

# FLORIDA'S ACCESSORY DWELLING UNIT LAWS: MITIGATING FLORIDA'S HOUSING WOES THROUGH STATE-ENCOURAGED EXPANSION OF ADU PERMITTING

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## I. INTRODUCTION

Millions of baby boomers<sup>1</sup> are approaching retirement.<sup>2</sup> Members of this group increasingly find themselves in the following predicament: financially or physically unable to maintain a large, single-family home lifestyle—requiring frequent upkeep and driving—yet unwilling to prematurely give up independence for unfamiliar company and surroundings.<sup>3</sup> Many

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1. The Baby Boomer Generation includes more than seventy-five million people born between 1946 and 1964. *Baby Boomers*, HISTORY.COM, <http://www.history.com/topics/baby-boomers> (last visited Apr. 13, 2017).

2. Patricia E. Salkin, *Where Will the Baby Boomers Go? Planning and Zoning for an Aging Population*, 32 REAL EST. L.J. 181, 181–82 (2003) [hereinafter Salkin, *Baby Boomers*] (citing statistics finding that the nation's elderly population—then 12.4 percent—is anticipated to grow to 20 percent by 2030).

3. ROBIN PAUL MALLOY, LAND USE LAW AND DISABILITY: PLANNING AND ZONING FOR ACCESSIBLE COMMUNITIES 3–5 (2015) (providing various examples of elderly or disabled people struggling to live comfortably due to the traditional ways in which communities are planned and housing is constructed); Patricia E. Salkin, *A Quiet Crisis in America: Meeting the Affordable Housing Needs of the Invisible Low-Income Healthy Seniors*, 16 GEO. J. ON POVERTY L. & POL'Y 285, 286–87 (2009) [hereinafter Salkin, *Quiet Crisis*] (describing how some low-income seniors wish to live independently but lack the funds to do so); Patricia E. Salkin, *Act Now: Accessory Dwelling Units Can Aid in the Intergenerational Housing Crisis*, 1 CAPITAL COMMONS QUARTERLY 13, 13 (2007) [hereinafter Salkin, *Intergenerational Housing Crisis*]. New Yorkers, for example, prefer to “age in place,” staying “in the community they are familiar with and with people who they are familiar with.” *Id.* at 13–14. Yet, financial and physical obstacles—such as declining health and unanticipated home maintenance costs—make staying in place difficult. *Id.* at 13.

young adults,<sup>4</sup> too, are not well suited for single-family homes in the suburbs.<sup>5</sup> Unless “workforce housing”<sup>6</sup> can be found, young adults today are often forced to move back in with family or pay high prices for rental apartments.<sup>7</sup> There is also some evidence that younger generations are less likely than older generations to ever desire the ideal of the single-family home in the suburbs.<sup>8</sup> Instead, newer generations prefer walkability<sup>9</sup> and access over seclusion and quiet.<sup>10</sup> Despite these facts, single-family homes

4. Young adults, for purposes of this Article, generally refer to the “millennial generation,” those currently aged twenty to thirty-six. See Richard Fry, *Millennials Overtake Baby Boomers as America’s Largest Generation*, PEWRESEARCH.ORG (Apr. 25, 2016), <http://www.pewresearch.org/fact-tank/2016/04/25/millennials-overtake-baby-boomers/> (describing the millennial generation as “those ages 18–34 in 2015”).

5. Post-World War II television shows, such as *Leave It to Beaver*, suggest that the ideal American lifestyle comes complete with a single-family home. See generally *Leave It to Beaver* (CBS television series 1957–1963). Only a few decades later, fewer than ten percent of American families fit the seen-on-TV model. STEPHANIE COONTZ, *THE WAY WE NEVER WERE: AMERICAN FAMILIES AND THE NOSTALGIA TRAP* 23 (1993). In fact, whether this “good old days” model ever existed for any substantial amount of time is a point of controversy. See *id.* at 28 (“[T]he 1950s family . . . was also a historical fluke, based on a unique and temporary conjecture of economic, social, and political factors.”).

6. Salkin, *Intergenerational Housing Crisis*, *supra* note 3, at 14 (describing “workforce housing” as affordable housing for young adults).

7. *Id.* (“[Y]oung people leaving school and starting on their careers and families are faced with the reality of lack of housing options. Reports are rampant about college graduates moving back home and married children moving back in with parents (or in-laws) in an effort to save money for a home because the income, debt-load and housing costs are not in balance.”). E.g., Jessica Hartogs, *Study: Record Number of Young Adults Living with Their Parents*, CBS NEWS (Aug. 1, 2013, 5:04 PM), <http://www.cbsnews.com/news/study-record-number-of-young-adults-living-with-their-parents/>.

8. *Millennials Prefer Cities to Suburbs, Subways to Driveways*, NIELSON.COM (Mar. 4, 2014), <http://www.nielsen.com/us/en/insights/news/2014/millennials-prefer-cities-to-suburbs-subways-to-driveways.html>. See *Smart Growth and Economic Success: Investing in Infill Development*, EPA.GOV (Feb. 2014), <http://www2.epa.gov/sites/production/files/2014-06/documents/developer-infill-paper-508b.pdf> (citing research showing that younger generations prefer “walkability”).

9. *Millennials Prefer Cities to Suburbs, Subways to Driveways*, *supra* note 8. Walkability measures how walkable a certain area is—that is, how likely it is that people will walk instead of drive, given the distances between residences and schools, work places, and shopping. See generally *Walkable Neighborhoods*, WALK SCORE, <https://www.walkscore.com/walkable-neighborhoods.shtml> (last visited Apr. 13, 2017).

10. *Millennials Prefer Cities to Suburbs, Subways to Driveways*, *supra* note 8 (“Millennials like having the world at their fingertips. With the resurgence of cities as centers of economic energy and vitality, a majority are opting to live in urban areas over the suburbs or rural communities. Sixty-two percent indicate they prefer to live in the type of mixed-use communities found in urban centers, where they can be close to shops, restaurants and offices. They are currently living in these urban areas at a higher rate than any other generation, and [forty] percent say they would like to live in an urban area in the future. As a result, for the first time since the 1920s growth in U.S. cities outpaces growth outside of them.”). See also *infra* Part II (describing the “new urbanism” movement).

continue to make up the majority of the nation's housing stock.<sup>11</sup> Consequently, many people of varying demographics struggle to find suitable living arrangements.<sup>12</sup>

Accessory dwelling units (ADUs) offer a solution for baby boomers and millennials while simultaneously providing benefits to other generations as well.<sup>13</sup> ADUs are defined as "small, independent living quarters on single-family lots."<sup>14</sup> They are praised for a variety of benefits: they provide affordable housing to populations with low to moderate incomes or on fixed budgets,<sup>15</sup> they provide elderly or disabled populations with accessible living<sup>16</sup> and continued independence,<sup>17</sup> and they provide homeowners with an additional source of income.<sup>18</sup> In addition,

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11. Emily Badger & Christopher Ingraham, *The Most Popular Type of Home in Every Major American City, Charted*, WASH. POST (Sept. 21, 2015), <http://www.washingtonpost.com/news/wonkblog/wp/2015/09/21/the-most-popular-type-of-home-in-every-major-american-city-charted/> (showing how single-family homes maintain a minority of the housing stock in only a few of the nation's largest cities).

12. *See infra* Part III (detailing housing troubles faced by baby boomers and millennials).

13. *See id.* (describing the benefits of ADUs for middle-aged parents, children, the economy, and the ecosystem).

14. Margaret F. Brinig & Nicole Stelle Garnett, *Accessory Dwelling Unit Reforms: Death by a Thousand Paper Cuts?*, 37 No. 4 ZONING AND PLANNING LAW REPORT 1, 1 (2014) [hereinafter Brinig & Garnett, *Thousand Paper Cuts*]. ADUs are sometimes better known as second dwelling units, elder cottages, in-law suites, and granny flats. *Id.* These units are smaller than the main dwellings they sit next to, often only a few hundred to one-thousand square feet in size. *Accessory Dwelling Units: Case Study*, HUDUSER.ORG 3–4, 7, <http://www.huduser.org/portal/publications/adu.pdf> (last visited Apr. 13, 2017) (providing examples of ordinances specifying minimum ADU sizes). ADUs may be interior, attached, or detached. *Id.* This Article generally uses the term to refer to any of these types, but tends to focus on the implications of detached units.

15. John Infranca, *Housing Changing Households: Regulatory Challenges for Micro-Units and Accessory Dwelling Units*, 25 STAN. L. & POL'Y REV. 53, 64 (2014); *infra* Part III (discussing benefits of ADUs).

16. Margaret F. Brinig & Nicole Stelle Garnett, *A Room of One's Own? Accessory Dwelling Unit Reforms and Local Parochialism*, 45 URB. LAW. 519, 532 n.58 (2013) [hereinafter Brinig & Garnett, *Reforms and Local Parochialism*]. "Accessibility" refers to design standards that allow people with disabilities or with limited mobility to get around more easily. *See generally* MALLOY, *supra* note 3, at 6–28 (suggesting various ways communities and local governments might encourage design and construction to promote accessibility).

17. Margaret F. Brinig, *Grandparents and Accessory Dwelling Units: Preserving Intimacy and Independence*, 22 ELDER L.J. 381, 388 (2015) [hereinafter Brinig, *Grandparents*]; *infra* Part III (explaining how ADUs allow elderly residents to live near caregivers, family, and friends without being uprooted).

18. *Infra* Part III (discussing benefits of ADUs).

ADUs promote environmental sustainability by allowing shorter commutes,<sup>19</sup> encouraging infill,<sup>20</sup> and discouraging sprawl.<sup>21</sup>

Despite their numerous benefits, ADUs are illegal by default in many municipalities due to traditional Euclidian zoning laws.<sup>22</sup> Euclidian zoning “supports the view that society functions best when cities and the surrounding land are segregated into districts that strictly limit the uses to which properties there can be put.”<sup>23</sup> A neighborhood zoned “single family,” for example, would generally allow only one home per lot; thus, building a second, detached dwelling on the lot would violate the zoning code.<sup>24</sup> To combat this automatic illegality, various municipalities around the country have amended their zoning laws to permit ADUs.<sup>25</sup> Some states have passed legislation incentivizing local governments to allow ADUs or even prohibiting local governments from completely precluding ADUs.<sup>26</sup>

Florida is one of only a few states to pass legislation that incentivizes municipalities to create ADU permitting ordinances.<sup>27</sup>

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19. *Id.*

20. “Infill . . . is the process of developing vacant or under-used parcels within existing urban areas that are already largely developed.” *Infill Development: Completing the Community Fabric*, MRSC: LOCAL GOV'T SUCCESS, <http://mrsc.org/Home/Explore-Topics/Planning/Development-Types-and-Land-Uses/Infill-Development-Completing-the-Community-Fabric.aspx> (last modified Dec. 22, 2016). Infill development can lessen sprawl by “reduc[ing] development pressure on outlying areas, helping to protect lands that serve important ecological functions.” *Smart Growth and Economic Success: Investing in Infill Development*, *supra* note 8, at 1.

