West 2013) (regulating the “Accessory Housing Program”); N.H. REV. STAT. ANN. § 674:21 (2013) (allowing for Innovative Land Use Grants); R.I. GEN. LAWS § 45-24-31 (2012); VT. STAT. ANN. tit. 24, § 4382 (2013) (mandating); WASH. REV. CODE §§ 36.70A.070, 43.63A.215(3) (2013) (mandating); MASS. GEN. LAWS ch. 40B § 20-23 (2013); *see also* ANNE VERNEZ-MOUDON ET AL., STRATEGIES AND TOOLS TO IMPLEMENT TRANSPORTATION-EFFICIENT DEVELOPMENT: A REFERENCE MANUAL 39 (2003), *available at* <http://www.mass.gov/hed/docs/dhcd/cd/smartgrowth/strategies.pdf> (model code for allowing accessory dwelling units).

15. See FLA. STAT. ANN. § 163.31771; MASS. GEN. LAWS ch. 40B § 20-23; VT. STAT. ANN. tit. 24, §§ 4382, 4412; WASH. REV. CODE §§ 36.70A.070, 43.63A.215(3).

16. See AM. PLANNING ASS’N, QUICKNOTES: ACCESSORY DWELLING UNITS NO. 19 (2009), *available at* <http://www.planning.org/pas/quicknotes/pdf/QN19.pdf>; *Accessory*

Despite the flurry of legislative action, however, many questions about these efforts remain unanswered—especially whether the reforms will actually achieve their stated purpose of breaking down regulatory barriers to affordable housing by encouraging the construction of ADUs. In order to do so, these reforms must overcome well-documented parochialism in the land use context, which has, for decades, represented a primary obstacle to increasing the supply of affordable housing, especially in suburban jurisdictions. For a number of reasons, accessory-dwelling-unit reforms theoretically represent an excellent vehicle for overcoming that parochialism. To begin, ADU reforms preserve the zoning pattern preferred by most homeowners—that is, those dominated by, and protective of, single family residences. Particularly if the law requires ADUs' appearance to match the architecture and materials of the principal dwelling,¹⁷ or if there is a limit on the percentage of homes than can include ADUs,¹⁸ the neighborhoods themselves need not significantly change in appearance. The risk of significant externalities resulting from the introduction of ADUs as an affordable housing option ought to be far more minimal than the multifamily apartment complexes traditionally considered the solution to affordable housing shortages.¹⁹ And, since the homeowner/landlord typically lives on the same property as the ADU (and in many cases is required to do so),²⁰ there should be better screening and supervision of tenants.²¹

In order to understand more about the effects of and potential for ADU reforms, this Article examines the effects of ADU regulations in

Housing is Part of the Solution, REGULATORY BARRIERS CLEARINGHOUSE, January 2004, available at <http://www.huduser.org/rbc/newsletter/vol3iss1more.html>.

17. See *infra* notes 242-46 and accompanying text (discussing design review requirements).

18. See, e.g., PASADENA, CAL., ZONING CODE § 17.50.275(B)(9) (2005), available at <http://ww2.cityofpasadena.net/zoning/P-5.html#17.50.275> (allowing the addition of no more than twenty ADUs per year within the city); WALNUT CREEK, CAL., CODE § 10-2.3.502(B) (2013), available at <http://www.codepublishing.com/ca/walnutcreek> (limiting the number of ADUs to 5% of the number of single family homes).

19. Of course, some homeowners conceivably might prefer to concentrate affordable housing in a distinct zone set apart from single-family homes.

20. See, e.g., BLOOMFIELD HILLS, MICH., CODE § 24-42(5) (2011), available at <http://library.municode.com/index.aspx?clientId=10301>; BRADENTON, FLA., LAND USE REGS. § 3.4.5.6(d) (1995), available at <http://library.municode.com/index.aspx?clientId=10466>; CRETE, ILL., CODE § 28-272(5) (2005), available at http://search.municode.com/html/14052/level3/MUCO_CH28ZO_ARTVIREAGDI.html; HIGHLAND, CAL., CODE § 15.52.010(F) (2013), available at <http://www.codepublishing.com/ca/highland>.

21. Selena Kyle, *There Goes the Neighborhood: The Failure and Promise of Second Units as a Housing Source for the Midpeninsula 22* (May 2000) (unpublished undergraduate Senior Honors Thesis, Program on Urban Studies, Stanford University), available at <http://www.stanford.edu/dept/URBS/pdf/kyle-thesis.pdf>.

a context which ought to predict a minimal level of local parochialism—that is, in a state where local governments are required to permit ADUs in residential zones. In 2002, California enacted state-wide legislation mandating that local governments either amend their zoning laws to permit ADUs in single-family zones, accept the imposition of a state-dictated regulatory regime, or demonstrate why they cannot conform to the state mandate. In addition, California law contains other provisions that seek to minimize localities' ability to employ land use restrictions in an exclusionary manner, including provisions requiring that all jurisdictions provide for a range of housing options, which also ought to minimize the exclusionary effects of land use regulations.²² Many California jurisdictions also have a long history of incorporating "inclusionary zoning" requirements into their planning laws.²³ All but a handful of California municipalities have enacted local legislation authorizing ADUs in response to the state mandate.

To understand more about the real-world effects of ADU reforms at the local government level, we carefully examined the zoning law of all California cities with populations over 50,000 people (150 total cities) to determine how local governments actually implemented ADU reforms "on the ground" after the state legislation was enacted. We then categorized these responses into several legislative groups that exemplify the varieties of responses to the state mandate. Our analysis suggests that ADU reforms—even state-mandated ones—are not silver bullets that overcome local governments' exclusionary impulses in the land use contexts. This seeming deregulatory success story masks hidden barriers that dramatically suppress the number of ADUs constructed and the value of ADUs as a means of increasing affordable housing options. Localities acting under the state mandate to implement ADU reforms have responded to local political pressures by delaying the enactment of local ADU legislation (and, in a few cases, simply refusing to do so despite the state mandate), imposing burdensome procedural requirements that are contrary to the spirit, if not the letter, of the state-law requirement that ADUs be permitted "as of right," requiring multiple off-street parking spaces, and imposing sub-

22. See PAUL G. LEWIS, CALIFORNIA'S HOUSING ELEMENT LAW: THE ISSUE OF LOCAL NONCOMPLIANCE (2003), available at http://www.ppic.org/content/pubs/report/r_203plr.pdf. The reporting requirement for this mandate, known as the "housing element," provides some evidence about the number of ADUs constructed in various jurisdictions throughout the state.

23. See NICO CALAVITA ET AL., NAT'L HOUS. CONFERENCE, INCLUSIONARY ZONING: THE CALIFORNIA EXPERIENCE (2004), available at http://www.nhc.org/media/documents/IZ_CA_experiencet.pdf.

stantive and procedural design requirements. Taken together, these details can represent *de facto* prohibitions—especially for the elderly and lower income individuals who are the supposed beneficiaries of the state ADU mandate.

We write at a time when cities across the country have begun to enact dramatic reforms to their land use regulations, especially by substituting or supplementing traditional zoning rules with the “form based” and “transect” regulatory principles favored by the new urbanists. Our analysis sounds a cautionary note about these efforts. Like the ADU regulations that we study (which are themselves part of the broader reform movements), these broader reforms ostensibly aim to “open up” our cities and suburbs by permitting a broader mixing of land uses than traditional zoning rules require. Our research suggests not only that local officials enacting these new regulations are not immune to the temptation to exclude, but also that these temptations can manifest themselves in hidden ways, as even seemingly deregulatory reforms can mask exclusionary regulatory burdens.

I. Land Use Regulations, Local Parochialism, and Affordable Housing

The impact of land use regulations on housing prices is well documented. Not only do land use regulations impose compliance costs,²⁴ but they also limit the supply of land available for development, thus increasing the price of the available supply.²⁵ Moreover, the authority to regulate land uses vests local jurisdictions with the power to exclude (or limit the prevalence of) undesirable land uses, including multi-family housing.²⁶ As predicted by Charles Tiebout, since mobility between these jurisdictions within a metropolitan area is relatively inexpensive,

24. See Anthony Downs, *The Advisory Commission on Regulatory Barriers to Affordable Housing: Its Behavior and Accomplishments*, 2 HOUS. POL’Y DEBATE 1095 (1991).

25. See Edward L. Glaeser et al., *Why Have Housing Prices Gone Up?*, 95 AM. ECON. REV. 329 (2005); Daniel B. Rodriguez & David Schleicher, *The Location Market*, 19 GEO. MASON L. REV. 637, 645 (2012); John M. Quigley & Steven Raphael, *Regulation and the High Cost of Housing in California*, 95 AM. ECON. REV. 323 (2005); John M. Quigley & Larry A. Rosenthal, *The Effects of Land Use Regulation on the Price of Housing: What Do We Know? What Can We Learn?*, 8 CITYSCAPE 69 (2005).

26. See ADVISORY COMM’N ON REGULATORY BARRIERS TO AFFORDABLE HOUS., “NOT IN MY BACK YARD” REMOVING BARRIERS TO AFFORDABLE HOUSING 4 (1991), available at <http://www.huduser.org/publications/rbcypubs/NotinMyBackyard.html>; ADVISORY COMM’N ON REGULATORY BARRIERS TO AFFORDABLE HOUS., U.S. DEP’T OF HOUS. AND URBAN DEV., “WHY NOT IN OUR COMMUNITY?” 3 (2005), available at <http://www.huduser.org/Publications/pdf/wnioc.pdf>.

local officials have incentives to use their regulatory power to maximize housing prices and minimize tax burdens in order to attract desirable residents.²⁷

Since land use regulations' effects are capitalized into housing prices, these exclusionary pressures are particularly strong in suburban locales, where homeowners tend to exercise substantial influence in the local political process. Indeed, in contrast to larger cities, where interest group influence reflects the traditional minoritarian model predicted by public choice theory, suburban politics frequently assumes a majoritarian flavor, dominated by homeowners. William Fischel has termed this phenomenon "the homevoter hypothesis."²⁸ There is little question that suburban homeowners tend to favor policies that drive up housing prices, which is not all bad since many of the policies that homeowners demand from their local governments—such as high quality public schools, safe communities, and efficient governmental services—undoubtedly generate significant positive externalities. Certainly, recent housing trends suggest that policies that help stabilize property values are also socially beneficial.²⁹ Still, homevoter anxieties tend to generate exclusionary impulses, as well as demands for land use policies that protect home values by enshrining those impulses, including zoning rules favoring single-family homes and excluding multi-family housing.³⁰

27. In his instrumental article "A Pure Theory of Local Expenditures," economist Charles Tiebout influentially predicted that local governments would use taxation, regulatory and public-goods policies to compete with one another for "consumer voters." Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 417–20 (1956); see also FISCHEL, *supra* note 8, at 65–68 (discussing role of land use policies in Tiebout model); Bruce W. Hamilton, *Zoning and Property Taxation in a System of Local Governments*, 12 URB. STUD. 205, 205 (1975) (discussing the importance of zoning to local tax policy); J. Vernon Henderson, *Community Development: The Effects of Growth and Uncertainty*, 70 AM. ECON. REV. 894 (1980) (discussing role of land use policies in Tiebout model).

28. FISCHEL, *supra* note 8, at 90–94 (discussing the majoritarian influence of homeowners in suburbs versus in cities); see NEIL K. KOMESAR, *LAW'S LIMITS* 60–70 (2001) (describing "two force model of politics" in the land use planning context, which is characterized by both "fear of the few" and "fear of the many"); Robert C. Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 YALE L.J. 385, 408–10 (1977) (describing model).

29. See Lee Anne Fennell & Julie A. Roin, *Controlling Residential Stakes*, 77 U. CHI. L. REV. 143 (2010) (observing that many homeowners rationally abandoned their homes when housing values dipped below the foreclosure value).

30. We leave to one side the heated debate about the costs and benefits of this inter-jurisdictional competition here. See, e.g., John D. Donohue, *Tiebout? Or Not Tiebout? The Market Metaphor and America's Devolution Debate*, 11 J. ECON. PERSP. 73, 74 (1997) (asserting that "[d]iverse policy regimes can cater to heterogeneous preferences"); Robert P. Inman & Daniel L. Rubinfeld, *The Political Economy of Federalism*, in PERSPECTIVES ON PUBLIC CHOICE 73, 83–85 (Dennis C. Mueller ed., 1997) (arguing that inter-local competition will increase efficiency in production of public

Proposals to increase the supply of affordable housing (especially in suburbs) by curbing the cost and exclusionary effects of land use regulations have taken many forms. Some, such as the comprehensive growth control regimes favored by many opponents of suburban sprawl, seek to wrest land-use authority from local governments, vesting it instead with state or regional entities, which theoretically ought to curb local parochialism and promote inter-jurisdictional coordination.³¹ Others—such as the regional “fair share” obligations resulting from New Jersey’s famed exclusionary zoning saga³² and California’s “housing element” requirement³³—impose obligations on localities to amend land use regulations to permit a variety of housing types (and price points).³⁴ Still others, such as “inclusionary zoning” mechanisms, place the burden of alleviating the price effects of land use regulations on private developers.³⁵ Yet, all of these ostensibly corrective devices have themselves been criticized for failing to address or even exacerbating the land use *status quo* by adding additional layers of regulation that might have the perverse effect of further driving up housing prices.³⁶

goods); Richard F. Wagner & Warren E. Weber, *Competition, Monopoly, and the Organization of Government in Metropolitan Areas*, 18 J. L. & ECON. 661, 684 (1975) (“[A]n increase in the number of competing and overlapping governments will lead the public economy to more closely perform as a competitive industry.”); *see also*, e.g., MARK SCHNEIDER, *THE COMPETITIVE CITY* 63–69 (1989) (purporting to find that tax rates are lower in more fragmented metropolitan areas). *But see*, e.g., Lee Anne Fennell, *Exclusion’s Attraction: Land Use Controls in Tieboutian Perspective*, in *THE TIEBOUT MODEL AT FIFTY* 15 (William A. Fischel, ed. 2006) (arguing that “Tiebout’s ideas cannot be fully appreciated without taking into account the place of exclusion both as an attractive item . . . available to consumer-voters and as a constraint on the choice sets that consumer-voters encounter”).

31. *See* ARTHUR C. NELSON & JAMES B. DUNCAN, *GROWTH MANAGEMENT PRINCIPLES AND PRACTICES* 4–7 (1995).

32. *See* S. Burlington Cnty. NAACP v. Mount Laurel Twp., 456 A.2d. 390 (N.J. 1983); S. Burlington Cnty. NAACP v. Mount Laurel Twp., 336 A.2d 713 (N.J. 1975).

33. *See* Calif. Dep’t of Hous. and Cmty. Dev., *Housing Elements and Regional Housing Need Allocation*, CA.Gov, <http://www.hcd.ca.gov/hpd/hrc/plan/he> (last visited Apr. 6, 2013).

34. *See* FENNELL, *supra* note 8, at 158–60 (2009); CHARLES M. HAAR, *SUBURBS UNDER SIEGE* (1996); DAVID L. KIRP ET AL., *OUR TOWN* (1995); J. Peter Byrne, *Are Suburbs Unconstitutional?*, 85 GEO. L.J. 2265 (1997).

35. *See* ROBERT C. ELLICKSON & VICKI L. BEEN, *LAND USE CONTROLS* 671–72 (3rd ed. 2005) (“Ostensibly to counter the effects of exclusionary zoning practices, a government may seek to induce developers to contribute to the housing programs for low and moderate-income families. This policy [is] typically referred to as ‘inclusionary zoning’ or a ‘housing linkage program.’”); Robert W. Burchell & Catherine C. Galley, *Inclusionary Zoning: Pros and Cons*, in *INCLUSIONARY ZONING* 3, 7 (2000), available at <http://www.nhc.org/media/documents/InclusionaryZoning.pdf>; Robert A. Johnston et al., *Selling Zoning: Do Density Bonus Incentives for Moderate Cost Housing Work?*, 36 WASH. U. J. URB. AND CONTEMP. L. (1989).

36. *See* PETER SCHUCK, *DIVERSITY IN AMERICA: KEEPING GOVERNMENT AT A SAFE DISTANCE* 200–10 (2003) (criticizing *Mt. Laurel*); Robert C. Ellickson, *Suburban Growth*

II. The Case(s) for ADUs

The flurry of legislative reforms authorizing ADUs over the past decade or so is primarily attributable to two factors: the growing influence of the “new urbanists” over land use regulation and the political power of the American Association of Retired People (AARP) and other advocates for older Americans, as well as the advocacy of affordable housing proponents. This Section discusses how these two factors have combined to promote ADU reforms.

A. *The New Urbanist Demand for Land Use Diversity*

In recent years, “new urbanist” architects and planners have become the regulatory reformers *du jour*. Over the past few decades, new urbanists have launched an expansive and increasingly influential attack on traditional zoning practices. The new urbanists’ case against zoning is part anti-suburban polemic and part pro-urban philosophy.³⁷ Building in important ways upon Jane Jacobs’s influential book, *The Death and Life of Great American Cities*, the new urbanists claim that cities are good for us, and suburbs are bad. Or, to put the claim into social science terminology, the new urbanists claim that mixed land use patterns generate social capital while single land use ones inhibit it.³⁸ Thus, it follows that zoning laws that mandate a single land use, “suburban” built environment ought to be scrapped.³⁹

Controls: An Economic and Legal Analysis, 86 YALE L.J. 385, 400 (1977) (“Anti-growth measures have one premier class of beneficiaries: those who already own residential structures in the municipality doing the excluding.”); Robert C. Ellickson, *The Irony of Inclusionary Zoning*, 54 S. CAL. L. REV. 1167, 1184–85 (1981) (arguing that inclusionary zoning will drive up housing prices for those who do not receive the subsidy); Laurence Katz & Kenneth T. Rosen, *The Interjurisdictional Effects of Growth Controls on Housing Prices*, 30 J.L. & ECON. 149, 150 (1987); Arthur C. Nelson et al., *The Link Between Growth Management and Housing Affordability: The Academic Evidence*, in GROWTH MANAGEMENT AND AFFORDABLE HOUSING (Anthony Downs ed., 2004) (summarizing evidence suggesting that comprehensive growth controls increase housing prices).

37. See, e.g., LÉON KRIER, *THE ARCHITECTURE OF COMMUNITY* 104 (2009) (“Functional zoning replaces the organic order of the city with the mechanical disorder of the suburbs.”).

38. For a thoughtful discussion of the new urbanism and social capital, see Sheila R. Foster, *The City as an Ecological Space: Social Capital and Urban Land Use*, 82 NOTRE DAME L. REV. 527, 559–61 (2006).

39. Jacobs wrote at the apex of the urban renewal period—a time when urban planning ideology and practices strongly favored the imposition of single-land-use patterns on our cities, even to the point of demolishing mixed-land-use communities in order to replace and modernize them. She vehemently rejected the accepted wisdom that dense, mixed-land-use urban neighborhoods were hopelessly antiquated and unhealthy. On the contrary, she argued that mixed-land-use neighborhoods are critical to city life because commercial land uses both generate social capital and guarantee

After years of relative obscurity, the new urbanists have, in recent years, begun to successfully promote land-use regulations that incorporate a variety of housing types, including accessory dwelling units, as a means of making communities both more affordable and “sustainable.”⁴⁰ The new urbanists’ growing influence is increasingly reflected in changes to longstanding land-use regulation practices, including a gradual trend toward the adoption of mixed-use zoning and, in some jurisdictions, the augmentation, or replacement of traditional zoning practices with regulatory alternatives that substitute the regulation of building design for the segregation of land uses.⁴¹ New urbanists argue that cities should reject zoning regulations based upon land uses in favor of a system of aesthetic controls that governs the appropriate *form* of buildings in a given neighborhood.⁴² Their regulatory alternative to zoning traces its origins to architect Andrés Duany’s 2003 *SmartCode*, which proceeds upon the assumption that urban development naturally proceeds from more dense areas to less dense ones.⁴³ Duany calls this progression the “transect” and urges cities to replace traditional use zoning with regulations of building form that are appropriate to the various “transect zones” along the progression.⁴⁴ The available evidence suggests that increasing numbers of local governments are implementing the concepts as alternatives or supplements to traditional zoning practices.⁴⁵

a steady supply of “eyes upon the street” to monitor and keep disorder and crime in check. See JANE JACOBS, *THE DEATH AND LIFE OF GREAT AMERICAN CITIES* (1961).

