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Tiny Home Lot Split Policy: A Needed Adjunct to Accessory Dwelling Units in Promoting Affordable Housing

I. INTRODUCTION

Many American cities are in the midst of an affordable housing crisis.¹ In 2022, approximately 46% of renters' households were cost-burdened, spending more than 30% of their income on housing.² Local governments have taken up the challenge by legalizing and encouraging dense development.³ One of the more popular housing policies is the Accessory Dwelling Unit ("ADU").⁴ An ADU is "a small, self-contained dwelling . . . that shares the site of a larger, single-unit dwelling."⁵ An ADU typically has its "own entrance, cooking, and bathing facilities,"⁶ and the unit can be in the basement of a home, over a garage, or detached in one's backyard.⁷

1. See Jared Bernstein et al., *Alleviating Supply Constraints in the Housing Market*, THE WHITE HOUSE: COUNCIL OF ECON. ADVISORS BLOG (Sept. 1, 2021), <https://www.whitehouse.gov/cea/written-materials/2021/09/01/alleviating-supply-constraints-in-the-housing-market/> [<https://perma.cc/72YY-VNA6>] ("[Sixty-five] of the country's largest 150 metros are seeing price increases of over 10 percent year-over-year."); Thomas E. Walls, Note, *Affordable Housing: Plenty of Demand, but No Supply to Be Found*, 24 N.C. BANKING INST. 417, 426–27 (2020) (discussing the dearth of affordable rental housing).

2. JOINT CTR. FOR HOUS. STUD. OF HARV. UNIV., THE STATE OF THE NATION'S HOUSING 2022, at 6–7 (2022) [hereinafter HARVARD HOUSING REPORT] (stating that 46% of renter households were at least moderately cost burdened and defining cost burdened households).

3. See Christopher S. Elmendorf & Darien Shanske, *Auctioning the Upzone*, 70 CASE W. RESV. L. REV. 513, 517 (2020) (discussing the rise of duplexes and fourplexes in single family zones).

4. See Lauren Ashley Week, Note, *Less is Not More: The False Promise of Accessory Dwelling Units for San Francisco's Lowest-Income Communities*, 30 J. AFFORDABLE HOUS. & CMTY. DEV. L. 281, 282 (2021) ("[A]s of early 2021, municipalities across forty-seven states as well as the District of Columbia currently include accessory dwelling units (ADUs), as part of their local zoning and development codes.").

5. Sandra K. Adomatis, *Valuation of Accessory Dwelling Units*, 89 APPRAISAL J. 248, 248 (2021) (quoting *Accessory Dwelling Unit*, APPRAISAL INST., THE DICTIONARY OF REAL ESTATE APPRAISAL (6th ed. 2015)).

6. *Id.* (quoting APPRAISAL INST., *supra* note 5).

7. *Id.* at 248, 250. A diagram of ADUs is provided below, *supra* Part III.A.

Still, some cities have seen low ADU adoption.⁸ This has slowed the creation of infill development, a term for housing within existing neighborhoods,⁹ and has hindered the fight against the affordable housing crisis.¹⁰ One reason for this low ADU uptake is that homeowners find it difficult to finance ADUs, as they can often cost upwards of \$150,000.¹¹ In response to these hurdles to ADU development, cities are looking for better ways to catalyze ADU production, hoping to ameliorate the housing crisis and provide benefits to new and existing residents.¹²

This note argues that a Tiny Home Lot Split policy can encourage infill development within existing neighborhoods and provide homeownership opportunities to incoming residents.¹³ Similar to an ADU policy, a Tiny Home Lot Split policy allows a secondary unit¹⁴ to be built on an old, single-family lot.¹⁵ But rather than requiring that the primary and secondary unit be owned by the same homeowner, a Tiny Home Lot Split policy allows the secondary dwelling to have

8. See Shelby R. King, *How Financing Barriers Keep ADUs Expensive*, SHELTERFORCE (May 9, 2022) [hereinafter King, *Financing Barriers*], <https://shelterforce.org/2022/05/09/how-financing-barriers-keep-adus-expensive/> [<https://perma.cc/CS83-MALQ>] (“[T]he uptake on ADU construction has been slow in most places even after zoning changes made them legal.”).

9. See Michael Lewyn, *How Environmental Review Can Generate Car-Induced Pollution: A Case Study*, 14 SUSTAINABLE DEV. L. & POL’Y 16, 16 (2014) (defining infill development as “development in already-developed areas such as cities and older suburbs”).

10. See John Infranca, *Housing Changing Households: Regulatory Challenges for Micro-Units and Accessory Dwelling Units*, 25 STAN. L. & POL’Y REV. 53, 55 (2014) (discussing how ADUs function as a form of infill development).

11. See King, *Financing Barriers*, *supra* note 8 (discussing the financial difficulties in financing an ADU); see also KAREN CHAPPLE ET AL., U.C. BERKELEY CTR. FOR CMTY. INNOVATION, *IMPLEMENTING THE BACKYARD REVOLUTION: PERSPECTIVES OF CALIFORNIA’S ADU OWNERS* 11 tbl.2 (2021), <https://www.aducalifornia.org/wp-content/uploads/2021/04/Implementing-the-Backyard-Revolution.pdf> [<https://perma.cc/U83N-JFAX>] (noting that the median construction cost of a DADU in a 2021 California survey was \$180,000).

12. See *infra* Part III.B, V.A (discussing the ways that local governments are attempting to encourage ADU development); see, e.g., Infranca, *supra* note 10, at 85 (noting that Portland, Oregon waived ADU fees from 2011-2016 to increase ADU construction).

13. *Infra* Part V.

14. This note will use “secondary unit” to refer to a housing unit that is *either* a tiny home in a Tiny Home Lot Split or a Detached Accessory Dwelling Unit. Although a tiny home is not “secondary” to the initial dwelling in a Tiny Home Lot Split, the tiny home is often smaller and built after the more typical dwelling.

15. See Stephen R. Miller, *Prospects for A Unified Approach to Housing Affordability, Housing Equity, and Climate Change*, 46 VT. L. REV. 463, 485 (2022) (proposing that localities “revisit their subdivision or lot-split codes to permit the ADU to become its own for-sale unit”).

completely separate ownership from the original, “primary” dwelling.¹⁶ Under this new policy, a homeowner with excess land can split off the land from the rest of the homeowner’s property.¹⁷ This new parcel of land can then be sold to a developer, an incoming resident, or a rental company who can then build a tiny home on the lot, according to the municipality’s size specifications.¹⁸ These third parties can supply the capital needed for construction when the initial homeowner does not have the funds, which can increase the rate of infill development.¹⁹ Such development can also generate tax revenue for the local government.²⁰

To implement a Tiny Home Lot Split Policy, most municipalities will need to allow a lower lot size for both the lot with the tiny home and the lot with the initial dwelling.²¹ Additionally, municipalities that have not yet legalized Tiny Homes will need to do so.²² A Tiny Home Lot Split Policy is not a set policy prescription.²³ Instead, the specifics of the policy vary from municipality to municipality depending on the mechanisms used to control density and the municipality’s views on the proper qualities of an independent lot.²⁴ Local governments must examine the physical realities of homeowner

16. See CITY OF DURHAM & DURHAM CNTY., EXPANDING HOUSING CHOICES (2018) [hereinafter DURHAM, EXPANDING HOUSING CHOICES POWERPOINT], <https://www.durhamnc.gov/DocumentCenter/View/23567/Presentation> [<https://perma.cc/BL43-DWXX>] (discussing how Durham’s “Small House/Small Lot” option “could provide [an] alternative to an ADU, with a different ownership pattern”).

17. See Miller, *supra* note 15, at 485.

18. See *infra* notes 99, 230–232 and accompanying text (discussing the parties who might purchase the excess land after a Tiny Home Lot Split).

19. See *infra* notes 99, 230–232 and accompanying text.

20. See Elmendorf & Shanske, *supra* note 3, at 526–27 (discussing how cities capture value from new development through exactions and fees); *infra* Part V.B (arguing that Tiny Home Lot Splits allow a greater opportunity to collect tax revenue).

21. See M. NOLAN GRAY & SALIM FURTH, MERCATUS CTR., DO MINIMUM-LOT-SIZE REGULATIONS LIMIT HOUSING SUPPLY IN TEXAS? 2, 17 (2019) (describing the ubiquity of minimum lot sizes and finding that most of the studied lots did not have an excess of land above the minimum lot size); *infra* Part IV.A.1 (arguing that density regulations should be relaxed for Tiny Home Lot Splits).

22. See Emily Nonko, *Tiny House Zoning Regulations: What You Need to Know*, CURBED (Sept. 22, 2016, 11:30 AM), <https://archive.curbed.com/2016/9/22/13002832/tiny-house-zoning-laws-regulations> [<https://perma.cc/Z66X-BXR5>] (noting the restrictions on tiny homes in many U.S. municipalities).

23. See *infra* Part IV.B (describing the scattered and piecemeal approach to Tiny Home Lot Splits).

24. See Miller, *supra* note 15, at 485 (“Such subdivisions or lot splits would need to be creative given the variety of ways that ADUs are built onto existing properties . . .”).

properties, current ADU laws, and local values to fashion a Tiny Home Lot Split Policy that creates a viable alternative for potential ADU owners while respecting the municipality's view for what a stand-alone lot requires.²⁵

This Note proceeds in six parts. Part II gives a brief introduction on the affordable housing crisis and discusses how state and local governments have adopted policies to support dense and affordable housing.²⁶ Part III discusses the rise of ADUs and introduces the Tiny Home Lot Split Policy as an alternative to ADUs.²⁷ Part IV discusses the policy hurdles and accompanying solutions to Tiny Home Lot Split policies and investigates Durham's Tiny Home Lot Split policy as a case study.²⁸ Part V discusses the practical benefits of Tiny Home Lot Splits.²⁹ Lastly, Part VII concludes this Note.³⁰

II. THE AFFORDABLE HOUSING CRISIS AND THE RESPONSE OF MUNICIPALITIES

Many cities in the United States are facing a housing crisis.³¹ The median rent for all renters increased from \$512 a month in 2001³² to \$1100 in 2019.³³ These high costs have resulted in approximately 46% of renters' households becoming cost-burdened as of 2022, meaning that the household spent more than 30% of its income on

25. See *infra* Part IV (discussing how local governments can and have implemented Tiny Home Lot Split policies); see also Miller, *supra* note 15, at 485 (“Such subdivisions or lot splits would need to be creative given the variety of ways that ADUs are built onto existing properties . . .”).

26. *Infra* Part II.

27. *Infra* Part III.

28. *Infra* Part IV.

29. *Infra* Part V.

30. *Infra* Part VI.

31. See Katherine Levine Einstein et al., *Who Participates in Local Government? Evidence from Meeting Minutes*, 17 PERSPS. ON POL. 28, 29 (2019) (noting the media attention on the housing crisis and pointing out that “[t]here is not a *single county in the country* in which a minimum-wage earner can afford an average two-bedroom rental”); Bernstein et al., *supra* note 1 (“[Sixty-five] of the country’s largest 150 metros are seeing price increases of over 10 percent year-over-year.”).

32. SUSAN K. URAHN & TRAVIS PLUNKETT, PEW CHARITABLE TRS., AMERICAN FAMILIES FACE A GROWING RENT BURDEN 6, 20 n.3 (2018) (“This figure was calculated using only 2015 PSID data for those who paid at least \$1 a year in rent and was adjusted for inflation to 2017 dollars using the CPI deflator. Stricter definitions would meaningfully raise the median and mean rents.”).

33. JOINT CTR. FOR HOUS. STUD. OF HARV. UNIV., AMERICA’S RENTAL HOUSING 2022, at 13 (2022) (noting 2019’s “median monthly gross rent of \$1,100”).

housing.³⁴ Aspiring homeowners also face affordability problems, with the median home price rising to \$391,200 as of 2022.³⁵ These high housing prices rival the 2006 peak before the Great Recession.³⁶ Many economists, in their attempt to find the causes of rising housing costs, have concluded that limited housing supply is a key contributor to the crisis.³⁷ Specifically, economists Edward Glaeser and Joseph Gyourko argue that a stagnating housing supply caused by restrictive land use policies is a significant cause of the housing crisis.³⁸

The housing crisis was exacerbated by the fact that, after the Great Recession, housing construction shifted to the creation of larger, high-cost housing to the detriment of smaller housing.³⁹ The corresponding “meager increases” in the supply of smaller, affordable housing means that low and middle-income homeowners now face an intensely constrained housing segment.⁴⁰

The affordable housing crisis has led to a new movement, often called YIMBYism (“Yes In My Back-Yard-ism”), which seeks to make housing more affordable by allowing denser housing within cities.⁴¹ Local governments have recently allowed the construction of denser housing within single-family zoned areas—areas that used to only allow

34. HARVARD HOUSING REPORT, *supra* note 2, at 6–7.

35. *Id.* at 24.

36. Walls, *supra* note 1, at 427 (“[A]verage home prices also increased significantly nationwide to rival the pre-crisis peak.”).

37. See Edward Glaeser & Joseph Gyourko, *The Economic Implications of Housing Supply*, 32 J. ECON. PERSPS. 3, 20 (2018) (“[W]e believe that the higher cost of land [and housing] has been driven by binding land use restrictions.”); Einstein et al., *supra* note 31, at 29 (stating that “[e]conomists have attributed the current affordability crisis in large part to insufficient supply,” and listing seven sources in a footnote).

38. Glaeser & Gyourko, *supra* note 37, at 16.

39. See Walls, *supra* note 1, at 425 (“Since 2013, completions of large homes marketed to high-income households outpaced smaller, more affordable homes.”); see also Bernstein et al., *supra* note 1 (“[N]ew homes constructed below 1,400 square feet—typically considered ‘entry-level’ . . . —has decreased sharply since the Great Recession and is more than 80 percent lower than the amount built in the 1970s.”).

40. See Walls, *supra* note 1, at 425 (explaining that supply has not increased enough to satisfy demand in the housing market, leading to a housing shortage).

41. See Roderick M. Hills Jr. & David Schleicher, *Building Coalitions out of Thin Air: Transferable Development Rights and “Constituency Effects” in Land Use Law*, 12 J. LEGAL ANALYSIS 79, 80 (2020) (discussing the creation of a YIMBY coalition); Einstein et al., *supra* note 31, at 30 (discussing a new coalition between “affordable housing advocates, developers, and urban planners”). The movement arose in opposition to NIMBYism (“Not-In-My-Back-Yard-ism”), a political dynamic among homeowners that prevented dense development. See Hills & Schleicher, *supra*, at 80 (discussing the conflict between NIMBYs and YIMBYs).

one home per lot.⁴² For example, in 2018, the Minneapolis City Council authorized “four-unit dwellings on every lot in the city,” including lots in single-family neighborhoods.⁴³ In 2019, the state of Oregon required larger cities to permit duplexes or fourplexes on parcels zoned for residential use.⁴⁴ Cities in North Carolina have recently joined these forward-looking localities.⁴⁵ In July 2021, the Raleigh City Council voted to allow “the development of denser housing options, such as duplexes and apartments, where previously only single-family housing was allowed.”⁴⁶ In August 2022, the Charlotte City Council allowed developers to build duplexes and triplexes on single-family zoned lots.⁴⁷ Many local governments, both within and outside of North Carolina, have also allowed homeowners to build ADUs, or small, secondary housing units on their yards which can be used to house family, friends, or other residents.⁴⁸

42. See Richard C. Schragger, *The Perils of Land Use Deregulation*, 170 U. PA. L. REV. 125, 126–27 (2021) (noting that the YIMBY movement “has made the elimination of single-family zoning one of its central goals”); Elmendorf & Shanske, *supra* note 3, at 517 (discussing the rise of duplexes, triplexes, and fourplexes in single family zones).

