

Golden Gate University Environmental Law Journal

Volume 6

Issue 1 *Symposium Issue: The City As Habitat: A
Place For Urban Wildlands*

Article 8

November 2012

Looking For a Home: How Micro-Housing Can Help California

Dawn Withers

Follow this and additional works at: <http://digitalcommons.law.ggu.edu/gguelj>

 Part of the [Environmental Law Commons](#), and the [Housing Law Commons](#)

Recommended Citation

6 Golden Gate U. Envtl. L. J. 125 (2012).

This Comment is brought to you for free and open access by the Academic Journals at GGU Law Digital Commons. It has been accepted for inclusion in Golden Gate University Environmental Law Journal by an authorized administrator of GGU Law Digital Commons. For more information, please contact jfischer@ggu.edu.

LOOKING FOR A HOME: HOW MICRO-HOUSING CAN HELP CALIFORNIA

DAWN WITHERS*

I. INTRODUCTION

Humans have long shared small homes and small communal spaces.¹ In the Middle Ages, it was common for many people to share a bed and for many people to share a room.² Pilgrims lived in homes of about 165 square feet, and German farmers in nineteenth-century Texas built 200-square-foot homes for use on the weekends when they came to town.³ After the 1906 earthquake, San Francisco built 140-square-foot homes to shelter survivors.⁴

Continuing the tradition of living in small quarters is no simple task in the modern era. How and where we live is not determined by us alone but by zoning rules and building codes, which require that certain standards for habitability and safety be met. These rules ensure that people live in safe conditions removed from industrial and commercial areas. But these same rules also present challenges for those who want to live in small houses that do not fall directly within the parameters set by California's Building Code and zoning laws.

With the advent of micro-housing—dwellings generally smaller than 300 square feet—California's Building Code, and to some extent zoning laws, create a range problems for those who want compact, environmentally conscious living because, although dwellings smaller

* Doctor of Jurisprudence Candidate 2013, Golden Gate University School of Law. The author would like to thank associate editor, Christina Tetreault, for her excellent editing, as well as the *Golden Gate University School of Law Environmental Law Journal* editorial board for their leadership and vision.

¹ Alec Wilkinson, *Let's Get Small*, THE NEW YORKER, July 25, 2011, at 29.

² WITOLD RYBCZYNSKI, HOME: A SHORT HISTORY OF AN IDEA 28 (1986).

³ Wilkinson, *supra* note 1, at 29.

⁴ *Id.*

than 300 square feet are not explicitly prohibited, they do not meet minimum size requirements.⁵ Micro-housing built as second units⁶ could be a primary source of new housing in California, but the Building Code stands in the way. This new housing would not produce more sprawl because it could be built within existing communities close to job and urban centers served by public transportation. Micro-housing reduces sprawl because the distances people travel between work and home in their cars is shorter, and cars are a major source of greenhouse gas emissions linked to climate change.⁷ In 2012, nearly one-third of energy-related emissions in the United States came from transportation.⁸ But before California can benefit socially and environmentally from micro-housing, these small homes must become less difficult to build. Currently, a local jurisdiction grants special permission for a micro-house to be built legally. This costly process can require a public hearing (with an uncertain outcome) for someone seeking permission to build a micro-home, creating a great deterrent to even starting the permitting process.

Traditional zoning regimes and building codes in California have long thwarted efforts to build denser developments with a mixture of uses in walkable neighborhoods. Prior to the widespread use of formal zoning regulations, homes were built close together and up to property lot lines in dense neighborhoods.⁹ California, with its reputation as a sprawl haven, has long suffered the consequences of unchecked growth, with its massive highway system clogged by commuter vehicles pumping tons of carbon into the atmosphere, all at the hands of California's zoning regime.

The environmental costs of sprawl cannot be ignored. Californians

⁵ CAL. CODE REGS., tit. 24, § R304.1 (2010) (requiring that a dwelling must have one room no smaller 120-square feet). This code section is one of several sections that comprise the California Building Code.

⁶ CAL. GOV'T CODE § 65852.2(i)(4) (Westlaw 2012) (“‘Second unit’ means an attached or a detached residential dwelling unit which provides complete independent living facilities for one or more persons. It shall include permanent provisions for living, sleeping, eating, cooking, and sanitation on the same parcel as the single-family dwelling is situated.”).