21. Infranca, *supra* note 15, at 54–55. Sprawl generally refers to residential development patterns that push single-family home construction into previously undeveloped, rural areas inhabited by farmland, wildlife, and various ecosystems. John G. Mitchell, *Urban Sprawl*, NAT'L GEOGRAPHIC, available at <http://environment.nationalgeographic.com/environment/habitats/urban-sprawl/#page=7> (last visited Apr. 13, 2017). Such growth patterns have created numerous problems, including the loss of two million acres of open space per year. *Id.*

22. Jaimie Ross, *Accessory Dwelling Units: A Smart Growth Tool for Providing Affordable Housing*, FLORIDA HOUSING COALITION (Aug. 2016), <http://www.flhousing.org/wp-content/uploads/2016/10/Accessory-Dwelling-Units-A-smart-growth-tool-for-providing-affordable-housing.pdf>; Brinig & Garnett, *Thousand Paper Cuts*, *supra* note 14, at 4.

23. Eliza Hall, *Divide and Sprawl, Decline and Fall: A Comparative Critique of Euclidean Zoning*, 68 U. PITT. L. REV. 915, 918 (2007).

24. Ross, *supra* note 22; see, e.g., JACKSONVILLE, FLA., CODIFIED ORDINANCES § 656.304 (2017) (providing permitting by right for “single-family” homes and other enumerated uses in the “rural residential” district).

25. See *infra* Part II (detailing ADU provisions throughout the United States).

26. Infranca, *supra* note 15, at 69; Brinig & Garnett, *Reforms and Local Parochialism*, *supra* note 16, at 534–35; see *infra* Part II (discussing how California, Vermont, and Washington prohibit municipalities from banning ADUs).

27. Fewer than ten other states have enacted similar legislation. Brinig & Garnett, *Thousand Paper Cuts*, *supra* note 14.

In this sense, Florida is ahead of the curve. However, Florida's attempt to expand the use of ADUs through legislation has fallen short:<sup>28</sup> ADUs remain underutilized. In particular, ADUs have not developed in the way the Florida legislature envisioned.<sup>29</sup>

Part II of this Article describes the types of laws, policies, and ways of thinking that tend to hinder ADU growth. It then recounts the ways in which ADUs have managed to grow nationally. Part III of this Article shifts the focus to Florida, explaining how ADUs can benefit state residents. It also addresses ADU opponents' concerns. It then examines the current Florida laws and assesses why the laws fall short of their intended goals. Part IV discusses solutions for how Florida's laws could be improved to encourage more ADU permitting. Ultimately, this Article suggests that Florida create compromise between proponents and opponents of ADUs through amendment of the current laws.

## II. THE GROWTH OF ADUs

### A. Euclidian Zoning Patterns

Euclidian zoning<sup>30</sup> has both created the need for<sup>31</sup> and stymied the potential growth of ADUs.<sup>32</sup> Euclidian zoning is a traditional form of land use planning which “reflects a longstanding value judgment that the appropriate way to order different land uses is to separate them from one another into single-use zones [or districts].”<sup>33</sup> Courts are highly deferential toward local

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28. *Infra* Part III.

29. *Id.*

30. *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365 (1926). This important decision upholding an ordinance that restricted how properties within a municipality could be used gave local governments the “okay” to plan communities as they wished, provided that any laws restricting property use maintained some relation to the “general welfare” and were not “clearly arbitrary and unreasonable.” *Id.* at 380–83, 395, 397. The *Euclid* Court justified its decision by explaining that land use restrictions, such as allowing certain uses in one area and not in others, fall within a local government’s “police power”—the authority to create laws and regulate for the “public welfare.” *Id.* at 387; Hall, *supra* note 23, at 918 n.21.

31. *See infra* notes 39–41 (discussing how ADUs can make better use of underutilized, mandated minimum lot sizes).

32. *See* Brinig & Garnett, *Reforms and Local Parochialism*, *supra* note 16, at 520–21 (“Since zoning laws frequently segregate apartments and single-family homes, and almost always prohibit their co-location on a single residential parcel, reforms authorizing ADUs are necessary to bring these existing ADUs into regulatory compliance and to encourage the construction of more.” (footnotes omitted)).

33. Hall, *supra* note 23, at 918 (quoting Nicole Stelle Garnett, *Ordering (And Order In) The City*, 57 STAN. L. REV. 1, 4 (2004)). *See* Brinig & Garnett, *Reforms and Local*

governments regarding land use issues. Challenged ordinances are reviewed under rational basis review<sup>34</sup> and are rarely invalidated.<sup>35</sup> The justification for such deference lies in the belief that land use and zoning are “intensely local” issues, understood best by the people who reside in the particular municipality at issue.<sup>36</sup>

Euclidian zoning and the judicial deference that accompanies it are blamed for numerous land use patterns posing modern housing difficulties.<sup>37</sup> Neighborhoods are, for the most part, free to implement requirements that by their nature make housing less affordable, resulting in the exclusion of certain classes of people.<sup>38</sup> Minimum lot requirements,<sup>39</sup> for example, require potential

*Parochialism*, *supra* note 16, at 520–21 (discussing the evolution of ADUs over the past decade). Theoretically, a municipality zoned strictly in Euclidian fashion would have no two dissimilar uses side by side: offices would comprise one part of town, businesses another, and residences another, with each district being separated by roads or other markers. *See Contrast with Euclidian Zoning*, 36 N.J. PRAC., LAND USE LAW § 6.3 (“There is no allowance in the Euclidian scheme for situations involving lands having qualities which do not lend themselves to uniform development.”). To accomplish this uniformity, municipalities create “zones” or “districts” where land may be used only for designated purposes. DAVID L. CALLIES, ROBERT H. FREILICH & THOMAS E. ROBERTS, CASES AND MATERIALS ON LAND USE 77–82 (6th ed. 2012) (internal quotation marks omitted).

34. Rational basis review, utilized by the Court in *Euclid* to uphold the Village’s zoning ordinance, “grants great deference to legislative judgments because the link between the means and the purpose of the legislation is satisfied by any conceivable rational basis, regardless of whether it was the actual basis of the legislative action.” Ashira Pelman Ostrow, *Judicial Review of Local Land Use Decisions: Lessons from RLUIPA*, 31 HARV. J.L. & PUB. POL’Y 718, 730 (2008).

35. *Exclusionary Zoning and Equal Protection*, 84 HARV. L. REV. 1645, 1647–49 (1971).

36. *See* Marc B. Mihaly, *Living in the Past: The Kelo Court and Public-Private Economic Redevelopment*, 34 ECOLOGY L.Q. 1, 8–9 (2007) (“The variety and situational nature of land use development frustrate the courts . . . resulting in the inability to form generally applicable rules. Judicial deference, as well as judicial references to the American federalist experiment featuring the states as ‘laboratories,’ may implicitly recognize this varied and intensely local nature of land use.” (internal footnotes omitted)).

37. *See, e.g.*, Hall, *supra* note 23, at 916–17 (blaming Euclidian zoning for sprawl, socioeconomic segregation, and crime rates); *Exclusionary Zoning and Equal Protection*, *supra* note 35, at 1647–49 (blaming exclusionary tactics, like minimum lot sizes, floor area restrictions, and apartment exclusions on the judicial deference that resulted from *Euclid*).

38. *See generally* S. Burlington Cnty. N.A.A.C.P. v. Mt. Laurel Tp., 456 A.2d 390, 411, 415 (N.J. 1983) (detailing the New Jersey Supreme Court’s unprecedented approach to amend such exclusion, requiring that local governments offset exclusionary tactics by providing at least a “fair share” of affordable housing somewhere within each of the states’ municipalities).

39. It is common for municipalities to require that homes be built on lots of large sizes, such as a half-acre or more. *See generally* Susan Ellenberg, *Judicial Acquiescence in Large Lot Zoning: Is It Time to Rethink the Trend?*, 16 COLUM. J. ENVTL. L. 183, 184–86 (1991) (discussing the harms of minimum lot size provisions).

homebuyers to purchase more space than they need,<sup>40</sup> inevitably pricing many out of certain markets.<sup>41</sup>

Though such zoning procedure no longer fits the needs of newer generations<sup>42</sup>—many of whom tend to live alone or in small households,<sup>43</sup> cannot afford to purchase or maintain large homes on large lots,<sup>44</sup> and who want to remain in their communities past retirement-age<sup>45</sup>—it is unlikely zoning patterns will change rapidly. This is because most homeowners would prefer that their local governments continue to employ exclusionary strategies, such as minimum lot sizes in order to maintain the status quo.<sup>46</sup> Indeed, the concerns and opinions of a neighborhood's current

40. Infranca, *supra* note 15, at 86 (stating that “there is evidence that zoning imposes minimum lot sizes larger than what individuals would freely choose”).

41. *Exclusionary Zoning and Equal Protection*, *supra* note 35, at 1645–46 (describing how large minimum lot sizes pose difficulty for home searchers by requiring them to buy more space than needed); *S. Burlington Cnty. N.A.A.C.P.*, 336 A.2d at 717 (“[Many people] cannot afford the only kinds of housing realistically permitted in most places—relatively high-priced, single-family detached dwellings on sizeable lots. . . . [T]he effect of Mount Laurel’s land use regulation has been to prevent various categories of persons from living in the township because of the limited extent of their income and resources.”).

42. Infranca, *supra* note 15, at 54–56 (stating that “[c]hanging household compositions render the existing housing stock inadequate for many households”).