40. See *infra* notes 64–69 and accompanying text; see also OFFICE OF SUSTAINABLE CMTYS., U.S. ENVTL. PROT. AGENCY, *PARTNERSHIP FOR SUSTAINABLE COMMUNITIES* (2012), available at http://www.sustainablecommunities.gov/pdf/partnership_accomplishments_report_508%20compliant_final_062112.pdf (highlighting the efforts of several municipalities to create “sustainable” communities through land-use regulations and other means).

41. See Nicole Stelle Garnett, *Redeeming Transect Zoning?*, 78 BROOK. L. REV. 571 (2013).

42. See DANIEL G. PAROLEK ET AL., *FORM-BASED CODES* 4, 12 (2008) (describing form-based codes as a method to regulate new-urbanist-style development by controlling physical form rather than land use).

43. See ANDRÉS DUANY ET AL., *SMARTCODE* VERSION 9.2, at iv (2012), available at <http://www.transect.org/codes.html>.

44. *Id.* at xi; see Andrés Duany & Emily Talen, *Transect Planning*, 68 J. AM. PLAN. ASS’N 245, 245–48 (2002).

45. See Doris Goldstein, *New Urbanism: Recreating Florida by Rewriting the Rules*, 80 FLA. B.J. 63, 64–65 (2006); Philip Langdon, *Form-Based Codes Reach Critical Mass*, BETTER! CITIES & TOWNS, Apr. 1, 2010, <http://bettercities.net/article/form-based-codes-reach-critical-mass>. As of April 2013, there were 445 form-based codes that meet Form-Based Code Institute criteria. See *Form-Based Codes? You’re Not Alone*, PLACEMAKERS, <http://www.placemakers.com/how-we-teach/codes-study> (last visited June 30, 2013). The cities of Miami and Denver have completely overhauled their existing zoning codes in favor of transect-zoning regulations. See Dakota Handon & Alex Adams, *Miami 21: The Blueprint for Miami’s Future*, FLA. PLAN.

While the new urbanists' regulatory agenda extends far beyond the promotion of ADUs (or affordable housing, more generally), they are in large part responsible—along with advocates for older Americans, especially the AARP—for popularizing ADUs as an affordable housing alternative. The new urbanists argue that reforms enabling ADUs serve two important functions. First, they enable class and race integration by providing affordable housing options in suburbs now dominated by single-family residential communities, with home values out of the reach of many Americans of modest means. Second, they enable age integration by enabling older Americans to remain independent longer than they might if independence required upkeep on a single-family home.⁴⁶ Professor Gerald Frug, a proponent of the new urbanism, argues that the elderly are “disserved” by current zoning practices, reasoning:

Most people over sixty-five would prefer to stay in their own neighborhoods as long as they can, but a single-family house and a car-centered environment makes it hard for them to do so Yet zoning laws that require single-family residences prohibit many plausible alternatives: sharing the house with non-family members; reconstructing the house to install a separate apartment for the elderly resident and then selling or renting the rest of it; building an elder cottage behind the single-family house and transferring the house itself to friends or relatives.⁴⁷

Frug argues that, by taking these options off the table, zoning regulations result in “many elderly residents of traditionally designed suburbs feel[ing] they have no choice but to move elsewhere.”⁴⁸

B. ADUs and the Elderly: The Need for Granny Flats

Not surprisingly, the concerns of older Americans, as expressed by Frug above, have played a central rhetorical role in debates about ADUs.⁴⁹ Historically, aged parents were sources of oral tradition

(Winter 2010), http://www.ftod.com/research/tod_planning_and_fbc_in_florida/miami_21/miami_21_florida_planning.pdf; *Project Vision*, MIAMI 21 (last visited June 30, 2012), <http://www.miami21.org>; Sarah Neumann, *The New Denver Zoning Code and What It Means for Downtown*, URB. EYE BLOG (Mar. 9, 2010), <http://www.livedowntowndenver.com/LDDBlog/?p=1752>; Christopher N. Osher, *New Zoning Laws Council Revamps Land-Use Rules*, DENVER POST, June 22, 2010, at B01.

46. See RANA ABU GHAZALEH ET AL., AM. PLANNING ASS'N, MULTIGENERATIONAL PLANNING 11 (2011), available at <http://cms.mildredwarner.org/p/169>.

47. GERALD FRUG, CITY MAKING 158 (1990).

48. *Id.*

49. See Tom Castro, *Are We Ready for the Golden Age of Boomers?*, L.A. DAILY NEWS, May 20, 2007, at N1; Lynette Evans, *Mom and Dad Moving In? Maybe It's Time to Build an In-Law Suite*, S.F. CHRON., Sept. 15, 2001, at 8; Nzong Xiong, *A Cozy Spot for the In-Laws: Families Make Room for Relative [sic] in or next to Their Homes*, THE FRESNO BEE, Feb. 10, 2007 (“In the future, [in-law suites are] definitely something we’ll keep in the mix. With the baby boomers, with population growth,

and inspired awe because they had beaten the odds of early death.⁵⁰ At a later time (and in some East Asian cultures), they were the property holders and family heads while they lived, with the younger generation only assuming these roles of power as the landowner died.⁵¹ Since industrialization, in the West, they have been less and less valued economically, particularly when there is Social Security to fall back on⁵² and so very many living to advanced ages where they are more likely to become dependent (with over half of those over eighty-five suffering from dementia).⁵³ Still, the young-old, between fifty-five and sixty-four, as well as those over sixty-five, exert significant influence over the legislative process. They are well-organized politically, and they still control many assets and wield enormous financial power (despite investment losses in the recent recession, see figure below).⁵⁴

In California, while nearly 16% of elderly residents live below the poverty line, nearly 18% enjoy annual incomes of more than \$100,000.⁵⁵

When asked, a majority of older adults report that they would prefer to age in place.⁵⁶ That is, they would choose not to move to retirement

it's important we consider the needs of all buyers" (quoting Laura Mather, director of sales and marketing at Walthen-Castanos)).

50. See RICHARD A. POSNER, *AGING AND OLD AGE* 202–31 (1996).

51. See Margaret F. Brinig, *The Family Franchise: Elderly Parents and Adult Siblings, Elderly Parents and their Adult Siblings*, 1996 UTAH L. REV. 393, 406; John N. Langbein, *The Twentieth-Century Revolution in Family Wealth Transmission*, 86 MICH. L. REV. 722, 725 (1988).

52. See Margaret F. Brinig, *Finite Horizons: The American Family*, 2 INT'L J. CHILD. RTS. 293, 304 (1994).

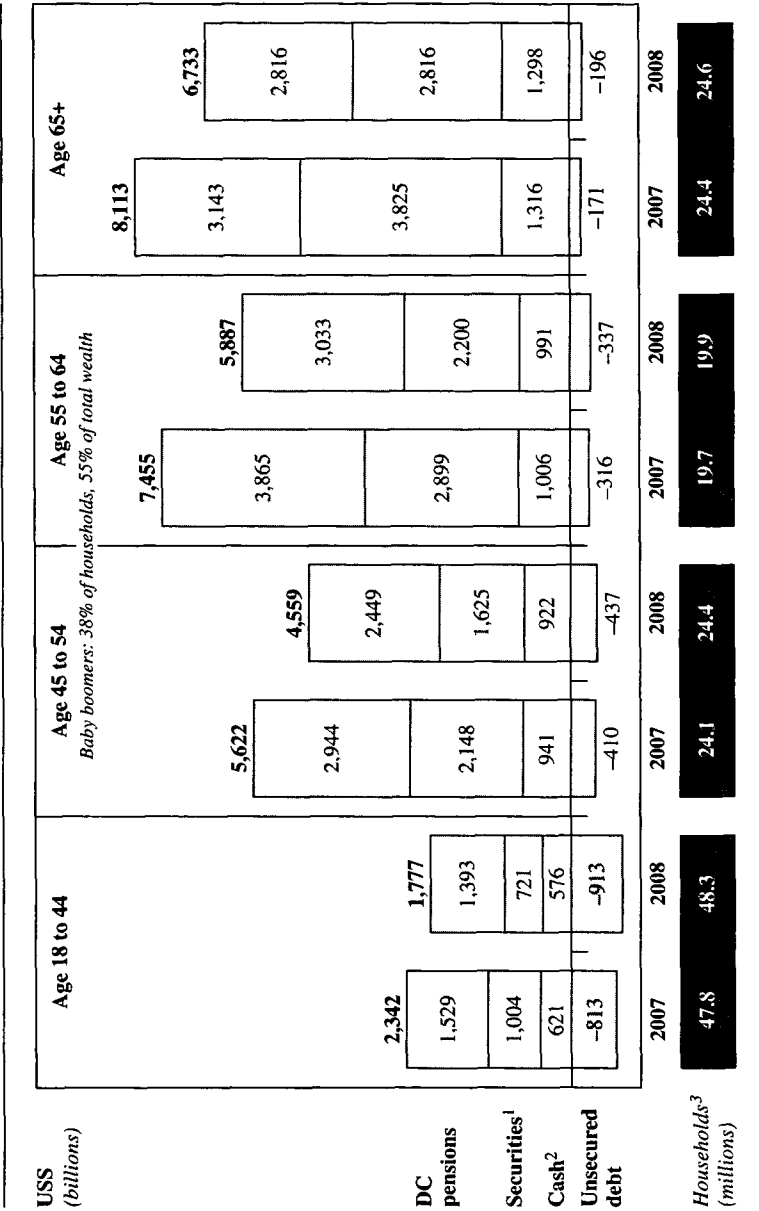
53. The Alzheimer's Association estimates that one-in-eight people over age sixty-five and nearly half of people over eighty-five have Alzheimer's disease. See ALZHEIMER'S ASS'N, 2011 ALZHEIMER'S DISEASE FACTS AND FIGURES 12 (2011), available at http://www.alz.org/downloads/Facts_Figures_2011.pdf (citing Julie A. Schneider et al., *Mixed Brain Pathologies Account for Most Dementia Cases in Community-Dwelling Older Persons*, 69 NEUROLOGY 2197, 2197–2204 (2007)).

54. Penney Frohling & Neil Dennington, *A Whole Lot Less Wealthy*, EXECUTIVE AGENDA: VERTICAL VIEW 36, 43, & fig.5 (A.T. Kearney, Chicago, Ill 2009), available at <http://www.atkearney.com/documents/10192/22e0b165-e127-474a-ab79-85b7d2037529>.

55. CAL. DEP'T OF AGING, CALIFORNIA STATE PLAN ON AGING 2009–2013, at 13, fig. 4 (2009), available at http://www.aging.ca.gov/aboutcda/docs/California_State_Plan_on_Aging_AoA_2009-2013_06-30-2009.pdf.

56. RODNEY L. COBB & SCOTT DVORAK, AARP, ACCESSORY DWELLING UNITS: MODEL STATE ACT AND LOCAL ORDINANCE, 9 (2000), available at http://assets.aarp.org/rgcenter/consume/d17158_dwell.pdf (stating that surveys consistently reveal that over 80% would like to age in place). See generally KATHRYN LAWLER, JOINT CTR. FOR HOUS. STUDIES, AGING IN PLACE: COORDINATING HOUSING AND HEALTH CARE PROVISION FOR AMERICA'S GROWING ELDERLY POPULATION (2001), available at <http://www.nw.org/network/pubs/studies/documents/agingInPlace2001.pdf> (discussing concerns, challenges, and possible solutions relating to implementing aging in place programs).

Figure 1: United States: Total liquid assets by age group and year



1. The net including capital losses, new capital flow and intra-asset capital flows.

2. Cash is generated from existing assets including land and buildings, labor and other productive assets. In addition, it can be generated through other contractual obligations, including annuities and defined benefit pension payouts.

3. Assumes annual household growth rate of 0.5%.

Source: A.T. Kearney analysis.

havens or elder communities (and certainly not to nursing homes).⁵⁷ As long as they are able, they would like to remain in familiar surroundings, with their longtime neighbors and cherished possessions. However, the housing in which they live may not be suited for one with less mobility,⁵⁸ and may be too expensive (and wasteful) to maintain. While the very fluid labor force in the United States has encouraged movement of adult children away from the communities in which they grew up, many parents and their adult children report a desire to live near each other.⁵⁹ The elderly also increasingly do child care for their grandchildren as more and more mothers with young children remain in the workforce.⁶⁰

Surveys suggest that both adult children and their elderly parents view ADUs as an ideal living arrangement to promote these benefits.⁶¹ The adult children see the advantages of being able to rely on their parents for childcare, as well as to serve their parents by being available to help out doing heavy lifting, home maintenance, and other like tasks. In financially difficult times, they may see the "home place" as a

57. This is not simply an American phenomenon. See, e.g., Stephen Lunn, *In-Care Age on the Rise As More Resist Moving*, THE AUSTRALIAN, Aug. 31, 2011, <http://www.theaustralian.com.au/national-affairs/health/in-care-age-on-the-rise-as-more-resist-moving/story-fn59nokw-1226125911217>.

58. For example, one portable ADU provides accessibility and easy medical care in a homelike setting. See Elaine Martin Petrowski, *ADU for Medical Caregiving: MED-Cottage Offers Options for High-Tech Medical Monitoring and Security Equipment*, AARP MAG., Oct. 18, 2010, at 1, available at http://www.aarp.org/home-garden/housing/info-10-2010/adu_for_medical_caregiving_medcottage.html.

59. See Kao-Lee Liaw et al., *Location of Adult Children As an Attraction for Black and White Elderly Primary Migrants in the United States*, 34 ENV'T & PLAN. A 191, 192 (2002). This is a universal desire. See FRÉDÉRIC MÉGRET ET AL., DIGNITY: A SPECIAL FOCUS ON VULNERABLE GROUPS 24 (2009), available at http://www.udhr60.ch/report/HumanDignity_Megret0609.pdf.

60. See Lina Guzman, *Grandma and Grandpa Taking Care of the Kids: Patterns of Involvement*, CHILD TRENDS RESEARCH BRIEF, at 1, 3, & fig. 3 (2004), available at <http://www.childtrends.org/files/grandparentsr.pdf> (showing evidence from the National Survey of Families and Households that approximately 49% of grandparents were providing at least some child care for their very young grandchildren (under 5)). A Census Report, *Grandparents in the United States, 2001*, discusses these roles. JASON FIELDS ET AL., U.S. CENSUS BUREAU, GRANDPARENTS IN THE UNITED STATES (2001), available at <http://www.census.gov/population/www/socdemo/grandparents2001SIPP.pdf>. See generally U.S. Census Bureau, *Grandparents, 2001 American Community Survey 1-Year Estimates, S1002* (indicating 7,059,261 grandparents lived with their own grandchildren under 18 years). New Census data indicates that about 21% of preschoolers were primarily cared for by grandparents. See Table 2A: *Primary Child Care Arrangements of Preschoolers Under 5 Years Old Living with Employed Mothers by Selected Characteristics: Spring 2010*, U.S. CENSUS BUREAU, <http://www.census.gov/hhes/childcare/data/sipp/2010/tab02A.xls> (last visited June 30, 2013).

61. See COBB & DVORAK, *supra* note 56; Patrici Baron Pollak, *Rethinking Zoning to Accommodate the Elderly in Single Family Housing*, 60 J. AM. PLAN. ASS'N 521 (1994).

living situation more desirable than anything they could afford. The older generation may want to spend time with their grandchildren, be able to trust in a family member to help out and provide security (from crime and fraud as well as in medical emergencies), help out in concrete ways through provision of a place to live (if better off than children) or be helped (by renting to wealthier children).⁶² While each situation is unique, most elder-child dyads would not prefer to live in the same household,⁶³ with some space protecting the dignity and privacy of both the elderly parents and the younger families. This overlap in concerns and motives supports the creation of ADUs. The confluence nicely dovetails with New Urbanists' desire for "infilling," providing low-cost housing, and creating diverse, mixed-use communities.

C. ADUs As Affordable Housing

Affordable housing advocates agree that ADUs will promote people's ability to live in single-family communities containing mixed rental and more expensive ownership properties, while paying approximately the same rent as for a studio apartment.⁶⁴ In fact, ADU rents may actually be below market, since the landlord can conceivably depend on the tenant for house sitting and minor maintenance tasks, etc. Particularly in locales with high real estate values and property taxes, single-family houses remain out of the reach of individuals and families of modest means. They may also be too expensive to maintain for older Americans, especially those on fixed incomes. ADUs are more affordable than single-family homes, almost by definition, since they usually are smaller than other units in the neighborhood (by regulation in many municipalities they must be much smaller than the "principal dwelling").⁶⁵

62. See David Heintz, *Elderly Parents Increasingly Moving in with Their Children*, QUAD CITY TIMES, April 4, 2009 available at http://qctimes.com/news/local/elderly-parents-increasingly-moving-in-with-their-children/article_5a35b7c0-217e-11de-ba4b-001cc4c03286.html (highlighting stories of two women who live in apartments in their children's homes). For a more academic view, see Liaw et al., *supra* note 59, at 195, 202 (finding that a large number of young-old migrants moved in order to facilitate the exchange of services with their adult children, and for those moving to Arizona, 31% indicated that they'd moved to be nearer their children, and 54% indicated they were nearer to at least one child than at the time of retirement).

63. But see Albrecht et al., *Effects of Potential Changes in Coresidence on Matched Older Parent-Adult Child Dyads*, 11 J. AGING STUD. 81, 84, 87 (1997) (disabling children using elderly parents as caregivers).

64. See Kyle, *supra* note 21, at 21 (claiming that second units make it moderately affordable for renters to live in more affluent neighborhoods).

65. See, e.g., WICHENDON, MASS., ZONING BYLAW § 6.3.4(G) (2012), available at http://www.townofwinchendon.com/Pages/WinchendonMA_BComm/ZBA/Zoning_By

On the supply side, proponents claim they will “provide [for] new housing,” encourage full utilization of single-family properties, and “provide a cost-effective means of creating new housing.”⁶⁶ Construction will either take place within the existing “principal dwelling” or in the rear, and because it will be small scale, in any event, and will take advantage of existing land ownership, it will cost less than a typical rental unit.⁶⁷ Allowing the residents of single-family homes to rent their unneeded space can provide additional income as well as the living space. Even where the ADU unit will house an elderly family member, it will save the costs of full-time nursing care (for the elder) and/or daycare for a small child living in the principal unit.⁶⁸ ADUs also may offer lower-income people the opportunity to live near suburban employment opportunities and access to high-quality public schools.⁶⁹

III. The Political Economy of ADU Reforms: A Nationwide Snapshot

The primary purpose of this Article is to analyze local government responses to California’s state law ADU mandate, both in terms of their substantive differences and their predicted effects on the construction of new ADUs. The basis for this Article is empirical, in the sense that we carefully examined all the municipal laws (zoning ordinances) of

law_accepted_5.21.12.pdf (providing that the living space in an ADU shall not exceed the smaller of 750 square feet or 33% of the primary dwelling).

66. BARSTOW, CAL., CODE § 19.75.010 (2011), available at <http://library.municode.com/index.aspx?clientId=16205>.

67. See Kyle, *supra* note 21, at 22.

68. See *id.* A recent survey by MetLife shows a daily cost of \$239 for a private room in a nursing home, for an annual cost of \$87,235. METLIFE MATURE MKT. INST., MARKET SURVEY OF LONG-TERM CARE COSTS 5 (2011), available at <https://www.metlife.com/assets/cao/mmi/publications/studies/2011/mmi-market-survey-nursing-home-assisted-living-adult-day-services-costs.pdf>. According to the same survey, a home health aide costs on average \$21,840 annually. *Id.*

69. The “purpose clause” of the Walnut Creek, California, accessory dwelling unit regulation reflects all of these goals:

Furthermore, it is the purpose of this section to allow the more efficient use of the City’s existing stock of dwellings, to provide economic support for resident families of limited income, to provide rental housing units for persons who are elderly or disabled, while protecting property values and the integrity and character of single family neighborhoods by ensuring that second family residential units are architecturally compatible with the principal structure and neighborhood and are installed under such additional conditions as may be appropriate to further the purpose of this ordinance.