⁷ U.S. ENVTL. PROT. AGENCY, CLIMATE CHANGE SCIENCE FACTS 1 (2010), *available at* www.epa.gov/climatechange/downloads/Climate_Change_Science_Facts.pdf (explaining that climate change refers to major and long-term changes in global weather, temperature, and sea levels, associated with the warming of the planet, and that human activities principally related to the release of carbon and other greenhouse gas emissions are considered a major contributor and catalyst to climate change rather than natural fluctuations in the Earth's climate).

⁸ *Sources of Greenhouse Gas Emissions*, U.S. ENVTL. PROT. AGENCY, www.epa.gov/climatechange/ghgemissions/sources.html (last updated June 14, 2012).

⁹ Edward A. Tombari, NAT'L ASS'N OF HOME BUILDERS, SMART GROWTH, SMART CHOICES SERIES: MIXED-USE DEVELOPMENT 2-3 (2005), *available at* www.nahb.org/FILEUPLOAD_DETAILS.ASPX?CONTENTID=37219.

experience the worst air quality in the nation, with growing public health issues related to air pollution.¹⁰ The underpinnings of sprawl—abundant land, cheap fuel, and cheap transportation¹¹—are longer ubiquitous, and California must place its new housing back within its cities and existing communities, not on undeveloped land. Micro-housing is one way to reduce sprawl by providing homes close to jobs and allowing people to commute without a car. It also fits into California's goal to reduce greenhouse gas emissions by way of better land-use and transportation policies, including housing people closer to their work sites.¹²

Because the impacts of global warming cannot be addressed one city a time, the leadership required to make micro-housing legal in California must come at the state level. This means the Legislature and state regulators must change the California Building Code to allow for residential dwellings smaller than 300 square feet so all communities can use micro-housing as a solution to sprawl. Otherwise, towns and cities will continue to be bound by the limitations set in the Building Code and thus prevented from permitting micro-housing in their localities.

Coordination between states and localities is also crucial because an ad hoc approach will simply not lead to any real reduction in greenhouse gas emissions. Greenhouse gases now trapped in the Earth's atmosphere may cause the planet's temperature to increase by one degree Fahrenheit in the future, making immediate reductions in greenhouse gas emissions critical.¹³ Much of the Earth's warming during the last four decades is due to concentrations of greenhouse gas produced by human activity.¹⁴ Localities can do their share to reduce greenhouse gas emissions through better planning. From Las Vegas¹⁵ to Miami-Dade County, Florida, towns and cities throughout the United States have passed mixed-use, compact-growth development plans that combine housing types in higher-density neighborhoods.¹⁶ With mounting concerns over climate

¹⁰ CAL. ENVTL. PROT. AGENCY, CLIMATE ACTION TEAM REPORT TO GOVERNOR SCHWARZENEGGER AND THE LEGISLATURE 28 (2006), *available at* www.climatechange.ca.gov/climate_action_team/reports/2006report/2006-04-03_FINAL_CAT_REPORT.PDF (explaining that the annual health and economic impacts of poor air quality are estimated at 9,000 deaths and \$60 billion per year, and that the number of days conducive to pollution formation may rise by seventy-five to eighty-five percent in the high ozone areas of Los Angeles (Riverside) and the San Joaquin Valley (Visalia) by the end of the century).

¹¹ Witold Rybczynski, *Living Smaller*, THE ATLANTIC MONTHLY, Feb. 1991, *available at* www.theatlantic.com/magazine/archive/1991/02/living-smaller/6205/2/?single_page=true.

¹² CAL. ENVTL. PROT. AGENCY, *supra* note 10, at 61.

¹³ *Id.* at 20.

¹⁴ *Id.*

¹⁵ Hubble Smith, *Finding the Will to Infill*, LAS VEGAS BUSINESS PRESS, Jan. 16, 2012, www.lvbusinesspress.com/articles/2012/01/16/news/iq_49199132.txt.

¹⁶ Tombari, *supra* note 9.

change and a growing preference among cities and counties for compact, mixed-use development, changing California's Building Code to accommodate micro-housing is more important than ever.