43. See Elmendorf & Shanske, *supra* note 3, at 517.

44. *Id.*

45. See Leigh Tauss, *Despite Rumors, Raleigh City Council Did Not Ban Single-Family Zoning*, INDY WEEK (Jul. 21, 2021, 6:00 AM), <https://indyweek.com/news/wake/raleigh-zoning-update-middle-housing/> [<https://perma.cc/PK5Q-LK6T>] (discussing changes to Raleigh’s single family zoning policy); WBTB Web Staff & Nikki Hauser, *Charlotte City Council votes to pass Unified Development Ordinance*, WBTB (Aug. 22, 2022, 5:48 AM), <https://www.wbtv.com/2022/08/22/charlotte-city-council-scheduled-vote-unified-development-ordinance/> [<https://perma.cc/49PE-DPGV>] (discussing changes to Charlottes single family zoning policy).

46. Tauss, *supra* note 45.

47. WBTB Web Staff and Hauser, *supra* note 45; see CHARLOTTE, N.C., UNIFIED DEV. ORDINANCE § 4.1 (2022) (effective June 1, 2023), https://charlotteudo.org/wp-content/uploads/2022/08/CLT-UDO-Adopted-08_22_22.pdf [<https://perma.cc/Z46J-D9BZ>] (allowing “for the development of single-family, duplex, and triplex dwellings on all lots” within certain zones, and allowing quadraplexes under certain conditions).

48. *Why add an ADU?*, HOUSABLE, <https://www.housable.com/adu-guides/why-add-an-adu> [<https://perma.cc/XQ74-TTCW>] (last visited Oct. 28, 2022) (discussing the many uses of an ADU); Week, *supra* note 4, at 282 (“[A]s of early 2021, municipalities across forty-seven states as well as the District of Columbia currently include accessory dwelling units (ADUs), as part of their local zoning and development codes.”).

III. THE RISE OF ADUS AND THE ALTERNATIVE TINY HOME LOT SPLIT POLICY

A. WHAT ARE ADUS?

In response to the affordable housing crisis, many local governments have legalized ADUs.⁴⁹ ADUs are secondary dwelling units that are built on the same lot as a primary house.⁵⁰ The secondary dwelling can be either attached to or detached from the primary dwelling.⁵¹ Imagine a normal suburban home with a yard and a family living inside the house.⁵² Then add a second, smaller home with only a few rooms, and put it close to or alongside the existing house.⁵³ That second, smaller home is an ADU.⁵⁴ The ADU probably contains a bedroom, a kitchen, and a bathroom, and may be used to house a relative, friend, or a paying tenant.⁵⁵

ADUs are typically limited in size.⁵⁶ For example, in Durham, North Carolina, ADUs cannot exceed 800 square feet,⁵⁷ while in the city of Charlotte, the floor area of a detached ADU must be less than half of the primary dwelling's floor area, according to the city's new zoning regime (effective June 1, 2023).⁵⁸ ADUs go by many other names, including granny flats, in-law suites, casitas, guest houses, and backyard

49. Week, *supra* note 4, at 282 (discussing the widespread adoption of ADUs).

50. See Adomatis, *supra* note 5, at 248–49 (listing many definitions of ADUs and discussing the overarching common attributes).

51. Robyn A. Friedman, *The Business Case for Accessory Dwelling Units*, HOUSING WIRE (Apr. 9, 2021, 9:56 AM), <https://www.housingwire.com/articles/the-business-case-for-jumping-on-the-adu-bandwagon/> [https://perma.cc/B7L3-KMLQ] (discussing how ADUs can be attached to the primary dwelling or converted from an existing space).

52. See *id.* (noting that ADUs are on “the same parcel as a single-family home”).

53. See *id.* (discussing the number of rooms and possible locations of an ADU).

54. See *id.* (defining of an ADU).

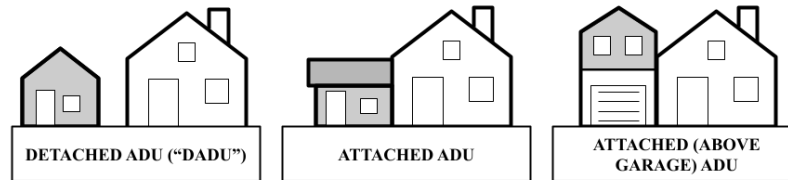
55. See *id.* (stating that ADUs are “self-contained living units that usually have their own bedrooms, kitchen and bathroom, but are situated on a lot with a separate home,” and discussing the different types of people who might reside in an ADU).

56. See Infranca, *supra* note 10, at 72 (noting that size is one of “[t]he primary restrictions on ADU development”).

57. DURHAM, N.C., UNIFIED DEV. ORDINANCE § 5.4.2B.4. (2022), <https://durham.municipal.codes/UDO/5.4.2B.4> [https://perma.cc/AF5Z-BZ5D] (describing the general size requirements of ADUs, though there are exceptions).

58. CHARLOTTE, N.C., UNIFIED DEV. ORDINANCE § 15.6.C.7.a (2022) (effective June 1, 2023), https://charlotteudo.org/wp-content/uploads/2022/08/CLT-UDO-Adopted-08_22_22.pdf [https://perma.cc/Z46J-D9BZ] (“The ADU shall have a total floor area no greater than 50% of the total floor area of the principal residential use.”).

cottages, and they allow multiple dwelling units on one piece of land, which promotes greater density within existing neighborhoods.⁵⁹ Below is a diagram that depicts a few types of ADUs.⁶⁰



While ADUs can be used by the homeowner for extra space⁶¹ or used to house family members for a free or reduced rate,⁶² a significant number of ADUs are put on the market and rented out in arm's-length transactions.⁶³ In a 2021 study of California ADU owners, 51% of ADUs served as “income-generating rental units.”⁶⁴ In a 2014 study of Portland, Oregon, 80% of ADUs were rented at the market rate.⁶⁵

59. Friedman, *supra* note 51 (noting that ADUs are “commonly referred to as granny flats, in-law suites, casitas or guest houses”); Eric Jaffe, *Why Minimum Lot Sizes Are a Growing Affordability Problem*, MEDIUM (Jan. 24, 2020), <https://medium.com/sidewalk-talk/why-minimum-lot-sizes-are-a-growing-affordability-problem-d1ba3a3244d> [<https://perma.cc/4X3Y-9KBR>] (noting that “backyard cottages” is another name for ADUs).

60. The diagram was adapted from *Accessory Dwelling Units*, AM. PLAN. ASS'N: KNOWLEDGE CTR, <https://www.planning.org/knowledgebase/accessorydwelling/> [<https://perma.cc/75QR-H44Y>] (last accessed Dec. 20, 2022).

61. See JAKE WEGMANN & ALISON NEMIROW, INST. FOR URBAN & REG'L DEV., UNIV. OF CAL., BERKELEY, SECONDARY UNITS AND URBAN INFILL: A LITERATURE REVIEW 7 (2011), <http://iurd.berkeley.edu/wp/2011-02.pdf> [<https://perma.cc/X2ZC-2C4V>] (noting that a 2000 Nordvik study “treated the decision to *not* rent out a secondary unit as evidence of a homeowner’s demand for space within her own house,” and measured an income elasticity of renting, where homeowners required varying rental rates before they would rent out an ADU (citing Viggo Nordvik, *Utilisation of the Stock of Owner-Occupied Single-family Houses: An Econometric Analysis*, 37 URB. STUD. (2000))).

62. ADUs used to house family members are an especially interesting dynamic. For more information, see generally Margaret F. Brinig, *Grandparents and Accessory Dwelling Units: Preserving Intimacy and Independence*, 22 ELDER L.J. 381 (2015); Jessica Dixon Weaver, *Grandma in the White House: Legal Support for Intergenerational Caregiving*, 43 SETON HALL L. REV. 1 (2013).

63. See, e.g., CHAPPLE ET AL., *supra* note 11, at 14 (noting that 51% of ADUs within the sample served as “income-generating rental units”).

64. *Id.*

65. MARTIN J. BROWN & JORDAN PALMERI, ACCESSORY DWELLING UNITS IN PORTLAND, OREGON: EVALUATION AND INTERPRETATION OF A SURVEY OF ADU OWNERS 38 (2014). Of the 18% of ADUs rented “free-or-clearly-below-market,” 85% of the tenants

Detached Accessory Dwelling Units (“DADUs”) may serve as a great format for these arm’s-length rentals, as they offer the most separation between the ADU and the main dwelling unit.⁶⁶ In a 2021 California survey, 53% of ADUs were DADUs despite DADUs being the most expensive form of ADU to build, with a median construction cost of \$180,000.⁶⁷ But DADUs received the most rent per square foot, with the median rent equaling \$2200.⁶⁸ The privacy and accompanying high rental price of DADUs suggest that DADUs are a great option to lease to renters in arm’s-length transactions.⁶⁹

North Carolina stands out among eastern states as having a higher proportion of DADU compared to attached ADU units.⁷⁰ Therefore, policy regimes involving DADUs are particularly relevant to local governments within North Carolina.⁷¹

B. *The Growing Political Popularity of ADUs*

ADUs, including DADUs, are often seen as a good tool to ameliorate the housing crisis.⁷² Specifically, ADUs are seen as a win-

were family members or friends of the owner. *Id.* While the fact that 26% of ADU tenants were the homeowner’s friends or family means that some homeowners are charging their friends or family members the market rate, there is clearly significant overlap between market-rate ADU rentals and arms-length ADU rentals. *See id.* at 37 (discussing the relationships between ADU residents and owners).

66. *See* CHAPPLE ET AL., *supra* note 11, at 8 (“The popularity of detached units may be attributed to the amount of privacy that these ADUs provide to homeowners, compared to attached or converted ADUs where the unit shares a wall with the primary residence.”).

67. *Id.* at 3, 11.

68. *Id.* at 16.

69. *Id.* at 8, 16.

70. FREDDIE MAC, GRANNY FLATS, GARAGE APARTMENTS, IN-LAW SUITES: IDENTIFYING ACCESSORY DWELLING UNITS FROM REAL ESTATE LISTING DESCRIPTIONS USING TEXT MINING 10, exhibit 9 (2020).

71. *See id.* (showing the larger concentration of attached versus detached housing in North Carolina).

72. *See* Porch Research, *2021 Study: How Much Value Do Granny Flats and other Accessory Dwelling Units Add to a Home?*, PORCH (Sept. 7, 2021), <https://porch.com/advice/state-of-adu-market-2021> [<https://perma.cc/X28T-343A>] (“In 2020, ADUs were often heralded as one answer to the growing housing affordability crisis.”); M. Nolan Gray, *The Housing Revolution Is Coming*, THE ATLANTIC (Oct. 5, 2022), <https://www.theatlantic.com/ideas/archive/2022/10/california-accessory-dwelling-units-legalization-yimby/671648/> [<https://perma.cc/QAQ5-7AG6>] (observing that ADU legalization “seems like a pilot study” for a new “denser, more diverse” suburbia); Jake Wegmann & Karen Chapple, *Hidden Density in Single-Family Neighborhoods: Backyard Cottages as an Equitable Smart Growth Strategy*, 7 J. URBANISM: INT’L RSCH. ON

win-win scenario as homeowners gain extra income, developers gain work, and new residents get a place to live.⁷³ As described by a former Los Angeles mayor: ADUs are a “way for homeowners to play a big part in expanding our city’s housing stock and make some extra money while they’re at it.”⁷⁴

The presence of ADUs has grown as cities and states have accepted them.⁷⁵ As of 2021, municipalities in forty-seven states and the District of Columbia allow ADU construction.⁷⁶ The number of ADUs in the United States rose to 1.4 million as of mid-2020,⁷⁷ representing approximately 2% of all homes in the United States.⁷⁸ Yet, the prominence of ADUs varies from locality to locality.⁷⁹ For example, a field study of three neighborhoods in Los Angeles in 2009 found that at least 34% of single-family housing units had ADUs in those areas.⁸⁰

Even still, some cities have experienced lower ADU construction than desired, and municipalities have made follow-up changes to increase ADU development.⁸¹ For example, municipal

PLACEMAKING & URB. SUSTAINABILITY 307, 307 (2014) (arguing that backyard cottages hold a lot of potential for increasing affordable housing).

73. Friedman, *supra* note 51 (“ADUs . . . are often seen as a win/win/win for the parties involved – property owners, tenants and builders.”).

74. Rich Garner, *6 Loan Options to Finance an ADU (Accessory Dwelling Unit)*, RENOFI (Oct. 25, 2021) (quoting former Los Angeles’ Mayor Eric Garcetti), <https://www.renofi.com/learn/adu/financing/> [<https://perma.cc/87JE-UEA2>].

75. *See* Week, *supra* note 4, at 282 (“[A]s of early 2021, municipalities across forty-seven states as well as the District of Columbia currently include accessory dwelling units (ADUs), as part of their local zoning and development codes.”); FREDDIE MAC, *supra* note 70, at 9 (listing the “[t]op 25 metropolitan areas with the fastest growth in ADUs entering the MLS market for the first time” from 2015 to 2018).

76. Week, *supra* note 4, 282.

77. King, *Financing Barriers*, *supra* note 8 (citing FREDDIE MAC, *supra* note 70, at 10).

78. Porch Research, *supra* note 72. Additionally, the rate of growth for ADUs has increased in recent years: the number of first-time listings of ADUs grew 8.6% year-over-year between 2009 and 2019. FREDDIE MAC, *supra* note 70, at 3.

79. *See* Porch Research, *supra* note 72 (ranking U.S. cities by which cities have the largest proportion of the U.S.’s ADU units).

80. FREDDIE MAC, *supra* note 70, at 3 (citing UCLA DEP’T OF ARCHITECTURE & URB. DESIGN, BACKYARD HOMES (Dana Cuff et al. eds., 2010)) (“[A] 2009 field survey of three neighborhoods in Los Angeles with high numbers of foreclosures revealed that 34% to 80% of single-family housing units in these areas were likely to have illegal ADUs”)

81. *See* Laurie Goodman & Solomon Greene, *To Unleash Housing Supply, Allow and Finance Accessory Dwelling Units*, URB. INST.: URB. WIRE (Feb. 3, 2020), <https://www.urban.org/urban-wire/unleash-housing-supply-allow-and-finance-accessory-dwelling-units> [<https://perma.cc/XK8J-2NLY>] (specifically pointing to Arlington, Virginia, which updated its 2009 ADU policy to allow DADUs after the county saw few units

governments around the United States have made ADUs easier to build, including: Austin, San Francisco, Seattle, Los Angeles, Nashville, San Diego, Minneapolis, Raleigh, and Durham.⁸² Cities have eased ADU requirements by relaxing owner-occupier requirements,⁸³ increasing the maximum ADU size,⁸⁴ creating a slate of pre-approved ADU designs,⁸⁵ and cutting fees associated with ADU development.⁸⁶ From these

produced); see also Shelby R. King, *ADUs: Laws and Uses, Do's and Don'ts*, SHELTERFORCE (May 3, 2022) [hereinafter King, *ADUs: Laws and Uses*], <https://shelterforce.org/2022/05/03/adus-laws-and-uses-dos-and-donts/> [https://perma.cc/UL7Q-L2ZW] (“Some cities that originally required one of the units to be owner occupied repealed those laws once officials realized the law reduced the number of ADUs being built.”).