WALNUT CREEK, CAL., CODE § 10-2.3.501 (2013), available at <http://www.codepublishing.com/ca/walnutcreek>.

the 150 cities in California with populations over 50,000, and that we categorized them into several legislative groups that exemplify the varieties of responses to the state mandate. We have examined the minutes of city councils in a number of the jurisdictions to make sure we have the stories right: we know who testified and what the witnesses said or submitted. We also collected local press accounts, including editorials supporting and opposing local ADU reforms. What we are not able to do, unfortunately, is to see the effect of the varying ordinances over time. We cannot obtain access to local data on the number of ADU permits granted or units built—both because data collection would be costly and also because some jurisdictions do not keep track of numbers of permits in this way (in other words, singling out the ADUs).

Although this Article is part of the literature on the market for legislation among jurisdictions, we go one step further than the “race to the top”⁷⁰ or “race to the bottom”⁷¹ scholarship because we examine localities’ responses to a state “legislate or be preempted” mandate, analyzing the reasons why some municipalities adopted drafted zoning laws designed to increase the number of ADUs and why some have followed the more traditional call to protect local single-family homeowners. In making this analysis, we do not take a position on which side is right in the substantive debate about ADUs, although, in the interest of full disclosure, our instincts are that they represent an important (if incomplete) response to the needs of both lower-income and older Americans. We also, however, recognize the costs of mandating uniform rules (for what are not uniform communities), including a reduction on the diversity of communities that individuals are able to choose as their homes.

Before turning to the California story, we briefly review the national movement to liberalize the regulation of ADUs, which has gained significant momentum in recent years. While most state laws are silent on the question of ADUs, a total of nine states have passed legislation at least enabling ADU reforms. In addition to California, Washington and Vermont mandate accessory units. Washington’s code requires that governments incorporate provisions allowing accessory apart-

70. See, e.g., ROBERTA ROMANO, *THE ADVANTAGE OF COMPETITIVE FEDERALISM FOR SECURITIES REGULATION* 100, 213, 257 (2002); Robert H. Sitkoff & Max M. Schanzbach, *Jurisdictional Competition for Trust Funds: An Empirical Analysis of Perpetuities and Taxes*, 115 *YALE L.J.* 356, 416 (2005).

71. See, e.g., Richard L. Revesz, *The Race to the Bottom and Federal Environmental Regulation: A Response to Critics*, 82 *MINN. L. REV.* 535 (1997).

ments, though flexibility in the specific provisions is allowed.⁷² Vermont's statute provides that "no bylaw shall have the effect of excluding" as a permitted use one ADU that is within or appurtenant to an owner-occupied ADU.⁷³ Florida, Maryland, and Rhode Island do not mandate that local zoning ordinances permit ADUs, but instead provide incentives for local governments to make provisions for them. Florida allows municipalities to count ADUs towards satisfying the affordable housing components of a comprehensive plan if building permits include affidavits from applicants attesting they are renting at affordable rates to extremely low-income to moderate-income persons.⁷⁴ Rhode Island also allows credits of this type and features ADUs under its innovative community planning tools.⁷⁵ Maryland provides for Department of Housing and Community Development loans to rehabilitate homes to include accessory housing.⁷⁶ Finally, Hawaii and Massachusetts have enabling legislation. Hawaii's "ohana law" allows each county to adopt reasonable standards allowing construction of two single-family dwellings on any residential lot.⁷⁷ Massachusetts supplies an accessory apartment application as part of its local initiative program under Code Section 40B, and includes case studies (from Lexington, Northampton, and Pelham), model bylaws, and links as part of its Smart Growth Toolkit.⁷⁸

At the local level nationwide, we observe a spectrum of responses to pressure to adopt ADU legislation. Some localities have amended their zoning laws to encourage ADUs even to the point of subsidizing them. On the other extreme, some localities forbid ADUs entirely.⁷⁹ One curiosity that we confronted at the beginning of our research is that many large cities, including New York, Los Angeles, Fort Worth, Chicago, and San Francisco have resisted pressure from affordable housing ad-

72. See WASH. REV. CODE § 43.63A.215 (2013).

73. VT. STAT. ANN. tit. 24, § 4412(E) (2013).

74. See FLA. STAT. § 163.31771(3)-(5) (2013).

75. See R.I. GEN. LAWS § 42-128-8.1(b)(5) (2012). One such regulation, which provides income-restricted ADUs with tax mitigation, is the Town of Charlestown's. See CHARLESTOWN, R.I., CODE § 218-53.1 (2012), available at <http://ecode360.com/14969418>.

76. See MD. CODE ANN., HOUS. & CMTY. DEV. § 4-926(c) (West 2013).

77. See HAW. REV. STAT. § 46-4(c) (2012). See generally Jody Lynn Kea, *Honolulu's Ohana Zoning Law: To Ohana or Not to Ohana*, 13 U. Haw. L. Rev. 505 n. 9 (1991) (referring to HONOLULU, HAW., LAND USE ORDINANCE § 21A-6.20 (1988)).

78. See *Smart Growth/Smart Energy Toolkit*, MASS.GOV, http://www.mass.gov/envir/smart_growth_toolkit/index.html (last visited July 27, 2013).

79. See AM. PLANNING ASS'N, *supra* note 16, at 1; Christopher N. Osher, *Zoning Debate in Homestretch*, DENVER POST, Feb. 7, 2010, at B01.

vocates to adopt ADU reforms, even though these jurisdictions have both a tremendous need for affordable housing and large numbers of illegal accessory dwellings within their municipal boundaries.⁸⁰ For example, in 2008, New York's Pratt Center for Community Development found that nearly 115,000 ADUs were created, illegally, in New York City between 1990 and 2000 (nearly 40% of all new housing created during that period), observing that for "the people who live in . . . them, these units are necessary, a crucial resource in a city sorely lacking in affordable alternatives."⁸¹

On the other hand, many smaller communities, including many affluent suburbs, have embraced them. This is a puzzle because we would expect suburban homeowners to be more resistant to the mixing of land uses represented by ADU reforms than residents of more diverse, mixed-use communities in larger cities. We believe that solving this puzzle requires both a nuanced understanding of the politics of land use reforms at the state and local level and a finely tuned analysis of the actual effects of regulations at the local level. If the matter of designing optimal ADU laws and regulations could be thought of in terms of attracting or deterring types of potential state residents, presumably, at least on the margin, the states with growing numbers of the elderly would have the best—or at least the most tolerant—ADU laws. It turns out that attraction for the elderly does not determine ADU-friendly legislation. While some "Sun Belt" states (Hawaii and Florida) encourage ADUs, others do not; conversely, states like

80. See NEUWIRTH, *supra* note 11, at 7 (discussing ADU prohibition in New York City). One particularly interesting debate took place in Fort Worth, Texas, beginning in 2007. One neighborhood association proposed zoning that would permit ADUs if the neighborhood desired it. This position was originally supported by the local city planners and the zoning commission. However, at the city council meeting late in the year, when it was proposed as an amendment to a non-conforming use proposal, a number of other neighborhood associations opposed the change. The Council dropped the proposal. See Fort Worth, Tex., City Council Meeting Minutes, at 25-26 (Oct. 2, 2007), available at http://fortworthtexas.gov/uploadedFiles/City_Secretary/City_Council/Minutes/2007_Minutes/100207.pdf (discussing proposed Ordinance 17822-10-2007); *Council Briefs*, FT. WORTH STAR-TELEGRAM, Oct. 3, 2007, at B11. The rule currently in place allows habitable accessory buildings (that meet all other applicable regulations and do not exceed the height of the primary building), but "habitable accessory buildings . . . may not be used as a separate independent residence for one-family districts." FORT WORTH, TEX., CODE APPENDIX A: ZONING REGULATIONS § 5.301(C)(3) (2013), available at [http://www.amlegal.com/nxt/gateway.dll/Texas/fortworth_tx/cityoffortworthtexascodeofordinances?f=templates\\$fn=default.htm\\$3.0\\$vid=amlegal:fortworth_tx](http://www.amlegal.com/nxt/gateway.dll/Texas/fortworth_tx/cityoffortworthtexascodeofordinances?f=templates$fn=default.htm$3.0$vid=amlegal:fortworth_tx).

81. NEUWIRTH, *supra* note 11, at 1.

Massachusetts, Oregon, and Washington have both welcoming legislation and relatively low elderly populations.⁸²

Public choice theorists maintain that state and local lawmakers constantly balance and optimize.⁸³ They do so to protect their own interests as well as to advance the needs of their constituents. Like all decision makers, they must also budget the time they spend on various issues, choosing which stances to promote, which to merely support or reject through voting, and which to actively oppose. Legal and economic academics have, understandably, primarily focused on the political or financial reasons for sponsoring legislation or voting for or against it.⁸⁴ Evolutionary economics, at least as demonstrated by Thomas Schelling,⁸⁵ suggests that if various cooperative or coordinating⁸⁶ solutions are possible, one that becomes salient to the participants at the time of decision is much more likely to be chosen. This is true not only of legal sanctions,⁸⁷ but also of securities regulations⁸⁸ and of environmental regulations.⁸⁹ More generally, according to public choice literature, legislators have at least three sets of influences on their behavior. First, they must confront their voting public.⁹⁰ Are they acting within their constituents' expressed preferences and their own campaign

82. A regression table is not included at this point because no coefficient was statistically significant. The same is true with mathematical prediction of selection of the individualized solution.

83. See JERRY L. MASHAW, GREED, CHAOS, AND GOVERNANCE 23–25 (1997); FRED S. MCCHESENEY, MONEY FOR NOTHING 170 (1997) (“The one unambiguous solution for reducing rent extraction is reducing the size of the state itself and its power to threaten, expropriate, and transfer.”); DENNIS C. MUELLER, PUBLIC CHOICE II 229–45 (1989) (“[T]he best and simplest way to avoid the rent-seeking problem is to avoid establishing the institutions that create rents, that is, the regulations and regulatory agencies that lead to rent seeking.”); Daniel A. Farber, *Politics and Procedure in Environmental Law*, 8 J.L. ECON. & ORG. 59 (1992); Richard L. Revesz, *The Race to the Bottom and Federal Environmental Regulation: A Response to Critics*, 82 MINN. L. REV. 535, 542–43 (1997); Peter H. Schuck, *Against (and for) Madison: An Essay in Praise of Factions*, 15 YALE L. & POL’Y REV. 553, 565–66 (1997).

84. A counter example is the work of Robert Tollison (himself an economist). See, e.g., Robert D. Tollison, *Public Choice and Legislation*, 74 VA. L. REV. 339 (1988) (discussing how it costs far less for a legislator to introduce a bill than actually see it passed, since to gain passage in fact education of colleagues, if not logrolling methods, comes into play).

85. See THOMAS SCHELLING, *THE STRATEGY OF CONFLICT* 54–55 (1960).

86. See Richard McAdams, *A Focal Point Theory of Expressive Law*, 86 VA. L. REV. 1649, 1664 (2000).

87. See *id.* at 1650.

88. See Robert B. Ahdieh, *Law’s Signal: A Cueing Theory of Law in Market Transition*, 77 S. CAL. L. REV. 215 (2004).

89. See Jonathan H. Adler, *Fables of the Cuyahoga: Reconstructing a History of Environmental Protection*, 14 FORDHAM ENVTL. L.J. 89, 144 (2002).

90. See Jeffrey J. Rachlinski & Cynthia A. Farina, *Cognitive Psychology and Optimal Government Design*, 87 CORNELL L. REV. 549, 568–69.

promises so they will be most likely elected again? Second, not surprisingly, they act according to their own true preferences. This influence may be as simple as voting according to party line or may be deeply influenced by family situation and personal ethics.⁹¹ Third, they must pay at least some attention to special interest groups whose support will be needed to fund election campaigns in the future and to guarantee the perquisites of office.⁹²

While the universe of proponents and opponents may be similar at the state and local levels, their relative influence differs at the state versus municipal level. The most active proponents of state-wide legislation addressing ADUs have been planners concerned with sprawl, environmentalists, the AARP, and other advocates for the older Americans; the most active opponents have been local governments seeking to maintain autonomy from state intervention and thus resistant to state-level uniform rules. For some time, an alliance between the AARP (and other senior-citizen advocacy groups) and progressive urban planners has advocated removing legal restrictions to the creation of new ADUs.⁹³ In addition to California, in fact, a number of states have yielded to pressure from these groups by enacting legislation approximating the sample ADU legislation found on the AARP website.⁹⁴

Even where these interests secure permissive or mandatory ADU legislation at the state level, we observe that, at the local level, other interests tend to dominate. In fact, we observe a greater diversity of group influences at the local level, with the most active and influential voices varying depending on the size of the jurisdiction. In larger cities, both experience and the public choice analysis of local politics suggests that homeowners' voices may be joined by developers (who may prefer the large scale, affordable housing projects rather

91. See DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE 24–25, 28–33 (1991) (citing evidence to this effect); Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 225–27 (1986); Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1690–91 (1984). Jeffrey J. Rachlinski and Cynthia A. Farina argued recently that fallibility, rather than bad motivations, causes most regulatory mistakes. Rachlinski & Farina, *supra* note 90, at 553–54.

92. See FARBER & FRICKEY, *supra* note 91, at 21–33; Sam Peltzman, *Constituent Interest and Congressional Voting*, 27 J.L. & ECON. 181, 192–206 (1984); Schuck, *supra* note 36; Barry R. Weingast et al., *The Political Economy of Benefits and Costs: A Neoclassical Approach to Distributive Politics*, 89 J. POL. ECON. 642 (1981). The classical concern about this is found in *The Federalist* No. 10 (James Madison).

93. See, e.g., COBB & DVORAK, *supra* note 56.

94. See *id.*

than incremental micro-developments represented by ADUs) and the construction unions interested in the jobs generated by larger projects. In suburban jurisdictions, the most vocal participants in the debate have been advocates for affordable housing⁹⁵ and homeowners concerned about how ADU reforms will affect their property values.⁹⁶ ADUs increase density in suburban communities, and thus also increase the likelihood of the negative externalities associated with density, such as a possible influx of undocumented migrants⁹⁷ and service

95. See, e.g., Susan Abram, *City Grapples with Rules for 'Granny Flats': Proposal Would Ease Restrictions*, L.A. DAILY NEWS, Apr. 3, 2003, at N3 (quoting the Construction Industry Research Board's Research Director, Ben Bartolotto); Garth Stapley, *Tuolumne Housing Debate a Draw: Tuolumne Again Puts Off Inclusionary Issue*, THE MODESTO BEE, Sept. 19, 2007, <http://www.modbee.com/2007/09/19/71561/tuolumne-housing-debate-a-draw.html> (quoting Donny Lieberman, president of Sunseri Construction, as saying, "It's our belief that inclusionary policies strengthen our communities by providing housing all across the spectrum").

96. See, e.g., Jeanne Matteucci, *Backyard Cottage Industry Before Adding a Flat or In-Law Suite for Aging Parents or Boomerangers, Know Your Local Building Codes—And Know Your Own Limits*, S.F. CHRON., Oct. 9, 2011, at N1 ("You want to [win neighbors over first, and] avoid disagreements down the line . . . Have a wine and cheese party with your architect and neighbors and show them what you plan to do." (quoting Michael Litchfield, Bay Area home renovation expert)). For another example see Fort Worth, where only one homeowner's association ultimately favored ADUs. See *Council Briefs*, *supra* note 80, at B11 (discussing a unanimous council vote to withdraw a proposal that would have created a new zoning classification tailored to single-family homes with stand-alone or garage apartments, commonly called "granny flats" or mother-in-law cottages). The Fairmount neighborhood sought a zoning classification to prevent duplexes while allowing the long-term use of granny flats, but most Fort Worth neighborhood associations opposed the proposal. *Id.* Instead, city planning officials will use historic guidelines to control the use of the secondary dwellings. *Id.*; see also Fort Worth, Tex., City Council Meeting Minutes, at 12 (Mar. 7, 2006), available at http://fortworthtexas.gov/uploadedFiles/City_Secretary/City_Council/Minutes/mar0706.pdf (discussing Zoning Docket No. ZC-06-011). The motion was denied in Regular City Council Meeting of Mar. 7, 2006. The denial of the motion is discussed in the Ft. Worth Star. See *Council Briefs*, *supra* note 80, at B11.

97. See David Alpert, *Arlington Rental Proposal Brings out Immigrant Phobia*, GREATER GREATER WASHINGTON (May 14, 2008, 8:36 AM), <http://greatergreaterwashington.org/post/838/arlington-rental-proposal-brings-out-immigrant-phobia>. Here is one opposition noted by the Ashton Heights Civic Organization, dated May 8, 2008 (vote of 23-15 against), available at <http://groups.yahoo.com/group/ashtonheights/>. Arlington County Republications, while supporting ADUs for elderly family members and caregivers, voted overwhelmingly against a resolution allowing them. Their June 3, 2008, resolution reads in part, "WHEREAS 73% of delegates responding expressed concern about the County's willingness and/or ability to enforce AD rules, 62% expressed concern about changing the character of single-family neighborhoods and encouraging more intense development of single-family lots, and 61% expressed concern about making parking and maneuvering out of driveways more difficult." ARLINGTON CNTY. CIVIC FED'N, *Arlington County Civic Federation Resolution on Accessory Dwellings* (June 3, 2008), available at <http://www.civfed.org/resadu0806.pdf>. WTOP radio reported on June 19 that some people see that the city's crackdown on overcrowded houses is an effort to move out illegal immigrants. See *Arlington Passes Measure for Residents to Create Apartments in Their Homes*, WTOP (July 19, 2008,

costs attendant to increased housing density. To the extent that ADUs represent affordable housing opportunities (that is, to the extent that local laws permit homeowners to lease the units), they may introduce lower income residents who may strain public services, especially public schools. Once the danger of allowing large numbers of low-income people became salient to the voting public because of the publicity surrounding particular applications,⁹⁸ neighborhood associations sprang into action, securing the enactment of restrictive regulations.⁹⁹

IV. The California Story: A Cautionary Tale

California first enacted state-wide legislation addressing ADUs in 1982 that enabled local jurisdictions to allow second-family residential units to meet housing needs, properly utilize existing housing resources, permit relatively affordable housing without public subsidy, and provide security for homeowners.¹⁰⁰ The 1982 law also forbade ordinances precluding second units unless the ordinance contained findings showing that “such action may limit housing opportunities of the region and further contains findings that specific adverse impacts on the public health, safety, and welfare that would result from allowing second units within single-family and multifamily zoned areas justify adopting such an ordinance” and detailed the standards that could be utilized.¹⁰¹ Concerned that the statute was still not effective because

8:13 PM), <http://www.wtop.com/?nid=25&sid=1443377>; see also Jerry Markon, *Tejada, Arlington Kick Off Historic Year With Relatives Tuning In From Guatemala*, *New County Board Chairman Unveils Agenda*, WASH. POST, Jan. 10, 2008, T11 (discussing immigrant activist's work in Arlington).

98. See Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1051, 1087 (2000) (“When actors overestimate the relevance of salient or memorable incidents at the expense of base rates, they employ the ‘availability heuristic.’”); see also Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1518–19, 1520–22 (1998) (discussing pollutants).

99. For examples from California, see Alex Friedrich, *Not Just for Grannies Anymore*, MONTEREY CNTY. HERALD, June 21, 2004, at B1. (“But not everyone welcomes [granny flats]. In cities throughout California, some neighbors have objected to the add-ons, saying they’re unsightly, increase traffic and bring in a seedy, low-rent element. All of that tends to bring down property values, they complain.”); Jennifer Sparks, *Advisers Split on Mother-In-Law Quarters*, THE SACRAMENTO BEE, Mar. 8, 2001, at N1 (“Neighbors express fears that granny flats are destined to just become rental units in five years, which they find undesirable.”).