II. CALIFORNIA LIVING: A BRIEF HISTORY

Zoning responsibilities fall primarily on local governments based on their police powers. Under their authority to protect public health, safety and welfare, localities have traditionally created zoning ordinances that segregate different uses and building types.¹⁷ State law gives local jurisdictions discretion to decide their own zoning needs,¹⁸ so long as the localities' regulations do not conflict with federal or state laws that preempt local authority.¹⁹ Most traditional zoning regimes restrict uses rather than guide development.²⁰ Growth is deterred based on zoning rules for minimum lot sizes, parking, density, and requiring and maintaining distance between different uses (e.g., residential and commercial).²¹ Density is also limited through minimum lot sizes, building heights, and setbacks from lot lines.²² Together, these are powerful forces for shaping communities because they determine what type of housing gets built and where. As is evident in many California communities, low-density residential development has long been the norm, with single-family homes often segregated from higher-density multi-family housing and apartments. For much of the twentieth century, large, low-density homes were favored by developers seeking to maximize profits and by consumers wanting to maximize space with homes built on undeveloped land.²³

It was not always this way. Before 1840, American homes looked like European row houses. Homes from this period remain in a few places like Philadelphia, Boston, and New York City.²⁴ The standard American lot size at the time was about twenty-five feet wide and created neighborhoods that were walkable, busy, and close to most places

¹⁷ Thomas Jacobson, *Growth Management*, in CALIFORNIA LAND USE PRACTICE 114 (Adam U. Lindgren et al eds., 2011).

¹⁸ Vivian Kahn et al., *Zoning*, in CALIFORNIA LAND USE PRACTICE 139 (Adam U. Lindgren et al. eds., 2011).

¹⁹ *Id.*

²⁰ Andres Duany & Emily Talen, *Making the Good Easy: The Smart Code Alternative*, 29 FORDHAM URB. L.J. 1445, 1452 (2002).

²¹ *Id.*

²² Oliver A. Pollard, III, *Smart Growth: The Promise, Politics, and Potential Pitfalls of Emerging Growth Management Strategies*, 19 VA. ENVTL. L.J. 247, 254 (2000).

²³ Andrew Rice, *The Elusive Small-House Utopia*, N.Y. TIMES, Oct. 15, 2010, www.nytimes.com/2010/10/17/magazine/17KeySmallHouse-t.html?pagewanted=all.

²⁴ Rybczynski, *supra* note 11.

Americans visited daily.²⁵ But by 1870, American tastes began to change. Americans began preferring detached single-family homes rather than row houses that served numerous families and commercial uses in a single building.²⁶ This shift in home design came at time when American cities had booming immigrant populations, a lack of public sanitation, and a growing desire among the middle class and the wealthy for the private leisure of country estates.²⁷ Suburbs developed during the late nineteenth century were more compact than twentieth century suburbs, primarily because they supported denser populations with public transit to urban centers.²⁸

A major shift in how America zoned its cities followed *Village of Euclid, Ohio v. Ambler Realty Co.*, wherein the United States Supreme Court held that zoning ordinances were constitutional based on the government's authority to protect the public from nuisances.²⁹ In that case, a property owner sued the city after it adopted a comprehensive zoning plan that placed limitations on what the property owner could build on his parcel.³⁰ The property owner claimed, among other things, that the ordinance violated his constitutional due process rights, and he sought an injunction preventing the zoning ordinance from taking effect.³¹ In its decision, the Court elucidated the relatively short history of zoning ordinances in the United States (only about twenty-five years at the time), finding "they are now uniformly sustained, [whereas] a century ago or even half a century ago, [they] probably would have been rejected as arbitrary and oppressive."³²

The ordinance declared constitutional in *Euclid* is a prime example of the segregated-use zoning that led to so much sprawl and low-density development in the past century. Under *Euclid*, localities could divide up land without regard to how it impacted growth locally and regionally.³³ Since *Euclid*, zoning practices on the state and local levels pushed development outside of America's older urban centers following World War II, when cities were seen as less desirable places to live (mostly by

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 389-90 (1926).

³⁰ *Id.* at 379, 384.

³¹ *Id.* at 384.

³² *Id.* at 387.

³³ See Richard A. Epstein, *A Conceptual Approach to Zoning: What's Wrong with Euclid*, 5 N.Y.U. ENVTL. L.J. 277, 287-89 (1996). ("This vision of the world presupposes that identical uses within single zones are wonderful, that mixed uses are to be discouraged, and, as noted, that the problems with the zoned boundaries are to be ignored.")