82. Billy Ulmer, *Why Small Will Soon be Large*, CONGRESS FOR THE NEW URBANISM: PUBLIC SQUARE (Oct. 3, 2017), <https://www.cnu.org/publicsquare/2017/10/03/why-small-will-soon-be-large> [https://perma.cc/49C3-WAYD] (“Major cities like Austin, San Francisco, Seattle, Los Angeles, Nashville, San Diego and Minneapolis have made recent legislative changes to make ADUs easier to build.”); Michelle Crouch, *Pushing to Ease Restrictions on Alternative Housing Options in North Carolina*, AARP (June 1, 2022, 12:00 AM), <https://states.aarp.org/north-carolina/aarp-north-carolina-adu-housing> [https://perma.cc/3485-DDE2] (“With AARP’s support, Durham, Raleigh, Wilmington and Asheville have made changes to their ordinances to make it easier to build [ADUs].”).

83. King, *ADUs: Laws and Uses*, *supra* note 81 (noting that Minneapolis, Minnesota, repealed owner occupancy requirements); *Investors and ADU Owner Occupancy Requirements*, SNAPADU (Apr. 12, 2021), <https://snapadu.com/blog/investors-adu-owner-occupancy-requirements/> [https://perma.cc/Q33C-GE4A] (“California law has eliminated all owner occupancy requirements for ADUs permitted between January 1, 2020, and January 1, 2025 . . .”).

84. Durham, N.C., An Ordinance to Amend the Unified Development Ordinance Regarding Expanding Housing Choices (TC1800007), Attachment B1, at 3 (Oct. 28, 2019) (codified as amended at DURHAM, N.C., UNIFIED DEV. ORDINANCE §§ 5.2, 5.4 (2022)), https://www.durhamnc.gov/DocumentCenter/View/27600/B1--Part-1_Accessory-Dwelling-Units [https://perma.cc/WP72-Q9T4] (on file and complemented with legislative context and history at Durham N.C. Expanding Housing Choices webpage, <https://www.durhamnc.gov/3679/Expanding-Housing-Choices> [https://perma.cc/C35E-3K4U]) (changing the maximum floor area to 800 square feet instead of 30% of the size of the primary dwelling).

85. See Off. of Plan. & Cmty. Dev. & Seattle Dep’t of Constr. & Inspections, *2021 ADU Annual Report*, STORYMAPS (Sept. 23, 2022), <https://storymaps.arcgis.com/stories/f8ee6480b1764b1bab219beec38b2d88> [https://perma.cc/KKS9-KJAL] (“In September 2020, [Seattle] launched a gallery of 10 pre-approved DADU plans with a range of sizes, unit types, and architectural styles that provide a faster, more predictable, and lower-cost option for creating a DADU.”); see also Ashley Gurbal Kritzer, *Tampa Could Legalize Accessory Dwelling Units in More Neighborhoods*, TAMPA BAY BUS. J. (June 15, 2022), <https://www.bizjournals.com/tampabay/news/2022/06/15/tampa-to-explore-accessory-dwelling-units.html> [https://perma.cc/U9H5-RDNA] (noting that Tampa Councilwoman Lynn Hurtak wanted to explore the idea of “pre-approved ADUs, a concept that’s taken off in other cities”).

86. Infranca, *supra* note 10, at 85 (noting that Portland ADU development increased after the city waived ADU fees).

liberalization efforts, it is clear that many cities are interested in increasing rates of infill development in existing neighborhoods.⁸⁷

C. *The Lot Split Alternative*

Local governments can facilitate more infill development by allowing homeowners to subdivide off excess land and allowing purchasers of that land to build a tiny home.⁸⁸ The policies allowing these transactions can be referred to as Tiny Home Lot Split policies.⁸⁹

A tiny home is a small home that is often between 100 and 400 square feet,⁹⁰ though the word has expanded to cover homes as large as 1000 square feet.⁹¹ Take a second to imagine a 10-foot by 10-foot space

87. See, e.g., Kritzer, *supra* note 85 (“We’re not just looking at the conventional construction of single-family residences and multifamily units. We’re looking at tiny homes, ADUs, 3D-printed homes — whatever it is that we can do to help [with the affordable housing crisis].” (quoting Tampa Mayor Jane Castor)).

88. See Miller, *supra* note 15, at 485 (proposing that localities “revisit their subdivision or lot-split codes to permit the ADU to become its own for-sale unit”).

89. The policy does not have a firm naming convention. “Tiny homes” have been well established in the literature. See generally Katherine M. Vail, Note, *Saving the American Dream: The Legalization of the Tiny House Movement*, 54 U. LOUISVILLE L. REV. 357 (2016). “Tiny House” has been used in reference to lot split policies by the City of Raleigh in North Carolina. *Missing Middle 2.0*, CITY OF RALEIGH, N.C. (last updated Aug. 9, 2022), <https://raleighnc.gov/planning/missing-middle-20> [<https://perma.cc/4M5K-V7FT>] (discussing flag lots which can hold “Tiny Houses” that have “a maximum 800-square-foot building footprint”). But see DURHAM, EXPANDING HOUSING CHOICES POWERPOINT, *supra* note 16 (showing that Durham’s local government opted to use the phrase “Small homes” rather than “Tiny homes” because Tiny Homes typically refer to homes under 400 square-foot). Durham initially called its policy “Small House/Small Lot,” *id.*, but the name did not stick with the policy, see DURHAM, N.C., UNIFIED DEV. ORDINANCE §§ 6.12.5A.2, 7.1.2C (2022), <https://durham.municipal.codes/UDO/6.12.5A.2> [<https://perma.cc/W6HP-F8SD>] (setting forth the “Reduced Pole Width [Flag Lot] Option” and “Small Lot Option,” which encapsulated the old proposals). “Lot split” is often used to describe California’s SB-9, a policy discussed in Part IV.C which is similar to the policy options that this paper advocates for. See, e.g., *ADUs vs. SB 9: What’s the Difference?*, OTTO ADU (last updated Sept. 8, 2022), <https://www.ottoadu.com/blog/adus-vs-sb-9> [<https://perma.cc/MR3W-W679>] (discussing SB-9’s lot split policy); see also *infra* Part IV.C (discussing California’s SB-9). Taking these different names into consideration, this note has opted to use the term “Tiny Home Lot Split” to refer to applicable policies, even when the official name of a government’s policy differs from this convention.

90. Vail, *supra* note 89, at 358 (“[T]he typical small or tiny house is around 100–400 square feet.” (quoting *What is the Tiny House Movement?*, THE TINY LIFE, <http://thetinylife.com/what-is-the-tiny-house-movement/> [<https://perma.cc/QZ4K-LLEP>] (last visited Feb. 4, 2023)). The website has since rephrased its statement, but it still states, “[W]hen people refer to ‘the tiny life,’ their tiny house generally falls under the 400 square foot level.” THE TINY LIFE, *supra*.

91. Lauren Trambley, *The Affordable Housing Crisis: Tiny Homes & Single-Family Zoning*, 72 HASTINGS L.J. 919, 929–30 (2021) (“[T]iny homes typically range from 100 to

around you.⁹² Picture a house that is four or eight times that size.⁹³ It may be difficult to imagine someone living in such a small space, but many people find it wonderfully habitable.⁹⁴ For the curious, many tiny home residents have posted tours of their home on YouTube.⁹⁵

A tiny home is functionally similar to a DADU, but a tiny home exists on its own independent lot.⁹⁶ Because of DADUs, ADUs have been described as “a tiny home behind an existing home.”⁹⁷ The main difference is that while an ADU is an “accessory” to a primary unit and is situated on the same parcel with the primary unit, Tiny Home Lot Splits allow for two housing units on two separate pieces of land.⁹⁸ The subdivided lot could be bought by a developer, a landlord, or an incoming resident, and this third party could then construct a tiny home using their own funds.⁹⁹

400 square feet, but [they] can get as large as 1,000 square feet. In comparison, the average size of a single-family home built in 2014 was 2,453 square feet”); *see also* MISSING MIDDLE 2.0, *supra* note 89 (“A Tiny House could have a maximum 800-square-foot building footprint and a 1,200-square-foot floor area.”).

92. *See* Trambley, *supra* note 91, at 929 (discussing the size of tiny homes).

93. *See id.* (discussing the size of tiny homes).

94. *See* Vail, *supra* note 89, at 357–58 (describing the growth of the “Tiny House Movement”).

95. *See, e.g.*, Tiny House Giant Journey, *This Tiny Home Community Could be Best Yet!* (North Carolina), YOUTUBE (Dec. 17, 2021), <https://www.youtube.com/watch?v=KMvpzQsHUGg&t=2s> [<https://perma.cc/BW3C-K9MR>]; Tiny Home Tours, *Texas Tiny Home Village Offers Affordable Housing in Competitive Communities*, YOUTUBE (Jan. 1, 2023), https://www.youtube.com/watch?v=xcO_JI3mPQQ [<https://perma.cc/B5TR-3FA4>].

96. *See* Tamara Scott, *Raleigh City Council Approves the Use of Tiny Homes*, ABC-11 EYEWITNESS NEWS (Dec. 8, 2021), <https://abc11.com/tiny-homes-raleigh-city-council-affordable-housing/11313448/> [<https://perma.cc/7X78-HS37>] (“An ADU is a tiny home behind an existing home.” (quoting Dexter Tillett, co-owner of Tiny Homes Raleigh)); *see also* Alyssa Davis, *The Tiny House Solution: Accessory Dwelling Units as a Housing Market Fix*, 18 KENNEDY SCH. R. 145, 146 (2018) (“ADUs are essentially tiny houses—usually less than 1,000 square feet—either attached to the main unit or built separately on the same lot.”).

97. Scott, *supra* note 96 (quoting Dexter Tillett, co-owner of Tiny Homes Raleigh).

98. *See* DURHAM, EXPANDING HOUSING CHOICES POWERPOINT, *supra* note 16 (discussing how Durham’s “Small House/Small Lot” option “[c]ould provide [an] alternative to an ADU, with a different ownership pattern”).

99. *See* Miller, *supra* note 15, at 485 (noting that an ADU could become “its own for-sale unit”); *see also* Peter Whoriskey & Kevin Schaul, *Corporate Landlords are Gobbling Up U.S. Suburbs. These Homeowners are Fighting Back*, THE WASHINGTON POST (Mar. 31, 2022, 6:00 AM), <https://www.washingtonpost.com/business/2022/03/31/charlotte-rental-homes-landlords/> [<https://perma.cc/S628-THWY>] (discussing the role of landlords in real estate investment); Tiny House Giant Journey, *supra* note 95, at 1:25–4:20 (highlighting a real estate project which constructed tiny homes and rented them to residents); Scott,

Although North Carolina is leading the way in such lot splits,¹⁰⁰ such policies are not widely known or adopted.¹⁰¹ Even when Tiny Home Lot Splits are mentioned, they are often relegated to a footnote in the larger policy discussion of ADUs.¹⁰²

IV. IMPLEMENTING TINY HOME LOT SPLITS

Although the previous part described the Tiny Home Lot Split policy as if it were a firm policy prescription, in reality, it is more of an amalgamation of policy changes.¹⁰³ When local governments enact

supra note 96 (mentioning Tiny Homes Raleigh, which is an example of a company which specializes in constructing Tiny Homes and ADUs).

100. See Memorandum from Patrick O. Young, Plan. Dir., Durham City-Cnty. Plan. Dep't, to Thomas J. Bonfield, City Manager, City of Durham 6 (Sept. 3, 2019) [hereinafter Sept. 3, 2019 Durham Memo for EHC Adoption], https://www.durhamnc.gov/DocumentCenter/View/27597/CC_EXPANDING-HOUSING-CHOICES-MEMO [<https://perma.cc/ZUK5-G4BP>] (discussing how the small flag lot policy allows homeowners to subdivide their property and make use of excess land); RALEIGH, N.C., UNIFIED DEV. ORDINANCE §§ 1.4.1.I, 2.2.8, 2.6.4 (2022), <https://raleighnc.gov/planning/unified-development-ordinance-udo> [<https://perma.cc/SB2E-T3RC>] (setting out the flag lot dimensions and establishing the Tiny House building type which can be situated on such lots); City of Raleigh, *Ask-A-Planner: Missing Middle 2.0 - Wednesday, February 9*, YOUTUBE, at 07:54 (Feb. 17, 2022), <https://youtu.be/gX3j73rHWxw?t=474> [<https://perma.cc/5FZS-AAJH>] (featuring Eric Hodge, Raleigh City Staff Liaison for Zoning Administration, who discussed how Raleigh's flag lot policy allows a structure "similar to an ADU" to be situated on its own, independent lot).

101. See E-mail from Scott Whiteman, Cmty. Plan. Manager, Durham City-Cnty. Plan. Dep't, to author (Dec. 16, 2022, 09:59 EST) (on file with author) ("While we have no problem 'borrowing inspiration' from other localities, our small lot rules were something that we came up with on our own. It was inspired by 1) Habitat telling us it would be great if they could split their lots in [two] to get twice as many houses and 2) making the financing issues for ADU's easier by creating a fee-simple option.").

102. See AARP North Carolina, *Accessory Dwelling Units - Durham, NC Community Forum*, YOUTUBE, at 35:50–37:25 (Dec 16, 2021), <https://youtu.be/mS3Tw8UT98Q?t=2197> [<https://perma.cc/VUL9-YNFP>] (spending only two minutes discussing tiny home lot splits in a one hour and twenty minute video about how elderly individuals can use ADUs to age in place); OnWire Realty – Raleigh Durham Real Estate, *Unpacking Raleigh Series 6 ADU's In Raleigh*, YOUTUBE, at 15:47–18:38 (Aug. 25, 2022), <https://youtu.be/OXUSGBGC4q8?t=947> [<https://perma.cc/V5SN-9WZ9>] (featuring a guest who discusses the Tiny Home LotSplit policy—including the guest's potential use of the policy—for about 3 minutes within a twenty-four minute video).

103. See, e.g., RALEIGH, N.C., UNIFIED DEV. ORDINANCE §§ 1.4.1.I, 2.2, 2.6.4 (2022), <https://raleighnc.gov/planning/unified-development-ordinance-udo> [<https://perma.cc/BT7D-3S87>]. Raleigh defines a tiny house in Sections 1.4 and 2.2.8. The size limit for tiny houses was increased when the Tiny Home Lot Split policy was implemented. See MISSING MIDDLE 2.0, *supra* note 89 (noting that the amendment "increased the allowed building size" for tiny homes). The lot beneath a tiny house is regulated by Section 2.2.8 or 2.6.4

Tiny Home Lot Splits, they often take the form of amendments scattered throughout the zoning and building codes.¹⁰⁴ In combination, these policy changes are intended to make Tiny Home Lot Splits possible or more feasible for a significant number of lots.¹⁰⁵

The omnibus nature of Tiny Home Lot Split policies generates two questions. First, what policy changes need to take place to enable Tiny Home Lot Splits? Second, which lots should a government intend to make viable for a Tiny Home Lot Split?