100. Act of Sept. 27, 1982, ch. 1440, § 1, 1982 Cal. Stat. 5500 (Historic statute that lead to the model law).

101. *Id.* § 2(c), at 5502. The 1986 amendment, in addition to minor, non-substantive changes, in subd. (a)(4) following “may” deleted “in its discretion”; rewrote subd. (b)(4); in subd. (b)(5) substituted “15[%]” for “10[%]” for the maximum area; inserted a new paragraph (6) limiting the total area of floor space for a detached second unit to

the conditional use permitting system was allowing neighbors to object,¹⁰² the statute was amended in 2002.¹⁰³ This latest revision requires that all review be ministerial rather than discretionary¹⁰⁴ and allows local governments to refrain from public hearings for coastal development permit applications for second units.¹⁰⁵ The state law requires that localities either adopt an ADU ordinance incorporating certain requirements (detailed below),¹⁰⁶ implement a state legislative scheme,¹⁰⁷ or demonstrate that a local ADU ordinance would actually limit housing opportunities.¹⁰⁸ The state law provides that, at a minimum, approval of ADUs be “ministerial” rather than discretionary¹⁰⁹ and that parking requirements shall not exceed one space per unit or per bedroom.¹¹⁰ The state law permits (but does not require) localities to prohibit the sale of the second unit;¹¹¹ to limit ADUs to lots containing existing single-family dwellings;¹¹² to require that ADUs be “‘located within the living area of the existing dwelling’ or ‘detached from the existing dwelling’ ” but on the same lot;¹¹³ to restrict the size of the ADU to thirty percent of the existing living area and/or less than 1200 square feet of floor space;¹¹⁴ to meet generally applicable height,

640 square feet; in the paragraph relating to local building code requirements, substituted “addition to existing single family dwellings” for “detached dwellings”; inserted a new subd. (d) defining “second unit”; inserted a new subd. (e) providing definitions of living area, local agency, and second unit. Act of June 15, 1986, ch. 156, § 1, 1986 Stat. 329, 329–31. In 1990, the required maximum floor area was increased to 30% of the primary space and the maximum area increased to 1200 square feet rather than 640. CAL. GOV’T CODE § 65852.2(b)(1)(E)–(F) (West 2013).

102. See, e.g., *Harris v. City of Costa Mesa*, 31 Cal. Rptr. 2d 1 (Ct. App. 1994); *Desmond v. Cnty. of Contra Costa*, 25 Cal. Rptr. 2d 842 (Ct. App. 1993).

103. Act of Sept. 29, 2002, ch. 1062, § 2, 2002 Cal. Stat. 6847, 6852–55 (This is a historic statute that has since been revised); see Coal. Advocating Legal Hous. Options v. City of Santa Monica, 105 Cal. Rptr. 2d 802, 805 (Ct. App. 2001) (“The amendment’s legislative history indicates that local governments had responded to the existing law either by embracing second units as a source of affordable housing, or by discouraging their creation through complicated and expensive application procedures or other means.”); *Bill Analysis of AB 3198 as Amended May 4, 1994 Before the Assembly Comm. on Hous. & Cmty. Dev.*, 1993–1994 Leg. Sess. 4 (Cal. 1994), available at [http://leginfo.ca.gov/pub/93-94/bill/asm/ab_3151-3200/ab_3198_cfa_940509_185843_asm_comm_\(commenting_on_an_earlier_version_of_statute\)](http://leginfo.ca.gov/pub/93-94/bill/asm/ab_3151-3200/ab_3198_cfa_940509_185843_asm_comm_(commenting_on_an_earlier_version_of_statute)). Nonetheless, the current ordinance maintains the restriction.

104. CAL. GOV’T CODE § 65852.2(b)(1) (West 2013).

105. § 65852.2(j).

106. § 65852.2(a)(1).

107. § 65852.2(b)(1).

108. § 65852.2(c).

109. § 65852.2(a)(3), (b)(1).

110. § 65852.2(e).

111. § 65852.2(b)(1)(A).

112. § 65852.2(b)(1)(C).

113. § 65852.2(b)(1)(D).

114. § 65852.2(b)(1)(E)–(F).

setback architectural and site plan review and other zoning requirements and local building codes for detached dwellings;¹¹⁵ and to mandate approval from local health officers for private sewage disposal systems.¹¹⁶ While local legislation can condition a second unit permit on the owner occupying one of the units on the property,¹¹⁷ California case law precludes limiting ADUs to occupation by family members, the disabled,¹¹⁸ or the elderly.¹¹⁹

A. *The State Success Story*

At the state level, standard public choice theory would seem to explain the success of the legislative effort. In other words, at the state level, groups organized around central important issues (the housing needs of the elderly and low- and moderate-income residents) were able to overcome information and other transaction costs to secure legislation advancing their interests.¹²⁰ In California, the AARP and other advocates for the elderly were strong and active supporters for ADU legislation. The California Association of Realtors also played a key role,¹²¹ pushing to mandate ministerial rather than discretionary approval of ADU permitting.¹²² About 100 cities unsuccessfully at-

115. § 65852.2(b)(1)(G).

116. § 65852.2(b)(1)(I).

117. See *Sounhein v. City of San Dimas*, 55 Cal. Rptr. 2d 290 (Ct. App. 1996).

118. See *generally* Coal. Advocating Legal Hous. Options 105 Cal. Rptr. 2d (holding that ordinance restricting second unit permits to family members, dependents, and their caregivers violated the right to privacy and the equal protection clauses of the California Constitution). The City argued (unsuccessfully) that the state statute violated the California constitution's municipal home rule provision. *Id.* at 806.

119. See *Travis v. Cnty. of Santa Cruz*, 94 P.3d 538 (Cal. 2004) (striking restrictions on low income households, senior households (62 or over), or relatives). While the case was decided on other grounds and remanded, the latest opinion found the ordinance unconstitutional under the Unruh Civil Rights Act. CAL. CIV. CODE §§ 51–53 (West 2007 & Supp. 2013) The Act prohibits discrimination on housing on the basis of age except where designed to serve seniors only. See *generally* *Travis v. Cnty. of Santa Cruz*, No. H029771, 2007 WL 294132 (Cal. Ct. App. Feb. 2, 2007). There are still such restrictions in Cerritos, Fontana, and Newport Beach. See CERRITOS, CAL., CODE § 22.22.300 (2012), available at <http://www.codepublishing.com/ca/cerritos.html>; FONTANA, CAL., ZONING & DEV. CODE § 30-180(1) (2008), available at <http://library.municode.com/index.aspx?clientId=12998>; NEWPORT BEACH, CAL., CODE § 20.48.200(E) (2013), available at <http://www.codepublishing.com/CA/NewportBeach>.

120. For an official list of supporters of the 2003 legislation, see *AB 2702 Assembly Bill—Bill Analysis*, CA.GOV, ftp://leginfo.public.ca.gov/pub/03-04/bill/asm/ab_2701-2750/ab_2702_cfa_20040823_141224_sen_floor.html (last visited July 27, 2013).

121. See *Second-Unit Bill Clears California Senate Committee*, INMANNEWS, Aug. 17, 2004, <http://www.inman.com/news/2004/08/3/second-unit-bill-clears-california-senate-committee> (asserting that the California Association of Realtors drafted the original legislation).

122. On its web site, the California Association of Realtors commented that the [then current California] second-unit law has not lived up to its potential due, in

tempted to block the state legislation in 2003.¹²³ Local governments prevailed a year later, however, in convincing Governor Schwarzenegger to veto a yet more aggressive piece of legislation.¹²⁴ These localities complained both that the bill stripped them of longstanding autonomy to regulate land uses, and that the state mandate was tantamount to an unfunded mandate that would be quite costly to implement at the local level. In his veto statement, Schwarzenegger acknowledged that he was influenced by this concern, stating that the legislation “dictates unilateral decisions by the state regarding what type of development is appropriate for local communities without any community participation.”¹²⁵

Following the enactment of the state mandate, the power to regulate ADUs remained in local hands. Although municipalities were required to enact a law implementing the state standards, the details of the regulations and the power to approve individual permit requests remain a local power. The legislative findings accompanying the 2002 statute expressed opposition to avoid burdensome local regulation, voicing concerns that the localities had imposed rules, governing such things as unit size, parking, fees, and other requirements, that were so arbitrary, excessive, or burdensome so as to unreasonably restrict the ability of homeowners to create second units in zones in which they are

part, to unreasonable obstacles imposed by local governments, which had become creative and restrictive with their new “ministerial” guidelines in order to force a hearing for such additions or to effectively prohibit the construction of new second units. CAL. ASS’N OF REALTORS, <http://www.car.org/legal/new-laws/2004-new-laws/> (last visited July 27, 2013).

123. See Jessica Mullen, *Urgent Action Alert on 2nd Unit Legislation, AB 2702: Hearing Scheduled For April 14th, 2004*, LEAGUE OF CAL. CITIES (Apr. 9, 2004, 3:05:06 PM), <http://lists.cacities.org/pipermail/hced/2004-April/000401.html>; see also Christine L. Esparza, *Valley Cities Urging Governor to Reject Granny-Flat Bill*, SAN GABRIEL VALLEY TRIBUNE, Sep. 19, 2004 (“A one-size-fits-all approach is not a good thing . . . I’ve been very strong on protecting our city’s history and the city the way it is.” (quoting Shelley Sanderson, West Covina Councilwoman); *Legislative Session Ends: A Look at Some of the Key Bills Passed*, L.A. TIMES, Aug. 29, 2004; Courtney Perkes, *New California Law Gives Boost to ‘Granny Flats’*, ORANGE CNTY. REGISTER, July 4, 2003.

124. See *Legislative Session Ends: A Look at Some of the Key Bills Passed*, L.A. TIMES, Aug. 29, 2004 (noting the support by California Association of Realtors); *Governor Vetoes AB 2702, Killing Bill That Would Have Made It Harder For Cities To Stop Second Units on Single Residential Lots*, LBREPORT.COM, Sept. 30, 2004, <http://www.lbreport.com/news/sep04/ab2702f.htm>.

125. Letter from Arnold Schwarzenegger, Governor, State of Cal., to Members of the California State Assembly (Sept. 29, 2004), available at ftp://leginfo.public.ca.gov/pub/03-04/bill/asm/ab_2701-2750/ab_2702_vt_20040929.html (While claiming awareness of the need for affordable housing, Schwarzenegger complained of the one size fits all approach, the limitations on local control, and the lack of consideration given to the impact on adequate water and sewer facilities and on schools).

authorized by local ordinance.¹²⁶ Municipal officials also would control the way the individual applications are handled at the local level. How municipal officials acted in response to permit applications for approval of such second units ranged from more or less routine to tedious,¹²⁷ and the state legislation reflected a concern that they might abuse this approval power by requiring that ADU approval be discretionary rather than ministerial.¹²⁸

What form this more regulated behavior takes apparently depends upon the community culture.¹²⁹ Following the state mandate, some local California communities enacted permissive ADU ordinances without significant public outcry.¹³⁰ In others, usually following negative media attention, the issue of implementation was more hotly

126. See Memorandum from Cathy E. Creswell, Deputy Dir., Div. of Hous. Policy Dev., on Second-Unit Legislation Effective Jan. 1, 2003 and July 1, 2003 (Aug. 6, 2003), available at http://www.hcd.ca.gov/hpd/hpd_memo_ab1866.pdf.

127. Applications could routinely be pushed to the bottom of a pile, or applicants could be directed precisely to the information and forms needed. For example, a five-day approval time frame is indicated on the Livermore website. *Permit Center Review Time Frames*, CITY OF LIVERMORE, available at <http://www.cityoflivermore.net/citygov/cd/permits/approval.asp> (last visited July 27, 2013). The implementing authorities could provide checklists or sample completed applications, as with the City of Claremont. See *Accessory Second Unit Permit: Description and List of Requirements*, CITY OF CLAREMONT, available at <http://www.ci.claremont.ca.us/download.cfm?ID=24847> (last visited July 27, 2013). They could, despite the ordinance, remain largely ignorant of ADUs and/or unhelpful when people inquired about them. For a case study in the a completely different context, see STEVEN L. NOCK ET AL., COVENANT MARRIAGE 44 (2008) (finding that found that only 35% of county court clerks began the application process by asking, as mandated by state law, whether couples applying for a marriage license wanted a covenant marriage).

128. At the point of approval, even unelected officials are subject to public choice pressures. See Daniel A. Farber & Philip P. Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873 (1987); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1684–87 (1975) (providing a summary of the discussion of agency “capture” by special interests). The original article was by George Stigler. See George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971) (discussing regulation of the fur trade). They may be concerned with their reputation among the people they will encounter when they leave public service (the revolving door syndrome). See Gary S. Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 Q. J. ECON. 371, 371–73 (1983); William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875, 877 (1975); Saul Levmore, *Efficiency and Conspiracy: Conflicts of Interest, Anti-Nepotism Rules, and Separation Strategies*, 66 FORDHAM L. REV. 2099, 2101 (1998); Macey, *supra* note 91, at 231–32; Robert D. Tollison, *Public Choice and Legislation*, 74 VA. L. REV. 339 (1988).

129. See Avner Greif, *Cultural Beliefs and the Organization of Society: A Historical and Theoretical Reflection on Collectivist and Individualist Societies*, 102 J. POL. ECON. 912 (1994); Richard H. McAdams, *Cultural Contingency and Economic Function: Bridge-Building from the Law & Economics Side*, 38 L. & SOC. REV. 221 (2004).

130. There have been marked differences in the speed with which second unit legislation has become law in the various cities in California (again, despite the state mandate).

contested and more restrictive measures were eventually passed. As had been the case nationwide, some of the objection to implementing permissive ADU reforms may have been driven by a desire to limit an influx of lower-income or immigrant residents.¹³¹ We find a statistical correlation between the percentage of Mexican immigrants and restrictive licensing, such as requirements of large lots or conditional use permits, although discussions about immigration have played a more prominent role in ADU debates in places outside the state, such as New York City (supporting ADUs)¹³² and Arlington, Virginia (opposing ADUs).¹³³

B. *A Tale of Six Cities*

As discussed above, after the state mandate, calls for amending zoning laws to permit ADUs met stiff resistance in some localities. The local government officials confronting this resistance found themselves in a difficult situation: they faced a decision between either enacting local reforms consistent with the (unpopular) state law or implementing what would be an even more unpopular state regulatory regime. In order to understand the local response to this dilemma, we analyzed the legislation that localities actually enacted in response to the mandate. What we find are several patterns of legislation that might be characterized as passive resistance. While some localities liberalized zoning laws in a spirit consistent with the state mandate to do so—

131. For Santa Ana, California, Stacy Harwood and Dowell Meyers explain that the increase in persons per household was the increase in the number of Mexican and Central American households living in the city. See Stacy Harwood & Dowell Meyers, *The Dynamics of Immigration and Local Governance in Santa Ana: Neighborhood Activism, Overcrowding, and Land-Use Policy*, 30 POLICY STUD. J. 70, 76 (2002). With these new immigrant residents, the primary factor for living within Santa Ana was vested in the overall affordability of the city. *Id.* Myers and Harwood stress that the income disparity experienced with the Latino immigrant population pushed “doubl[ing] up” with other families and friends to “make ends meet.” *Id.* An article on the single-family zoning case of *Moore v. East Cleveland*, 431 U.S. 494 (1977), notes that East Cleveland was in fact a middle-class city that was about 50% African-American at the time the ordinance was enacted to discourage white flight. Peggy Cooper Davis, *Moore v. East Cleveland: Constructing the Suburban Family*, in FAMILY LAW STORIES 77, 84 (Carol Sanger ed., 2008).

132. See N.Y. IMMIGRANT HOUS. COLLABORATIVE, ACCESSORY DWELLING UNITS IN NEW YORK CITY: MOVING TO SOLUTIONS (2010), available at http://www.newpartners.org/2010/docs/presentations/friday/np10_fujioka2.pdf.

133. See ARLINGTON CNTY., VA., ZONING ORDINANCE § 31(A)(19) (2011), available at <http://building.arlingtonva.us/wp-content/uploads/2012/04/ACZOSection31.pdf>; *Accessory Dwellings: Background on Development of Arlington's Zoning Ordinance Provisions*, ARLINGTON VA., <http://www.arlingtonva.us/departments/CPHD/housing/hpp/page61595.aspx> (last visited July 27, 2013) (noting that a July 19, 2008 amendment to the Arlington Zoning Ordinance allows nonrelatives to live in caregiver suites in single-family homes).

and a handful of others simply defied it, either by refusing to act or enacting legislation that is clearly inconsistent with the letter of the state law¹³⁴—a majority of California cities took a “thousand paper cuts” response. In other words, most California cities appeared to comply with the state mandate by amending their zoning rules to permit ADUs, but they imbedded many costly regulatory requirements within the “authorization” that dramatically curtail the likelihood that ADUs will actually be developed. Many of these requirements mirror those that the legislature expressed concern about when it enacted the state mandate, including costly off street parking and minimum lot size requirements, as well as restrictions on the maximum size of the ADU. Other common restrictions include limits on the ability of owners to lease ADUs and design requirements (including rules requiring the use of expensive materials and the submission of architectural plans to a design review committee).

The remainder of this Section describes the responses of California cities that fall along the spectrum described above, from refusal to act to subsidization. After each of the “vignettes,” we provide a snapshot of similar legislation in other California jurisdictions.

1. LARGE-CITY RESISTANCE

As noted previously, at the beginning of our investigation into the scope of ADU reforms, we confronted with curiosity the fact that many large cities, facing extreme affordable housing needs and large numbers of illegal ADUs have resisted pressure to adopt ADU reforms. This is even the case in California, where the largest cities have resisted adopting

134. See, e.g., BALDWIN PARK, CAL., CODE § 153.040.070(A)(7)–(8) (2012), available at [http://www.amlegal.com/nxt/gateway.dll/California/baldwin/cityofbaldwinpark/california/codeofordinan?f=templates\\$fn=default.htm\\$3.0\\$vid=amlegal:baldwinpark_ca](http://www.amlegal.com/nxt/gateway.dll/California/baldwin/cityofbaldwinpark/california/codeofordinan?f=templates$fn=default.htm$3.0$vid=amlegal:baldwinpark_ca) (prohibiting guesthouses and bathrooms in an accessory structure); CERRITOS, CAL., CODE § 22.22.300 (2012), available at <http://www.codepublishing.com/ca/cerritos.html> (restricting ADUs to people over sixty-two); FRESNO, CAL., CODE § 12-306-N-38.5(e) (2012) (prohibiting kitchens in accessory living quarters), available at <http://library.municode.com/index.aspx?clientId=14478>; LANCASTER, CAL., CODE § 17.08.360(D) (2013), available at <http://library.municode.com/index.aspx?clientId=16042&stateId=5&stateName=California> (providing that approval be discretionary rather than ministerial); MISSION VIEJO, CAL., CODE § 9.10.020(b)(12) (2012), available at <http://library.municode.com/index.aspx?clientId=12487> (providing that approval be discretionary rather than ministerial); NEWPORT BEACH, CAL., CODE § 20.48.200(E) (2013), available at <http://www.codepublishing.com/CA/NewportBeach> (allowing only occupants over fifty-five years old); SANTA MONICA, CAL., CODE § 9.04.13.040(a) (2013), available at <http://www.qcode.us/codes/santamonica> (allowing only for dependents and caregivers); VICTORVILLE, CAL., DEV. CODE § 16.3.08.050 (2012), available at <http://library.municode.com/index.aspx?clientId=16674&stateId=5&stateName=California> (prohibiting second units).

local legislation conforming to the state mandate.¹³⁵ As in many large cities with high housing prices, illegal ADUs have proliferated in Los Angeles¹³⁶—some estimates range as high as 200,000—with some of these displaying truly deplorable living conditions.¹³⁷ Despite this problem, the city has failed to adopt any legislation implementing the state ADU mandate, which would have the effect of bringing many of these units into the mainstream economy (and subjecting them to regulatory oversight).¹³⁸ While the city conducted several hearings on ADUs during 2009, and there was some discussion of it in the press earlier than that, it has never enacted an ADU ordinance. By default, it is subject to section 65852.2 of the California Government Code's provisions. There are no available records of public comments from hearings, but

135. Some other California cities that either prohibit or effectively prohibit ADUs include Arcadia, Cerritos, Davis, Fountain Valley, Garden Grove, Glendale, Inglewood, Oceanside, Paramount, Santa Maria, Santa Monica, and Victorville. See CERRITOS, CAL., CODE § 22.22.300 (2012), available at <http://www.codepublishing.com/ca/cerritos.html>; DAVIS, CAL., CODE § 40.26.450 (2012), available at <http://qcode.us/codes/davis>; FOUNTAIN VALLEY, CAL., CODE § 21.08.050(d) (2013), available at <http://qcode.us/codes/fountainvalley>; GARDEN GROVE, CAL., CODE § 9.08.020.050(K) (2013), available at http://www.ci.garden-grove.ca.us/cgi-bin/municode_public/code.cgi; GLENDALE, CAL., CODE § 30.70.020 (2012), available at <http://library.municode.com/index.aspx?clientId=16369> (prohibiting “[a]ccessory living quarters and/or guest house[s]” from having cooking facilities); INGLEWOOD, CAL., CODE § 12-16.3 (2013), available at <http://qcode.us/codes/inglewood>; PARAMOUNT, CAL., CODE § 44-1 (2007), available at <http://www.paramountcity.com/download.cfm?ID=92> (prohibiting kitchens); SANTA MARIA, CAL., CODE § 12-2.72 (2011), available at http://www.ci.santa-maria.ca.us/staffrep/MUNI_CODE/SMMC_Title-12.pdf (defining a “[g]uest home” as not having a kitchen); SANTA MONICA, CAL., CODE § 9.04.13.040(a) (2013), available at <http://www.qcode.us/codes/santamonica>; VICTORVILLE, CAL., DEV. CODE § 16.3.08.050(a) (2013), available at <http://library.municode.com/index.aspx?clientId=16674&stateId=5&stateName=California>; *Ordinance List and Disposition Table*, MUNICODE, <http://library.municode.com/HTML/16197/level1/ORLIDITA.html> (last visited May 20, 2013) (identifying various ordinances of Arcadia, California, including Ordinance 1782 which “[p]recludes second units in R-1 zones (Not codified)”).