Caucasians).³⁴ Residential development during this time followed the expansion of the interstate highway and transportation corridors serving residential and commercial development where none existed before.³⁵ Development in suburban areas created a plethora of environmental problems as more Americans sought larger homes on larger lots with resource-intensive amenities.³⁶ Suburban development priced out low-income families, and discriminatory housing practices kept urban centers racially segregated from suburbs.³⁷ Low-density zoning (a hallmark of suburban development) also discouraged compact, urban-centered development.³⁸

Loss of agricultural land, open space, damage to wetlands and hillsides, reduced water quality, and mass production of greenhouse gas emissions are all consequences of this low-density development.³⁹ Climate change associated with greenhouse gas emissions will not be gradual over time but will result in sudden and dramatic changes in weather patterns and sea levels, leading to an increase in global hunger and water shortages.⁴⁰ The period between 1995 and 2006 ranks among the warmest years for global surface temperature since record keeping started in 1850.⁴¹ Evidence of sea-level rise, decreases in snow and ice, and average global temperature increases over the past century are all signs of climate change from human activity.⁴² Greenhouse gas emissions, including carbon, produced from human activity have grown upwards of eighty percent from 1970 to 2004, with the rate of production accelerating between 1995 and 2004.⁴³ The largest growth of greenhouse gas emissions since 1970 came from energy supply, transport and industry.⁴⁴ Emissions from residential, commercial, and institutional buildings, in addition to transportation emissions in industrialized nations such as the United States, are projected to increase through 2050.⁴⁵

³⁴ ROBERT H. FREILICH ET AL., FROM SPRAWL TO SUSTAINABILITY: SMART GROWTH, NEW URBANISM, GREEN DEVELOPMENT AND RENEWABLE ENERGY 4 (2d ed. 2010).

³⁵ *Id.*

³⁶ *Id.* at 5.

³⁷ *Id.* at 238.

³⁸ *Id.* at 6.

³⁹ *Id.* at 5.

⁴⁰ CAL. ENVTL. PROT. AGENCY, *supra* note 10, at 61.

⁴¹ LENNY BERNSTEIN ET AL., INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2007: SYNTHESIS REPORT 30 (2007), available at www.ipcc.ch/pdf/assessment-report/ar4/syr/ar4_syr.pdf.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ ROBERT T. WATSON ET AL., INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, TECHNOLOGIES, POLICIES AND MEASURES FOR MITIGATING CLIMATE CHANGE 11 (1996), available

In California, transportation accounts for forty-one percent of total greenhouse gas emissions.⁴⁶ Fossil fuel combustion from sources like vehicles accounts for ninety-eight percent of gross California carbon dioxide emissions.⁴⁷ Fossil fuels are expected to remain the dominant source of global energy beyond 2030.⁴⁸ Changes to California's climate will mean warmer winters and springs with drops in precipitation and snowpack, which the state relies on for its drinking water.⁴⁹ To slow sprawl,⁵⁰ California must allow micro-housing for second units in its existing neighborhoods.

A. BARRIERS TO SECOND UNITS AND MICRO-HOUSING

One type of housing California lacks across the state is legal second units. Second units provide an important source of housing. They are small and relatively inexpensive to build within existing neighborhoods (making them a perfect choice for micro-housing), but many localities make it difficult to build these units. A second unit is defined as “an attached or a detached residential dwelling unit which provides complete independent living facilities for one or more persons. It shall include permanent provisions for living, sleeping, eating, cooking, and sanitation on the same parcel as the single-family dwelling is situated.”⁵¹ Second units are sometimes referred to as accessory dwelling units, “granny flats”⁵² or efficiency units,⁵³ which are separately defined as “[a] dwelling unit containing only one habitable room.”⁵⁴ Whatever their name, second units were a common feature in single-family housing in the early 1900s. But after World War II, most home building focused on suburban single-family homes and many local governments banned second units.⁵⁵

Building a second unit is not easy, primarily because the California Health and Safety Code mandates a minimum size for an efficiency

at www.ipcc.ch/pdf/technical-papers/paper-I-en.pdf.

⁴⁶ CAL. ENVTL. PROT. AGENCY, *supra* note 10, at 13.

⁴⁷ *Id.* at 14.

⁴⁸ BERNSTEIN ET AL., *supra* note 41, at 44.