43. As the United States population has increased, the average household size has decreased, and spacious homes have been rendered impractical for many. *U.S. Household and Families: 2010*, CENSUS.GOV (April 2012), <http://www.census.gov/prod/cen2010/briefs/c2010br-14.pdf>; *Accessory Dwelling Units Model State Act and Local Ordinance*, AARP 8, [http://assets.aarp.org/rgcenter/consume/d17158\\_dwell.pdf](http://assets.aarp.org/rgcenter/consume/d17158_dwell.pdf) (last visited Apr. 13, 2017) (stating that households are becoming smaller, in part, because “[p]eople are living longer, more people are staying single longer, and married couples are having fewer children”); Infranca, *supra* note 15, at 57–58.

44. See Brinig & Garnett, *Reforms and Local Parochialism*, *supra* note 16, at 532 (explaining how traditional suburban homes may be too costly or “wasteful” for elderly people to maintain); Salkin, *Intergenerational Housing Crisis*, *supra* note 3, at 14 (explaining how younger Americans are less able to afford traditional suburban homes).

45. See Brinig & Garnett, *Reforms and Local Parochialism*, *supra* note 16, at 532 (explaining that traditional suburbs make it difficult for elderly people to “age in place” because they generally are not “suited for [people] with less mobility”).

46. See *id.* at 522 (describing parochialism in land use as “well documented” and stating that many homeowners are “protective of[] single family residences”). Exacerbating the problems of judicial deference and parochialism is the fact that

the United States practices neolocality, a residence pattern that ‘encourages newly married couples to establish a household independent of either extended family.’ Zoning restrictions serve to encourage and reinforce neolocality, setting limitations on property use from the type of structure that can be built to the number of people who can reside therein.

Jessica Dixon Weaver, *Grandma in the White House: Legal Support for Intergenerational Caregiving*, 43 SETON HALL L. REV. 1, 59 (2013) (internal footnotes omitted).

residents are the driving force behind why legislatures continue to hold firm on such measures.<sup>47</sup>

Many solutions have been proposed to correct such outdated methods of planning stemming from Euclidian tradition.<sup>48</sup> Of these, laws encouraging ADU growth may be one of the more modest, easily managed solutions. This is because ADUs do not require a fresh slate; they can simply supplement zoning and development already in place.<sup>49</sup> Even supplementation, however, requires proactive legislation.<sup>50</sup> Though such legislation is often slowed due to local resistance,<sup>51</sup> certain parts of the United States have seen progress, particularly where state legislatures become involved.

### B. ADU Provisions in the United States: Getting Around *Euclid*

Recognizing the benefits of ADUs, some municipalities began amending their zoning codes<sup>52</sup> to permit ADUs “by right” or otherwise, such as through conditional or special use permitting.<sup>53</sup> Due to local resistance, however, some municipalities only began

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47. Such exclusion is closely related to the “NIMBY,” or “Not In My Backyard” principle. See, e.g., 2 N.Y. ZONING LAW & PRAC. § 20:01 (2015) (discussing reported findings of the Advisory Commission on Regulatory Barriers to Affordable Housing).

48. For example, the new urbanism movement strays from traditional Euclidian zoning models by integrating various land uses, such as by combining shopping, services, and housing in one area. See Brinig & Garnett, *Reforms and Local Parochialism*, *supra* note 16, at 527–28 (describing the new urbanism movement); *New Urbanism Division*, AM. PLAN. ASS’N, <https://www.planning.org/divisions/newurbanism/> (last visited Apr. 13, 2017) (describing the need to depart from “restrictive conventional” zoning). New urbanists have, in addition, suggested increasing the use of ADUs. Brinig & Garnett, *Reforms and Local Parochialism*, *supra* note 16, at 529.

49. See Ross, *supra* note 22, at 17 (stating that ADUs are “built where there is existing infrastructure, making greater use of the already developed land”); Brinig & Garnett, *Reforms and Local Parochialism*, *supra* note 16, at 522 (stating that ADUs “represent an excellent vehicle for overcoming [local] parochialism . . . [because they] preserve the zoning pattern preferred by most homeowners—that is, those dominated by, and protective of, single family residences”).

50. See *supra* note 22 and accompanying text (explaining how most current zoning automatically disallows the addition of ADUs).

51. Discussed *infra* Part III.

52. Brinig & Garnett, *Reforms and Local Parochialism*, *supra* note 16, at 556–57; Weaver, *supra* note 46, at 61. For example, Fauquier County, Virginia provides an “administrative permit for an Efficiency Apartment.” *Accessory Dwelling Units: Case Study*, *supra* note 14.

53. Conditional or special use permitting “introduces some flexibility to a fairly static and rigid Euclidean zoning scheme” by requiring a “case-by-case evaluation by an administrative zoning body” to determine whether a specific use is in fact compatible with its surroundings. CALLIES, FREILICH & ROBERTS, *supra* note 33, at 123 (internal quotation marks omitted).



permitting after state governments stepped in and either passed legislation encouraging local governments to permit ADUs or passed legislation prohibiting local governments from entirely excluding ADUs.<sup>54</sup> Five states have created laws incentivizing municipalities to create ADU permitting procedures.<sup>55</sup> Only California, Vermont, and Washington prohibit municipalities from entirely excluding ADUs.<sup>56</sup>

### 1. Solutions and Sidesteps

California has remained a leader in providing expansive protections for ADUs since the initial enactment of a 1982 statute that “forbade [municipalities from enacting] ordinances precluding [ADUs],”<sup>57</sup> unless the municipality could show that allowing ADUs “may limit housing opportunities of the region” and could create “specific adverse impacts on the public health, safety, and welfare.”<sup>58</sup> A 2003 amendment of the law provided further protection for ADUs by requiring municipalities to “either adopt an ADU ordinance incorporating certain requirements[,] . . . implement a state legislative scheme, or demonstrate that a local ADU ordinance would actually limit housing opportunities.”<sup>59</sup> The amendment further required a ministerial permitting process for all ADU applications, regardless of whether a municipality enacted its own ADU ordinance and regardless of any “local ordinance regulating the issuance of variances or special use permits.”<sup>60</sup> Ministerial permitting—in contrast to discretionary permitting—is designed to minimize local parochialism<sup>61</sup> and

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54. Infranca, *supra* note 15, at 69; Brinig & Garnett, *Reforms and Local Parochialism*, *supra* note 16, at 534–35.

55. Brinig & Garnett, *Reforms and Local Parochialism*, *supra* note 16, at 536. Florida, Hawaii, Maryland, Massachusetts, and Rhode Island each passed legislation encouraging municipalities to permit them. *Id.* at 521 n.14, 536.

56. *Id.* at 535–36. “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.” *Id.* at 536. (internal citation omitted). Washington has gone a bit further and taken the unusual step of “requir[ing] that [local] governments incorporate provisions allowing accessory apartments.” *Id.* at 535–36 (internal citations omitted).

57. Brinig & Garnett, *Thousand Paper Cuts*, *supra* note 14, at 4.

58. *Id.* (internal quotation marks omitted).

59. *Id.*; CAL. GOV’T CODE § 65852.2(a)(3) (2003) (amended Jan. 2017).

60. CAL. GOV’T CODE § 65852.2(a)(3) (2003) (amended Jan. 2017).

61. California adopted a mandatory ministerial permitting process because “state legislation reflected a concern that [local government officials] might abuse . . . approval power by requiring that ADU approval be discretionary.” Brinig & Garnett, *Reforms and Local Parochialism*, *supra* note 16, at 541–42, 545, 567.

“improve certainty and predictability”<sup>62</sup> by requiring that decision-makers adhere to a checklist of “predictable, objective, fixed, quantifiable and clear standards.”<sup>63</sup> Initially, California’s expansive pro-ADU provisions appeared to leave no question that local California governments should embrace ADUs. Yet, not all California cities welcomed the spirit of California’s ADU legislation. Some local California governments “imbedded many costly regulatory requirements . . . that dramatically curtail[ed] the likelihood that ADUs w[ould] actually be developed.”<sup>64</sup> For example, some municipalities required “costly off street parking” and “limits on the ability of owners to lease ADUs.”<sup>65</sup>

California most recently amended its ADU regulatory scheme in January 2017.<sup>66</sup> The 2017 amendments appear to strengthen protection of ADUs by further restricting municipal regulatory authority in certain regards. The statute keeps in place the mandated ministerial permitting process<sup>67</sup> and deletes language formerly allowing municipalities to enact ordinances precluding ADUs if justified by findings that such may “limit housing opportunities” and create “specific adverse impacts on the public health, safety, and welfare that would result from allowing” ADUs.<sup>68</sup> The amended statute does not require municipalities to

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62. Memorandum from Cathy E. Creswell, Deputy Director, Division of Housing Policy Development, to Planning Directors and Interested Parties, *Second-Unit Legislation Effective January 1, 2003 and July 1, 2003* at 5 (Aug. 6, 2003), available at [http://abag.ca.gov/planning/housingneeds/pdf/secondunits/hpd\\_memo\\_ab1866.pdf](http://abag.ca.gov/planning/housingneeds/pdf/secondunits/hpd_memo_ab1866.pdf).

63. *Id.*

64. Brinig & Garnett, *Reforms and Local Parochialism*, *supra* note 16, at 541, 546–47.

65. *Id.* at 547. Other local requirements included “minimum lot size requirements,” “restrictions on the maximum size of the ADU,” and “design requirements.” *Id.*

66. CAL. GOV’T CODE § 65852.2 (West 2017).

67. CAL. GOV’T CODE §§ 65852.2(a)(3), (4). The Statute also adds the following language:

[ADU ordinances] shall provide an approval process that includes only ministerial provisions for the approval of accessory dwelling units and shall not include any discretionary processes, provisions, or requirements for those units. . . . In the event that a local agency has an existing accessory dwelling unit ordinance that fails to meet the requirements of this subdivision, that ordinance shall be null and void upon the effective date of the act adding this paragraph and that agency shall thereafter apply the standards established in this subdivision for the approval of accessory dwelling units, unless and until the agency adopts an ordinance that complies with this section.

*Id.* § 65852.2(a)(4).