136. With 3.75 million people, Los Angeles is the second most populous city in the United States, although with a population density of 7544.6 people per square mile, it is much less dense than San Francisco. Los Angeles covers a vast geographic area, with its diverse population (49.8% white, 9.6% African-American, 11.3% Asian, and 48.5% Hispanic) spread over 502 square miles. *Los Angeles (City) QuickFacts*, U.S. CENSUS BUREAU (June 6, 2013), <http://quickfacts.census.gov/qfd/states/06/0644000.html>.

137. See Greg Goldin, *The ‘Granny Unit’ Option for a Rental-Squeezed L.A.*, L.A. TIMES, June 1, 2003, at M03 (stating that “estimates range from 40,000 to 200,000 households occupying unlawful residences”); Morris Newman, *Santa Cruz Opens the Door to Second Units*, CAL. PLAN. & DEV. REP. (Jan. 1, 2004, 1:00 AM), <http://www.cp-dr.com/node/660> (“[M]any California cities are awash in illegal second units. Los Angeles alone probably has tens of thousands, if not hundreds of thousands, of illegal second units.”).

138. Goldin, *supra* note 137, at M03 (asserting that “all the code words for ‘Not In My Neighbor’s Yard’ have repeatedly checkmated efforts to reform the city’s zoning regulations”).

press reports suggest that the legislative inaction results in part from resident concerns that ADUs would lead to a population “invasion,” especially in wealthier neighborhoods, and strain public infrastructure.¹³⁹

San Francisco¹⁴⁰ has similarly resisted implementing the state mandate despite a significant shortage of affordable housing. (While the median household income is \$65,519, the median rental for a two-bedroom apartment is \$1,905, the most for any city in the country,¹⁴¹ and the median home sale price from February–April 2013 was \$815,000.)¹⁴² With the exception of units reserved for the elderly, ADUs are not permitted under the city’s zoning law¹⁴³—despite the fact that this is in direct conflict with state law. A good deal of debate about ADUs has occurred in San Francisco, beginning around 2000, with proponents arguing that ADUs would facilitate additional, much needed, housing while opponents worried about its effect on home values and on neighborhoods.¹⁴⁴ The City Council and Planning Commission held numerous hearings on a proposed secondary unit ordinance in 2003 and included provisions for ordinances in the city housing element update. During this time, an editorial argued that second unit construction could lower rents and ease the crisis caused by displacement of the poor, but quoted Supervisor Tony Hall as saying “I don’t want a neighborhood’s character changed unless it is ap-

139. Steven Leigh Morris, *Invasion of the Granny Flat: Los Angeles Weighs a Plan to Allow Back Yard Dwellings and Car Parking on Lawns*, LA WEEKLY Dec. 10, 2009, <http://www.laweekly.com/2009-12-10/news/invasion-of-the-granny-flat/> (noting concerns that permitting ADUs might “double the population of some of the city’s most attractive neighborhoods, . . . a possibility complicated further by infrastructure that cannot adequately handle the population invasion”).

140. Although the city’s population of 812,826 is far lower than that of Los Angeles, San Francisco has the highest density of any city in California (17,179 per square mile), and the second highest in the United States (after New York, which also has resisted ADUs). Demographically it is diverse: 41.9% white, non-Hispanic, 33.3% Asian, 15% Hispanic, and 6.1% black according to the 2010 U.S. Census. *San Francisco (City) QuickFacts*, U.S. CENSUS BUREAU (June 6, 2013), <http://quickfacts.census.gov/qfd/states/06/0667000.html>. Only 37.7% of San Francisco’s population was born in California, and 35.6% were born outside the United States.

141. See Aaron Sankin, *San Francisco Rents the Highest of Any City in the Country*, HUFFINGTON POST, Mar. 14, 2012, http://www.huffingtonpost.com/2012/03/14/san-francisco-rents-the-highest-in-nation_n_1345275.html.

142. *San Francisco Market Trends*, TRULIA, http://www.trulia.com/real_estate/San_Francisco-California/market-trends (last visited May 20, 2013).

143. S.F., CAL., PLANNING CODE § 207.2(a) (2013), available at [http://www.amlegal.com/nxt/gateway.dll/California/planning/planningcode?f=templates&fn=default.htm\\$3.0\\$vid=amlegal:sanfrancisco_ca\\$sync=1](http://www.amlegal.com/nxt/gateway.dll/California/planning/planningcode?f=templates&fn=default.htm3.0vid=amlegal:sanfrancisco_ca$sync=1).

144. See Randy Shaw, *The Argument in Favor: In-Law Proponents Say Legalizing So-Called “Granny Flats” Will Ease the Housing Crunch for a City in Crisis. Foes Say They’ll Lower Home Values and Crowd Neighborhoods*, S.F. CHRON., July 30, 2000, at 1.

proved upon [sic] by a majority of that neighborhood's citizens.' ”¹⁴⁵ The same piece noted concerns over the “thousands” of illegal in-law apartments that ha[d] flourished here for decades.”¹⁴⁶

At a hearing on April 24, 2003, thirty-seven individuals spoke to the issues surrounding ADUs.¹⁴⁷ Those in favor gave the standard rationale for ADUs: they would support affordable housing (four proponents) and provide extra income for homeowners (six), especially benefiting seniors (three), while owners are not likely to own cars and create parking problems (two).¹⁴⁸ The negative speakers voiced concerns about “nightmare” parking (five speakers), the massive overhaul of the zoning code (three), the harm to neighborhood character (two) and the environment (two), and increases in traffic (one), density (two), and crime (one).¹⁴⁹ The positive written comments came from planners, including the San Francisco Housing Coalition and San Francisco Planning and Urban Research, disability activists, a representative of the Asian Law caucus, affordable housing developers, and the Chamber of Commerce.¹⁵⁰ Opponents were various neighborhood associations, the Land Use Committee, and some homeowners. The proposal matter was continued eight times by the Planning Commission, and finally continued indefinitely after over fifty people, many of whom attended several prior hearings as well, spoke about the proposal. Although affordable housing and aging proponents continue to argue that the city ought to allow ADUs, the Board of Supervisors has never implemented the state mandate. In fact, it took the opposite course in 2011, by adopting legislation imposing further restrictions on ADUs, rather than liberalizing them to conform to the state mandate.¹⁵¹ Apparently in order to make the case for exemption from

145. Matt Smith, *In-laws You Can Live With: How a New Law on In-Law Apartments Can Help Solve S.F.'s Housing Shortage*, S.F. WEEKLY, Jul. 9, 2003, <http://www.sfweekly.com/2003-07-09/news/in-laws-you-can-live-with/full/>.

146. *Id.*

147. See Meeting Minutes, S.F. Planning Comm'n, Apr. 24, 2003, <http://www.sfplanning.org/index.aspx?page=1020>.

148. See *id.*

149. See *id.*

150. See *id.*

151. See Jeannie Matteucci, *Backyard Cottage Industry: Before Adding a Flat or In-Law for Aging Parents or Boomerangers, Know Your Local Building Codes—And Know Your Own Limits*, S.F. CHRON., Oct. 9, 2011, at N1 (citing survey evidence that 68% of homebuilders were working on a home remodeling project relating to aging and 37% of real estate professionals noticed an increase in home buyers looking for a property to accommodate more than one generation of their family. Robert Poole, *Amidst a Crisis, San Francisco Needs Secondary Dwelling Units*, GLOBAL SITE PLANS (Jan. 15, 2013, 9:57 AM), <http://www.globalsiteplans.com/environmental-non-profit/amidst-a-crisis-san-francisco-needs-secondary-dwelling-units>.

state law, the 2011 ordinance also included significant language that an expansion posed health and welfare risks.

San Diego, California's second largest city, also resisted implementing the state mandate for nearly a decade, despite an affordable housing crisis and the nation's third largest homeless population.¹⁵² The mayor at the time the state mandate was enacted opposed ADUs, citing concern about neighborhoods becoming too dense, and led the San Diego City Council to approve restrictions that made it nearly impossible to actually build granny flats in the city.¹⁵³ The mayor-directed staff was reportedly directed to draft the most restrictive ordinance permitted under the new state law.¹⁵⁴

Between 2003 and 2011, the City took no action on ADUs. During this time, a number of groups published position statements.¹⁵⁵ The San Diego Chamber of Commerce sought an ordinance that would permit more companion units like those in Santa Cruz, eliminating lot size impediments and allowing for ministerial review.¹⁵⁶ The Clairmont Community Planning Board largely spoke in terms of desirable affordable senior housing, but also sought size and parking restric-

152. See Patricia A. Cruise, *City's Homeless Problem Still Needs Attention*, SAN DIEGO UNION-TRIBUNE, Dec. 12, 2012, <http://www.utsandiego.com/news/2012/dec/26/citys-homeless-problem-still-needs-attention/>. Although the city has approximately 1.3 million inhabitants, San Diego is relatively low-density, with 4020 residents per square mile. It is also less racially diverse than San Francisco and Los Angeles. According to the 2010 Census, the city has 58.9% whites, 6.7% African-Americans, 15.9% Asians, and 28.8% Hispanics, only 25% of whom are Mexicans (thus making up only 7.2% of the total population), despite its nearness to the Mexican border. Apartments had a median rental of \$1735 per month, while the median price for homes was \$477,100. *San Diego (City) QuickFacts*, U.S. CENSUS BUREAU (June 6, 2013), <http://quickfacts.census.gov/qfd/states/06/0666000.html>.

153. When the planning commission held hearings on the ADU issue, the speakers included homeowners who wished to preserve the character of single family neighborhoods and their own investments or who were concerned about mini-dorms in the neighborhoods near the University of California-San Diego, parking, and density ("Manhattanization") issues, and planning board members who praised the opportunity for affordable housing and housing for the elderly. The transcripts of the hearings also pay special attention to the fact that covenants would, in many neighborhoods, restrict second units. CCRs also were substantially discussed in Chula Vista and San Francisco; the City Attorney in San Diego recommended that they not be addressed in the ordinance because of enforceability issues.

154. Adrian Florido, *Hey! Now Granny Can Move In!*, VOICE OF SAN DIEGO (May 23, 2011, 10:30 AM), http://www.voiceofsandiego.org/survival/article_6ddf9da8-834d-11e0-a3e0-001cc4c002e0.html.

155. So did some citizens, mostly seeing the lot size requirement as unreasonable as well as the 700 square foot limitation.

156. See *Housing Policy Recommendations for the City of San Diego*, SAN DIEGO REG'L CHAMBER OF COMMERCE, Mar. 23, 2006, available at <http://www.sdcoastal.org/chambrhousplan.pdf>.

tions.¹⁵⁷ The Association of Realtors supported ADUs “to provide independent living for aging family members, to assist new homebuyers in qualifying income to purchase a home or to provide needed income for families on fixed incomes.”¹⁵⁸ The city sponsored a granny flat design competition during this period.¹⁵⁹ In both May and July 2011, San Diego Planning Commission held hearings on amending the ADU restrictions, including eliminating the double lot size requirements. A member of the technical advisory committee favored the landscaping, parking, design, and square footage provisions. Several spoke in favor of lifting the living space limit, with only one opposed.¹⁶⁰ The Planning Commission unanimously recommended liberalizing the ADU requirements in 2011, and the City Council amended the zoning law to make the construction of ADUs a realistic possibility.¹⁶¹

2. SANTA CRUZ: RENTAL RESTRICTIONS

Santa Cruz, located at about the center of California’s Pacific coastline, had a population of 59,946 in 2010, composed of 74.5% whites, 7.7% Asians, 19.4% Hispanics of any race, and 1.8% African Americans.¹⁶² It has a population density of 4705.3 per square mile.¹⁶³ The city is known for being a center of liberal and progressive activity,¹⁶⁴ including early adoption of medical marijuana.¹⁶⁵ The city is com-

157. *Planning Group*, CLAIREMONT TOWN COUNCIL, <http://www.clairemontonline.com/planning-group> (last visited July 27, 2013).

158. *SDAR Position Statements Issue: Companion Units*, SAN DIEGO ASS’N OF REALTORS, http://sdar.com/index.php?option=com_content&view=article&id=48&Itemid=594 (last visited July 27, 2013).

159. See Catherine Darragh, Letter to the Editor, *Seeking a Workable ‘Granny Flat’ Law*, SAN DIEGO UNION-TRIBUNE, Dec. 4, 2006, at B7.

160. Meeting Minutes, City of San Diego Planning Comm’n, May 19, 2011, at 4–5, <http://www.sandiego.gov/planning-commission/pdf/2011/minutes/110519.pdf>.

161. See SAN DIEGO, CAL., CODE § 141.0302 (2012), available at <http://docs.sandiego.gov/municode/MuniCodeChapter14/Ch14Art01Division03.pdf>.

162. *Santa Cruz (City) QuickFacts*, U.S. CENSUS BUREAU (June 6, 2013), <http://quickfacts.census.gov/qfd/states/06/0669112.html>.

163. *Id.*

164. For a history, including survey results, see G. WILLIAM DOMHOFF, WHO RULES AMERICA? CHALLENGES TO CORPORATE AND DOMINANCE (2d ed. 2009); see also G. William Domhoff, *The Leftmost City: Power & Progressive Politics in Santa Cruz* (Apr. 2013), http://www2.ucsc.edu/whorulesamerica/santacruz/progressive_politics.html (reflecting a chapter from Domhoff’s *Who Rules America?*).

165. The county ordinance dates to 1992. It is available, with some commentary, online.

See *Santa Cruz County Measure a Marijuana for Medical Use Initiative*, SCHAFFER LIBRARY OF DRUG POLICY, <http://www.druglibrary.org/schaffer/hemp/medical/santacruz.htm> (last visited Apr. 22, 2013) (discussing the passing of medical marijuana in Santa Cruz).

prised of 45.4% owner-occupied dwellings, while 54.6% rent.¹⁶⁶ The average rental price in 2012 for a two-bedroom apartment was \$1,487 per month, and home median prices were \$390,000 for October through December 2012.¹⁶⁷

The city had an ADU plan in place well before the state mandate,¹⁶⁸ and largely accepted the model statute proposed by the AARP. The city sponsored an ADU design competition in 2002, and has won several national prizes for architecture¹⁶⁹ and “smart growth”¹⁷⁰ for its ADU sponsorship since 2000. Some prototypes are available on the city’s website.¹⁷¹ A self-help booklet with designs and guidelines can be obtained on the city website for a modest cost, as can a fee waiver application.¹⁷² One source notes that low cost mortgages are available in conjunction with a local credit union.¹⁷³ The national press frequently mentions the city as an outstanding example of a community that has embraced the ADU concept.¹⁷⁴ Each year, the Gen-

166. See *Santa Cruz (City) QuickFacts*, *supra* note 162.

167. This figure is for San Diego County. See *San Diego County QuickFacts*, U.S. CENSUS BUREAU (June 6, 2013), <http://quickfacts.census.gov/qfd/states/06/06073.html>.

168. For the current ordinance, see SANTA CRUZ, CAL., CODE § 24.12.140 (2013), available at <http://www.codepublishing.com/CA/SantaCruz>.

169. The City of Santa Cruz Accessory Dwelling Unit Program: RACESTUDIO, won the 2005 American Institute of Architects Honor Award in Architecture. See *2005 AIA Awards Announced*, ARCHITECTURAL RECORD, Jan. 10, 2005, <http://archrecord.construction.com/news/daily/archives/050110aia.asp>.

170. See *National Award for Smart Growth Achievement 2004 Winners*, U.S. EPA, http://www.epa.gov/smartgrowth/sg_awards_publication_2004.htm (last visited Apr. 22, 2013). It was also cited as one of Jerry Yudelson’s Top Ten Green Building Trends for 2011. See *The Top 20 Green Building Trends for 2011*, GREEN ECON. POST, Jan. 17, 2011, <http://greeneconomypost.com/green-building-trends-12562.htm>.

171. See, e.g., *ADU Prototype Architects*, CITY OF SANTA CRUZ, <http://www.cityof santacruz.com/index.aspx?page=1158> (last visited Apr. 22, 2013). Apparently a grant paid for these designs. See Neal Peirce, *Aging of the Baby Boom: A Community ‘Blueprint for Action,’* PASSENGER TRANSP. ARCHIVE (June 18, 2007), available at http://www.apta.com/passengertransport/Documents/archive_4473.htm.

172. *Accessory Dwelling Unit Program*, CITY OF SANTA CRUZ, <http://www.cityof santacruz.com/index.aspx?page=1150> (last visited Apr. 22, 2013). The Manual is free of charge, while printed versions of it and architectural plan sets are available for \$11 and \$33 respectively. *Ordering Information*, CITY OF SANTA CRUZ, <http://www.cityofsantacruz.com/index.aspx?page=1151> (last visited July 27, 2013). The website also links to a list of ADU architects.

173. See Fred A. Bernstein, *National Perspective: In Santa Cruz, Affordable Housing Without Sprawl*, N.Y. TIMES, Feb. 6, 2005, § 11, at 13; see also *Affordable Housing Trust Fund (AFTF) Project and ADU Loan Program Funding*, Joint City Council–Redevelopment Agency Agenda, Santa Cruz, Cal., Apr. 22, 2008, ¶ 12, available at <http://sire.cityofsantacruz.com/sirepub/mtgviewer.aspx?meetid=117&dctype=AGENDA> (mentioning that as of that date there were \$237,000 in uncommitted in-lieu funds in the ADU loan pool account at the Santa Cruz Community Credit Union). Since its inception in 2003, only two ADU loans had been made.

174. See, e.g., Bernstein, *supra* note 173; Wendy Koch, *A House Divided Helps Pay the Bills*, USA TODAY, Aug. 17, 2011, <http://usatoday30.usatoday.com/MONEY/>

eral Plan and County Growth Management System shall include a section analyzing impacts of the ordinance including the number of second units constructed.¹⁷⁵ Subsidized construction loans are provided to construct ADUs, and a trust fund pays for the application fees of individuals building for low or very low income households.¹⁷⁶ Despite the hopes of hundreds of new units each year, however, not many have actually been built. An estimate in the recent Housing Element Plan noted that from 2007–2009, forty-nine total units were constructed,¹⁷⁷ with eight permits granted in 2001 and thirty-nine in 2004.¹⁷⁸

Even in ostensibly enthusiastic jurisdictions, hidden regulatory barriers may limit the attractiveness of ADUs. For example, in Santa Cruz, while there is no minimum lot size requirement, ADUs on lots smaller than 10,000 square feet must not exceed 640 square feet, with up to 1200 square foot units permitted on 2.5 acre or larger lots.¹⁷⁹ Moreover, the ordinance mandates that the property owner occupy either the principal or secondary unit and that the other must be occupied by seniors (sixty-two or older), low-income families, or family members. Rental ADUs may also be subject to rent control, if owners take advantage of the City's incentives.¹⁸⁰ Although the city coun-

usaedition/2011-08-18-housesplitting10-CV-----With-_CV_U.htm ("Many of the laws are modeled after one advocated by the AARP and passed by Santa, Cruz, Calif., in 2003 . . .").