⁴⁹ CAL. ENVTL. PROT. AGENCY, *supra* note 10, at 22-23, 28.

⁵⁰ Duany & Talen, *supra* note 20, at 1452.

⁵¹ CAL. GOV'T CODE § 65852.2(i)(4) (Westlaw 2012).

⁵² 12 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW Real Property § 825, at 967 (10th ed. 2005).

⁵³ CAL. CODE REGS. tit. 24, § 1208.4 (2010).

⁵⁴ CAL. HEALTH & SAFETY CODE § 17958.1 (Westlaw 2012).

⁵⁵ OFFICE OF POLICY DEV. & RESEARCH, U.S. DEP'T OF HOUS. & URBAN DEV., ACCESSORY DWELLING UNITS: CASE STUDY 11 (2008), available at www.huduser.org/portal/publications/adu.pdf.

dwelling unit, the smallest dwelling unit recognized by the Health and Safety Code.⁵⁶ Such a unit may be no smaller than 150 square feet for one to two occupants, with additional space (not included in the 150-square-foot minimum) required for a kitchen.⁵⁷ The California Building Code has its own requirements, mandating that an efficiency unit must have a room no smaller than 220 square feet, with an additional 100 square feet for each occupant over two persons, unless otherwise allowed by the California Health and Safety Code.⁵⁸ The Building Code also mandates additional space for closets, a kitchen, and a separate bathroom,⁵⁹ further adding to the size of a dwelling unit. If a micro-home is to be considered a dwelling unit, it must have at least one room no smaller than 120 square feet of floor area, and each other habitable room must have a net floor area no less than seventy square feet, with additional space required for other occupants and rooms.⁶⁰ Localities may establish their own minimum or maximum sizes for second units beyond what state law provides, but they are prevented by state law from approving second units that are smaller than an efficiency unit “in compliance with local development standards.”⁶¹ These laws essentially prohibit micro-second units, especially those totaling less than 300 square feet, including the kitchen, bathroom and closet space, for more than one occupant, because of the law’s minimum size requirements for dwelling units.

Even without the challenges of building a micro-house as a second unit, most local zoning ordinances nationwide do not allow second units of any size.⁶² However, California does not ban second units outright either.⁶³ Localities cannot forbid second units unless they find “specific adverse impacts” on public health, safety and welfare.⁶⁴ Even when banned or restricted, second units have proliferated in places where the local housing supply could not keep up with demand, like in the San Francisco Bay Area.⁶⁵ By 1960, about ninety percent of San Francisco’s

⁵⁶ CAL. HEALTH & SAFETY CODE § 17958.1 (Westlaw 2012).

⁵⁷ *Id.*

⁵⁸ CAL. CODE REGS. tit. 24 § 1208.4 (2010).

⁵⁹ *Id.* § 1208.4.

⁶⁰ *Id.* § 1208.3.

⁶¹ CAL. GOV’T CODE § 65852.2(d) (Westlaw 2012).

⁶² DOUGLAS W. KMEC, *Preservation of property values or neighborhood character – Limitations on single-family use – Accessory apartments*, in ZONING AND PLANNING DESKBOOK 2-3 (2nd ed. 2010).

⁶³ CAL. GOV’T CODE § 65852.2(c) (Westlaw 2011).

⁶⁴ *Id.*

⁶⁵ OFFICE OF POLICY DEV. & RESEARCH, *supra* note 55, at 7.

20,000 to 30,000 second units were illegal.⁶⁶ In the absence of a local ordinance governing second units, state law provides a default process requiring local agencies to approve applications for second units without public hearings, and localities must grant variances, or special-use permits, for second units that meet statutory standards.⁶⁷ However, minimum size requirements, requirements for parking, setback, and lot coverage, and local rules for allowable density,⁶⁸ all mean that any second unit approved through this default process will not be micro-housing because it conflicts with state law over minimum room size requirements.