68. Brinig & Garnett, *Thousand Paper Cuts*, *supra* note 14, at 4 (internal citation and quotation marks omitted); *Accessory Dwelling Unit Memorandum*, CAL. DEP’T OF HOUS. & COMMUNITY DEV. at 22 (Dec. 2016), available at <http://www.hcd.ca.gov/policy-research/docs/2016-12-12-ADU-TA-Memo.docx.pdf>.

enact ADU ordinances; however, a municipality that chooses to enact an ADU ordinance must comply with certain requirements, including that it “[d]esignate areas . . . where accessory dwelling units may be permitted.”<sup>69</sup> The “designation of areas may be based on criteria, that may include, but are not limited to, the adequacy of water and sewer services and the impact of [ADUs] on traffic flow and public safety.”<sup>70</sup> The amended statute further requires that local parking requirements “shall not exceed one parking space per unit or per bedroom.”<sup>71</sup> Municipalities are prohibited from imposing parking restrictions for an ADU if the ADU is located “within one-half mile of public transit” or “within an architecturally and historically significant” district, is “part of the existing primary residence or an existing accessory structure,” or when “on-street parking permits are required but not offered to the occupant of” the ADU or if “a car share vehicle [is] located within one block” of the ADU.<sup>72</sup> Municipal ordinances which do not comport with the new amended statute are “null and void” as of January 2017.<sup>73</sup>

As the 2017 amendments are new, time is needed to tell whether the law will sufficiently remedy the prior gaps in the legislation and generate greater expansion of ADUs as intended by state legislators.<sup>74</sup> For now, however, California clearly stands firm behind the use of ADUs as a tool to help rectify the state’s housing shortage.<sup>75</sup>

Predictably, research revealed no legislation in any state that mandates or recommends that municipalities *ban* ADUs. However, municipalities in states that do not have laws prohibiting the exclusion of ADUs are free to leave local zoning codes in place (potentially excluding ADUs by default due to Euclidian zoning

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69. CAL. GOV'T CODE § 65852.2(a)(1) (“A local agency may, by ordinance, provide for the creation of accessory dwelling units in single-family and multifamily residential zones. The ordinance shall do all of the following: (A) Designate areas within the jurisdiction of the local agency where accessory dwelling units may be permitted.”).

70. *Id.* § 65852.2(a)(1)(A).

71. *Id.* § 65852.2(a)(1)(D)(x)(I).

72. *Id.* §§ 65852.2(d)(1)–(5).

73. *Accessory Dwelling Unit Memorandum*, *supra* note 68, at 5, 8.

74. *See id.* at 7 (“ADU law and recent changes intend to address barriers, streamline approval and expand potential capacity for ADUs recognizing their unique importance in addressing California’s housing needs.”).

75. *See supra* note 57 and accompanying text (examining California’s role in the national ADU reform movement).

provisions)<sup>76</sup> or ban ADUs outright through a municipal ordinance.<sup>77</sup> Thus, proponents of ADUs continue to advance the suggestion of state legislation in order to encourage use of the units.<sup>78</sup>

## 2. A Model Solution

Drawing from the most effective state and local pro-ADU provisions available at the time, the American Association of Retired Persons (AARP) and the American Planning Association created a permitting guide for municipalities and states, entitled the *Accessory Dwelling Units Model State Act and Local Ordinance*.<sup>79</sup> The publication recognizes that ADUs “can be a valuable addition to a community’s housing stock”<sup>80</sup> and states that “[the] guide [is] for communities that want to make the benefits of ADUs available to households of all ages.”<sup>81</sup> The publication recommends that state acts strongly encourage (not mandate) municipalities to adopt ADU permitting ordinances.<sup>82</sup> Like the prior California law, the model state act suggests enacting a provision which states that “[n]o municipality shall adopt an ordinance that totally prohibits ADUs,” unless the municipality can explain its reasoning.<sup>83</sup> The model state act allows

76. See *supra* Part II(A) (explaining how Euclidian zoning excludes ADUs).

77. See, e.g., Ben Kleine, *New Accessory Dwelling Units Banned in Parker*, NEWS HERALD, <http://www.newsherald.com/1.454533> (last updated Mar. 22, 2015, 2:22 PM) (banning ADUs in Parker, Florida); VILL. OF PLEASANT PRAIRIE, WIS., CODIFIED ORDINANCES §§ 420–30 (2005) (“[A]ccessory structures shall not be used as a dwelling unit.”).

78. Brinig & Garnett, *Reforms and Local Parochialism*, *supra* note 16, at 527.

79. *Accessory Dwelling Units Model State Act and Local Ordinance*, *supra* note 43, at 5.

80. *Id.*

81. *Id.*

82. *Id.* at 17–18. Neither California nor Florida currently mandate that municipalities proactively adopt their own ADU ordinances. See *supra* notes 57–75 (California law) and *infra* notes 136–155 (Florida law).

83. Compare CAL. GOV’T CODE § 65852.2(c) (2003) (amended Jan. 2017) (formerly stating that “no local agency shall adopt an ordinance which totally precludes second units within single-family or multifamily zoned areas unless the ordinance contains findings acknowledging that the ordinance 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 the ordinance”), with *Accessory Dwelling Units Model State Act and Local Ordinance*, *supra* note 43, at 21 (stating that “[n]o municipality shall adopt an ordinance that totally prohibits ADUs within single-family or multi-family zoned areas unless [it finds that doing so may] limit housing opportunities[,] . . . [have] specific adverse impacts on the . . . single-family and multi-family zoned areas[,] . . . [and] [e]xplains why such units

municipalities to determine in what areas ADUs will be permitted, and offers guidelines for how to make those determinations.<sup>84</sup> It encourages the creation of an approval process and discusses the differences between permitting by right and permitting by using a conditional permitting process.<sup>85</sup> The model local ordinance also suggests that municipalities choose from optimal, favorable, and minimal provisions drafted in the model.<sup>86</sup>

Pro-ADU legislation is slowly gaining traction, providing more housing options<sup>87</sup> to people who might otherwise be displaced. Future ADU law drafters may do well to draw from the model provisions, above, as well as any lessons learned from previously enacted state or municipal law.

### III. ADUs IN FLORIDA

#### A. The Need for ADUs in Florida

Legislation encouraging ADUs has likely picked up due to the myriad of benefits the units provide, such as affordable housing and continued independent living. In fact, more common use of ADUs would be of particular benefit to Florida residents. As the third most populous state in the nation,<sup>88</sup> Florida stands to benefit greatly from ADUs because of its continued growth.<sup>89</sup>

ADUs have the potential to benefit specific Florida generations, beginning with the retired and elderly. People aged sixty-five and older make up 17.3 percent of Florida's population.<sup>90</sup>

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cannot be accommodated within the present utility and service capacities of existing single-family neighborhoods"). The AARP Model Act takes the position that its provision is stronger (more protective of ADUs) than California's prior law because the Model Act requires municipalities to justify its position with technical reports. *Accessory Dwelling Units Model State Act and Local Ordinance*, *supra* note 43, at 21.

84. *Accessory Dwelling Units Model State Act and Local Ordinance*, *supra* note 43, at 17–18.

85. *Id.* at 18.

86. *Id.* at 28–29.

87. *See Accessory Dwelling Units: Case Study*, *supra* note 14, at 3–7 (showing how successful ADU ordinances have created an increase in permit applications).

88. *Florida Passes New York to Become the Nation's Third Most Populous State*, *Census Bureau Reports*, U.S. CENSUS BUREAU (Dec. 23, 2014), available at [www.census.gov/newsroom/press-releases/2014/cb14-232.html](http://www.census.gov/newsroom/press-releases/2014/cb14-232.html).

89. *Id.*

90. *Florida's Economic Future and the Impact of Aging*, FLA. LEGISLATURE OFF. OF ECON. & DEMOGRAPHIC RES. 5 (Mar. 17, 2014), [http://edr.state.fl.us/Content/presentations/economic/FlEconomicFuture&theImpactofAging\\_3-17-14.pdf](http://edr.state.fl.us/Content/presentations/economic/FlEconomicFuture&theImpactofAging_3-17-14.pdf) (explaining that in 2010, Florida had the greatest number and percentage of people aged sixty-five and older of all states that had a median age of forty or above); Stanley K. Smith, *The Baby*

This number is expected to *double* by 2040.<sup>91</sup> How Florida will find appropriate housing for so many elderly residents is an anticipated challenge,<sup>92</sup> particularly since most want to “age in place.”<sup>93</sup>

[Older adults] would choose not to move to retirement havens, elder communities, and certainly not to nursing homes. As long as they are able, they would like to remain in familiar surroundings with their longtime neighbors and cherished possessions. This is closely associated with the elderly’s desire to maintain independence with its associated trappings—the driver’s license, the set of keys, the small patch of land in which to garden. But the housing in which they live may not be suited for one with reduced mobility and may be too expensive (and wasteful) to maintain.<sup>94</sup>

A small, detached unit built on the same lot as a current single-family home is one solution. Rather than move to an unfamiliar, manufactured setting,<sup>95</sup> retirement-age adults can do any of the following: build an ADU on their own property and rent either it or the main dwelling to supplement a fixed income;<sup>96</sup> move into an ADU on a friend or relative’s property;<sup>97</sup> or build an ADU

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*Boom and the Aging of Florida’s Population*, BUREAU OF ECON. & BUS. RES., U. OF FLA. (Feb. 25, 2015), <https://www.bebr.ufl.edu/population/website-article/baby-boom-and-aging-florida%E2%80%99s-population>:

[T]he greatest impact . . . may be yet to come—especially in retirement states such as Florida. The huge national increase in the number of people in their [fifties, sixties], and [seventies] over the next several decades will lead to substantial increases in the number of older persons moving to Florida. . . . [L]arge increases in Florida’s older population between 2010 and 2050 [are projected]. The proportion aged [sixty-five plus], which fluctuated between 17 and 18 [percent] between 1990 and 2010, is projected to increase to 21.7 [percent] by 2020, to 25.7 [percent] by 2030, and to 26.6 [percent] by 2050.

*E.g.*, Salkin, *Baby Boomers*, *supra* note 2, at 182.

91. *Florida’s Economic Future and the Impact of Aging*, *supra* note 90, at 11.

92. Smith, *supra* note 90. *See generally* Salkin, *Baby Boomers*, *supra* note 2, at 183 (discussing influential factors).

93. Brinig, *Grandparents*, *supra* note 17, at 387.

94. *Id.* at 387–88.

95. Weaver, *supra* note 46, at 60 (“ADUs allow aging grandparents who may be exhibiting some health issues to maintain a level of independence without the high costs of moving to assisted living and nursing home environments.”).