175. SANTA CRUZ CNTY., CAL., CODE § 13.10.681(G), available at <http://www.codepublishing.com/ca/santacruzcounty>.

176. If fully subsidized, this amounted to a waiver of \$11,103 for a 500 square foot ADU in 2012.

177. Though 164 permits were granted. See *Housing & Community Development 2010–2015 Consolidated Plan & 2010–2011 Action Plan*, CITY OF SANTA CRUZ § 7, at 13 (2010), available at <http://www.cityofsantacruz.com/Modules/ShowDocument.aspx?documentid=13086> (suggesting that the city assist seniors or their families to develop an accessory dwelling units through the City's ADU Program).

178. See Bernstein, *supra* note 173.

179. § 13.10.681(D)(2). There are also regulations in the City of Santa Cruz, at Ordinance 26.16.

180. See § 13.10.681(e). To be placed in the Affordable Housing Program in order to be eligible for financial incentives, such as fee reductions (or elimination) and a loan program, rent charged cannot exceed that established by the Section 8 Program or the rent level allowed for affordable rental units pursuant to Chapter 17.10 of the County Code, whichever is higher. See § 13.10.681(e)(4); see also ADU ZONING REGULATIONS, PLANNING DEPT. HOUS. & CMTY. DEV. DIV., CITY OF SANTA CRUZ, available at <http://www.cityofsantacruz.com/Modules/ShowDocument.aspx?documentid=8862> (for a description of City of Santa Cruz Ordinance 26.16.180(1)). The process is described in the City's ADU Manual. ACCESSORY DWELLING UNIT MANUAL, SANTA CRUZ, CALIFORNIA 47 (2003), available at www.cityofsantacruz.com/Modules/ShowDocument.aspx?documentid=8875.

cil has debated lifting the owner-occupancy requirements, it has rejected proposals to do so.¹⁸¹

Owner-occupancy requirements (of either the primary resident or accessory dwelling) are an extremely frequent component in local ADU ordinances in California.¹⁸² Some jurisdictions limit occupancy to family members, including Santa Monica (dependent or caregiver of owner or dependent).¹⁸³ Others prohibit leasing ADUs except to the elderly or low-income individuals, including Fontana (sixty-two or older);¹⁸⁴ Vista (low income for first ten years, medical exception can defer this);¹⁸⁵ Cerritos and Newport Beach (only seniors);¹⁸⁶ and Santa Monica (dependent or caregiver).¹⁸⁷ Still others, like Santa Cruz, impose the equivalent of rent control on ADUs by conditioning the right to lease ADUs on “affordable” rental rates.

3. WEST COVINA: CONDITIONAL USE PERMITS

The City of West Covina is located in Los Angeles County in the eastern San Gabriel Valley. In 2010, it reported a population of 106,098, of which 42.5% were white, 4.5% Africa-American, 25.8% Asian, and

181. See *Accessory Dwelling Unit Occupancy Requirement, Amendments to Chapter 24.16*, Joint City Council–Redevelopment Agency Agenda, Santa Cruz, Cal., Mar. 11, 2008, ¶ 19, available at <http://sire.cityofsantacruz.com/sirepub/mtgviewer.aspx?meetid=114&doctype=AGENDA>. The staff, noting queries about transferring only a nominal share of ownership to a tenant would violate the deed restrictions, recommended majority or equal ownership if there is more than one owner of the property. The deed restrictions are contained in section 24.16.170 (3) of Ordinance No. 2008-04, and require that either the main residence, or the accessory unit, be occupied by the majority owner of record as the owner’s principal place of residence. A public hearing on the proposal was scheduled for March 25, 2008, and the minutes reflect that it was carried unanimously. However, the current ordinance does not include this amendment. See § 24.16.170(3).

182. There are some exceptions. For example, Anaheim does not allow separate sale of the unit, while Apple Valley does not mention the owner-occupancy rule. See ANAHEIM, CAL., CODE § 18.38.230.1303 (2013), available at [http://www.amlegal.com/nxt/gateway.dll/California/anaheim/anaheimmunicipalcode?f=templates\\$fn=default.htm\\$3.0\\$vid=amlegal:anaheim_ca](http://www.amlegal.com/nxt/gateway.dll/California/anaheim/anaheimmunicipalcode?f=templates$fn=default.htm$3.0$vid=amlegal:anaheim_ca); APPLE VALLEY, CAL., DEVELOPMENT CODE § 9.29.120 (2010), available at <http://www.applevalley.org/Modules/ShowDocument.aspx?documentid=10843>. Though there was concern that the ownership restrictions might be unconstitutional, they were upheld in *Sounhein v. City of San Dimas*, 55 Cal. Rptr. 2d 290 (Ct. App. 1996).

183. See SANTA MONICA, CAL., CODE § 9.04.13.040(a) (2013), available at <http://www.qcode.us/codes/santamonica>.

184. FONTANA, CAL., ZONING & DEV. CODE § 30-180(1) (2008), available at <http://library.municode.com/index.aspx?clientId=12998>.

185. See VISTA, CAL., DEV. CODE § 18.31.030(K) (2011), available at <http://www.cityofvista.com/WebLink8/0/doc/11093/Page1.aspx>.

186. See CERRITOS, CAL., CODE § 22.22.300 (2012), available at <http://www.codepublishing.com/ca/cerritos.html>; NEWPORT BEACH, CAL., CODE § 20.48.200(E) (2013), available at <http://www.codepublishing.com/CA/NewportBeach>.

187. See SANTA MONICA, CODE § 9.04.13.040(a).

53.2% Hispanic. The median home price was \$362,200, and monthly rentals were \$1,314. The median household income was \$63,833. The two largest employers in West Covina are the Citrus Valley Medical Center and the West Covina School District. According to the City's website, West Covina was incorporated in 1923 to prevent the City of Covina from establishing a sewage farm within the current city boundaries. The 507 residents of the area were mostly citizens who banded together to maintain local control of their land and were more interested in preventing the establishment of a sewage facility than in creating a city.¹⁸⁸ Originally an agricultural community, with citrus trees and walnut groves, the City was the fastest growing in the United States between 1950 and 1960.

The ordinance regulating second dwelling units¹⁸⁹ was first adopted in 1983,¹⁹⁰ and was amended in 2005 (to increase the minimum lot size required by 2,000 square feet and reduce the number of parking spaces from four to two).¹⁹¹ Though some regulations make new units more affordable, such as the one-half reduction in the parkland fee,¹⁹² others make it less likely that units will be built. The minimum lot size on which one can build a second unit is 12,000 square feet,¹⁹³ and two enclosed parking spaces are required per unit.¹⁹⁴ According to the Housing Element plan, only three units have been constructed since 1994.¹⁹⁵ The most onerous of the requirements, however, may be need for obtaining a conditional use permit¹⁹⁶ to construct a second

188. *About the City*, WESTCOVINA.ORG, <http://www.westcovina.org/about/default.asp> (last visited July 27, 2013).

189. WEST COVINA, CAL., CODE § 26-685.30-685.38 (2005), available at <http://library.municode.com/index.aspx?clientId=11504>. Other cities with similar requirements are Carson (for conversion of existing units; also 6500 sq. ft. lots and one enclosed space /bedroom except for studios, when unenclosed), Chico (language regarding owner residence expressed as conditional), Huntington Park ("subject to approval of director"), Lancaster (in section on conditional use permits), Merced (refers to conditional use permitting process), Mission Viejo (for conversion of existing units); Moreno Valley (requires written notice to neighbors requesting comments), Rosemead (for two story units); San Clemente (only in very low density or low density zones); Tracy (uses conditional language). Baldwin Park had such a rule until 2012. See BALDWIN PARK, CAL. ZONING CODE § 153.120.350 (2010).

190. WEST COVINA, CAL., CODE § 26-685.30-685.38.

191. § 26-685.32.

192. HOUSING ELEMENT UPDATE, CITY OF WEST COVINA 14 (2012), available at <http://www.westcovina.org/civica/filebank/blobdload.asp?BlobID=11426>.

193. § 26-685.34(g)(1).

194. See § 26-685.34 (g)(6) (one per bedroom); see also HOUSING ELEMENT UPDATE, *supra* note 192, at 107.

195. *Id.* at 179 & Table 8-1.

196. § 26-685.34(c) ("A conditional use permit shall be obtained prior to the issuance of building permits for a second unit (as specified in article VI, division 3 of this

unit, since this adds both cost (at least in terms of filing fees)¹⁹⁷ and time to the process.¹⁹⁸ A 2005 recommendation by the Planning Department that would have deleted the language was removed at the recommendation of the City Attorney.¹⁹⁹ The 2008-2014 Housing Element Update again suggests removing the conditional permitting language and making the application ministerial.²⁰⁰ ADUs are forbidden in residential zones that allow horses (III, IV and V). A recent controversy is whether private stables in a gated community can be converted into second units.²⁰¹

Other cities requiring owners to secure a conditional use permit to construct an ADU include Carson, Chico, Huntington Park, Lancaster, Merced, Mission Viejo, Moreno Valley, Rosemead, San Clemente, Tracy, and West Covina.²⁰²

4. CHULA VISTA: PARKING AND LOT-SIZE RESTRICTIONS

Chula Vista, California, is the second largest city in the San Diego metropolitan area, and fourteenth largest in California. Located nine miles south of San Diego and only seven miles from the Mexican border, it has about 58.2% Hispanics among its nearly quarter of a million

chapter). The application shall include a precise plan (as specified in article VI, division 2), including examples of proposed architectural treatment as specified in section 26-226(e)").

197. HOUSING ELEMENT UPDATE, *supra* note 192, at 121.

198. *Id.* (usually 60-90 days).

199. SECOND DWELLING UNITS, PLANNING DEPT. STAFF REPORT, CITY OF WEST COVINA (Mar. 23, 2004), available at www.westcovina.org/civica/filebank/blobdload.asp?BlobID=4175.

200. HOUSING ELEMENT UPDATE, *supra* note 192, at 22 (Program 3.5).

201. Nick Green, *Political Boat Being Rocked in Rolling Hills*, SAN GABRIEL VALLEY TRIBUNE, Feb. 9, 2013, http://www.dailybreeze.com/news/ci_22556441/political-boat-being-rocked-rolling-hills. Conversions apparently concerned city officials, since the language now allows conversion to workshops or exercise rooms but not bedrooms. See ROLLING HILLS, CAL., CODE § 17.18 (2011).

202. See CARSON, CAL., CODE § 9122.1 (2013), available at <http://www.codepublishing.com/ca/carson.html>; CHICO, CAL., CODE § 19.76.130 (2012), available at http://www.chico.ca.us/document_library/municode/Title19.pdf; HUNTINGTON PARK, CAL., CODE § 9-4.103(2)(N)(14) (2013), available at <http://qcode.us/codes/huntingtonpark>; LANCASTER, CAL., CODE § 17.08.360(D) (2013), available at <http://library.municode.com/index.aspx?clientId=16042&stateId=5&stateName=California>; MERCED, CAL., CODE § 20.10.0709(A) (2012), available at <http://library.municode.com/index.aspx?clientId=16096>; MISSION VIEJO, CAL., CODE § 9.10.020(b)(12) (2012), available at <http://library.municode.com/index.aspx?clientId=12487>; MORENO VALLEY, CAL., CODE § 9.09.130(C)(14) (2012), available at <http://qcode.us/codes/morenovalley>; ROSEMEAD, CAL., CODE § 17.30.030 (2013), available at <http://library.municode.com/index.aspx?clientId=16591>; SAN CLEMENTE, CAL., CODE § 17.28.270(B) (2012), available at <http://library.municode.com/index.aspx?clientId=16606&stateId=5&stateName=California>; TRACY, CAL., CODE § 10.08.3180 (2013), available at <http://library.municode.com/index.aspx?clientId=16660>; WEST COVINA, CAL., CODE § 26-685.38 (2012), available at <http://library.municode.com/index.aspx?clientId=11504>.

inhabitants.²⁰³ Population density is 4682 per square mile, median household income was \$59,045, and the median gross rent was \$1,194 per month in 2009.²⁰⁴ The average purchase price for a household unit was \$502,931, with the median being \$363,200.²⁰⁵

Chula Vista's ADU ordinance has been hailed as one of the least restrictive of California's zoning ordinances.²⁰⁶ Its purpose clause mentions affordable housing, and the ordinance includes some "emergencies" that modify the requirement that owners occupy one of the two dwellings. Unlike the ordinances in many jurisdictions, Chula Vista allows construction of a "secondary unit" at the time the principal unit is built. Twenty-five units were constructed between 1999–2004,²⁰⁷ and eighty-six between 2005–2010.²⁰⁸

Some features of the ordinance, however, make building secondary units fairly difficult. First, although Chula Vista's ordinance was originally passed in 2003 in response to the state mandate,²⁰⁹ it was modified in 2004 to add off-street parking requirements (one off-street space for a one or two bedroom unit, two for a three bedroom).²¹⁰ These spaces must be distinct from the single-family home's driveway. While this parking requirement is consistent with the state mandate, and is fairly typical, it decreases the attractiveness (and increases the cost) of constructing an ADU. The city amended the ordinance again in 2007 to require that the flat portion of a lot must be greater

203. *Chula Vista (City) QuickFacts*, U.S. CENSUS BUREAU (June 6, 2013), <http://quickfacts.census.gov/qfd/states/06/0613392.html>.

204. *Id.*

205. *Chula Vista, California*, CITY-DATA, <http://www.city-data.com/city/Chula-Vista-California.html> (last visited July 27, 2013).

206. See SALT LAKE CITY PLANNING COMM'N, ACCESSORY DWELLING UNITS ZONING TEXT AMENDMENT, STAFF REPORT 11 (2011), available at <http://www.slcdocs.com/Planning/Planning%20Commission/2011/March/000612.pdf>; Steven T. Sek, *Housing the Frail Elderly: History, Contemporary Practice, and Future Options* 44 (July 2011) (unpublished Master's research paper, Ball State University), available at http://cardinalscholar.bsu.edu/bitstream/123456789/195035/1/SekS_2011-3_BODY.pdf.

207. CITY OF CHULA VISTA, DRAFT 2013–2020 GENERAL PLAN: HOUSING ELEMENT OF THE GENERAL PLAN, at AD-53 (2013), available at http://www.chulavistaca.gov/city_services/development_services/redevhousing/PDF/2013CVHEDraftComplete.pdf (discussing Policy H6.2).

208. CITY OF CHULA VISTA, HOUSING ELEMENT OF THE GENERAL PLAN, at AD-32 tbl. D-1 (2006), available at http://www.chulavistaca.gov/city_services/development_services/Planning_Building/General_Plan/documents/07-Housing_10-06.pdf.

209. CHULA VISTA, CAL., CODE § 19.58.022 (2013), available at <http://www.codepublishing.com/CA/ChulaVista/PDF/ChulaVista19e.pdf>.

210. For a description of the modification, see Amy Oakes, *Chula Vista OKs Ordinance Change for 'Granny Flats.'* SAN DIEGO UNION-TRIBUNE, Mar. 25, 2004, http://www.utsandiego.com/uniontrib/20040325/news_6m25cvadd.html. See also FRESNO, CAL., ORDINANCE § 12-306-N-38 (one parking place, enclosed, for first bedroom, one additional off-street for second).

than 5,000 square feet for any ADU to be constructed at all, a requirement that one Councilwoman acknowledged was tantamount to an outright prohibition for most property owners.²¹¹ A 750 square foot ADU can only be constructed if the (buildable, flat) lot size exceeds 10,000 square feet. Half the yard must be usable for the primary dwelling, and sixty square feet of yard (green space) must be set aside for the ADU. To preserve privacy, windows must to be staggered with neighbors' or be oriented away from them. Further, getting a permit for a secondary unit requires two site inspections.²¹² The 2007 amendments received a good amount of public comment at two City Council hearings, each attended by forty to fifty members of the public.²¹³ The minutes for March 14, 2007 (thirteen speakers) include summaries of the speakers and the groups represented. A number of community activists spoke, praising the efforts of the staff for "mitigating impacts and maintaining the integrity of the R-1 zone" in the face of the state legislation. Some spoke for, some against, the owner occupancy requirement.²¹⁴ Several mentioned that the existing ordinance did not support affordable housing, one mentioning that the unit next door

211. Oakes, *supra* note 210 ("I have a certain comfort level in knowing that there are probably not that many lots out there that could have granny flats.") (quoting Councilwoman Mary Salas).

212. For a rather similar ordinance and story, see that of Monterey Park. Enacted in 2003, its ordinance requires a garage if less than 600 square feet and a two-car garage if more than 600 square feet. MONTEREY PARK, CAL., CODE § 21.08.040(11)(C)(viii) (2012), available at <http://qcode.us/codes/montereypark>. Units must be larger than 500 square feet but less than 30% of the gross area of primary unit, and cannot be constructed in gated communities. § (11)(B)(i), (C)(ii). Second Units are restricted to owner-occupants. § (11)(E). Another is Fresno's ordinance, enacted 2004, which does not have size restrictions but requires owner-occupancy plus one covered parking space for a one-bedroom second unit and two, one of which may be uncovered, for a two-bedroom. FRESNO, CAL., CODE § 12-306-N-38 (2012), available at <http://library.municode.com/index.aspx?clientId=14478>. It also does not allow a kitchen. § 12-306-N-38.5.

213. See Tanya Mannes, *Chula Vista Weighs Change to Size Rules for 'Granny Flats'*, SAN DIEGO UNION-TRIBUNE, Dec. 30, 2006, http://www.utsandiego.com/uniontrib/20061230/news_2m29cvgranny.html; Tanya Mannes, *Chula Vista Approves New 'Granny Flats' Rules*, SAN DIEGO UNION-TRIBUNE, May 2, 2007, <http://www.utsandiego.com/news/2007/May/02/chula-vista-approves-new-granny-flats-rules/>.

214. In *Sounhein v. City of San Dimas*, the court upheld a local ordinance requiring that the property owner occupy either the main or secondary unit as consistent with subsection (b)(3) of section 65852.2 permitting local ordinances that require that second unit applicants be owner-occupants. That provision, according to the court, was intended to protect the stability of existing family neighborhoods and to discourage speculation and absentee ownership. *Sounhein*, 55 Cal. Rptr. 2d, at 295 ("The legislative history of section 65852.2 indicates that the purpose of the owner-occupancy requirement of section 65852.2 is to protect neighborhood stability and the character of existing family neighborhoods and to discourage speculation and absentee ownership.").

rents for \$1200 per month. Typical specific complaints by residents involved parking, smoke from fireplaces, and light blockage.²¹⁵

Other jurisdictions with large-lot size restrictions include Alameda, Alhambra, Apple Valley, Burbank, Chino Hills, Concord, Corona, Diamond Bar, El Monte, Folsom, Gardena, Huntington Beach, Lakewood, Lodi, Lynwood, Norwalk, Pasadena, Rancho Cucamonga, Redding, San Jose, Santa Clara, Santa Clarita, South Gate, Sunnyvale, Tustin, Westminster, and Yorba Linda.²¹⁶ More onerous parking re-

215. A neighbor reportedly bemoaned that his single family residential home guaranteed by zoning laws and CC&Rs has been made 'null and void' by state and city laws, and "[b]y arbitrarily negating the controls imposed by zoning and CC&R requirements, government has effectively diminished incentives a property owner had to demonstrate pride of ownership through good property maintenance." Don Chalmers, Letter to the Editor, *Neighborhoods Impacted by Granny Flats*, SAN DIEGO UNION-TRIBUNE, Sept. 7, 2006, http://www.utsandiego.com/uniontrib/20060907/news_lz6e7letters.html.