In many jurisdictions, density regulations and building codes need to be loosened to allow for Tiny Home Lot Splits.¹⁰⁶ These changes are discussed in Section A.¹⁰⁷ Even so, zoning and building regulations vary greatly across jurisdictions, so policymakers must look at their current regulatory scheme to find and adjust the policies that prevent Tiny Home Lot Splits.¹⁰⁸

A Tiny Home Lot Split should be viable for most lots where a DADU could viably be built.¹⁰⁹ This way, the Tiny Home Lot Split can serve as an alternative to building an ADU.¹¹⁰ Where a lot is too small or other regulations prohibit ADUs, it is not necessary to allow a Tiny Home Lot Split.¹¹¹ Because ADU policies vary widely between jurisdictions, the Tiny Home Lot Split policy must be tailored in order

while the residual lot (in splits that create a flag lot) is regulated partially by Section 2.6.4 and partially by “applicable building type regulations set forth in Articles 2.2.” § 2.6.4.

104. See *supra* note 103 (discussing the different sections of Raleigh’s Tiny Home Lot Split policy).

105. See DURHAM, EXPANDING HOUSING CHOICES POWERPOINT, *supra* note 16 (discussing how Durham’s “Small House/Small Lot” option “[c]ould provide [an] alternative to an ADU, with a different ownership pattern”).

106. See *infra* Part IV.A.

107. See *infra* Part IV.A.

108. See Trambley, *supra* note 91, at 941 (discussing the many ways that municipalities regulate housing, including “lot size, floor area ratio (percentage of land to be left unbuild upon), height, parking, driveway length, and setbacks”).

109. The convenient part about a Tiny Home Lot Split policy is that it allows Tiny Home Lot Splits to ride on the coattails of ADUs in terms of NIMBYism. One does not have to ask questions about densifying neighborhoods because the locality has already legalized ADUs on these exact lots. This may help limit the debate to the desirability of different ownership patterns and the desired traits of independent lots (such as street access or yard area).

110. See DURHAM, EXPANDING HOUSING CHOICES POWERPOINT, *supra* note 16 (discussing how Durham’s “Small House/Small Lot” option “[c]ould provide [an] alternative to an ADU, with a different ownership pattern”).

111. See *id.* (discussing how the city’s Tiny Home Lot Split policy was meant to serve as an alternative to an ADU); see also Infranca, *supra* note 10, at 72 (noting common ADU restrictions which limit what lots are eligible to add an ADU).

to complement ADU regulations.¹¹² While this process will look different for different jurisdictions, section B seeks to explain the tailoring process by examining Durham as a case study and describing how Durham’s Tiny Home Lot Split Policy is tailored to complement the city’s ADU regulations.¹¹³

The Tiny Home Lot Split policy does not have to perfectly overlap with ADU viable lots.¹¹⁴ There may be some lots that are appropriate for an ADU but not a Tiny Home Lot Split.¹¹⁵ For example, perhaps a municipality does not think that an ADU needs its own street access but that an independent tiny home does.¹¹⁶ A local government with this belief should fashion their Tiny Home Lot Split policy to exclude lots where a secondary unit could not feasibly gain street access, even if such a lot could legally house an ADU.¹¹⁷ However, deviations between the ADU regulations and Tiny Home Lot Split Policies should be directly related to a governmental belief about the desired qualities of an independent lot and its tiny home.¹¹⁸ Section B discusses how Durham has limited the breadth of its Tiny Home Lot Split policy and discusses ways that Durham might more closely align the Tiny Home Lot Split and ADU policies.¹¹⁹

Section C discusses policy changes that have some mechanisms of a Tiny Home Lot Split policy, but have missing provisions which prevent the policy from optimally facilitating Tiny Home Lot Splits.¹²⁰

112. See Miller, *supra* note 15, at 485 (“Such subdivisions or lot splits would need to be creative given the variety of ways that ADUs are built onto existing properties . . .”).

113. See *infra* Part IV.B.

114. See, e.g., *infra* Part IV.B (discussing how Durham has larger setback requirements for small homes than compared to ADUs).

115. See *infra* Part IV.B (discussing how Durham has larger setback requirements for small homes than compared to ADUs).

116. RALEIGH URB. DESIGN CTR., REPORT 02: ACCESSORY DWELLING UNIT PROGRAMS AND REGULATORY TOOLS 23 (2020), <https://cityofraleigh0drupal.blob.core.usgovcloudapi.net/drupal-prod/COR22/ADUStudyReport.pdf> [<https://perma.cc/Q9SZ-W4UP>] (discussing choices that local governments can make in terms of required street access for independent lots).

117. See, e.g., DURHAM, N.C., UNIFIED DEV. ORDINANCE § 6.12.5A.2 (2022), <https://durham.municipal.codes/UDO/6.12.5A.2> [<https://perma.cc/2VFZ-T9K5>] (requiring that flag lots have a twelve-foot-wide “pole” to provide a small home with street access).

118. This will maximize the ability of homeowners to use Tiny Home Lot Splits as an “alternative” to ADU development. See DURHAM, EXPANDING HOUSING CHOICES POWERPOINT, *supra* note 16 (discussing how Durham’s “Small House/Small Lot” option “[c]ould provide [an] alternative to an ADU, with a different ownership pattern”).

119. See *infra* Part IV.B.

120. See *infra* Part IV.C.

The Section highlights the intentionality that is often required to create a true Tiny Home Lot Split policy which parallels ADUs.¹²¹

A. *Policy Hurdles That Prevent Tiny Home Lot Splits*

Tiny Home Lot Splits involve several pieces: a parent lot, the splitting process, a resulting primary and secondary lot, and the construction of a tiny home.¹²² A regulation applicable to any one of these pieces might prevent a Tiny Home Lot Split, and a Tiny Home Lot Split policy may adjust regulations surrounding many or all of these derivative pieces.¹²³ While Tiny Home Lot Splits are not a well-known policy solution as a whole, the pieces have often been the subject to study.¹²⁴ In particular, there is a rich literature in support of tiny homes, which provides useful policy recommendations.¹²⁵ These suggestions serve as good guidance when creating Tiny Home Lot Split policies.¹²⁶

1. Density Policies

In order to facilitate Tiny Home Lot Splits, local governments should relax density requirements for both the small lot and the residual lot.¹²⁷

121. See *infra* Part IV.C.

122. See RALEIGH, N.C., UNIFIED DEV. ORDINANCE §§ 1.4.1.I, 2.2, 2.6.4 (2022), <https://raleighnc.gov/planning/unified-development-ordinance-udo> [<https://perma.cc/BT7D-3S87>] (setting out the flag lot dimensions, residual lot dimensions, and establishing the Tiny House building type which can be situated on such lots).

123. See, e.g., *infra* Part IV.A.1, IV.A.2 (discussing how regulations regarding the primary lot, secondary lot, and tiny home construction can each hinder tiny home lot splits).

124. See Trambley, *supra* note 91, at 922, 940–49 (discussing the “legal obstacles that prevent tiny homes from being implemented across jurisdictions in California”); Dawn Withers, *Looking for a Home: How Micro-Housing Can Help California*, 6 GOLDEN GATE UNIV. ENV’T L.J. 125, 150–51 (2012) (suggesting building code and zoning rule modifications to support micro-housing, including tiny homes, in California); Nonko, *supra* note 22 (discussing which localities have legalized tiny homes and what their regulations allow for); A. Robin Donnelly, *Smart Growth Through Tiny Homes: Incentivizing Freedom of Housing*, 4 TEX. A&M J. PROP. L. 327, 346–48 (2018) (discussing the political concerns that often prevent Tiny Home legalization).

125. See *supra* note 124.

126. See *supra* note 124.

127. See *infra* notes 128–166 and accompanying text (arguing that density restrictions should be relaxed for small lots and residual lots in Tiny Home Lot Splits); *cf.* Trambley, *supra* note 91, at 941 (discussing how minimum lot sizes are a significant hinderance to the tiny home movement).

Many local governments control density through minimum lot sizes.¹²⁸ Minimum lot sizes prevent development on lots that are below a certain size, often in an attempt to limit neighborhood density.¹²⁹ Minimum lot sizes are a significant barrier for Tiny Home Lot Splits and tiny homes generally.¹³⁰ Tying a tiny home to excess land can significantly increase the cost and defeat the affordability appeal of tiny homes.¹³¹ And, on top of making a tiny home non-economical, minimum lot sizes can doom a Tiny Home Lot Split.¹³² Few suburban lots are twice the minimum lot size.¹³³ As a result, most suburban homeowners cannot split their lot unless the minimum lot size is adjusted for Tiny Home Lot Splits or tiny homes generally.¹³⁴ For example, if a neighborhood's minimum lot size was 5000 square feet, only homeowners with lots above 10,000 square feet could split their lot unless the local government made appropriate adjustments.¹³⁵

Minimum lot sizes can create difficulties on two fronts for Tiny Home Lot Splits because both the small lot *and* the residual lot must

128. GRAY & FURTH, *supra* note 21, at 2 (“Minimum lot sizes regulate the density of housing in almost all American municipalities.”).

129. *See id.* at 3 (“[T]he rules that govern minimum lot size condition new housing development on the lots being larger than a certain size. For example, if a municipality enforces a minimum lot size of 9,000 square feet for a detached single-family house, it will not routinely issue the permits necessary to build a house on any lot smaller than 9,000 square feet.”); Paul Boudreaux, *Lotting Large: The Phenomenon of Minimum Lot Size Laws*, 68 ME. L. REV. 1, 29 (2016) (discussing how minimum lot sizes limit the “maximum number of houses that is permissible in an area”).

130. Trambley, *supra* note 91, at 941 (discussing how minimum lot sizes are a significant hinderance to the tiny home movement). Minimum lot sizes are particularly burdensome to tiny homes, even compared to other methods of density regulation. Other density regulations, like maximum floor-area ratios, can scale with the size of the land—if a potential resident wants a larger house, they can purchase more land. *See id.* (defining floor area ratio). The scaling effect of floor-area ratios could provide flexibility for tiny home owners. If a potential resident wants a smaller house, they can purchase *less* land. In contrast, minimum lot sizes prevent potential homeowners from building on a smaller parcel at all. *See* GRAY & FURTH, *supra* note 21, at 3 (explaining that minimum lot size requirements restrict lots under a certain size).

131. Trambley, *supra* note 91, at 941 (pointing out that land is “one of the leading factors increasing housing costs” and that high minimum lot size requirements force owners of tiny homes to “buy larger than necessary lots,” which “defeats the main appeal of the tiny home—affordability”).

132. *See* GRAY & FURTH, *supra* note 21, at 13 fig.3, 15 fig.5, 18 fig.8, 22 fig.11 (showing that few lots have twice the area of the required minimum lot size).

133. *Id.* (displaying graphs that show the ratios of actual-lot-size to minimum-lot-size-requirement, which confirm that few (non-outlier) lots exceed twice the minimum lot size).

134. *Id.*

135. *Id.*

conform to zoning standards.¹³⁶ When local governments legalize Tiny Home Lot Splits, they may focus on reducing the minimum lot size of the tiny house's lot.¹³⁷ But, maintaining the residual lot's minimum lot size also prevents many residents from using a Tiny Home Lot Split. If the parent lot is smaller than the combined minimum lot sizes of the residual lot and the small lot, then the lot split will not be allowed.¹³⁸ For example, say that a lot is 6500 square feet, and the minimum lot size for the underlying zone is 5000 square feet.¹³⁹ Let us also say that the local government, to support tiny homes, allows lots as small as 2000 square feet as long as the lot is exclusively reserved for a tiny home.¹⁴⁰ If the residual lot must conform to the existing lot size requirement of 5000 square feet, then the parent lot will be unable to engage in a Tiny Home Lot Split because there is no way that a 6500 square foot lot will

136. See DURHAM, N.C., UNIFIED DEV. ORDINANCE § 7.1.2B, 7.1.2C.2 (2022), <https://durham.municipal.codes/UDO/7.1.2B> [<https://perma.cc/M6K4-U27B>] (listing the minimum lot size for single-family detached houses, including small lots); DURHAM, N.C., An Ordinance to Amend the Unified Development Ordinance Regarding Expanding Housing Choices (TC1800007), Attachment B3, at 9 n.22 (Oct. 28, 2019) [hereinafter DURHAM, N.C., DISTRICT INTENSITY & FLAG LOT AMENDMENT TO UDO] (codified as amended at DURHAM, N.C., UNIFIED DEV. ORDINANCE §§ 6.2–6.12 (2022)), https://www.durhamnc.gov/DocumentCenter/View/27602/B3--Part-3_District-Intensity- [<https://perma.cc/ERJ6-JGN2>]

(on file and complemented with legislative context and history at Durham N.C. Expanding Housing Choices webpage, <https://www.durhamnc.gov/3679/Expanding-Housing-Choices> [<https://perma.cc/C35E-3K4U>]) (stating that the flag lot amendment “does not reduce the [residual lot’s] minimum required lot area”); see also RALEIGH, N.C., UNIFIED DEV. ORDINANCE §§ 2.2.1, 2.6.4 (2022), <https://raleighnc.gov/planning/unified-development-ordinance-udo> [<https://perma.cc/3F7F-8PGJ>] (establishing that flag lots must conform to a minimum lot size of 3500 square feet in areas without frequent transit, while other regulations “[not] provided for above,” like the residual lot size, are controlled by “applicable building type regulations set forth in Articles 2.2”). Section 2.2.1.A1 of Raleigh’s Article 2.2 lists the required minimum lot size for conventional houses in various zones. *Id.*

137. See DURHAM, N.C., DISTRICT INTENSITY & FLAG LOT AMENDMENT TO UDO, *supra* note 136, at 9 n.22 (noting that the amendment decreases restrictions on the small home’s lot, but “does not reduce the minimum required lot area” for the residual lot); see also RALEIGH, N.C., UNIFIED DEV. ORDINANCE §§ 2.2.1, 2.6.4 (2022), <https://raleighnc.gov/planning/unified-development-ordinance-udo> [<https://perma.cc/3F7F-8PGJ>] (establishing that flag lots must conform to a minimum lot size of 3500 square feet in areas without frequent transit, while other regulations “[not] provided for above,” like the residual lot size, are controlled by the typically “applicable building type regulations set forth in Articles 2.2”). Section 2.2.1.A1 of Raleigh’s Article 2.2 lists the required minimum lot size in various zones. *Id.*

138. See *supra* note 137 (describing Tiny Home Lot Split policies where the residual lot must conform to existing minimum lot sizes).

139. See *supra* note 137.

140. See *supra* note 137.

be able to produce the compliant 5000 square foot and 2000 square foot lots.¹⁴¹ This Tiny Home Lot Split will be prevented despite the fact that the parent lot is 30% larger than the current zoning rules require.¹⁴² The enduring lot size requirements for residual lots, in combination with the minimum lot size for a tiny home, creates a de-facto (and often prohibitive) lot size requirement for parent lots when owners are considering a Tiny Home Lot Split.¹⁴³

This de-facto parent lot size requirement is particularly problematic because research has shown that lot sizes in suburban neighborhoods are often close to the required minimum lot size.¹⁴⁴ A study of four Texas suburbs found that, in two of the towns, fewer than one-third of the studied lots were more than 120% of the local minimum lot size requirement.¹⁴⁵ In three of the four suburbs, there were “concentrations of lots close to the minimum lot size”¹⁴⁶ In such situations where most lots are close to the local minimum lot size and residual lots are not exempted from standard minimum lot size requirements, many homeowners will not have the option to engage in a Tiny Home Lot Split as an alternative to an ADU.¹⁴⁷ To fully facilitate a Tiny Home Lot Split, municipalities that use minimum lot sizes should consider creating exemptions for residual lots or decreasing minimum lot sizes for standard lots.¹⁴⁸

Aside from minimum lot sizes, local governments use other density controls like floor area ratios, which can also hinder Tiny Home

141. *See supra* note 137.