96. Tom Sightings, *Get Extra Income from Real Estate*, U.S. NEWS & WORLD REPORT (Mar. 4, 2014, 10:36 AM), <http://money.usnews.com/money/blogs/on-retirement/2014/03/04/get-extra-income-from-real-estate> (suggesting that retirees supplement income through real estate investments).

97. *See* Brinig & Garnett, *Reforms and Local Parochialism*, *supra* note 16, at 529–30 (stating that ADUs “enable age integration by enabling older Americans to remain independent longer than they might if independence required upkeep on a single-family

on their own property to allow relatives or caregivers to move into it or the main dwelling.<sup>98</sup> Each option provides some solution for continued independence, increasing the likelihood that an elderly resident will be able to age in place.

Florida's middle-age population can potentially benefit from an elderly parent's use of an ADU because of the support and help elderly parents may provide to their families.<sup>99</sup> For example, grandparents can provide security and care for grandchildren who may otherwise not have had supervision because their parent is working.<sup>100</sup>

One might assume that a family choosing to take care of an elderly relative or seeking help with childrearing from a grandparent can simply have the older person move in to the main dwelling. While this may sometimes be appropriate, studies show families are often happier with and more appreciative of one another when they have the opportunity to retreat to their own space.<sup>101</sup> At least one study shows that “[w]hile living *with* one's adult children seems to signal a decline in health, living *close to*, but not with, one's children, *positively* affects the elderly person's health and longevity.”<sup>102</sup> Such living arrangements are likely better for middle-aged adults as well, who may perceive that they are “[t]aking care of both minor children and elderly parents[,

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home”). Renting an ADU might allow such a person to downsize while continuing “to live in the community they are familiar with and with people who they are familiar with.” Salkin, *Intergenerational Housing Crisis*, *supra* note 3, at 13–14. Similarly, those with declining health conditions that “do not necessitate moves to assisted living and nursing home environments” can maintain independence by living near family. *Id.* at 13.

98. *Accessory Dwelling Units Model State Act and Local Ordinance*, *supra* note 43, at 10 (giving an example of an elderly “homeowner with Alzheimer's [who] was able to trade ADU quarters for medical services from an ADU tenant, a nurse, who was also delighted by the arrangement”).

99. Brinig, *Grandparents*, *supra* note 17, at 382 (“Families with children can take advantage of the child care, good advice, and love provided by their parents without suffering the inconvenience of sharing homes with them.”).

100. *Id.* at 387–40; Weaver, *supra* note 46, at 10–11 (“Grandparents' roles in the lives of their families have been increasing over the last decade. A record forty-nine million Americans [or 16.1 percent] live in a family household that contains at least two adult generations, or a grandparent and at least one other generation.”); Frank Bass, *Fewer Home Alone as Census Sees 39% Drop in Latchkey Kids*, BLOOMBERG (June 11, 2013, 12:00:01 AM EDT), <http://www.bloomberg.com/news/articles/2013-06-11/fewer-home-alone-as-census-sees-39-drop-in-latchkey-kids> (stating that at least one in four parents, nationally, have grandparents or other relatives help take care of children after school).

101. See Brinig, *Grandparents*, *supra* note 17, at 389–91 (examining statistics to determine the sociological effects of older residents living with versus near younger family members).

102. *Id.* at 392–93 (emphasis added).

which] undoubtedly adds stress.”<sup>103</sup> Thus, it seems ADUs provide the best compromise by allowing both independence and caregiving in measured doses.<sup>104</sup>

Florida’s younger generations also stand to gain from easier access to ADUs. Housing options for millennials and low to middle-income households are not bountiful in Florida,<sup>105</sup> and the state has somewhat of a reputation for chasing away young people.<sup>106</sup> This is problematic because young people may leave familiar places and bring their skills and abilities to more affordable or welcoming cities.<sup>107</sup> ADUs would provide affordable housing and an incentive for young people to stay,<sup>108</sup> which, in turn, would benefit the Florida market.

In addition to paying rent at an affordable rate, the young person may have the benefit of becoming part of a community that might otherwise be out of their price range. For example, an ADU vacancy might allow a teacher to move into the district where he or she works, rather than have to commute a long distance due to lack of affordability.<sup>109</sup> The ability to build a second unit may even encourage some to become homeowners<sup>110</sup>—current and aspiring Florida property owners may feel better about such an investment if they are allowed to supplement their income with rent.<sup>111</sup>

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103. *Id.* at 384.

104. *Id.* at 381–82.

105. See Kathryn Vasel, *Most and Least Affordable Rental Markets for New Grads*, CNN MONEY (May 20, 2015, 10:23 AM ET), [http://money.cnn.com/2015/05/20/real\\_estate/least-affordable-rental-markets/](http://money.cnn.com/2015/05/20/real_estate/least-affordable-rental-markets/) (listing Tampa and Miami as two of the least affordable cities for recent graduates among the twenty-five largest housing markets in the United States).

106. See, e.g., Deborah Acosta, *Brain Drain? Many Young South Floridians Seek Brighter Economic Prospects Elsewhere*, MIAMI HERALD (Dec. 12, 2011, 5:00 AM), <http://www.miamiherald.com/news/local/community/miami-dade/article1939204.html> (detailing the local trend).

107. *Id.*; Jacob Davidson, *The 15 Most Affordable Cities for Millennials*, TIME (Aug. 3, 2014), <http://time.com/money/3070910/15-most-affordable-cities-millennials/>.

108. George W. Liebmann, *Suburban Zoning—Two Modest Proposals*, 25 REAL PROP. PROB. & TR. J. 1, 6–7 (1990); Infranca, *supra* note 15, at 55 (“[M]icro-units a[re] a means through which expensive cities can attract and retain young professionals.”).

109. See *Accessory Dwelling Units*, MASS.GOV, [http://www.mass.gov/envir/smart\\_growth\\_toolkit/pages/mod-adu.html](http://www.mass.gov/envir/smart_growth_toolkit/pages/mod-adu.html) (last visited Apr. 13, 2017) (explaining how ADUs can provide housing for teachers and other public sector employees who might not otherwise be able to afford living in the area where they work).

110. See William E. Gibson, *Florida Home Ownership Stays Low*, SUNSENTINEL (Aug. 3, 2013), [http://articles.sun-sentinel.com/2013-08-03/news/fl-home-ownership-bust-20130804\\_1\\_home-ownership-homeownership-rate-mike-larson](http://articles.sun-sentinel.com/2013-08-03/news/fl-home-ownership-bust-20130804_1_home-ownership-homeownership-rate-mike-larson) (discussing the recent downturn in home ownership).

111. Infranca, *supra* note 15, at 82.



Besides housing, ADUs provide more subtle, but important, benefits. Florida is a known offender of sprawl and maintains other environmental issues.<sup>112</sup> ADUs can preserve Florida's environment by preserving open space; rather than continue to build into untouched areas (creating sprawl), new housing can be accomplished by the process of infill.<sup>113</sup>

### B. Addressing Opponent Concerns

ADUs are not without their critics. Like other innovative land use proposals, ADUs have garnered outspoken opponents who worry about the effect new development may have on their neighborhoods. Some of these opponent concerns predictably smell of protectionism and "NIMBYism"<sup>114</sup>—the kind of thinking that tends to reinforce Euclidian zoning norms and encourage maintenance of the status quo.<sup>115</sup> These concerns, as well as some of opponents' more rational concerns, may be rebutted. Still other concerns, though well founded, can be assuaged through compromise.<sup>116</sup>

One primary concern among opponents is that allowing a permitting process for ADUs will result in "massive overhaul of the [local] zoning code[s]" and "harm to neighborhood character."<sup>117</sup> This contention is easily rebutted. As mentioned earlier, ADU inclusion is one of the more mild alternatives to Euclidian zoning because it supplements patterns already in existence.<sup>118</sup> Nothing about an ADU permitting process would have the power to substantially affect a local government's zoning procedure; in fact, most zoning codes already allow some accessory structures (like garages or sheds) "by right" or through a conditional use process.<sup>119</sup> An ADU permitting process would simply add to local

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112. See John Kennedy, *Florida's Booming Population Risks Sprawl Ahead*, PALM BEACH POST (Sept. 15, 2016, 5:26 PM), <http://www.mypalmbeachpost.com/news/state-regional-govt-politics/florida-booming-population-risks-sprawl-ahead/IK6i44kzQm1nessXosyxcJ/> (discussing current and potential issues for sprawl in Florida).

113. Infranca, *supra* note 15, at 54–55; Dawn Withers, Article, *Looking for a Home: How Micro-Housing Can Help California*, 6 GOLDEN GATE U. ENVTL. L.J. 125, 139–44 (2012).

114. See *supra* note 47 (explaining that NIMBY is an acronym for "not in my back yard").

115. See *supra* Part II (describing Euclidian zoning, exclusionary tactics, and the NIMBY relation).

116. *Infra* Part IV.

117. Brinig & Garnett, *Reforms and Local Parochialism*, *supra* note 16, at 550.

118. *Supra* note 49 and accompanying text.

119. See *supra* Part II (describing zoning techniques throughout the nation).

government's flexibility to plan. In addition, the units themselves can hardly be considered novel or extraordinary: ADUs were once commonplace in American towns.<sup>120</sup> As such, it is also very unlikely that the addition of ADUs would result in a substantial change to a neighborhood. Because they are small and may be required to match the materials and colors of the main dwelling,<sup>121</sup> ADUs hardly appear out of the ordinary and may even "offer hidden density [because they are] not readily apparent from the street."<sup>122</sup>

ADU opponents also point to concerns about overcrowding, heavier traffic, congested parking, and burdens on infrastructure.<sup>123</sup> These concerns are more practical, but also are likely misplaced due to the changing nature of modern households.<sup>124</sup> There are few studies analyzing the effect of ADUs on neighborhoods, making it difficult to conclude definitively whether opponents' concerns will ever come to fruition.<sup>125</sup> However, the "[e]xisting research . . . suggests that ADUs have less of an effect on neighborhoods than critics expect."<sup>126</sup>

Due to the fact that data on this point is lacking, opponents may have a valid concern assuming that density has the potential to increase past what current planning provides. However, this can be managed. A forward-thinking compromise between proponents and opponents of ADUs—for example, state-funded infrastructure

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120. *Accessory Dwelling Units: Case Study*, *supra* note 14, at 1 (describing ADUs as a "common feature in single-family housing" before World War II).