216. See ALAMEDA, CAL., CODE § 30-4.1-R-1 (b)(9) (2012), available at <http://library.municode.com/index.aspx?clientId=16753&stateId=5&stateName=California>; ALHAMBRA, CAL., CODE § 23.57.040(C)(2) (2012), available at [http://www.amlegal.com/nxt/gateway.dll/California/alhambra/cityofalhambra/california/codeofordinances?f=templates\\$fn=default.htm\\$3.0\\$vid=amlegal:alhambra_ca](http://www.amlegal.com/nxt/gateway.dll/California/alhambra/cityofalhambra/california/codeofordinances?f=templates$fn=default.htm$3.0$vid=amlegal:alhambra_ca); APPLE VALLEY, CAL., DEV. CODE § 9.29.120(B) (2010), available at <http://www.applevalley.org/Modules/ShowDocument.aspx?documentid=10843>; BURBANK, CAL., CODE § 10-1-625.5(D) (2013), available at <http://www.codepublishing.com/ca/burbank>; CHINO HILLS, CAL., CODE § 16.10.020 (2012), available at <http://library.municode.com/index.aspx?clientId=16034&stateId=5&stateName=California>; CONCORD, CAL., DEV. CODE § 122-631(f) (2012), available at http://www.ci.concord.ca.us/pdf/citygov/code/Chapter122_ArticleV_Div1_631.pdf; CORONA, CAL., CODE § 17.85.030(D) (2012), available at [http://www.amlegal.com/nxt/gateway.dll/California/corona/coronacaliforniamunicipalcode?f=templates\\$fn=default.htm\\$3.0\\$vid=amlegal:corona_ca](http://www.amlegal.com/nxt/gateway.dll/California/corona/coronacaliforniamunicipalcode?f=templates$fn=default.htm$3.0$vid=amlegal:corona_ca); DIAMOND BAR, CAL., CODE § 22.42-120(3)(a) (2012), available at <http://library.municode.com/index.aspx?clientId=12790>; EL MONTE, CAL., CODE § 17.06.165(I)(4) (2012), available at <http://library.municode.com/index.aspx?clientId=16228&stateId=5&stateName=California>; FOLSOM, CAL., CODE § 17.105.060(B) (2013), available at <http://www.codepublishing.com/CA/Folsom>; GARDENA, CAL., CODE § 18.12.050(P)(1) (2013), available at <http://www.codepublishing.com/CA/gardena>; HUNTINGTON BEACH, CAL., ZONING CODE § 230.10(B)(1) (2012), available at http://www.huntingtonbeachca.gov/files/users/city_clerk/Chp230.pdf; LAKEWOOD, CAL., BLDG. & ZONING CODE § 9302.21a; LODI, CAL., DEV. CODE (DRAFT) § 17.36.130(A) (2010), available at http://www.lodi.gov/community_development/Planning/PDFs/Draft_Development_Code_092512.pdf; LYNWOOD, CAL., CODE § 25-20-8(A) (2013), available at <http://www.codepublishing.com/ca/lynwood>; NORWALK, CAL., CODE § 17.04.210(E) (2013), available at <http://www.qcode.us/codes/norwalk>; PASADENA, CAL., ZONING CODE § 17.50.275(B)(1) (2005), available at <http://www2.cityofpasadena.net/zoning/P-5.html>; 17.50.275; RANCHO CUCAMONGA, CAL., DEV. CODE § 17.100.020(D) (2012), available at <http://www.cityofrc.us/civica/filebank/blobdload.asp?BlobID=12919>; REDDING, CAL., CODE § 18.43.140(C)(2) (2013), available at <http://library.municode.com/index.aspx?clientId=16572>; SAN JOSE, CAL., CODE § 20.30.150(B) (2012), available at [http://sanjose.amlegal.com/nxt/gateway.dll/California/sanjose_ca/title20zoning*1?f=templates\\$fn=default.htm\\$3.0\\$vid=amlegal:sanjose_ca](http://sanjose.amlegal.com/nxt/gateway.dll/California/sanjose_ca/title20zoning*1?f=templates$fn=default.htm$3.0$vid=amlegal:sanjose_ca); SANTA CLARA, CAL., CODE § 18.10.030(d) (2013), available at <http://www.codepublishing.com/ca/santaclarita>; SANTA CLARITA, CAL., CODE § 17.15.020(N)(3)(h) (2013), available at <http://www.codepublishing.com/ca/santaclarita>; SOUTH GATE, CAL., CODE §§ 11.07.010(2)(c), 11.08.010(2)(c) (2012), available at

quirements are imposed in many cities, including some that require, in seeming contravention of the state law, more than one covered parking space for any ADU. For example, San Bernardino and Torrance both require two covered spaces for a two bedroom ADU, while Compton, Downey, and Torrance all require a separate two car garage.²¹⁷ Buena Park only allows a one bedroom ADU but requires a 220 square foot garage, and Hesperia mandates an enclosed garage that is nine by nineteen feet.²¹⁸ Anaheim, while it does not require covered parking, requires one spot per bedroom, but yet one more spot if the ADU is in a “parking deficient zone.”²¹⁹

5. THOUSAND OAKS: ADU SQUARE-FOOTAGE LIMITATIONS

Thousand Oaks is a community in Ventura County in southern California, near Los Angeles. The 2010 United States Census reported a population of 126,683, with a population density of 2,302 people per square mile.²²⁰ The racial makeup of Thousand Oaks was 80.3% White, 1.3% African American, 8.7% Asian, while Hispanic or Latino

depublishing.com/CA/southgate; SUNNYVALE, CAL., CODE § 19.68.040(a) (2012), *available at* <http://qcode.us/codes/sunnyvale>; TUSTIN, CAL., CODE § 9223(a)(7)(b) (2013), *available at* <http://library.municode.com/index.aspx?clientId=11307>; WESTMINSTER, CAL., CODE § 17.400.135(B)(2) (2012), *available at* <http://qcode.us/codes/westminster>; YORBA LINDA, CAL., CODE § 18.20.830(B) (2012), *available at* <http://library.municode.com/index.aspx?clientId=13406>; Ulysses Torassa, *Not in Our Backyard: A New State Law Was Supposed to Make It Easier to Build In-Law Units, But City Restrictions Mean They Might as Well Be Outlawed*, S.F. CHRON., Aug. 28, 2005, at J1. The same publication notes that expensive water connections are required by other jurisdictions stating that \$28,430 is the cost in Marin Municipal Water District, though it is cut in half for rental to a low-income tenant for at least [ten] years. *Id.*

217. See COMPTON, CAL., CODE § 30-11.2(c)(5) (2011), *available at* <http://www.comptoncny.org/index.php/Municipal-Code.htm> (requiring a two-car garage for the primary unit plus a paved parking space for the ADU); DOWNEY, CAL., CODE § 9414.08(g) (2013), *available at* <http://qcode.us/codes/downey>; SAN BERNARDINO, CAL., DEV. CODE § 19.04.030(2)(P)(8) (2012), *available at* <http://www.ci.san-bernardino.ca.us/civica/filebank/blobdload.asp?BlobID=14657>; TORRANCE, CAL., CODE § 92.2.10(b) (3) (2012), *available at* <http://library.municode.com/index.aspx?clientId=16471> (requiring a two-car garage for the primary unit per section 93.2.1 of the Torrance Code plus one space per ADU bedroom in a garage); *see also* CTR. FOR CMY. INNOVATION, YES IN MY BACKYARD: MOBILIZING THE MARKET FOR SECONDARY DWELLING UNITS (2012), *available at* <http://communityinnovation.berkeley.edu/reports/secondary-units.pdf> (mentioning Oakland and Richmond).

218. BUENA PARK, CAL., CODE § 19.348.010(B)(7)–(8) (2013), *available at* <http://qcode.us/codes/buenapark>; HESPERIA, CAL., CODE § 16.12.360(F)(8) (2012), *available at* <http://library.municode.com/index.aspx?clientId=16400>.

219. ANAHEIM, CAL., CODE § 18.38.230.100–1004 (2013), *available at* [http://www.amlegal.com/nxt/gateway.dll/California/anaheim/anaheimmunicipalcode?f=templates\\$fn=default.htm\\$3.0\\$vid=amlegal:anaheim_ca](http://www.amlegal.com/nxt/gateway.dll/California/anaheim/anaheimmunicipalcode?f=templates$fn=default.htm$3.0$vid=amlegal:anaheim_ca).

220. *Thousand Oaks (City) QuickFacts*, U.S. CENSUS BUREAU (June 6, 2013), <http://quickfacts.census.gov/qfd/states/06/0678582.html>.

of any race made up 16.8%.²²¹ The median home price in 2009 was \$764,379, with a median gross rental of \$1626, while the median income for a household in the city was \$100,373 in 2010.²²² Thousand Oaks was one of the numerous cities that urged Governor Schwarzenegger to veto Assembly Bill 2702.²²³

During public hearings held by the City Council and Planning Commission between May and July of 2003, a number of speakers were listed in agendas as being against ADU legislation.²²⁴ One was quoted in a Los Angeles Daily News article stating that “[w]e don’t want houses that look like apartment buildings coming into our neighborhoods and ruin [sic] our family’s quality of life.”²²⁵ The ADU ordinance reflects these concerns by imposing very severe size restrictions. Secondary units are limited to 10% of the area of the primary unit and are capped at 499 square feet, regardless of the size of the lot. Hearings between May and July of 2003 reportedly mentioned the need for affordable housing, but also the stress of additional housing density.²²⁶ Between 2000 and 2005, the city reported construction of ten ADUs.²²⁷

Square footage limitations are common in local laws, and these fall along a continuum of restrictiveness. Perhaps the most common limit, mentioned in the state law, restricts attached ADUs to 30% of the pri-

221. *Id.*

222. *Id.*

223. See Mullen, *supra* note 123; *Thousand Oaks (City) Quickfacts*, *supra* note 220; *infra* notes 224-25.

224. For descriptions of the meetings generally, see Gregory W. Griggs, *Thousand Oaks to Address Affordable Housing*, L.A. TIMES, July 1, 2003, <http://articles.latimes.com/2003/jul/01/local/me-oaksafford1>. In a later piece, Griggs noted that the Mayor expected that few people would apply because of the other restrictions. Gregory W. Griggs, *Making Thousand Oaks Affordable*, L.A. TIMES, July 3, 2003, § California Metro, at 3.

225. Rachel Uranga, *Home-Addition Rules Tightened*, DAILY NEWS L.A., July 24, 2003, at N7. Similarly, one Thousand Oaks councilman said “We don’t want to end up being a city of duplexes If everyone put a granny flat on their property, we’d end up with more people and more smog and more of every problem.” Daryl Kelley, *City-State Clash Looms over ‘Granny Flats’ Bill*, L.A. TIMES, Apr. 11, 2004, § California Metro, at 1.

226. See Griggs, *Thousand Oaks to Address Affordable Housing*, *supra* note 224; Griggs, *Making Thousand Oaks Affordable*, *supra* note 224; Kelley, *supra* note 225.

227. CITY OF THOUSAND OAKS, 2006–2014 HOUSING ELEMENT, THOUSAND OAKS GENERAL PLAN 83 tbl.V-1 (2010), available at <http://www.toaks.org/civica/filebank/blobdload.asp?BlobID=13167> (noting ten units from 2000–2005). No comparable numbers are reported in the current housing element. See CITY OF THOUSAND OAKS, 2014–2021 HOUSING ELEMENT DRAFT THOUSAND OAKS GENERAL PLAN (2013), available at www.toaks.org/civica/filebank/blobdload.asp?BlobID=25469. The new draft reports that the city allows for ministerial approval, that the standards are reasonable and meet the state law, and the requirements “do not hinder the City from meeting its share of the regional need for housing for households of all income levels, nor the housing needs of persons with disabilities and homeless persons.” *Id.* at 59.

mary dwelling space and all ADUs to either 640 square feet²²⁸ or, for detached units, 1,200 square feet.²²⁹ Some restrict the ADUs to very

228. Anaheim, Apple Valley, Bakersfield, Buena Park, El Monte, Encinitas, Monterey Park, Moreno, Murrieta, Palmdale, Pomona, Redding, Redlands, Roseville, San Bernardino and Simi Valley are of the 30% variety, while the 640 square foot limitation includes, but is not limited to, Carlsbad, El Cajon, Los Angeles, Petaluma, and Richmond. ANAHEIM, CAL., CODE § 18.38.230.070 (2013), *available at* [http://www.amlegal.com/nxt/gateway.dll/California/anaheim/anaheimmunicipalcode?f=templates\\$fn=default.htm\\$3.0\\$vid=amlegal:anaheim_ca](http://www.amlegal.com/nxt/gateway.dll/California/anaheim/anaheimmunicipalcode?f=templates$fn=default.htm$3.0$vid=amlegal:anaheim_ca); APPLE VALLEY, CAL., DEV. CODE § 9.29.120(C)(8) (2010), *available at* <http://www.applevalley.org/Modules/ShowDocument.aspx?documentid=10843>; BAKERSFIELD, CAL., CODE § 17.65.020(A)(2) (2013), *available at* <http://www.qcode.us/codes/bakersfield>; BUENA PARK, CAL., CODE § 19.348.010(B)(6) (2013), *available at* <http://qcode.us/codes/buenapark>; CARLSBAD, CAL., CODE § 21.10.030(E)(11) (2012), *available at* <http://library.municode.com/index.aspx?clientId=15184>; EL CAJON, CAL., CODE § 17.140.180(B)(7) (2013), *available at* <http://qcode.us/codes/elcajon>; EL MONTE, CAL., CODE § 17.06.165(I)(7) (2012), *available at* <http://library.municode.com/index.aspx?clientId=16228&stateId=5&stateName=California>; ENCINITAS, CAL., CODE § 30.48.040(T)(3) (2010), *available at* <http://archive.ci.encinitas.ca.us/WebLink8/DocView.aspx?id=653994&dbid=0>; L.A., CAL., ZONING CODE § 12.24(W)(43)(a)(1) (2012), *available at* http://www.amlegal.com/nxt/gateway.dll?f=templates&fn=default.htm&vid=amlegal:lapz_ca; MONTEREY PARK, CAL., CODE § 21.08.040(11)(C)(ii) (2012), *available at* <http://qcode.us/codes/montereypark>; MURRIETA, CAL., CODE § 16.44.160(E)(1) (2013), *available at* [http://www.amlegal.com/nxt/gateway.dll/California/murrieta_ca/murrietacaliforniamunicipalcode?f=templates\\$fn=default.htm\\$3.0\\$vid=amlegal:murrieta_ca](http://www.amlegal.com/nxt/gateway.dll/California/murrieta_ca/murrietacaliforniamunicipalcode?f=templates$fn=default.htm$3.0$vid=amlegal:murrieta_ca); PALMDALE, CAL., ZONING CODE § 91.03(B)(8) (1994), *available at* <http://www.cityofpalmdale.org/departments/planning/zoning/chapter%209.pdf>; PETALUMA, CAL., ZONING CODE § 7.030(A) (2013), *available at* <http://cityofpetaluma.net/cdd/pdf/izo/chapter7-standards-for-specific-land-uses.pdf>; POMONA, CAL., ZONING CODE § .062, *available at* <http://library.municode.com/index.aspx?nomobile=1&clientId=16560> (defining “Second-Unit Housing” at (G)); REDDING, CAL., CODE § 18.43.140(C)(3)(a)–(b) (2013), *available at* <http://library.municode.com/index.aspx?clientId=16572>; REDLANDS, CAL., CODE § 18.156.450(C)(2) (2012), *available at* http://www.sterlingcodifiers.com/codebook/index.php?book_id=550; RICHMOND, CAL., CODE § 15.04.810.022(D) (2012), *available at* <http://library.municode.com/index.aspx?clientId=16579&stateId=5&stateName=California>; ROSEVILLE, CAL., CODE § 19.60.040(D) (2013), *available at* <http://qcode.us/codes/roseville>; SAN BERNARDINO, CAL., DEV. CODE § 19.04.030(2)(P)(5) (2012), *available at* <http://www.ci.san-bernardino.ca.us/civical/filebank/blobdload.asp?BlobID=14657>; SIMI VALLEY, CAL., CODE § 9-44.160(C) (2012), *available at* <http://library.municode.com/index.aspx?clientId=16629>.

229. Chino Hills, Elk Grove, Folsom, Fontana, Irvine, Norwalk, Whittier, Yorba Linda and Yuba City, while 1200 square foot restrictions only apply to detached ADUs in Roseville and San Clemente. CHINO HILLS, CAL., CODE § 16.10.020(D)(2) (2012), *available at* <http://library.municode.com/index.aspx?clientId=16034&stateId=5&stateName=California>; ELK GROVE, CAL., CODE § 23.90.040(E) (2013), *available at* <http://www.codepublishing.com/CA/elkgrove>; FOLSOM, CAL., CODE § 17.105.060(C) (2013), *available at* <http://www.codepublishing.com/CA/Folsom>; FONTANA, CAL., ZONING & DEV. CODE § 30-180(1) (2008), *available at* <http://library.municode.com/index.aspx?clientId=12998>; IRVINE, CAL., ZONING CODE § 3-26-3(A)(7) (2012), *available at* <http://library.municode.com/index.aspx?clientId=13239>; NORWALK, CAL., CODE § 17.04.210(E)(3)(h) (2013), *available at* <http://www.qcode.us/codes/norwalk>; ROSEVILLE, CAL., CODE § 19.60.040(D); SAN CLEMENTE, CAL., CODE § 17.28.270(C)(4)(b) (2012), *available at* <http://library.municode.com/index.aspx?clientId=16606&stateId=5&stateName=California>; WHITTIER, CAL., CODE § 18.10.020(I)(5)(A) (2013), *available at* <http://library.municode.com/index.aspx?clientId=16695>; YORBA LINDA, CAL., CODE § 18.20.840(C) (2012), *available at* <http://library.municode.com/index.aspx?clientId=13406>; YUBA CITY, CAL., CODE § 8.5.5001(F)(4) (2011), *available at* <http://clerkshq.com/default.ashx?clientsite=yuba-ca>.

small units, 10% of the principal dwelling, or to one bedroom. This includes Long Beach (10%), Davis (less than 325 square feet), Tracy (300–460 square feet), and Buena Park and San Jose (one bedroom).²³⁰ Others have very tight requirements for minimum and maximum sizes. For example, Tracy only allows units to be 300–460 square feet, West Covina only allows 500–640 square feet units, and Newport Beach allows 600–640 square feet.²³¹ On the other hand, some size requirements seem to be assuring adequate space in the ADUs. For example, Fullerton requires that they be at least 150 square feet, Riverside and Rosemead at least 400 square feet, Moreno Valley at least 450 square feet, and Monterey Park at least 500 square feet.²³²

6. RICHMOND: DESIGN REVIEW

Richmond is a city of 103,701 in the Bay Area northwest of San Francisco.²³³ It has a population density of 3448.9 per square mile.²³⁴ The city is quite diverse, with 31.4% whites, 26.6% African Americans, 13.5% Asians, and 39.5% Hispanics of any race (of which 27% are Mexican, or just about 11% of the whole).²³⁵ Median income is \$44,210.²³⁶ The average housing price in 2009 was \$327,171, but only about half (51.7%) the population owned homes as opposed to renting.²³⁷ For

230. BUENA PARK, CAL., CODE § 19.348.010(B)(7), *available at* http://qcode.us/codes/buenapark/view.php?topic=19-3-19_348-19_348_010&frames=on; DAVIS, CAL., CODE § 40.26.450(i)(1)(B) (2012), *available at* <http://qcode.us/codes/davis> (restricting detached ADUs); LONG BEACH, CAL., CODE § 21.51.275(B) (2012), *available at* <http://library.municode.com/index.aspx?clientId=16115>; SAN JOSE, CAL., CODE § 20.30.150(F) (2012), *available at* [http://sanjose.amlegal.com/nxt/gateway.dll/California/sanjose_ca/title20zoning*1?f=templates\\$fn=default.htm\\$3.0\\$vid=amlegal:sanjose_ca](http://sanjose.amlegal.com/nxt/gateway.dll/California/sanjose_ca/title20zoning*1?f=templates$fn=default.htm$3.0$vid=amlegal:sanjose_ca); TRACY, CAL., CODE § 10.08.3180(f) (2013), *available at* <http://library.municode.com/index.aspx?clientId=16660>.