142. *See supra* note 137.

143. *See supra* note 137.

144. *See generally* GRAY & FURTH, *supra* note 21 (discussing the trends of lot sizes within four Texan suburbs). As an example, in Frisco Texas, only approximately 33% of the studied lots exceed 120% of the local minimum lot size, *see id.* at 17 (listing the proportions of Frisco lots under 1.2 LSR), while in Pflugerville, only one-fifth of lots exceeded 120% of the local minimum lot size, *id.* at 17. The paper’s graphs show how few lots deviate significantly from the locality’s minimum lot size. *Id.* at 13 fig.3, 15 fig.5, 18 fig.8, 22 fig.11 (showing the number of lots that lie within specific lot size ratios in comparison to the locality’s minimum lot size).

145. *Id.* at 16–17 (noting the percentage of lots that are of a certain size in Frisco and Pflugerville).

146. *Id.* at 3.

147. *See supra* note 137 (describing Tiny Home Lot Split policies where the residual lot must conform to existing minimum lot sizes).

148. *See supra* notes 127–147 and accompanying text (arguing that exemptions on minimum lot sizes in Tiny Home Lot Splits should also extend to the residual lot); *cf.* Trambley, *supra* note 91, at 941 (discussing how minimum lot sizes are a significant hinderance to the tiny home movement).

Lot Splits.¹⁴⁹ Floor area ratios define how much building space is allowed per area of land.¹⁵⁰ Floor area ratios scale with the size of the lot, so the regulation is typically less prohibitive of tiny houses.¹⁵¹ However, where a home is already close to the maximum floor area ratio, splitting off a section of the lot can push the residual lot above the maximum floor area ratio and prevent a Tiny Home Lot Split.¹⁵²

One might wonder whether such density adjustments and exceptions should be made to support Tiny Home Lot Splits.¹⁵³ After all, these density policies—minimum lot sizes, floor area ratios, etc.—serve an important density regulating purpose and protect neighborhood character.¹⁵⁴ Still, there is an argument that, given the affordable housing crisis discussed in Part II, these density regulating policies are too strict and should be loosened to promote growth in housing supply even at the expense of neighborhood character.¹⁵⁵ Even so, loosening density regulations raises a question about the proper balance: how much density should be allowed to support the housing supply.¹⁵⁶

Fortunately, these balancing questions are not at issue when Tiny Home Lot Splits are tailored to complement existing ADU policies.¹⁵⁷ In loosening density regulations to accommodate Tiny

149. See Jason M. Barr, *The Birth and Growth of Modern Zoning (Part I): From Utopia to FARTopia*, BUILDING THE SKYLINE: SKYNOMICS BLOG (May 11, 2021), <https://buildingtheskyline.org/floor-area-ratio-1/> [<https://perma.cc/HX6M-YUKK>] (“Today, one of the main ways that cities measure density is through the floor area ratio (FAR) . . .”).

150. *Id.* (explaining that the floor area ratio measures the amount of building space that is “provided per square foot or meter of land”).

151. See Trambley, *supra* note 91, at 946 (noting that San Diego’s use of maximum floor area ratios, along with other factors, makes the city’s regulations “appear . . . more lenient towards smaller house sizes” when compared to Los Angeles).

152. See 81 Spooner Rd., LLC v. Zoning Bd. of Appeals of Brookline, 936 N.E.2d 895, 907 (Mass. App. Ct. 2010), *aff’d*, 964 N.E.2d 318 (Mass. 2012) (upholding the revocation of a developer’s building permit for a new, subdivided lot because the subdivision rendered the residual lot non-conforming with respect to floor area ratio).

153. *Cf.* Infranca, *supra* note 10, at 65–66 (discussing debates as to the proper density for neighborhoods).

154. See GRAY & FURTH, *supra* note 21, at 2 (discussing the role of minimum lot size regulations).

155. See *infra* Part II (discussing how limited housing supply and density has contributed to the affordable housing crisis).

156. *Cf.* Infranca, *supra* note 10, at 65–66 (noting debates about the proper density for neighborhoods).

157. See DURHAM, EXPANDING HOUSING CHOICES POWERPOINT, *supra* note 16 (discussing how Durham’s “Small House/Small Lot” option “[c]ould provide [an] alternative to an ADU, with a different ownership pattern”).

Home Lot Splits, local governments would simply be extending many of the variances given to ADUs.¹⁵⁸

ADUs represent a retreat from many density policies, especially minimum lot sizes.¹⁵⁹ Many residents hope minimum lot sizes will prevent traffic congestion, preserve open space, and protect neighborhood character,¹⁶⁰ but ADUs, with the potential to “double the population of some . . . neighborhoods,” represent a compromise of this policy purpose.¹⁶¹ In addition to contravening the typical density limitations of minimum lot sizes, ADUs are sometimes exempted from other density calculations like floor area ratios.¹⁶² These exemptions help facilitate infill development,¹⁶³ and the changes are often tolerated because tiny homes and ADUs represent a type of “gentle” density that

158. See Boudreaux, *supra* note 129, at 28–29 (exemplifying the assumption that minimum lot sizes will only allow one housing unit per lot in the author’s density calculations); see, e.g., RALEIGH, N.C., UNIFIED DEV. ORDINANCE § 1.5.2.F.2 (2022), <https://raleighnc.gov/planning/unified-development-ordinance-udo> [<https://perma.cc/C7P7-WTYY>] (exempting ADUs from a series of density calculations); CAL. GOV’T CODE § 65852.2(c)(2) (West 2022) (preventing local agencies from establishing a “minimum or maximum size for an accessory dwelling unit, size based upon a percentage of the proposed or existing primary dwelling, or limits on lot coverage, floor area ratio, open space, front setbacks, and minimum lot size” requirement that would prevent the construction of an 800 square foot ADU that meets specified standards).

159. See Boudreaux, *supra* note 129, at 28–30 (assuming that minimum lot sizes will only allow one unit per acre and discussing the policy justifications for minimum lot sizes).

160. See *id.* at 29 (discussing the policy justifications for minimum lot sizes).

161. See Margaret F. Brinig & Nicole Stelle Garnett, *A Room of One’s Own? Accessory Dwelling Unit Reforms and Local Parochialism*, 45 URB. LAW. 519, 549 n.139 (2013) (quoting Steven Leigh Morris, *Invasion of the Granny Flat: Los Angeles Weighs a Plan to Allow Back Yard Dwellings and Car Parking on Lawns*, LA WEEKLY (Dec. 10, 2009), <https://www.laweekly.com/invasion-of-the-granny-flat/> [<https://perma.cc/M5ZK-Y9QH>]) (discussing the threats of accessory dwelling units).

162. See RALEIGH, N.C., UNIFIED DEV. ORDINANCE § 1.5.2.F.2 (2022), <https://raleighnc.gov/planning/unified-development-ordinance-udo> [<https://perma.cc/C7P7-WTYY>] (noting that, in certain areas “one accessory dwelling unit is permitted per lot, regardless of underlying density, minimum lot size, minimum lot area per dwelling unit, or minimum site area per dwelling unit designations” (emphasis added)); CAL. GOV’T CODE § 65852.2(c)(2) (West 2022) (preventing local governments from imposing size restrictions, “limits on lot coverage, floor area ratio, open space, front setbacks, and minimum lot size” requirements which prevent the construction of a compliant “800 square foot accessory dwelling unit”); *Summit-Waller Cmty. Ass’n v. Pierce Cnty.*, 2016 WL 2864397, at *28 (Wash. Central Puget Sd. Growth. Mgmt. Hrgs. Bd. May 9, 2016) (“Pierce County’s Plan provides that ADUs are not included in the calculation of residential densities.”). *But see* Taylor Haines, *Micro-Housing in Seattle Update: Combating “Seattle-ization”*, 43 SEATTLE UNIV. L. REV. 11, 14 (2020) (“ADUs must comply with regulations of . . . floor-area ratio . . .”).

163. See John Infranca, *The New State Zoning: Land Use Preemption Amid a Housing Crisis*, 60 B.C. L. REV. 823, 882 (2019) (noting that recent state legislation has permitted ADUs as a form of infill development and “gentle density”).

does not abruptly increase the density and character of neighborhoods.¹⁶⁴ Given that a Tiny Home Lot Split and a principal dwelling with an ADU can look identical, there is little reason to heavily distinguish between the two when considering density exemptions.¹⁶⁵ Density exemptions for a small unit of housing should not be determined by whether the initial dwelling and the secondary unit are owned by the same person.¹⁶⁶

2. Other Regulations

Building codes, which determine what building designs are legal, also have important impacts on tiny homes and therefore on Tiny Home Lot Splits.¹⁶⁷ Although building codes serve an important and ongoing role in protecting health and safety, the unconventional nature

164. King, *ADUs: Laws and Uses*, *supra* note 81 (“ADUs . . . create ‘gentle density’ by infilling existing neighborhoods . . .”); Adomatis, *supra* note 5, at 251 (“ADUs can be designed to blend in with the surrounding architecture and primary dwelling unit, be compatible with established neighborhoods, and preserve community character.”); Ashley Salvador, *Detached Accessory Dwelling Units – Who Benefits and Who Pays?*, at 3 (Nov. 12, 2020) (M.A. thesis, University of Waterloo), <https://uwspace.uwaterloo.ca/handle/10012/16502> [<https://perma.cc/JPS2-AQMV>] (“DADUs are seen as a relatively low-risk, ‘acceptable’ form of ‘gentle density’ that is socially and politically palatable.”).

165. See City of Raleigh, *Raleigh City Council Work Session: Text Change TC-20-21: Missing Middle 2.0 - More Homes, More Choices*, GRANICUS, at 2:12:04 (May 10, 2022), http://raleigh.granicus.com/MediaPlayer.php?view_id=5&clip_id=7144 [<https://perma.cc/6683-7AJA>] (“Well, you could certainly imagine a[n] . . . ADU meeting both the ADU standards and the definition of a tiny house.” (quoting Ken Bowers, Planning and Development Deputy Director for the City of Raleigh, when he was asked about the difference between an ADU and a tiny home)).

166. Cities may decide that each resident should have a certain amount of yard space. To see the value cities place on green space, see Elmendorf & Shanske, *supra* note 3, at 515 (discussing how ‘blue’ states have “more protected parks and open space”); NAT’L ASS’N HOME BUILDERS, *DIVERSIFYING HOUSING OPTIONS WITH SMALLER LOTS AND SMALLER HOMES* 54 (2019), <https://www.nahb.org/-/media/NAHB/advocacy/docs/top-priorities/housing-affordability/nahb-2019-small-homes-research-report.pdf> [<https://perma.cc/8B7S-TPWB>] (noting how the cottage court housing code in the City of Ashland, Oregon, requires a “shared courtyard,” which mitigates the community’s concerns about open space). A yard under one owner may act as a 2-household common area and provide both households with the shared amenity, while a Tiny Home and Residual Home may be less likely to share their yards (or may even fence their yard in), which prevents such benefits from being shared. In part, market dynamics can counter this concern. Market forces will likely value yard space, disincentivizing Tiny Home Lot Splits where there is little excess yard. Even more critically, local governments can compensate by creating more and larger parks that benefit the owners of all nearby lots.

167. See Trambley, *supra* note 91, at 942–43 (discussing how local building codes present an obstacle for tiny houses).

of tiny homes means that building codes often do not account for tiny homes and, consequentially, have onerous requirements that may not be needed for safety.¹⁶⁸ There are three main obstacles that many building codes present for tiny homes: (1) ceiling height restrictions—which may interfere with a tiny home’s loft and corresponding space efficiencies; (2) egress requirements which mandate stairs rather than ladders—taking up valuable space in a tiny home; and (3) room size requirements—which can force added bulk onto a tiny house.¹⁶⁹ There have been some efforts, like California’s Appendix Q, to tailor building codes for tiny home development.¹⁷⁰ Local governments should consider such codes to help facilitate Tiny Home Lot Splits.¹⁷¹

B. *Durham as a Case Study*

Durham, North Carolina, has enacted a version of a Tiny Home Lot Split policy which can serve as a great example for other local governments.¹⁷² Durham enacted its Tiny Home Lot Split Policy in 2018 as an amendment to its Unified Development Ordinance (“UDO”).¹⁷³

168. *See id.* (discussing how building codes are useful but present inflexible requirements for tiny homes).

169. *Id.* at 943 (discussing the most problematic building code restrictions for tiny homes).

170. *Id.* (discussing California’s Appendix Q, which “establish[es] specific building codes for tiny homes across jurisdictions in California”).

171. *See id.* at 956 (noting that, while California’s Appendix Q made progress toward allowing tiny homes throughout the state, the appendix could have been improved in major ways).

172. *See infra* Part IV.B (arguing that Durham’s Tiny Home Lot Split Policy also has policy and geographic elements that complement Durham’s ADU policy).

173. *See* Durham, N.C., An Ordinance to Amend the Unified Development Ordinance Regarding Expanding Housing Choices (TC1800007), Attachment B4 3–5 (Oct. 28, 2019) (codified as amended at DURHAM, N.C. UNIFIED DEV. ORDINANCE § 7.1 (2022)), https://www.durhamnc.gov/DocumentCenter/View/27603/B4--Part-4_Housing-Types- [<https://perma.cc/HB2N-CZW7>] (on file and complemented with legislative context and history at Durham N.C. Expanding Housing Choices webpage, <https://www.durhamnc.gov/3679/Expanding-Housing-Choices> [<https://perma.cc/C35E-3K4U>]) (establishing Durham’s small lot option); DURHAM, N.C., DISTRICT INTENSITY & FLAG LOT AMENDMENT TO UDO, *supra* note 136, at 4, 9 (establishing Durham’s reduced poll width option for flag lots); Sept. 3, 2019 Durham Memo for EHC Adoption, *supra* note 100, at 6 (discussing how the Expanding Housing Choices amendment allows homeowners to subdivide their backyard “into a separate flag lot for a small house,” which serves as an “alternative to building an ADU”).

Durham originally passed the UDO in 2006,¹⁷⁴ which, among many other things, allowed homeowners to build ADUs.¹⁷⁵ Just over a decade later, in 2018, Durham sought to further liberalize its zoning rules through its Expanding Housing Choices (“EHC”) amendment to the UDO.¹⁷⁶ One proposal for the amendment was to reevaluate minimum lot area requirements and to allow “Small House, Small Lot” developments.¹⁷⁷ Durham was inspired to make this policy because (1) Habitat for Humanity informed the city that it would be helpful if they could split their lots and make twice as many houses and (2) the city wished to make “financing issues for ADU’s easier by creating a fee-simple option.”¹⁷⁸

Durham thought that Small House/Small Lot development could provide an alternative to ADUs but “with a different ownership pattern.”¹⁷⁹ In its analysis of the legislation, Durham pointed out several advantages to allowing a Tiny Home Lot Split that complements the municipality’s ADU policy.¹⁸⁰ First, subdividing and selling a portion of one’s property as a small lot can be a preferable option for homeowners who don’t have the cash to invest in an ADU.¹⁸¹

174. *Unified Development Ordinance (UDO)*, CITY OF DURHAM, <https://www.durhamnc.gov/414/Unified-Development-Ordinance-UDO> [<https://perma.cc/APH7-MSVG>] (last visited Oct. 31, 2022) (stating that the UDO was adopted in 2006).