121. Discussed *infra* Part IV.

122. Infranca, *supra* note 15, at 55 n.5 (quoting Karen Chapple et. al., Ctr. For Community Innovation at the Inst. Of Urban and Regional Development, *Yes in My Backyard: Mobilizing the Market for Secondary Units* 1 (2011)).

123. Infranca, *supra* note 15, at 65–66.

124. *Infra* note 126.

125. Infranca, *supra* note 15, at 66.

126. *Id.* at 66–67. Perhaps this has something to do with the fact that U.S. households are smaller than ever. "In 2010, 31.2 million households consisted of one person living alone. This represents a 4.0 million increase in one-person households since 2000." *U.S. Household and Families: 2010*, *supra* note 43, at 9 (internal footnote omitted); Infranca, *supra* note 15, at 58. Consequently, it might be argued that the overall decrease in household size offsets any gain made by one or two people occupying an ADU. *U.S. Household and Families: 2010*, *supra* note 43, at 6 (showing that the traditional "[h]usband-wife family household" decreased from 55.2 percent of families in 1990 to 48.4 percent of families in 2010); Infranca, *supra* note 15, at 56–58 (describing the "mismatch" between homes and households). *See also supra* notes 39–41 (describing how people are often forced to buy lots larger than they would choose).

or transportation studies—may ease concern and keep the door open for ADUs.<sup>127</sup>

The final concern of ADU opponents includes worries about transient neighbors and the potential for crime.<sup>128</sup> For example, residents may want assurance that their neighbors are not renting units on a nightly basis or to traveling guests.<sup>129</sup> This, too, is manageable and may be addressed with legislation, as discussed below.

There is a final argument that cuts against the concerns of opponents: ADUs are steadily being built, despite zoning laws that render them incompatible.<sup>130</sup> Knowingly or unknowingly, thousands of U.S. residents violate local law by building ADUs.<sup>131</sup> The concern with these units is, of course, safety. Because the units are built surreptitiously, communities do not check them for code compliance.<sup>132</sup> Creating a permitting process for ADUs would result in substantially safer dwellings while simultaneously addressing opponents' concerns: housing officials would ensure an ADU met housing codes and other safety requirements,<sup>133</sup> while zoning officials would ensure that the ADU aesthetically matched the principal dwelling<sup>134</sup> and complied with other predetermined standards.

The potential benefits of ADUs far outweigh any perceived negatives. This is particularly true when one considers that a permitting process would only serve to regulate and bring into

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127. *Infra* Part IV.

128. Brinig & Garnett, *Reforms and Local Parochialism*, *supra* note 16, at 550.

129. *See, e.g.*, Josh Boatwright, *Web-based Room Rentals Enrich Some Tampa Area Homeowners, Anger Others*, TBO.COM (May 26, 2015), <http://www.tbo.com/news/business/web-based-room-rentals-enrich-some-tampa-area-homeowners-anger-others-20150526/> (raising resident concerns about frequent neighborhood rentals).

130. Withers, *supra* note 113, at 132–33 (stating that thousands of units in California—prior to the more recent amendments of the state ADU statute—have been built illegally); Brinig & Garnett, *Reforms and Local Parochialism*, *supra* note 16, at 537 (discussing illegal ADU units, including an estimated 115,000 built in New York City between 1990 and 2000).

131. Withers, *supra* note 113, at 132–33; Brinig & Garnett, *Reforms and Local Parochialism*, *supra* note 16, at 547–48; Infranca, *supra* note 15, at 54, 77–78; Michele Lerner, *Demand Rises for Properties That Can House More Than One Generation*, WASH. POST (Sept. 30, 2015), [http://www.washingtonpost.com/realestate/demand-rising-for-properties-that-can-house-more-than-one-generation/2015/09/29/9d6f7042-50bd-11e5-8c19-0b6825aa4a3a\\_story.html](http://www.washingtonpost.com/realestate/demand-rising-for-properties-that-can-house-more-than-one-generation/2015/09/29/9d6f7042-50bd-11e5-8c19-0b6825aa4a3a_story.html).

132. Withers, *supra* note 113, at 133.

133. *Id.*

134. *See Accessory Dwelling Units Model State Act and Local Ordinance*, *supra* note 43, at 42–43 (providing for a provision where zoning officials may require certain aesthetic standards).

compliance what is happening out of sight.<sup>135</sup> As such, Florida should encourage the increased permitting and use of ADUs whenever feasible.

### C. The Florida ADU Laws

Florida's current legislation encourages—rather than mandates—municipalities to permit ADUs.<sup>136</sup> In 2002, Florida voters passed a constitutional amendment encouraging municipalities to provide tax incentives to homeowners who build ADUs by “[a]llowing [those] who add living quarters for a parent or grandparent to have all or part of the value of the new construction deducted from their assessment.”<sup>137</sup>

In 2004, the Florida legislature added section 163.31771 to Title XI of Chapter 163 of the Florida Statutes “to promote the use of accessory dwelling units as an affordable rental option for very-low-, low- and moderate-income residents.”<sup>138</sup> The Statute provides that Florida’s “local government[s] may adopt an ordinance to allow accessory dwelling units in any area zoned for single-family residential use.”<sup>139</sup> It encourages municipalities to create such ordinances by allowing a municipality’s ADU count—if constructed in accordance with section 163.31771—to “apply [the ADU units] toward satisfying the affordable housing component of the housing

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135. Withers, *supra* note 113, at 133.

136. See FLA. STAT. § 163.31771(1) (2016) (“[T]he Legislature finds that it serves an important public purpose to encourage the permitting of accessory dwelling units in single-family residential areas. . . .”); *Id.* § 193.703(1) (explaining how counties may approach reductions in assessment for living quarters of parents or grandparents).

137. Ronald H. Kauffman, *Bleeding Grandparent Visitation Rights*, 86-OCT FLA. B.J. 42, 46 n.54 (2012); FLA. STAT. § 193.703:

[A] county may provide for a reduction in the assessed value of homestead property which results from the construction or reconstruction of the property for the purpose of providing living quarters for one or more natural or adoptive parents or grandparents of the owner of the property or of the owner’s spouse if at least one of the parents or grandparents for whom the living quarters are provided is at least 62 years of age [and that such a] reduction may be granted . . . only to the owner of homestead property where the construction or reconstruction is consistent with local land development regulations.

138. FLA. DEPT OF COMMUNITY AFF., ACCESSORY DWELLING UNITS REPORT TO THE FLORIDA LEGISLATURE 2–3 (2007). The Statute defines an ADU as “an ancillary or secondary living unit, that has a separate kitchen, bathroom, and sleeping area, existing either within the same structure, or on the same lot, as the primary dwelling unit.” FLA. STAT. § 163.31771(2)(a).

139. FLA. STAT. § 163.31771(3).

element in the local government's comprehensive plan."<sup>140</sup> The Statute further requires that any ordinance adopted pursuant to the Statute require an affidavit from the applicant "attest[ing] that the unit will be rented at an affordable rate to an extremely-low-income, very-low-income, low-income, or moderate-income person."<sup>141</sup>

In 2014, Florida Senator Wilton Simpson proposed a bill that would "authorize" property owners to build ADUs for disabled or elderly family members, even if local ordinances or comprehensive plans provided that property owners may not do so.<sup>142</sup> The bill died in the Senate.<sup>143</sup>

A 2007 report to the Florida legislature evaluating the effects of section 163.31771 indicated that in the three years since its passage by municipalities, the 2004 law was not followed in the way that the Florida Legislature had hoped.<sup>144</sup> The report found that just 44 of the 290 Florida municipalities studied permitted rentals of ADUs.<sup>145</sup> Other municipalities explicitly banned ADUs by ordinance, did not adopt provisions to overcome traditional zoning that disallowed them, or permitted ADUs but did not allow them to be rented.<sup>146</sup> Only one municipality enacted an ADU permitting ordinance explicitly furthering the aims of section 163.31771, to provide for affordable housing.<sup>147</sup>

Florida municipalities that do provide for ADU permitting vary widely in their processes for doing so. For example, Hillsborough County, Florida allows ADUs by special use permit,

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140. *Id.* § 163.31771(5). Other state law mandates that Florida municipalities describe in the "housing element" of their comprehensive plans how they will consider providing affordable housing. *See Id.* § 163.3177(6)(f).

141. *Id.* § 163.31771(4); FLA. DEP'T OF COMMUNITY AFF., ACCESSORY DWELLING UNITS REPORT TO THE FLORIDA LEGISLATURE, *supra* note 138, at 6.

142. S. Res. 644 Gen. Assemb., Reg. Sess. (Fla. 2014). The bill proposed to "authoriz[e] certain property owners to construct accessory dwelling units for exclusive occupancy by specified seniors, disabled persons, or the caregivers of such persons under certain circumstances." *Id.*

143. *Id.*

144. FLA. DEP'T OF COMMUNITY AFF., ACCESSORY DWELLING UNITS REPORT TO THE FLORIDA LEGISLATURE, *supra* note 138, at 2–4.

145. *Id.* at 18–20.

146. *Id.* at 9–10, 21.

147. *Id.* at 18. A phone call and email to Florida's Division of Community Development indicates this report has not been updated. A search of the municipalities listed that did not permit ADUs in 2007 have since changed to allow ADUs, though not necessarily in accordance with section 163.31771.

while other Florida municipalities permit them “by right.”<sup>148</sup> In addition, the varying ordinances sometimes provide for very different minimal standards—for example, St. Petersburg, Florida does not allow cooking facilities in ADUs, while Hillsborough County, Florida expressly allows space to be utilized for cooking.<sup>149</sup>

Florida’s two current laws, though well-intentioned, have not done as much as they could to encourage the creation of local ADU permitting ordinances.<sup>150</sup> A variety of factors, explained in turn below, play a part.