231. NEWPORT BEACH, CAL., CODE § 20.48.200(C)(4) (2013), *available at* <http://www.codepublishing.com/CA/NewportBeach>; TRACY, CAL., CODE § 10.08.3180(f); WEST COVINA, CAL., CODE § 26-685.34 (g)(3)–(4) (2012), *available at* <http://library.municode.com/index.aspx?clientId=11504>.

232. FULLERTON, CAL., CODE § 15.17.100(C)(4) (2012), *available at* [http://www.amlegal.com/nxt/gateway.dll/California/fullerton/fullertoncaliforniamunicipalcode?f=templates\\$fn=default.htm\\$3.0\\$vid=amlegal:fullerton_ca](http://www.amlegal.com/nxt/gateway.dll/California/fullerton/fullertoncaliforniamunicipalcode?f=templates$fn=default.htm$3.0$vid=amlegal:fullerton_ca); MONTEREY PARK, CAL., CODE § 21.08.040(11)(C)(ii); MORENO VALLEY, CAL., CODE § 9.09.130(C)(4) (2012), *available at* <http://qcode.us/codes/morenovalley>; RIVERSIDE, CAL., CODE § 19.525.030(E) (2007), *available at* <https://riversideca.gov/municode/pdf/19/article-7/19-525.pdf>; ROSEMEAD, CAL., CODE § 17.30.030(D) (2013), *available at* <http://library.municode.com/index.aspx?clientId=16591>.

233. *Richmond (City) Quick Facts*, U.S. CENSUS BUREAU (June 6, 2013), <http://quickfacts.census.gov/qfd/states/06/0660620.html>.

234. *Id.*

235. *Id.*

236. *Richmond, California*, CITY-DATA, <http://www.city-data.com/city/Richmond-California.html> (last visited July 27, 2013).

237. *City of Richmond Census Bureau Data*, BAY AREA CENSUS, <http://www.bayareacensus.ca.gov/cities/Richmond.htm> (last visited July 27, 2013).

renters, the median monthly price in 2009 was \$1,127.²³⁸ Richmond has long been home to a number of heavy industries, including a dynamite and gunpowder works that closed in 1950, a Ford assembly plant, and currently a Chevron USA refinery.²³⁹ It is the largest city in the country served by a Green Party mayor.²⁴⁰ In 2010, it was listed as the sixth most dangerous city in the United States.²⁴¹

Richmond's ADU ordinance²⁴² was first enacted in 1996.²⁴³ As is the case in many California jurisdictions, Richmond mandates design review for ADUs. Specifically, the owner must submit a packet with the application for any unit greater than 250 square feet or located outside the original building footprint that includes a number of features which probably would require the assistance of an architect.²⁴⁴ Fees

238. *Richmond City Income, Earnings, and Wages Data*, CITY-DATA, <http://www.city-data.com/city/Richmond-California.html> (last visited July 27, 2013).

239. *Chevron Richmond*, CHEVRON, <http://richmond.chevron.com/home.aspx> (last visited May 20, 2013); *Our History*, EASTBAY REG'L PARK DIST., <http://www.ebparks.org/about/history> (last visited July 27, 2013).

240. Jason B. Johnson, *Richmond/Green Party Mayor Takes the Reins/She Promises to Start Jobs Program, Cut Homicide Rate*, S.F. CHRON., Jan. 10, 2007, at B7.

241. Megan Gibson, *What's the Most Dangerous City in America?*, TIME, Nov. 22, 2010, <http://newsfeed.time.com/2010/11/22/whats-the-most-dangerous-city-in-america>. Nearby Oakland ranked one spot above, at number five. *Id.*

242. RICHMOND, CAL., CODE §§ 15.04.810.020-.029 (2012), available at <http://library.municode.com/index.aspx?clientId=16579&stateId=5&stateName=California>

243. See RICHMOND, CAL., ORDINANCE, no. 37-96 NS (1996) (requiring, originally, a Conditional Use Permit for a detached second dwelling unit).

244. The respective section of the code requires:

1. Plot Plan (Drawn to Scale). Dimension the perimeter of the parcel on which the second dwelling unit will be located. Indicate the location and dimensioned setbacks of all existing and proposed structures on the project site and structures located within [fifty] feet of the project site. All easements, building envelopes, and special requirements of the subdivision as shown on the final map and improvement plans shall be included. For sloping parcels, provide average slope calculations for the project site.
2. Floor Plans. Each room shall be dimensioned and the resulting floor area calculation included. The use of each room shall be identified. The size and location of all windows and doors shall be clearly depicted.
3. Elevations. North, south, east and west elevations which show all openings, exterior finishes, original and finish grades, stepped footing outline, roof pitch, materials and color board for the existing residence and the proposed second dwelling unit.
4. Cross Section. Provide building cross sections including, but not limited to: structural wall elements, roof, foundation, fireplace and any other sections necessary to illustrate items such as earth-to-wood clearances and floor-to-ceiling heights.
5. Color Photographs of the Site and Adjacent Properties. The photos shall be taken from each of the property lines of the project site to show the project site and adjacent sites. Label each photograph and reference to a separate site plan indicating the location and direction of the photograph.

for a design review range from \$816 for an attached second unit of less than 640 square feet to \$1,137 for a detached second unit (also less than 640 square feet).²⁴⁵

Other jurisdictions requiring design or site review are Camarillo, Citrus Heights, Costa Mesa, Cupertino, Manteca, Milpitas, Murrieta, Napa, Oakland, Redondo Beach, Redwood City, Richmond, San Buenaventura, San Leandro, San Mateo, San Rafael, Santa Barbara, Santa Rosa, Simi Valley, South San Francisco, Stockton, Turlock, and Union City.²⁴⁶

V. Conclusion: Local Intransigence in an Era of Reform

Local resistance to state-mandated land use reforms is nothing new,²⁴⁷ nor is the pattern we observe here of “hidden” regulatory barriers. The

245. See PLANNING DIV., CITY OF RICHMOND, PLANNING DIV. FEE SCHEDULE (2011), available at www.ci.richmond.ca.us/DocumentView.aspx?DID=7488.

246. CAMARILLO, CAL., CODE § 19.14.135(F) (2012), available at <http://library.municode.com/index.aspx?clientId=16239>; CITRUS HEIGHTS, CAL., CODE § 106.42.210(A) (2013), available at <http://library.municode.com/index.aspx?clientId=13326>; COSTA MESA, CAL., CODE § 13-35(h)-(j) (2012), available at <http://library.municode.com/index.aspx?clientId=10425>; CUPERTINO, CAL., CODE § 19.112.040 (2013), available at [http://www.amlegal.com/nxt/gateway.dll/California/cupertino/cityofcupertinocaliforniamunicipalcode?f=templates\\$fn=default.htm\\$3.0\\$vid=amlegal:cupertino_ca](http://www.amlegal.com/nxt/gateway.dll/California/cupertino/cityofcupertinocaliforniamunicipalcode?f=templates$fn=default.htm$3.0$vid=amlegal:cupertino_ca); MANTECA, CAL., CODE § 17.82.030(B) (2013), available at <http://qcode.us/codes/manteca>; MILPITAS, CAL., CODE § XI-10-13.08(B) (2013), available at <http://library.municode.com/index.aspx?clientId=16491>; MURRIETA, CAL., CODE § 16.44.160(G) (2013), available at [http://www.amlegal.com/nxt/gateway.dll/California/murrieta_ca/murrietacaliforniamunicipalcode?f=templates\\$fn=default.htm\\$3.0\\$vid=amlegal:murrieta_ca](http://www.amlegal.com/nxt/gateway.dll/California/murrieta_ca/murrietacaliforniamunicipalcode?f=templates$fn=default.htm$3.0$vid=amlegal:murrieta_ca); NAPA, CAL., CODE § 17.52.020(C)(4)-(5) (2013), available at <http://qcode.us/codes/napa>; OAKLAND, CAL., PLANNING CODE § 17.102.360(A)(11) (2013), available at library.municode.com/index.aspx?clientId=16490; REDONDO BEACH, CAL., CODE § 10-2.2506 (2013), available at <http://www.qcode.us/codes/redondobeach>; REDWOOD CITY, CAL., ZONING CODE, art. 37.2(K) (2012), available at <http://library.municode.com/index.aspx?clientId=16091>; RICHMOND, CAL., CODE § 15.04.810.024; SAN BUENAVENTURA, CAL., CODE § 24.430.020(14)-(15) (2012), available at <http://library.municode.com/index.aspx?clientId=10135>; SAN LEANDRO, CAL., ZONING CODE § 2-576(B) (2013), available at <http://www.qcode.us/codes/sanleandro-zoning>; SAN MATEO, CAL., CODE § 27.19.040(g)(3) (2013), available at <http://qcode.us/codes/sanmateo>; SAN RAFAEL, CAL., CODE § 14.16.285(C)(4) (2012), available at <http://library.municode.com/index.aspx?clientId=16610>; SANTA BARBARA, CAL., CODE § 28.18.075(E)(5) (2013), available at http://www.santabarbaraca.gov/Documents/Municipal_Code/01_Complete_Document/City_of_Santa_Barbara_Municipal_Code.pdf; SANTA ROSA, CAL., CODE § 20-42.130(D) (2012), available at <http://qcode.us/codes/santarosa>; SIMI VALLEY, CAL., CODE § 9-44.160(E) (2012), available at <http://library.municode.com/index.aspx?clientId=16629>; SOUTH S.F., CAL., CODE § 20.350.035 (2013), available at <http://qcode.us/codes/southsanfrancisco>; STOCKTON, CAL., CODE § 16.80.310(A) (2013), available at <http://qcode.us/codes/stockton>; TURLOCK, CAL., CODE § 9-2-119(f) (2013), available at <http://www.codepublishing.com/CA/Turlock>; UNION CITY, CAL., CODE § 18.32.020(M)(1)(f) (2013), available at <http://qcode.us/codes/unioncity>.

247. See CITY OF THOUSAND OAKS, 2006-2014 HOUSING ELEMENT, *supra* note 227.

California legislature specifically expressed concern that local governments had imbedded hidden impediments to ADUs in zoning regulations that undermined the past state efforts to promote them as an affordable housing device.²⁴⁸ In fact, a central purpose of the 2002 legislation was to limit localities' ability to engage in this kind of regulatory intransigence. Our analysis suggests that the legislation did not achieve its goal of overcoming local parochialism. But, the lesson of the California ADU story extends beyond the narrow context that we study here. Land use planning practices in many U.S. jurisdictions are undergoing significant transition as more and more localities embrace planning practices promoted by new urbanists in the name of increasing land use diversity, including the replacement or augmentation of traditional zoning practices with regulations that purport to permit a greater mixing of land uses. ADU reforms play a big part in this regulatory agenda, but the local experience with implementing them in California provides instructive lessons about the broader context. Our analysis suggests that even localities that, on the surface, appear to enthusiastically embrace deregulatory reforms may undermine the purpose of the reforms through regulatory practices that might aptly be described as "death by a thousand paper cuts." Indeed, new urbanists arguably invite the introduction of costly regulations into land use planning codes by championing swapping a system of regulation of building use with careful control over the building form. The California ADU story suggests that local parochialism remains alive and well in American zoning codes, often buried in regulatory details that escape the attention of advocates and academics alike.

248. See Coal. Advocating Legal Hous. Options, 105 Cal. Rptr. 2d, at 804 ("The amendment's legislative history indicates that local governments had responded to the existing law either by embracing second units as a source of affordable housing, or by discouraging their creation through complicated and expensive application procedures or other means.").

Table of California Zoning Ordinances Regulating Second Units

Alameda, Cal., Ordinance 30-4.1-R-1 (9)	Hesperia, Cal., Ordinance 16.12.360
Alhambra, Cal., Ordinance Chapter 23.57	Huntington Beach, Cal., Ordinance
Anaheim, Cal., Ordinance 18.38.230	Huntington Park, Cal., Ordinance 9-4.103N
Antioch, Cal., Ordinance 9-5.3805	Indio, Cal., Ordinance 159.1002
Apple Valley, Cal., Ordinance 9.29.120	Inglewood, Cal., Ordinance 12-16.3
Arcadia, Cal., Ordinance 1782	Irvine, Cal., Ordinance Division 3, Sec. 3-26-3
Bakersfield, Cal., Ordinance Ch. 17.65	La Habra, Cal., Ordinance 18.24.030F; 18.12.150
Baldwin Park, Cal., Ordinance 153.056	La Mesa, Cal., Ordinance
Bellflower, Cal., Ordinance 17.16.170	Laguna Niguel, Cal., Ordinance 9-1-35.7
Berkeley, Cal., Ordinance 23D.28.070	Lake Forest, Cal., Ordinance 9-146-050
Buena Park, Cal., Ordinance 19.348.010	Lakewood, Cal., Ordinance 9302.21a
Burbank, Cal., Ordinance 10-1-625.5	Lancaster, Cal., Ordinance 17.08.360
Camarillo, Cal., Ordinance 19.14.135	Livermore, Cal., Ordinance 6.03.120
Carlsbad, Cal., Ordinance 21.10.030	Lodi, Cal., Ordinance 17.12.030
Carson, Cal., Ordinance 9122.1	Long Beach, Cal., Ordinance 21.5.275
Cerritos, Cal., Ordinances 22.22.300; 22.23.300	Los Angeles, Cal., Ordinance § 12.22(W)(43)
Chico, Cal., Ordinance 19.76.130	Lynwood, Cal., Ordinance 25-20-8
Chino, Cal., Ordinance 20.11.020	Manteca, Cal., Ordinance 17.39.30
Chino Hills, Cal., Ordinance 16.10.020	Merced, Cal., Ordinances 20.10.070; 20.54.250; Ch. 20.68.
Chula Vista, Cal., Ordinance 19.58.022	Milpitas, Cal., Ordinance XI-10-13.08
Citrus Heights, Cal., Ordinance 106.42.210	Mission Viejo, Cal., Ordinance 9.10.020 (12)
Clovis, Cal., Ordinance 9.3.317	Modesto, Cal., Ordinance 10-2-502
Compton, Cal., Ordinance 30-11.2	Montebello, Cal., Ordinance 17.10.280
Concord, Cal., Ordinance 122-310	Monterey Park, Cal., Ordinance 21.08.040 (11)
Corona, Cal., Ordinance 17.85	Moreno Valley, Cal., Ordinance 9.09.130
Costa Mesa, Cal., Ordinance Art. 1, Sec. 13-35	Mountain View, Cal., Ordinance A36.12.040B
Cupertino, Cal., Ordinance 19.112	Murrieta, Cal., Ordinance 16.44.160
Daly City, Cal., Ordinance 17-40.100	Napa, Cal., Ordinance 17.52.020
Davis, Cal., Ordinance 40.26.450	National City, Cal., Ordinance 18.21.050
Diamond Bar, Cal., Ordinance 22.42.120	Newport Beach, Cal., Ordinance 20.85
Downey, Cal., Ordinance 9414	Norwalk, Cal., Ordinance 17.04.210
El Cajon, Cal., Ordinance 17.140.180	Oakland, Cal., Ordinance 17.102.360
El Monte, Cal., Ordinance 17.06.165	Oceanside, Cal., Ordinance 32A
Elk Grove, Cal., Ordinance 23.9	Ontario, Cal., Ordinance 9-1-1440 A.3
Encinitas, Cal., Ordinance 30.48.040T	Orange, Cal., Ordinance 17.14.050
Escondido, Cal., Ordinance Article 70	Oxnard, Cal., Ordinance 16-465
Fairfield, Cal., Ordinance 25.20.4.11	Palmdale, Cal., Ordinance 91.03B
Folsom, Cal., Ordinance 17.105	Palo Alto, Cal., Ordinance 18.60.070(b)
Fontana, Cal., Ordinance 30-180	Paramount, Cal., Ordinance 44-1
Fountain Valley, Cal., Ordinance 21.08.030	Pasadena, Cal., Ordinance 17-50.275
Fremont, Cal., Ordinance 8-22159.5	Petaluma, Cal., Ordinance 7.030
Fresno, Cal., Ordinance 12-306N-38.	Pico Rivera, Cal., Ordinances 22.52.1700 et seq.
Fullerton, Cal., Ordinance 15.17.100	Pittsburg, Cal., Ordinances 18.50.300 et seq.
Garden Grove, Cal., Ordinance § 9.08.020.050(k)	Pleasanton, Cal., Ordinance 18.106
Gardena, Cal., Ordinance 18.12.050(P)	Pomona, Cal., Sec. .062 of Zoning Ordinance
Glendale, Cal., Ordinance 30.10.070 (g)	Rancho Cordova, Cal., Ordinance 23.901.060
Hawthorne, Cal., Ordinance 17.20.130	
Hayward, Cal., Ordinance 1.245n	
Hemet, Cal., Ordinance 90-311	

Table of California Zoning Ordinances Regulating Second Units

Rancho Cucamonga, Cal., Zoning Code tit. 23, sec. 17.08(6)	Santee, Cal., Ordinance 17.10.030(F)(6)
Redding, Cal., Ordinance 18.43.140	Simi Valley, Cal., Ordinance 9-44.160 - 170
Redlands, Cal., Ordinance 18.156.450 and -460	South Gate, Cal., Ordinance 11.08.010;
Redondo Beach, Cal., Ordinance 10-2.1506	11.07R-7500
Redwood City, Cal., Ordinance Art 37.1 et seq.	South San Francisco, Cal., Ordinance 20.350.035
Rialto, Cal., Ordinance 18.10.020L	Stockton, Cal., Ordinances 16.80.310, 16.152.020
Richmond, Cal., Ordinance 15.04.810	Sunnyvale, Cal., Ordinance 19.68.040
Riverside, Cal., Ordinance	Temecula, Cal., Ordinance 17.06.050L
Rosemead, Cal., Ordinance 17.30	Thousand Oaks, Cal., Ordinance 9-4.2521
Roseville, Cal., Ordinance 19.60.040	Torrance, Cal., Ordinance 92.2.10
Sacramento, Cal., Ordinance 17.24.050(30)	Tracy, Cal., Ordinance 10.08.3180
Salinas, Cal., Ordinance 37-50.250	Turlock, Cal., Ordinance 9-2-119
San Bernardino, Cal., Ordinance 19.04(P)	Tustin, Cal., Ordinance 9223 (7) (l)(m)
San Buenaventura, Cal., Ordinance 24.43	Union City, Cal., Ordinance 18.32.020M (e)
San Clemente, Cal., Ordinance 17.28.270	Upland, Cal., Ordinances 17.120.050 (a) (2), 17.120.040
San Diego, Cal., Ordinance 141.0306	Vacaville, Cal., Ordinances 14.09.122.020 (A), 14.09.122.040 (F)
San Francisco, Cal., Ordinance 207.2	Vallejo, Cal., Ordinance 16.57.20
San Jose, Cal., Ordinance 20.30.150	Victorville, Cal., Ordinance 16.3.08.050
San Leandro, Cal., Ordinance 2-576	Visalia, Cal., Ordinance 17.12.140 et seq.
San Marcos, Cal., Ordinance 20.92.345	Vista, Cal., Ordinances 18.31.080, 18.31.100
San Mateo, Cal., Ordinance 27.19.040	Walnut Creek, Cal., Ordinance 10-2-3-501-505
San Rafael, Cal., Ordinance 14.16.285	West Covina, Cal., Ordinances 26-685.38 (f) & 26-685.34 (c)
Santa Ana, Cal., Ordinance 41-194.	Westminster, Cal., Ordinance 17.400.135
Santa Barbara, Cal., Ordinances 28.18.075.E; 28.04.605	Whittier, Cal., Ordinance 18.10.020 (I)(8) & (14-15)
Santa Clara, Cal., Ordinance 18.10.030	Yorba Linda, Cal., Ordinances 18.20.820, 18.20.840 (H-J)
Santa Clarita, Cal., Ordinance 17.15N	Yuba, Cal., Ordinance 8.5.5001(f)
Santa Cruz, Cal., Ordinance 24.16 part 2	
Santa Maria, Cal., Ordinance 12.104	
Santa Monica, Cal., Ordinance 129.04.13.040	
Santa Rosa, Cal., Ordinance 20-42.130	