175. *See ADUs Coming to Durham but Maybe Not Raleigh*, BUILDER (Jan. 17, 2019), https://www.builderonline.com/building/adus-coming-to-durham-but-maybe-not-raleigh_c [<https://perma.cc/YS6Z-K9JS>] (“ADUs have been allowed in Durham since 2006 . . .”).

176. *See* DURHAM CITY-CNTY. PLAN. DEP’T, SMALL HOUSE/SMALL LOT TYPE: PROPOSED CONCEPT AND BACKGROUND INFORMATION (2018) [hereinafter DURHAM, SMALL HOUSE/SMALL LOT PROPOSAL], <https://www.durhamnc.gov/DocumentCenter/View/23568/Proposed-Concepts> [<https://perma.cc/BL43-DWXX>] (on file as “Proposed Concepts” and complemented with legislative context and history at Durham N.C. Expanding Housing Choices webpage, <https://www.durhamnc.gov/3679/Expanding-Housing-Choices> [<https://perma.cc/C35E-3K4U>]) (seeking input on proposed concepts, including ADUs, “Small House, Small Lot[s],” and adjustment of “Lot Dimensions”).

177. *Id.*

178. *See* E-mail from Scott Whiteman to author, *supra* note 101.

179. *See* DURHAM, SMALL HOUSE/SMALL LOT PROPOSAL, *supra* note 176 (“For deep lots, the Small house/Small lot option to be similar to an accessory dwelling unit, but with a different ownership pattern.”).

180. *See id.* (listing “[c]onsiderations” for Small House/Small Lots including advantages of the policy change).

181. Sept. 3, 2019 Durham Memo for EHC Adoption, *supra* note 100, at 6 (“Subdividing the backyard into a separate flag lot for a small house is an alternative to building an ADU and could offer the existing homeowner an opportunity to access equity they have tied up in the land, allowing them to stay in place.”); *see* City of Durham, *City*

Subdividing one's yard "could offer the existing homeowner an opportunity to access equity they have tied up in the land, allowing them to stay in place."¹⁸² Second, subdividing one's land may be more convenient and less labor intensive for the initial homeowners, regardless of whether the homeowner has significant financial resources.¹⁸³ Durham planners point out that subdividing one's lot can be a good option for those who "don't want to go through the process of building an ADU or of being a landlord."¹⁸⁴

These motives support the contention that Durham's policy is a Tiny Home Lot Split policy.¹⁸⁵ Durham made amendments to its zoning ordinances to make Tiny Home Lot Splits possible for a significant number of ADU viable lots.¹⁸⁶ The city's leadership wanted homeowners to be able to split off excess land that could be used to build a tiny home, and the planners intended the policy to serve as an alternative to ADU development.¹⁸⁷

Durham's policies serve as an excellent example of how a Tiny Home Lot Split policy can be made to complement a jurisdiction's ADU policy. On top of reducing the minimum lot size for tiny homes (which are called "small houses" in Durham),¹⁸⁸ Durham created a

Council Work Session: Expanding Housing Choices Presentation, GRANICUS, at 1:44:05 (Aug. 23, 2018) [hereinafter *Durham, Expanding Housing Choices Recording*], https://durham.granicus.com/player/clip/2204?view_id=5&redirect=true&h=5fcbcced4424f1e01e42d0ad9c9d22d8 [<https://perma.cc/BK2L-FUZ9>] ("[B]uilding an ADU requires . . . money and good credit, and those are all things that . . . a lot of people don't have readily available.").

182. Sept. 3, 2019 Durham Memo for EHC Adoption, *supra* note 100, at 6.

183. See DURHAM, SMALL HOUSE/SMALL LOT PROPOSAL, *supra* note 176 (pointing out that a Small House/Small Lot option may provide a preferable option for homeowners "who don't want to go through the process of building an ADU or of being a landlord").

184. *Id.*

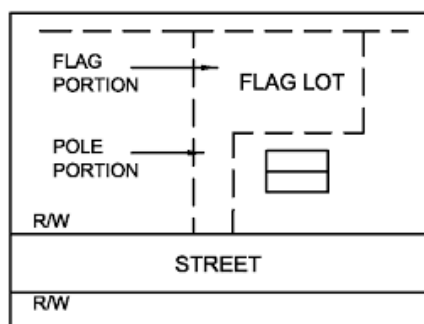
185. See *supra* notes 173–184 and accompanying text (pointing to Durham's small lot option and reduced flag lot option and noting the policymakers' intention for homeowners to split off a portion of their yard for the building of a small dwelling unit); see also *supra* text accompanying notes 14–18 (describing a Tiny Home Lot Split Policy).

186. See *supra* note 173 (identifying the amendments which created the small lot option and reduced width flag lot option).

187. See DURHAM, SMALL HOUSE/SMALL LOT PROPOSAL, *supra* note 176 (noting the similarity between the Small house/Small lot option and an accessory dwelling unit); Sept. 3, 2019 Durham Memo for EHC Adoption, *supra* note 100, at 6 ("Subdividing the backyard into a separate flag lot for a small house is an alternative to building an ADU . . ."); see also *Durham, Expanding Housing Choices Recording*, *supra* note 181, at 1:43:54 ("We also see the Small House/Small Lot option as being, potentially, a good alternative to an Accessory Dwelling Unit.").

188. DURHAM, N.C., UNIFIED DEV. ORDINANCE § 7.1.2C (2022), <https://durham.municipal.codes/UDO/7.1.2C> [<https://perma.cc/QY9R-8YA8>] (setting forth

“Reduced Flag Option” which made it easier for a parent lot to provide the Tiny Home with legally sufficient street access.¹⁸⁹ These provisions work to mirror Durham’s ADU policy by facilitating housing units *behind* an existing dwelling while providing the new lot with street access.¹⁹⁰



Durham’s ADU statute requires that ADUs be placed in the rear of the yard.¹⁹¹ For small lots to be a viable alternative to ADUs, homeowners needed to be able to subdivide off their *backyard* into its own independent lot with street access.¹⁹² To provide these small lots with access to the main road, Durham created a “reduced pole width option” for flag lots.¹⁹³ Flag lots consist of a fairly typical lot that is

“Small Lot Option” standards which allow lots as small as 2000 square feet but limits the floor area and footprint of structures on the lot to 1200 and 800 square feet respectively).

189. DURHAM, N.C., UNIFIED DEV. ORDINANCE § 6.12.5A.2 (2022), <https://durham.municipal.codes/UDO/6.12.5A.2> [<https://perma.cc/2VFZ-T9K5>] (setting forth the “Reduced Pole Width” flag lot option).

190. See Sept. 3, 2019 Durham Memo for EHC Adoption, *supra* note 100, at 6 (discussing how the Expanding Housing Choices amendments, which include the small lot option and the flag lot reduced width option, facilitate “small flag lot[s]” where homeowners can “[s]ubdivid[e] the[ir] backyard into a separate flag lot for a small house,” which serves as an “alternative to building an ADU”).

191. See DURHAM, N.C., UNIFIED DEV. ORDINANCE § 5.4.1B.1, 5.4.2B.7 (2022), <https://durham.municipal.codes/UDO/5.4.2B.7> [<https://perma.cc/5DG5-RXW6>] (establishing that an ADU must generally be placed either 5 feet behind the rear of the primary dwelling, or when placed beside the primary dwelling, behind the rear 25% of the primary dwelling).

192. See Sept. 3, 2019 Durham Memo for EHC Adoption, *supra* note 100, at 6 (“Subdividing the *backyard* into a separate flag lot for a small house is an alternative to building an ADU” (emphasis added)). The planners did not entertain the possibility of the initial dwelling being in the flag lot. This shows that planners explicitly knew that it was the backyard which would typically be severed off from an existing dwelling.

193. DURHAM, N.C., DISTRICT INTENSITY & FLAG LOT AMENDMENT TO UDO, *supra* note 136, at 9 (adding the reduced pole width option to the flag lot ordinance).

situated away from the street (the “flag”), and a thin strip of land that connects the flag to the street (the “pole”).¹⁹⁴ Previously, this pole had to be twenty feet wide,¹⁹⁵ which limited the number of lots that could undergo a split since the primary dwelling would have to have a spare twenty feet to one side of the dwelling.¹⁹⁶ However, Durham instituted a Reduced Pole Width Option, which reduced the required flag pole width to only twelve feet.¹⁹⁷ An excess twenty feet to one side of the property is a tall order for many homeowners, so this flexible policy works to make the Tiny Home Lot Split a more accessible option for those with underutilized land in their backyard.¹⁹⁸ Such technical, yet impactful, adjustments could be made because the planners were attentive to the current ADU policies and trends and because planners remained mindful of how residents with underutilized land would use the new policy.¹⁹⁹ Durham’s reduced flag pole option shows how a Tiny Home Lot Split Policy can be created to successfully complement the jurisdiction’s ADU policy.²⁰⁰

194. *Id.* The provided diagram of a flag lot is from Durham’s files. DURHAM CITY-CNTY. PLAN. DEP’T, DENSITY AND LOT DIMENSIONS: BACKGROUND INFORMATION AND SUMMARY OF PROPOSALS 1 (2019), https://www.durhamnc.gov/DocumentCenter/View/25617/Attachment-I_Lot-dimensions-and-Density-final [<https://perma.cc/VDQ5-FNBD>] (on file as “Lot Dimensions and Density Information Sheet” and complemented with legislative context and history at Durham N.C. Expanding Housing Choices webpage, <https://www.durhamnc.gov/3679/Expanding-Housing-Choices> [<https://perma.cc/C35E-3K4U>]).

195. *See id.* (maintaining the original provision that the pole “be a minimum of 20 feet in width,” but limiting its application to the “Standard Flag Lot” provision).

196. *See* DURHAM CITY-CNTY. PLAN. DEP’T, SMALL HOUSE/SMALL LOT (2018), <https://www.durhamnc.gov/DocumentCenter/View/24691/Small-House-Small-Lot-PDF> [<https://perma.cc/L2PT-E5F2>] (on file as “Small House/Small Lot (PDF)” at Durham N.C. Expanding Housing Choices webpage, <https://www.durhamnc.gov/3679/Expanding-Housing-Choices> [<https://perma.cc/C35E-3K4U>]) (discussing an example parent lot which could not create a pole of sufficient width under existing standards, and could, therefore, not undergo a lot split).

197. DURHAM, N.C., UNIFIED DEV. ORDINANCE § 6.12.5A.2 (2022), <https://durham.municipal.codes/UDO/6.12.5A.2> [<https://perma.cc/2VFZ-T9K5>]. Other requirements also have to be met. *See id.* (listing the requirements of a reduced width flag lot).

198. *See* DURHAM CITY-CNTY. PLAN. DEP’T, *supra* note 196 (discussing an example parent lot which could be created under the proposed pole width amendment).

199. *See* Sept. 3, 2019 Durham Memo for EHC Adoption, *supra* note 100, at 6 (“Subdividing the backyard into a separate flag lot for a small house is an alternative to building an ADU . . .”); *supra* notes 188–198 and accompanying text (describing how Durham’s Tiny Home Lot Split policy was tailored to align with its ADU policy).

200. *See supra* notes 188–198 and accompanying text (describing how Durham’s Tiny Home Lot Split policy was tailored to align with its ADU policy).

Empirically, Durham’s Tiny Home Lot Split policy is relatively popular compared to its ADU option.²⁰¹ From the fourth quarter of 2019 to the third quarter of 2022, the planning department received 152 submissions for EHC lot split permits and 132 submissions for small-lot option building permits.²⁰² These numbers compare favorably against the sixty submissions for ECH-enabled ADU permits.²⁰³

While there is significant use of the flag lot and small lot options, it is not clear that these options are being used as an alternative to ADUs.²⁰⁴ Instead, many developers are using these options to develop clusters of small single-family homes.²⁰⁵ At the same time, if awareness of the policy spreads between homeowners, and perhaps with more policy adjustments, homeowners may begin to see the Tiny Home Lot Split policy as a great tool to make use of underutilized land while contributing to the housing supply.²⁰⁶

There are ways in which Durham could further liberalize its Tiny Home Lot Split policy.²⁰⁷ Durham should consider changing its Tiny Home Lot Split policy to further align the Tiny Home Lot Splits with the city’s ADU regulations.²⁰⁸ Some restrictions in the Durham Tiny Home Lot Split policy, like lot dimension and setback

201. Memorandum from Scott Whiteman, Plan. Dir., Durham City-Cnty. Plan. Dep’t, to Members of the Joint City-Cnty. Plan. Comm. 2 (Nov. 30, 2022) [hereinafter Nov. 30, 2022 Durham Memo on EHC Quarterly Update], <https://www.durhamnc.gov/DocumentCenter/View/47593/JCCPC-EHC-Metrics-November-30-2022-PDF> [<https://perma.cc/VB4S-7FNV>] (showing that the number of submitted Expanding-Housing-Choices-enabled permits for lot splits increased from 4 permits in Q4 2019 to at least 12 permits per quarter for each quarter after 2020).

202. *Id.* Note, though, that there may have been other ADUs that were not EHC enabled.

203. *Id.*

204. See E-mail from Scott Whiteman to author, *supra* note 101 (“Based on what we’ve seen so far, it looks like [the small lot rules are] mostly being used by builders/developers and not homeowners.”).

205. See Nov. 30, 2022 Durham Memo on EHC Quarterly Update, *supra* note 201, at 4 (depicting a map of EHC lot splits over Durham, North Carolina). Many of the lot splits icons overlap with one another. *Id.* This indicates that there are multiple lot splits which have been used on neighboring properties.

206. See, e.g., OnWire Realty – Raleigh Durham Real Estate, *supra* note 102, at 15:47 (featuring a guest on YouTube who discusses Raleigh’s Tiny Home Lot Split policy, his potential use of the policy on his own land, and his observation that “the flag lot is a great option—for a lot of people—not just me”).

207. See *infra* notes 209-211 and accompanying text (describing Durham’s setback requirements for ADUs and Tiny Home Lot Splits and arguing that Durham could further liberalize its Tiny Home Lot Split policy by easing the applicable setback requirements).

208. See *infra* notes 209-211 and accompanying text (arguing that Durham should consider relaxing setback requirements for Tiny Home Lot Splits).

requirements, place a heavier burden on Tiny Home Lot Splits than ADUs.²⁰⁹ For example, a homeowner cannot conduct a Tiny Home Lot Split unless they have a spare forty-five feet of space in their backyard *plus* the desired length of the tiny house.²¹⁰ In comparison, ADUs only have a three foot or five foot setback requirement from the side and rear property lines.²¹¹ If there is not enough space for forty-five feet *plus* a dwelling unit behind the house, then the homeowner would have the option of building an ADU *but not* a Tiny Home Lot Split.²¹²

C. *Densification Policies that Miss the Mark*

Although Durham has not experienced a wave of homeowners splitting off a small lot from their backyard, the city has gone further than many cities in allowing Tiny Home Lot Splits.²¹³ Tiny Home Lot Splits are simply not possible in many cities and are specifically prohibited in other municipalities.²¹⁴ The city of Tucson, Arizona noted

209. *Compare* Durham, N.C., UNIFIED DEV. ORDINANCE §§ 6.12.5B.1, 7.1.2B, 7.1.2C.2 (2022), <https://durham.municipal.codes/UDO/6.12.5B.1> [<https://perma.cc/W6HP-F8SD>] (establishing that there must be forty-five feet of backyard space *plus* the desired length of the tiny house behind the standard lot's dwelling), *with* Durham, N.C., UNIFIED DEV. ORDINANCE § 5.4.1B.1.b–c (2022), <https://durham.municipal.codes/UDO/5.4.1B.1.b> [<https://perma.cc/T9SY-CEEU>] (establishing that ADUs only require a three feet or five feet setback from the side rear property lines depending on the zone). See *infra* note 210 for detailed calculations.