The Constitutional Amendment<sup>151</sup> allowing for a reduction in assessment for ADU builders is no doubt good for homeowners already allowed by municipal ordinance to build ADUs. However, it gives no benefit to property owners who would like to build ADUs but cannot because of local law.<sup>152</sup> While the Amendment may further incentivize property owners who are already incentivized to build, it does nothing to incentivize property owners who cannot obtain permitting for ADU construction in the first place.<sup>153</sup>

Florida Statutes, section 163.31771 is problematic for a number of reasons. First, section 163.31771 maintains a misplaced focus on affordability for very-low to moderate-income people. The Statute does not allow municipalities, which may not otherwise initiate studies on their own, to recognize other various benefits of

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148. HILLSBOROUGH CNTY., FLA., CODIFIED ORDINANCES § 6.11.02 (2009); FLA. DEP’T OF COMMUNITY AFF., ACCESSORY DWELLING UNITS REPORT TO THE FLORIDA LEGISLATURE, *supra* note 138, at 3 (“Local zoning codes vary regarding whether accessory dwelling units are permitted versus conditional uses.”).

149. CITY OF ST. PETERSBURG, FLA., CODIFIED ORDINANCES § 16.50.010.5.5 (2011); HILLSBOROUGH CNTY., FLA., CODIFIED ORDINANCES § 6.11.02 (2009). It would appear problematic that municipalities can set such different standards, particularly when “[t]he concept of an [ADU] is to have an additional *complete* residence, meaning a place for sleeping, bathing, and eating independent of the primary home.” Ross, *supra* note 22, at 17 (emphasis added).

150. While there are certainly more municipalities with ADU permitting statutes now than there were in 2007, few are based on section 163.31771 and its affordability provisions. *See, e.g.*, COCOA, FLA., CODIFIED ORDINANCES Art. XIII, § 6(A) (2017) (“No accessory building which contains living quarters shall be built on any lot in any residential district except servants quarters for persons, other than the immediate family, employed on the premises.”); APOPKA, FLA., CODIFIED ORDINANCES § 7.02.01 (2016) (providing for a “granny/guest cottage” without mention of affordable rents).

151. Codified as FLA. STAT. § 193.703.

152. FLA. STAT. § 193.703. The law requires that a reduction only be granted where construction “is consistent with local land development regulations.” *Id.* Nothing in the statute trumps local ordinances or authorizes a property owner to build inconsistently with local law. *Id.*

153. *Id.*

ADUs.<sup>154</sup> Further, the statute's narrow focus on affordability is inharmonious with the Constitutional Amendment, which focuses on the encouragement of units for elderly persons.<sup>155</sup> It would seem that if the legislature found it important to incentivize property owners to finance ADUs for elderly residents, it would incentivize municipalities to allow the building of such units in the first place.<sup>156</sup>

Even if the legislature correctly identified affordability as the sole focus of importance for section 163.31771, its logic remains flawed. The Statute overlooks people who do not classify as "moderate income"<sup>157</sup> or lower, but who could still benefit (financially or otherwise) from ADU rental. The Statute does not address the occasion where a property owner may decline the offer of rent, or instead ask to barter for chores or childcare help in exchange.<sup>158</sup> In addition, a municipality that decides to enact an ordinance pursuant to the Statute may hinder ADU growth in more affluent neighborhoods. While an affluent homeowner could build an ADU and rent it at a rate that would be far more "affordable" than other units in the vicinity, the structure may not

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154. See *supra* Part III(A) (explaining the various benefits of ADUs, particularly for Floridians). Compare FLA. STAT. § 163.31771(1) (focusing legislative findings on only one benefit of ADUs—affordability), with *Accessory Dwelling Units Model State Act and Local Ordinance*, *supra* note 43, at 15–16 (listing, under legislative findings in the state model act, twelve distinct benefits of ADUs) and R.I. GEN. LAWS § 42-128-8.1 (making mention of students, the elderly, and people with disabilities in addition to affordability).

155. FLA. STAT. § 193.703.

156. See *supra* Part II (explaining how Florida's Constitutional Amendment does nothing to *permit* ADUs; rather, the amendment only helps property owners who are already allowed by local ordinances to build).

157. FLA. DEPT OF COMMUNITY AFF., ACCESSORY DWELLING UNITS REPORT TO THE FLORIDA LEGISLATURE, *supra* note 138, at 17 (defining "[m]oderate-income persons' [as] one or more natural persons or a family, the total annual adjusted gross household income of which is less than 120 percent of the median annual adjusted gross income for households within the state, or 120 percent of the median annual adjusted gross income for households within the metropolitan statistical area"); *State & County QuickFacts*, CENSUS.GOV, <https://www.census.gov/quickfacts/table/PST045216/12,00> (last visited Apr. 13, 2017) (listing Florida's median household income as \$47,507).

158. At least one Florida municipality has struggled with section 163.31771's affordability language; Nassau County, Florida, argued over what might happen if a property owner wanted to allow someone in their ADU without paying rent: "... suggested changing the language of the affidavit to say that it would be occupied by someone who was not paying rent; or if it were, it would be to low income people." *Nassau County Meeting Minutes*, Tab C An Ordinance of the Board of County Commissioners of Nassau County, Florida Amending the Code of Ordinances to Encourage the Provision of Affordable Housing by Amending the Land Development Code in Accordance with the Comprehensive Plan, Feb. 17, 2015, available at <http://www.nassaucountyfl.com/DocumentCenter/View/11692>; see *supra* Part III (describing how an ADU-dweller might also benefit the principal homeowner).

qualify under the Statute because the person able to afford the rental rate may be above the moderate income requirement.<sup>159</sup>

Finally, and perhaps most problematic, the Statute's lack of mandatory language or additional incentives makes it unlikely that any municipality will go out of its way to enact ADU ordinances pursuant to the state law. While the Statute's lone incentive gives a municipality greater choice in how to fulfill its obligation under other state law,<sup>160</sup> it accomplishes little to produce knowledge and acceptance of ADUs. The Statute gives little to municipalities that they did not already have; in the absence of state law *forbidding* ADUs, municipalities have always had the power to choose whether to "adopt an ordinance to allow accessory dwelling units."<sup>161</sup>

Absent any mandatory language in section 163.31771, nothing stops Florida municipalities from ignoring or banning ADUs. Further, unlike the AARP model act, section 163.31771 does not suggest provisions or provide model guidance. Consequently, Florida municipalities that do have ADU ordinances vary widely.<sup>162</sup> This leaves open the potential problem of municipalities regulating an ADU's construction or use to the point of infeasibility, such as some local governments were accused of doing in California after the ADU statute was revised in 2003.<sup>163</sup>

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159. FLA. STAT. § 163.31771; see *Accessory Dwelling Units*, *supra* note 109 and accompanying text (schoolteacher example).

160. *Supra* Part III (describing section 163.31771's single incentive).

161. FLA. STAT. § 163.31771(3); FLA. DEP'T OF COMMUNITY AFF., ACCESSORY DWELLING UNITS REPORT TO THE FLORIDA LEGISLATURE, *supra* note 138, at 9; Ross, *supra* note 22.

162. FLA. DEP'T OF COMMUNITY AFF., ACCESSORY DWELLING UNITS REPORT TO THE FLORIDA LEGISLATURE, *supra* note 138, at 2–3.

163. Brinig & Garnett, *Reforms and Local Parochialism*, *supra* note 16, at 523–24 (examining the ways in which some California municipalities responded to the 2003 state mandate that local governments ministerially consider ADU applications):

This seeming deregulatory success story masks hidden barriers that dramatically suppress the number of ADUs constructed. . . . Localities acting under the state mandate to implement ADU reforms have responded to local political pressures by . . . 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 substantive 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.

In Florida, many communities that allow the construction of ADUs do not allow them to be rented; others allow construction and rental of ADUs, but require they be built without



Senator Simpson's 2014 proposed legislation would have likely also fallen short of recognizing the full potential of ADUs.<sup>164</sup> The proposal would have mandated some action on the part of municipalities by requiring they allow ADUs for certain people; however, it, like section 163.31771, would have been too narrow in scope, creating "authorization" only for certain groups and not others.<sup>165</sup>

Although Florida is only one of a few states to take any stance on ADUs, its efforts have not resulted in meaningful change. The simple acts of enabling municipalities and providing them with one incentive is not enough to create the change the legislature wished to see. Florida should consider revising its current legislation to promote greater construction and utilization of ADUs.

#### *IV. FLORIDA SOLUTION: COMPROMISE BY REVISION OF STATUTES*

Florida can overcome many of the issues with its current ADU laws and encourage greater production of the units by making some revisions to its existing laws. First, Florida should reconcile its two current statutes to ensure they operate in harmony with each other. Florida can also broaden the most recent statute's purpose and scope in order to give municipalities better information about the benefits of ADUs. Most importantly, Florida should create additional incentives for municipalities to encourage ADUs and provide sample language that municipalities can easily draw from to enact their own ordinances.

##### A. Harmonize Section 193.703 and Section 163.31771

Section 193.703 and section 163.31771 should be amended to complement one another. Section 193.703 could be expanded so that it offers a reduction in new building assessment (resulting in tax breaks) not only to homeowners who build ADUs for certain relatives as currently provided for under the statute, but also to homeowners who create ADUs for any purpose listed in section

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cooking facilities. FLA. DEP'T OF COMMUNITY AFF., ACCESSORY DWELLING UNITS REPORT TO THE FLORIDA LEGISLATURE, *supra* note 138, at 10.

164. S. Res. 644 Gen. Assemb., Reg. Sess. (Fla. 2014).

165. *Id.* (allowing "authorization" of ADUs for seniors, persons with disabilities, and some others).

163.31771's expanded findings.<sup>166</sup> This might include tax breaks for property owners who build ADUs for anyone requiring care (whether a grandparent or friend with a disability) or who build ADUs with the purpose of renting them at an "affordable"<sup>167</sup> rate. To address opponents' concerns about transient neighbors, section 163.31771 (and any other legislative incentives) should expressly exclude state benefits for property owners who build ADUs for purposes such as short-term vacation rentals.<sup>168</sup>

### B. Broaden Section 163.31771's Purpose and Scope

A revised statute with additional legislative findings and terms relating to the additional benefits of ADUs may encourage municipalities with concerns other than affordability to begin permitting ADUs. The AARP model state act provides an excellent example statement describing the beneficial aspects of the units.<sup>169</sup> Indeed, other states that have enacted ADU legislation took time to explain the broader benefits of these units.<sup>170</sup>

### C. Revise Section 163.31771 by Providing Mandatory Language, Additional Incentives, and Suggested Provisions

Florida should revise section 163.31771 to encourage municipalities to create ordinances pursuant to statute. In revision, the legislature should provide additional incentives and model language from which local governments may draw, facilitating enactment of municipal laws.