Just how many second units have been built in California is unclear because there is no uniform system to track second-unit construction.⁶⁹ Additionally, many second units are constructed illegally and are never subject to building inspection or the permitting process.⁷⁰ Despite these limitations, several studies looking into second unit construction have generated estimates.⁷¹ For example, eight percent of San Francisco's housing stock comes from second units.⁷² Less than three percent of Los Angeles County's housing comes from second units, which might not sound like much, but these second units shelter about 200,000 people.⁷³ Moreover, in the San Francisco Bay Area's Daly City, about 5,000 of the city's 21,000 housing units come from illegal second units.⁷⁴ One national study estimated that second units (with no distinction made for legal or illegal units) accounted for sixty-five percent of net additions to the nation's housing supply between 1973 and 1980 and provided a critical source of housing for low-income families.⁷⁵ The most common types of second-unit construction are non-residential spaces converted into residential spaces, and one or more units that are converted into a larger number of units.⁷⁶ Secondary units are usually built by homeowners, sometimes with the assistance of contractors or family members, but generally without environmental review or infrastructure

⁶⁶ *Id.*

⁶⁷ Vivian Kahn et al., *Zoning, in CALIFORNIA LAND USE PRACTICE* 147 (Adam U. Lindgren et al. eds., 2011) (citing Cal. Gov't Code § 65852.2(b)).

⁶⁸ CAL. GOV'T CODE § 65852.2(a)(1) (Westlaw 2012).

⁶⁹ JAKE WEGMANN & ALISON NEMIROW, INST. FOR URBAN & REG'L DEV., UNIV. OF CAL., BERKELEY, *SECONDARY UNITS AND URBAN INFILL: A LITERATURE REVIEW* 3 (2011), iurd.berkeley.edu/publications/wp/2011-02.pdf.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.* at 4.

⁷⁶ *Id.* at 4 fn. 3.

requirements placed on developers of large scale housing projects.⁷⁷

This informal, yet important, source of housing should not be kept in the shadow market, unregulated and uninspected for habitability. During a plan in the 1980s to encourage more second-unit production in the Bay Area, local regulatory barriers to building second units were the most frequent reason homeowners gave for dropping out of the program.⁷⁸ Despite liberalization of California's laws for second units since the 1980s, localities continue to place their own requirements on second-unit production that prevent homeowners from easily building them.⁷⁹ Allowing individual homeowners to build micro-housing as second units on their property should not be rife with uncertainty and potential illegality, but should be part of California's effort to supply more housing for its residents.

B. CALIFORNIA'S SHORTAGE OF AFFORDABLE HOUSING

Despite decades of home construction and population growth, California has a shortage of affordable housing.⁸⁰ Even with falling home prices, California has an inadequate supply of affordable housing, especially housing close to job centers.⁸¹ California will continue to grow from within the state⁸² and from an influx of people coming from outside the state.⁸³ This growth means California must examine what type of housing it needs to stop sprawl and reduce pollution while meeting the housing needs of its growing population.⁸⁴ The demand for affordable housing remains strong in California, especially in the Bay Area, where median home prices hover around \$350,000.⁸⁵

Before the United States' economy collapsed in 2008 and housing prices plummeted, California was behind in meeting its housing need

⁷⁷ *Id.* at 8.

⁷⁸ *Id.* at 9.

⁷⁹ *Id.*

⁸⁰ DIV. OF HOUS. POLICY DEV., CAL. DEP'T OF HOUS. & CMTY. DEV., THE STATE OF HOUSING IN CALIFORNIA 2011: SUPPLY AND AFFORDABILITY PROBLEMS REMAIN 1 (2011), available at www.hcd.ca.gov/hpd/HCD_PaperState_of_Housing_in_CA2011.pdf.

⁸¹ *Id.* See generally Memorandum from Glen A. Campora, Assistant Deputy Dir., Div. of Hous. Policy Dev., Cal. Dep't of Hous. & Cmty. Dev., Official State Income Limits for 2011—Revised 6 (July 13, 2011), available at hcd.ca.gov/hpd/hrc/rep/state/inc2k11r613.pdf (providing the latest table with income requirements for affordable housing).

⁸² ASS'N OF BAY AREA GOV'TS, SAN FRANCISCO BAY AREA HOUSING NEEDS PLAN 2007-2014, at 3 (2008).

⁸³ DIV. OF HOUS. POLICY DEV., *supra* note 80, at 2-3.

⁸⁴ FREILICH ET AL., *supra* note 34, at 22-23.