210. This forty-five-foot calculation comes from the combination of three provisions. First, there must be twenty-five feet of rear yard space between the primary dwelling that the Tiny Home Lot Split's property line. § 7.1.2B. The space between this property line and the Tiny Home will be classified as equivalent to a side yard setback, § 6.12.5B.1, which has a minimum length of five feet, § 7.1.2C.2. Finally, there must be fifteen feet between the rear of the Tiny Home and the rear property line. § 7.1.2C.2. Of course, these three requirements do not include the length of the actual Tiny Home itself. Durham, N.C., UNIFIED DEV. ORDINANCE §§ 6.12.5B.1, 7.1.2B, 7.1.2C.2 (2022), <https://durham.municipal.codes/UDO/6.12.5B.1> [<https://perma.cc/W6HP-F8SD>].

211. Durham, N.C., UNIFIED DEV. ORDINANCE § 5.4.1B.1.b–c (2022), <https://durham.municipal.codes/UDO/5.4.1B.1.b> [<https://perma.cc/T9SY-CEEU>].

212. *Supra* notes 209-211 and accompanying text (discussing the setback restrictions in Durham's Tiny Home Lot Split).

213. See E-mail from Scott Whiteman to author, *supra* note 101 (noting that the small lot rules were developed independently within Durham and that the rules have “mostly being used by builders/developers and not homeowners”); see also *infra* notes 214–227 and accompanying text (discussing local governments that have rejected or not fully implemented Tiny Home Lot Splits).

214. See, e.g., *Accessory Dwelling Units (ADUs)*, CITY OF FRIDLEY, <https://fridleymn.gov/1601/ADUs> [<https://perma.cc/DM5T-SFJV>] (last visited Nov. 3, 2022) (“Unlike a duplex, where two equivalent housing units share a site but are owned separately, an ADU is smaller than the principal home and cannot be owned separately.”).

the possibility of a separately owned ADU, but the two resulting properties would each have to meet the required minimum lot size, which is often 5000 or 7000 square feet.²¹⁵ Tucson has noted that “the ADU would no longer be an accessory unit,” but instead “the primary residence.”²¹⁶ Thus, if a homeowner with a *regular* sized lot wants to make a small dwelling unit with unused yard space, they must create an ADU.²¹⁷ Similarly, Portland, Oregon allows “small flag lots” only when the primary house is already on two lots.²¹⁸ In that case, the back half of both lots can be turned into a flag lot, leading to a unique arrangement of *standard* sized lots and houses.²¹⁹

California’s SB-9 comes close to creating a Tiny Home Lot Split policy which complements the state’s ADU policies.²²⁰ The law permits lot splits as long as each resulting parcel is at least 1200 square feet (and other requirements are met).²²¹

That said, SB9 requires the division to be at least a sixty-forty split, which makes it difficult to create a small lot next to a standard sized initial house.²²² If an owner’s house is too large to subdivide off

215. *Accessory Dwelling Units (ADUs) Code Amendment Frequently Asked Questions*, CITY OF TUCSON, <https://www.tucsonaz.gov/pdsd/accessory-dwelling-units-code-amendment/FAQ> [<https://perma.cc/6K8B-X4R7>] (last visited Oct. 31, 2022).

216. *Id.*

217. *See id.* (answering questions about ADUs in Tucson, Arizona, and noting that a parent lot would have to generate two conforming standard lots for an ADU to be purchased separate from the primary dwelling).

218. *Residential Infill - Development Options while Retaining an Existing House*, CITY OF PORTLAND, <https://www.portland.gov/bds/zoning-land-use/residential-infill-project/retaining-existing-house> [<https://perma.cc/L4DE-D6AR>] (last visited Oct. 31, 2022).

219. *See id.* (discussing how “Small flag lots” allow the *reconfiguration* of a pre-existing property line when development on one of the lots is prevented by an existing home).

220. *See Which SB 9 Option is Best for You? Part 2*, HOMESTEAD: BLOG (July 27, 2022), <https://www.myhomestead.com/blog/best-sb9-option-2> [<https://perma.cc/FT8M-GANK>] (presenting a flowchart which tells homeowners whether they should consider an ADU or an SB-9 lot split); How To ADU, *When you should NEVER use SB9*, YOUTUBE, at 00:00 (Oct. 18, 2021), <https://www.youtube.com/watch?v=PvgCLORLfOo> [<https://perma.cc/2CRZ-VT2P>] (noting that those who wish to build a detached home in their backyard have “two options”—they can either build an ADU or use SB-9 to build a regular dwelling unit).

221. Ryan Michael Leaderman & Kevin J. Ashe, *California Gov. Signs Landmark Duplex and Lot-Split Legislation into Law*, HOLLAND & KNIGHT: INSIGHTS (Sept. 17, 2021), <https://www.hklaw.com/en/insights/publications/2021/09/ca-gov-signs-landmark-duplex-and-lot-split-legislation-into-law> [<https://perma.cc/4REX-8Q6L>].

222. BEN METCALF ET AL., TERNER CTR. FOR HOUS. INNOVATION AT U.C. BERKELEY, WILL ALLOWING DUPLEXES AND LOT SPLITS ON PARCELS ZONED FOR SINGLE-FAMILY CREATE NEW HOMES? 4 (2021) (noting that a previous iteration of the law required a fifty-fifty split and noting that that inflexibility would have “potentially limit[ed] the number of

40% without encroaching on the existing house, they must either demolish the house or switch to an ADU format.²²³ Thus, if a homeowner's underutilized land comprises less than 40% of the lot, SB-9 does not facilitate a subdivision of that land to other users.²²⁴ SB9 was meant to accommodate two lots that are roughly equal in size²²⁵ for two residents that are equal in status.²²⁶ When a homeowner wishes to provide a smaller dwelling on a smaller unit, California refuses to facilitate an independent lot for that small unit.²²⁷

The policies described above do not have all the provisions necessary to make a successful Tiny Home Lot Split policy.²²⁸ These policies highlight the necessity to purposefully identify and adjust the policy hurdles to Tiny Home Lot Splits if a jurisdiction wishes to enact a successful Tiny Home Lot Split policy.

instances where new homes would be feasible"). Presumably, allowing lot splits with even larger size differences than a sixty-forty split would create more flexibility and would increase the number of feasible lot splits.

223. HOMESTEAD, *supra* note 220 (presenting a flowchart which tells homeowners whether they should consider an ADU or an SB-9 lot split). For homeowners whose houses do not fit neatly on one side of the property or the other, the flowchart asks: "Are you willing to demolish your house?" *Id.* The flowchart advises that any homeowners who are not willing to demolish their house should look into an ADU or a two-unit development (i.e., convert their existing house into a duplex). *Id.*

224. *See* Leaderman & Ashe, *supra* note 221 ("Each parcel must be at least 40 percent of the original parcel's size.").

225. *See id.* (discussing the relative size of parcels for an SB-9 split)

226. *See* HOMESTEAD, *supra* note 220 (noting that, if building equity for the second resident is important, an SB-9 lot split is preferable to an ADU because the resident can own, rather than simply rent, the second lot); Krista Evans, *Integrating Tiny and Small Homes into the Urban Landscape: History, Land Use Barriers and Potential Solutions*, 11 J. GEOGRAPHY & REG'L PLAN. 34, 36 (2018) ("Being a tenant has never been part of the 'American Dream,' and the status of tenants in this society has never been secure or comfortable." (quoting ALLAN DAVID HESKIN, *TENANTS AND THE AMERICAN DREAM: IDEOLOGY AND THE TENANT MOVEMENT*, at xi (1983))).

227. *See* Leaderman & Ashe, *supra* note 221 ("Each parcel must be at least 40 percent of the original parcel's size.").

228. *See id.* (discussing California's SB-9 lot split policy); CITY OF TUSCON, *supra* note 215 (noting that a parent lot would have to generate two conforming standard lots for an ADU to be purchased separate from the primary dwelling); CITY OF PORTLAND, *supra* note 218 (stating that small flag lots can be used by "taking advantage of an underlying platted lot," with each lot having a minimum lot area of 1600 square feet).

V. TINY HOME LOT SPLITS ALLOW AN EFFICIENT REDISTRIBUTION OF
COST BURDENS

A Tiny Home Lot Split and an arm's-length DADU rental are both ways to transfer a homeowner's underutilized land to incoming residents, either permanently or temporarily.²²⁹ This transaction is best understood by examining the parties involved. As a hypothetical, a homeowner named Homer owns a home with a yard. Homer enjoys his yard, but he is willing to part with it for \$50,000.

On the other side of the transaction, Shelly is looking for shelter. Her lease expires in a year, and she'd like to live in an 800 square foot housing unit. She is willing to pay either \$300,000 to own a tiny home outright or rent a unit for \$1400 per month. She is also willing to buy the land for \$100,000 and pay a contractor \$200,000, the going rate, to build a tiny home.

Homer's land is underutilized because the value he gets from the land (\$50,000) is much lower than Shelly's valuation (\$100,000). In an arm's-length DADU rental, Homer forks out \$200,000 to a developer to build a DADU, and then rents the room to Shelly. In a Tiny Home Lot Split, Shelly buys the land outright and builds the tiny home herself.²³⁰ Alternatively, an intermediary can step in. For example, a developer can buy the land, build a tiny home, and sell the tiny home along with the land to Shelly at a profit.²³¹ Additionally, a landlord could buy the land, build a tiny home, and rent the unit to Shelly, which is particularly helpful if Shelly is not currently in a position to own a home.²³² All of the options under the Tiny Home Lot Split relieve

229. For context on efficient transfers of property rights, see *Steven G. Medema, Debating Law's Irrelevance: Legal Scholarship and the Coase Theorem in the 1960s*, 2 *Tex. A&M L. Rev.* 159, 162 (2014). The Coase theorem argues that individuals will reach an efficient equilibrium by negotiating their property rights as long as there are no transaction costs and other requirements are met. *Id.*

230. Miller, *supra* note 15, at 485 (noting that ADUs could become "its own for-sale unit").

231. *See, e.g.,* Scott, *supra* note 96 (interviewing a co-owner of Tiny Homes Raleigh, which is an example of a company which specializes in constructing Tiny Homes and ADUs).

232. *See* Whoriskey & Schaul, *supra* note 99 (discussing the role of landlords in real estate investment). Readers may wonder why it is preferable to let professional landlords take the profit from small unit renting instead of everyday homeowners. As discussed in Part IV, allowing a landlord with financial resources to purchase land from a Tiny Home Lot Split can take the financial burden off poorer homeowners and increase the supply of housing. *See infra* Part IV. However, there may be negative social implications to

Homer of the responsibility to finance, construct, or rent out a secondary unit.²³³

A. *Decrease in Up Front Costs Allows House Rich Cash Poor Homeowners to Benefit from Infill Development*

The fact that Tiny Home Lot Splits relieve homeowners of the burdens associated with ADUs allows homeowners to sidestep a major hurdle seen in ADU development.²³⁴ Many homeowners struggle to gather the thousands of dollars needed to construct an ADU, a problem which prevents low- and medium income homeowners from benefiting from potential income.²³⁵

Academics and local governments have grappled with the financial barriers to ADUs and the equitable issues that arise from them.²³⁶ Commentators have advocated for more favorable terms on

increasing the number of small-scale landlords. See Kath Hulse, *The Everyman Archetype: Discursive Reframing of Private Landlords in the Financialization of Rental Housing*, 35 HOUS. STUD. 981, 985–86 (2020) (discussing Australia’s reinstatement of “negative gearing”—a tax subsidy to small scale landlords—after the constituency grew more politically powerful); see also Hal Pawson & Chris Martin, *Rental Property Investment in Disadvantaged Areas: The Means and Motivations of Western Sydney’s New Landlords*, 26 HOUS. STUD. 621, 622–23 (2021) (discussing the rise of small-scale investor landlords in Sydney, Australia).

233. See Sept. 3, 2019 Durham Memo for EHC Adoption, *supra* note 100, at 6 (pointing out that Durham’s Small House/Small Lot option may be a good option for those who are not willing or are not able to build and ADU and become a landlord).

234. *Id.*

235. See CHAPPLE ET AL., *supra* note 11, at 3, 11 (noting that the median construction cost of a DADU in a 2021 California survey was \$180,000); Salvador, *supra* note 164, at 3–4 (“[R]esearch suggests that the cost and financing of DADUs is preventing more middle-income households from building them This may limit their supposed affordability benefits to upper income households in upper-income areas of the city where rental rates are considerably higher, thereby diminishing affordability claims.” (citations omitted)).

236. See, e.g., CITY OF SEATTLE, ACCESSORY DWELLING UNITS ANNUAL REPORT: SEPTEMBER 2021, at 13 (2022) (“Most AADUs and DADUs permitted under Seattle’s new regulations have been in census tracts where the median household income is more than \$100,000.”); CHAPPLE ET AL., *supra* note 11, at 7 (“Overall, then, the development of ADUs to date has not been equitable across ethnic and class lines”); Week, *supra* note 4, at 281 (“[F]ew ADU permits have been filed in the most price-vulnerable communities, . . . [which] “challenges the theoretical benefits of ADUs espoused by politicians and academics.”); Salvador, *supra* note 164, at 3–4 (“[R]esearch suggests that the cost and financing of DADUs is preventing more middle-income households from building them This may limit their supposed affordability benefits to upper income households in upper-income areas of the city where rental rates are considerably higher, thereby diminishing affordability claims.” (citations omitted)); King, *Financing Barriers*, *supra* note 8 (“ADU construction isn’t an option for most moderate-income homeowners given the loan

ADU loans,²³⁷ and financial institutions, like Freddie Mac, have made corresponding changes.²³⁸ Governments and non-profits have supported ADU lending and directly subsidized the costs of ADUs in an effort to make ADUs accessible to low- and medium-income homeowners.²³⁹

Even so, these solutions have significant drawbacks.²⁴⁰ Many of these solutions require loans.²⁴¹ In the best-case scenario, these loans expose the homeowner to significant financial risk.²⁴² For example, one of the most popular ADU loans, a Home Equity Line of Credit,²⁴³ uses the homeowner's house as collateral for the loan.²⁴⁴ These homeowners risk losing their homes if the ADU project goes poorly.²⁴⁵ In other cases, homeowners with unsatisfactory credit or high debt may not

products available to them" (summarizing the comments of Ron Johnson, a program officer for Family Housing Fund, a Minneapolis-based nonprofit)).

237. *See, e.g.*, Goodman & Greene, *supra* note 81 (arguing that loans used to build ADUs should take into account the future income and property value increases generated by the ADU).

238. *See Helping You Leverage the ADU Boom*, FREDDIE MAC Single-Family (Sept. 15, 2022), <https://sf.freddiemac.com/articles/insights/helping-you-leverage-the-adu-boom> [<https://perma.cc/8XV2-T935>] (discussing recent changes to allow the use of rental income to qualify for ADU loans).