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166. Discussed *supra*.

167. Affordable should be redefined to expand beyond very-low-, low-, and middle-income. See *supra* Part III (discussing Florida's flawed logic on affordability).

168. Such provisions are one way to ensure that ADUs are not built for the purpose of accommodating a short-term rental business. See Boatwright, *supra* note 129, at 4 ("In Florida, rental contracts of less than six months require a variety of businesses licenses as well as state sales tax and local tourist development tax."). Rather, the new legislative findings should explicitly encourage long-term rentals.

169. *Accessory Dwelling Units Model State Act and Local Ordinance*, *supra* note 43, at 15.

170. See, e.g., *Massachusetts Model Bylaw for Accessory Dwelling Units*, COMMONWEALTH OF MASS. 1, [http://www.mass.gov/envir/smart\\_growth\\_toolkit/bylaws/ADU-Bylaw.pdf](http://www.mass.gov/envir/smart_growth_toolkit/bylaws/ADU-Bylaw.pdf) (last visited April 13, 2017) (providing model language which states an intent to "[p]rovide older homeowners with a means of obtaining rental income, companionship, security, and services, thereby enabling them to stay more comfortably in homes and neighborhoods they might otherwise be forced to leave," encourage "housing units in single-family neighborhoods that are appropriate for households at a variety of stages in their life cycle" and to "[p]rovide housing units for persons with disabilities").

Mandatory action requiring municipalities to enact local law allowing ADUs<sup>171</sup> would probably be the quickest way to ensure more widespread coverage of ADUs. However, the local nature of land use and zoning<sup>172</sup> may dissuade some states from taking this step. A more subtle way to include some mandatory provisions would be to require municipalities to enact a ministerial permitting process, rather than a discretionary permitting process.<sup>173</sup> This would at least discard some of the issues related to potential overregulation.<sup>174</sup> Florida can also enact a reporting requirement, mandating that municipalities send information annually to the state about how many ADU applications have been submitted, how many ADUs were permitted, and how many ADUs were denied.<sup>175</sup>

Short of enacting more mandates, the Florida legislature should provide greater incentives for municipalities to create ADU ordinances, in addition to the current incentive of allowing municipalities to count ADUs rented to very-low to moderate-income people to count toward affordable housing quotas.<sup>176</sup> Local governments may then be more likely to enact ADUs under the provisions of the state statute, thereby allowing the benefits of ADUs to be recognized.<sup>177</sup>

Fiscal incentives might prove particularly effective.<sup>178</sup> For example, Florida could provide a certain amount of funding for every certain number of ADU applications approved under a local

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171. *See supra* note 56 (describing, for example, the Washington law); *Accessory Dwelling Units Model State Act and Local Ordinance*, *supra* note 43, at 21 (providing similar language in its models).

172. *See generally supra* Part II (detailing the current landscape of local land use and zoning policies). *See also Accessory Dwelling Units Model State Act and Local Ordinance*, *supra* note 43, at 17 (describing the controversy over mandating or persuading).

173. *See supra* Part II (describing California's ministerial process).

174. *Id.* (describing why California chose a ministerial permitting process over a discretionary one).

175. *Accessory Dwelling Units Model State Act and Local Ordinance*, *supra* note 43, at 26 (suggesting annual reporting requirements). Providing such reports would at the least help the state collect better statistical evidence of ADUs and may help the legislature draft provisions further encouraging ADU-permitting beyond those suggested here.

176. FLA. STAT. § 163.31771 (2016).

177. *See supra* Part III (explaining how most current Florida ADU ordinances were not enacted pursuant to section 163.31771, do not necessarily require ministerial permitting, and vary greatly in their provisions).

178. *See Accessory Dwelling Units: Case Study*, *supra* note 14, at 3–4, 7 (stating that growth of ADUs requires “fiscal incentives,” among others).

government's ordinance enacted pursuant to the state statute.<sup>179</sup> Such funds could be used to study the effect of ADU occupancy in particular communities. Funds could also be set aside for public transportation and infrastructure improvements. Any funds donated to a municipality's public transportation or infrastructure pool should result in local government spending on updates and improvements as density increases, which should appease ADU opponents concerned about overcrowding and infrastructure burdens.

Another way to incentivize creation of municipal ADU ordinances is to provide local governments with ready-made ordinance language. Revised section 163.31771 could include recommended provisions for local governments to easily enact.<sup>180</sup> These provisions should be thoughtful, having considered compromises between proponents and opponents of ADUs discussed above. To address issues that most concern opponents, Florida should include "strongly suggested" model language. For example, Florida should strongly recommend that municipalities require that an "ADUs[] appearance . . . match the architecture and materials of the principal dwelling,"<sup>181</sup> and require homeowners to live in one of the two dwelling units.<sup>182</sup>

Florida might further compromise by suggesting levels of regulation similar to the AARP model ordinance.<sup>183</sup> For example, in deciding whether to require additional off-street parking,<sup>184</sup> a

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179. To ensure accuracy, and for better record-keeping, Florida might require municipalities to send annual reports to the state. *Accessory Dwelling Units Model State Act and Local Ordinance*, *supra* note 43, at 26.

180. See, e.g., *Accessory Dwelling Units Model State Act and Local Ordinance*, *supra* note 43, at 46–47 (showing a choice of "favorable," "optimal," and "minimal" provisions). Massachusetts is one state that has drafted its own model ordinance for municipalities to encourage greater approval of ADUs. See generally *Massachusetts Model Bylaw for Accessory Dwelling Units*, *supra* note 170 (discussing model bylaws).

181. Brinig & Garnett, *Reforms and Local Parochialism*, *supra* note 16, at 522. This would address opponents' concerns, ensuring that "the neighborhoods themselves . . . not significantly change in appearance." *Id.*

182. *Id.* ("[S]ince the homeowner/landlord typically lives on the same property as the ADU . . . there should be better screening and supervision of tenants."); *Accessory Dwelling Units Model State Act and Local Ordinance*, *supra* note 43, at 10 (requiring a homeowner to stay on premises should help address opponents' concerns about noise and potential criminality).

183. See, e.g., *Accessory Dwelling Units Model State Act and Local Ordinance*, *supra* note 43, at 46–47 (showing a choice of "favorable," "optimal," and "minimal" provisions).

184. At issue because "onerous parking requirements . . . can render it impossible for certain property owners to situate an ADU on a lot or to avoid violating maximum lot coverage or impermeable surface regulations." Infranca, *supra* note 15, at 88; see also *supra* Part II (discussing overregulation in California).

municipality could choose from one of several options in the state's model ordinance. A "favorable" provision might require no additional off-street parking requirement (thus making it easier for homeowners to construct ADUs), while a "minimal" provision might require no more than one or two additional one off-street parking spaces per additional living unit.<sup>185</sup> This approach should help ease opponents' concerns by showing that a municipality has thought about how much additional parking necessity ADU residents might realistically bring,<sup>186</sup> while, at the same time, suggesting parking measures that do not overburden owners and make it impossible to build.<sup>187</sup> Providing varying levels of language would, potentially, result in local government enacting ready-made language rather than creating innovative language for the potentially hidden purpose of hindering ADU growth.<sup>188</sup>

In addition to suggesting optimal, favorable, and minimal parking provisions, the revised statute can suggest language that addresses in which zones ADUs may be permitted;<sup>189</sup> what an ADU's floor area ratio (FAR) may be; and when an ADU may be built.<sup>190</sup> ADU opponents particularly worried about "character" changes<sup>191</sup> might be more receptive to ADU permitting if there

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185. See, e.g., *Accessory Dwelling Units Model State Act and Local Ordinance*, *supra* note 43, at 46–47 (showing a choice of "favorable," "optimal," and "minimal" provisions, including suggestions for parking); Infranca, *supra* note 15, at 88 (discussing how "onerous parking requirements . . . can render it impossible for certain property owners to situate an ADU on a lot").

186. See, e.g., *Accessory Dwelling Units Model State Act and Local Ordinance*, *supra* note 43, at 46–47 (showing optimal, favorable, and minimal provisions for parking). A municipality could choose which model parking provision to enact based on a state-funded study conducted to assess the impact of ADUs on a certain area. See FLA. STAT. § 163.31771 (2016) (discussing the procedures required to adopt a local ADU ordinance and apply for building permits).

187. See *Accessory Dwelling Units Model State Act and Local Ordinance*, *supra* note 43, at 46 (discussing "onerous" parking requirements).

188. See *supra* Part II, at n.75 (discussing California's hidden regulations.)

189. For example, single-family residential zones only; single-family residential zones with minimum lot sizes of .25 acres; single-family and multi-family residential only; or, all residential zones; etc.

190. See, e.g., *Accessory Dwelling Units Model State Act and Local Ordinance*, *supra* note 43, at 41 ("[Optimal provision] An ADU may be developed in either an existing or a new dwelling unit. . . . [Favorable provision] An ADU may be developed in a dwelling unit that has been completed for at least three years. . . . [Minimal provision] An ADU may be developed in a dwelling unit that has been completed for at least [specify] years.").

191. See generally *supra* Part III (discussing specific common concerns of ADU opponents).

were also provisions suggesting choices on setback, lot coverage, doorway orientations, and fencing.<sup>192</sup>

Finally, Florida can encourage municipalities to adopt ADU permitting ordinances by generating publications and toolkits similar to those created by award-winning ADU programs in some California municipalities.<sup>193</sup> Such resources should answer frequently asked questions and help municipalities and homeowners navigate a new and potentially tedious process.

#### V. CONCLUSION

ADUs are replete with benefits for local governments, communities, and various age groups. Encouragement of the units in Florida can help solve the state's current and impending housing problems. States and municipalities have the opportunity to create helpful legislation underscoring the benefits of ADUs while adding provisions to satisfy opponents of the units. Florida can do this by taking a first step toward improving its legislation. By offering greater incentives to municipalities and property owners and providing recommended ordinance language, Florida might see greater use of ADUs enacted pursuant to the state statutes.

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192. *Accessory Dwelling Units Model State Act and Local Ordinance*, *supra* note 43, at 36–50 (suggesting levels of provisions for each).

193. *See, e.g., Accessory Dwelling Units: Case Study*, *supra* note 14, at 3–4 (describing, for example, the ADU program in Santa Cruz, California, which provided an “ADU Plan Sets Book” and an “ADU manual”).