239. *See, e.g.*, Shelby R. King, *Affordable ADUs: How It's Being Done*, SHELTERFORCE (May 10, 2022) [hereinafter King, *Affordable ADUs*], <https://shelterforce.org/2022/05/10/affordable-adus-how-its-being-done/> [<https://perma.cc/P24S-ZTEA>] (discussing a pilot project in Los Angeles, which planned to use grant money to "de-risk the lending" of ADUs); *ADU Grant Program*, CAL. HOUS. FIN. AGENCY, <https://www.calhfa.ca.gov/adu/index.htm> [<https://perma.cc/JKM9-BX4A>] (last visited Jan. 1, 2023) ("The ADU Grant provided up to \$40,000 towards pre-development and non-reoccurring closing costs associated with the construction of the ADU. Predevelopment costs include site prep, architectural designs, permits, soil tests, impact fees, property survey, and energy reports.").

240. *See infra* notes 241–248 and accompanying text (discussing the shortcomings of conventional efforts to increase access to ADUs).

241. *See* Emma Diehl, *What is an Accessory Dwelling Unit (ADU)?*, SOFI: LEARN (Apr. 1, 2021), <https://www.sofi.com/learn/content/what-is-an-adu/> [<https://perma.cc/F8JQ-WNGF>] (discussing the use of loans for ADUs).

242. *See id.* (discussing the costs and benefits of different ADU loan options).

243. *See* King, *Financing Barriers*, *supra* note 8 (noting that, out of the two available loans, the HELOC is the "more common approach"); CHAPPLE ET AL., *supra* note 11, at 13 ("Of the 43% of homeowners who took out one or more loans from the bank, 66% used a . . . [HELOC], [and] 41% refinanced their primary residence . . .").

244. Diehl, *supra* note 241 (noting that HELOC loans use the homeowner's property as collateral).

245. *See* Lindsay VanSomeren, *Can a Lender Foreclose on a Home Equity Loan or HELOC?*, THE BALANCE (last updated July 31, 2022), <https://www.thebalancemoney.com/can-a-lender-foreclose-on-a-home-equity-loan-or-heloc-5268107> [<https://perma.cc/UH86-79PQ>] ("Your home equity loan or HELOC lender can foreclose on your home if you default on the loan.").

qualify for the loans at all.²⁴⁶ These vulnerable homeowners, who may benefit most from an income-generating ADU, are nevertheless unable to access the required financing without government funds or other programs.²⁴⁷ But, the use of government and nonprofit funds is also problematic because the programs run on money from third parties and may occasionally run out of funds.²⁴⁸

While academics, activists, and governments have put forward a valiant effort to help homeowners over the financial hurdle of ADU construction, homeowners with underutilized land should not *have* to overcome the hurdle of ADU construction in the first place.²⁴⁹ In many cases, other parties are better situated to take on the financial burden.²⁵⁰

Evidence shows that existing homeowners are less willing to finance the construction costs of secondary units compared to incoming residents.²⁵¹ A survey conducted from DADU owners and residents interested in DADUs in Edmonton, Canada, found that homeowners are willing to pay an average of \$124,000 to construct a DADU, which was \$60,000 below the average cost of a DADU.²⁵²

In contrast, it appears that incoming potential residents are more willing to pay for and finance small homes.²⁵³ For example, in Redmond, Washington, a developer built twelve 1000-square foot two-

246. See King, *Affordable ADUs*, *supra* note 239 (discussing how non-profits encountered and withheld loans from homeowners with “wild” debt-to-income ratios, which prevented those homeowners from using the program to construct and benefit from an ADU).

247. *Id.*

248. See Goodman & Greene, *supra* note 81 (noting that the local initiatives, while promising, “rely on scarce public and philanthropic dollars”); see, e.g., CAL. HOUS. FIN. AGENCY, *supra* note 239 (noting that all funds for a \$40,000 ADU grant program were fully reserved as of 12/09/2022).

249. See *infra* notes 251–258 and accompanying text (arguing that third parties are often better situated to handle the construction cost of a secondary unit).

250. See CITY OF RALEIGH, N.C., MISSING MIDDLE 2.0 PRESENTATION (Oct. 19, 2021), [https://go.boarddocs.com/nc/raleigh/Board.nsf/files/C7XLAL54AD5A/\\$file/20200921PLANDEVMissingMiddle2Presentation.pdf](https://go.boarddocs.com/nc/raleigh/Board.nsf/files/C7XLAL54AD5A/$file/20200921PLANDEVMissingMiddle2Presentation.pdf) [<https://perma.cc/JU52-RSW4>] (“Flag Lots can be created and sold, providing income to sellers at risk of displacement.”); see *infra* note 251–258 and accompanying text (arguing that third parties are often better situated to handle the construction cost of a secondary unit).

251. Compare Salvador, *supra* note 164, at 57 (discussing \$124,000 average willingness to pay for ADUs), with NAT’L ASS’N HOME BUILDERS, *supra* note 166, at 86 (discussing sale prices of small homes).

252. See Salvador, *supra* note 164, at 57 (discussing \$124,000 average willingness to pay for ADUs).

253. See *supra* note 251.

bedroom, two-bathroom cottages.²⁵⁴ These sold for between \$334,500 and \$425,000.²⁵⁵ Near downtown Durham, a 1200 square foot home utilizing the Small Lot Option was listed for \$525,000.²⁵⁶ While these units are slightly larger than the 800 square foot ADU limit in many jurisdictions, these prices indicate that incoming residents are more willing to finance a small housing unit than existing homeowners.²⁵⁷

By allowing Tiny Home Lot Splits, local governments allow homeowners with underutilized land to take their land to the market, which shifts the financing burden to those who are more willing to pay.²⁵⁸ This allocation of burdens may allow broader use of small housing units and allows homeowners to benefit from infill development without taking out a loan or relying on government or nonprofit dollars.²⁵⁹ Tiny Home Lot Splits allow land value transfers based on which pieces of land are underutilized according to the market, rather than relying on homeowner wealth, risky loans, or philanthropic funds.²⁶⁰

B. *Efficient Value Capture*

Using Tiny Home Lot Splits may allow local governments to charge fees on new secondary units while still fostering the desired level of infill development.²⁶¹ This would increase revenue for the

254. NAT'L ASS'N HOME BUILDERS, *supra* note 166, at 86–87.

255. *Id.* at 87.

256. Sarah Kreuger, *Half-Million Dollar Homes: Could Small Homes, Small Lots Solve Durham's Housing Crunch?*, WRAL NEWS (May 11, 2022), <https://www.wral.com/half-million-dollar-homes-could-small-homes-small-lots-solve-durham-s-housing-crunch/20277469/> [<https://perma.cc/7764-ZQJT>].

257. *See* NAT'L ASS'N HOME BUILDERS, *supra* note 166, at 86–87 (describing the price and demand for small homes in cottage courts).

258. *See* Durham, *Expanding Housing Choices Recording*, at 1:44:05 (“[B]uilding an ADU requires . . . money and good credit, and those are all things that . . . a lot of people don’t have readily available.”).

259. *See supra* notes 251–258 (arguing that third parties are often better situated to handle the construction cost of a secondary unit).

260. *See supra* notes 251–258 (arguing that third parties are often better situated to handle the construction cost of a secondary unit).

261. *See* Elmendorf & Shanske, *supra* note 3, at 531 (concluding that “value capture is now central to the practice of municipal land-use regulation . . .”); *supra* notes 251–257 and accompanying text (discussing the price sensitivity of potential ADU owners compared to potential tiny home owners).

government.²⁶² It may seem harsh for local governments to charge homeowners for producing much-needed housing, but this self-interested approach is the typical way that cities approach upzoning and new development.²⁶³ A Tiny Home Lot Split would allow the city to better extract value from ADU development.²⁶⁴ Homeowners have proved price sensitive and risk averse when constructing ADUs, which makes it difficult to exact fees without preventing ADU projects.²⁶⁵

Value capture is the way that many American cities approach upzoning and new development.²⁶⁶ There is a certain amount of revenue that a new project must generate for a developer to be willing to take on the project.²⁶⁷ Any revenue after that is just extra profit, and the city can tax it without ending the deal.²⁶⁸ This extra profit is called the residual.²⁶⁹ Cities will often upzone an area and generate new projects but will tax the projects just below the amount necessary for the deal.²⁷⁰ This focus on value extraction is sometimes called “public benefit zoning,” which is the “‘*explicit*[] attempt [] to recapture land value increases’ in the form of impact fees, affordable housing units, land dedications, and other ‘community benefits.’”²⁷¹

262. See Elmendorf & Shanske, *supra* note 3, at 526 (noting that value of land can be captured through “impact fees”).

263. See *id.* at 524–25, 531 (describing controversy and criticisms of local governments extracting value from zoning transformations and concluding that “value capture is now central to the practice of municipal land-use regulation”).

264. See *supra* notes 251–257 and accompanying text (discussing the price sensitivity of potential ADU owners compared to potential tiny home owners).

265. See, e.g., *The ABCs of ADUs*, LOVE PORTLAND (June 5, 2018), <https://www.loveportland.com/new-blog/2018/6/20/the-abcs-of-adus> [<https://perma.cc/547V-84FU>] (“ADUs have been legal in Portland since 1981, but few residents were building them until 2010 when the city issued a temporary waiver on SDC fees.”).

266. Elmendorf & Shanske, *supra* note 3, at 531 (concluding that “value capture is now central to the practice of municipal land-use regulation . . .”).

267. *Id.* at 524–26.

268. *Id.*

269. *Id.*

270. *Id.* (The city attempts to tax the developer until the “development or redevelopment of a parcel just slightly more profitable than the parcel’s next most remunerative use”).

271. *Id.* (quoting NICO CALAVITA & MARIAN WOLFE, WHITE PAPER ON THE THEORY, ECONOMICS AND PRACTICE OF PUBLIC BENEFIT ZONING, at ix (2014), http://ebho.org/wp-content/uploads/2011/09/LVR-White-Paper-ExecSum_141113.compressed.pdf [<https://perma.cc/H794-PHMF>]).

An ADU ordinance is essentially an upzone.²⁷² Yet, cities have found it difficult to collect fees from ADU development without exceeding the homeowner's "residual" and preventing the project entirely.²⁷³ For example, Portland lowered its ADU fees to promote more ADU development.²⁷⁴ Portland once charged "between \$10,000 and \$20,000 for an ADU Permit,"²⁷⁵ and saw low adoption.²⁷⁶ In 2010, Portland opted to waive the fee, which increased development,²⁷⁷ but Portland was forced to extend the waiver repeatedly until it made the waiver permanent in 2018.²⁷⁸ This shows the difficulty that cities face in extracting value from ADUs while still promoting this type of residential infill development.²⁷⁹

The danger of raising fees is supported by the price sensitivity expressed by homeowners considering ADUs.²⁸⁰ In a California Survey of ADU owners, "158 (24%) of homeowners surveyed cited paying for the cost of construction as a top challenge associated with constructing their ADU," and another 118 listed permitting fees as a top challenge.²⁸¹ One homeowner reported that she faced an easier time developing an ADU after the State restricted the amount of local permit fees because

272. See Nonko, *supra* note 22 (listing methods of upzoning single-family neighborhoods including allowing duplexes, triplexes, and ADUs).

273. See LOVE PORTLAND, *supra* note 265 ("ADUs have been legal in Portland since 1981, but few residents were building them until 2010 when the city issued a temporary waiver on SDC fees.").

274. Infranca, *supra* note 10, at 85.

275. *Id.*

276. See LOVE PORTLAND, *supra* note 265 ("ADUs have been legal in Portland since 1981, but few residents were building them until 2010 when the city issued a temporary waiver on SDC fees.").

277. Steve Law, *Fee Waiver for New Accessory Dwelling Units Fixed into Law, but There's a Fee to Get it*, PAMPLIN MEDIA GROUP (June 27, 2018), <https://pamplinmedia.com/sl/399497-294774-fee-waiver-for-new-accessory-dwelling-units-fixed-into-law-but-theres-a-fee-to-get-it> [<https://perma.cc/FR28-85XR>] ("In 2009, the year before the first temporary fee waiver, the city issued 24 permits for ADUs. In 2010, with the waiver in effect, that zoomed up to 86 permits."); Infranca, *supra* note 10, at 85 (noting that the waiver "led to an increase in [ADU] development").

278. Infranca, *supra* note 10, at 85 (noting that Portland's fee waiver was extended until July 2016); Law, *supra* note 277 ("The city has used a series of temporary fee waivers since 2010 to encourage more ADUs . . .").

279. See LOVE PORTLAND, *supra* note 265 ("ADUs have been legal in Portland since 1981, but few residents were building them until 2010 when the city issued a temporary waiver on SDC fees.").

280. See CHAPPLE ET AL., *supra* note 11, at 13, 34 (noting that "158 (24%) of homeowners surveyed cited paying for the cost of construction as a top challenge associated with constructing their ADU" while another 118 listed permitting fees as a top challenge).

281. *Id.*

she no longer needed to sign a promissory note to place a lien on her home.²⁸²

As discussed earlier, potential residents appear more willing to pay for and finance small homes.²⁸³ With selling prices between \$334,500 and \$425,000, cities could easily tax a portion of the residual while still increasing the supply of housing and allowing homeowners to benefit from transferring their land.²⁸⁴

VI. CONCLUSION

By rearranging the burdens of Tiny House development and ownership, Tiny Home Lot Splits can more efficiently convey underutilized land to incoming residents.²⁸⁵ The land transfer (1) benefits homeowners who have underutilized land but are unable or unwilling to build and run an ADU rental, (2) benefits new residents who will have a new selection of tiny homes and ADUs to choose from, and (3) generates more infill development which cities can capture value from.²⁸⁶

Local governments should consider implementing Tiny Home Lot Split policies to complement their ADU policies.²⁸⁷ Local governments should follow the recommendations in the current literature surrounding tiny homes, including the reforming of building codes and adjusting of minimum lot sizes.²⁸⁸ At the same time, local governments should enact further policies to facilitate Tiny Home Lot Splits in particular.²⁸⁹ Most concretely, minimum lot sizes on the residual lot should be relaxed to allow more homeowners to split their lot without violating current density regulations.²⁹⁰ In addition, local governments should tailor their Tiny Home Lot Split policies to

282. *Id.* at 12–13.

283. Compare Salvador, *supra* note 164, at 57 (discussing \$124,000 average willingness to pay for ADUs), with NAT'L ASS'N HOME BUILDERS, *supra* note 166, at 86–87 (discussing sale prices of small homes).

284. See NAT'L ASS'N HOME BUILDERS, *supra* note 166, at 87 (discussing sale prices of small homes).

285. See *supra* Part V.

286. See *supra* Part V.

287. See Miller, *supra* note 15, at 485 (proposing that localities “revisit their subdivision or lot-split codes to permit the ADU to become its own for-sale unit”).

288. See *supra* note 124 (listing notable articles on tiny home policies).

289. See *supra* Part IV.A.

290. See *supra* Part IV.A.

complement their ADU policies, reviewing the size and location requirements of ADUs and DADUs.²⁹¹ With this tailoring, many homeowners with underutilized land will have a choice between constructing an ADU or engaging a Tiny Home Lot Split.²⁹² Through these measures, local governments can facilitate infill development, provide homeownership opportunities, maintain a balance between homeownership and renting, and benefit residents.²⁹³

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291. *See supra* Part IV.

292. *See supra* Part IV.

293. *See supra* Part IV.

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