⁸⁵ *Bay Area Home Sales Up from 2010, Prices Down*, DQNEWS.COM (Nov. 16, 2011), dqnews.com/Articles/2011/News/California/Bay-Area/RRBay111116.aspx.

relative to population and employment growth. Residential permits peaked in 2004 at more than 212,000,⁸⁶ but permits reached their lowest level in fifty-five years in 2009, at just over 35,000.⁸⁷ Even with record home foreclosures over the past four years, California continues to face a general housing shortage compared to its population and employment growth.⁸⁸ Affordability is based on the relationship between housing prices and incomes; that is, a home becomes more affordable when its price falls by more than the decline in income.⁸⁹ While homes have become more affordable for first-time buyers, families with low and very low incomes are still locked out of California's housing market.⁹⁰ An extremely low-income family in California, earning thirty percent of the area median income, will have an annual income of \$22,060.⁹¹ If that household can spend less than thirty percent of its income on housing (based on the United States Housing and Urban Development standard), the housing is considered affordable.⁹² Low-income families at this level of affordability face a shortage of rental housing in California.⁹³ Out of 5.3 million renters in California, about 466,000 low-income households receive federal assistance to afford modest housing.⁹⁴ The majority of these households are headed by disabled or elderly adults, and a third these homes have children.⁹⁵ There are another 1.4 million low-income renter households paying more than half of their monthly cash income on housing.⁹⁶

In the 1980s, the California Legislature recognized second units as a valuable form of affordable housing when it changed the law to make it easier for homeowners to build second units on their property.⁹⁷ In the 1990s, many localities adopted sprawl-reducing growth plans for higher-density development that included second units.⁹⁸ Though California law encourages the construction of second units,⁹⁹ state law limits how small a unit can be, and there are many requirements imposed by towns and

⁸⁶ DIV. OF HOUS. POLICY DEV., *supra* note 80, at 3.

⁸⁷ *Id.* at 4.

⁸⁸ *Id.*

⁸⁹ *Id.* at 6.

⁹⁰ *Id.* at 7.

⁹¹ NATIONAL LOW INCOME HOUSING COALITION, California, nlihc.org/oor/2012/CA (last visited Aug. 9, 2012).

⁹² *Id.*

⁹³ DIV. OF HOUS. POLICY DEV., *supra* note 80, at 7.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.* at 8.

⁹⁷ *See Sounhein v. City of San Dimas*, 55 Cal. Rptr. 290, 291–92, 294 (Cal. Ct. App. 1996).

⁹⁸ OFFICE OF POLICY DEV. & RESEARCH, *supra* note 55, at 1.

⁹⁹ *Sounhein*, 55 Cal. Rptr. at 291–92, 294.

cities (parking for the unit) to be met before a second unit can be built. The most recent modification to California's second-unit laws came in 2003, when each California city was required to have a ministerial process (with no discretionary review) for approving second units.¹⁰⁰ However, cities can still impose conditions before issuing "over-the-counter" permits for second units.¹⁰¹ These rules have proved too onerous even to support a meaningful supply of second units built to sizes conforming to state law.¹⁰² The status quo is not only keeping second units from our cities and towns, but it is keeping micro-housing out of California's neighborhoods. This must be changed because micro-housing offers a unique solution for California's affordable-housing shortage by creating a new housing stock in neighborhoods.

One model to consider for micro-housing is Tiny Houses. Tiny Houses, created by Tumbleweed Tiny House Company, based in Sebastopol, California, can be built by amateurs in a range of layouts and sizes to fit residential backyards, just like a second unit.¹⁰³ Some of the most basic housing kits are a loft bed, kitchen, bathroom, and modest storage. Their appealing aesthetics may reduce resistance among neighbors fearful of blight and overcrowding long associated with second units.¹⁰⁴ Like traditional structures, they can be modified with solar panels and grey water systems,¹⁰⁵ and they are often made from recycled materials.¹⁰⁶ A Tiny House can cost up to \$30,000 or more, depending upon whether the home is built by the purchaser or is assembled and shipped by Tumbleweed.¹⁰⁷ Starting in 2000, the company initially sold about four Tiny House plans per year, but the number has grown to more than fifty, with about five Tiny Houses built and shipped by Tumbleweed to customers across the country each year.¹⁰⁸

The relatively low cost of Tiny Houses may make them an option for homeowners looking to build second units in their backyards, but good luck if you are in California. Even though micro-housing can be a

¹⁰⁰ WEGMANN & NEMIROW, *supra* note 69, at 10.

¹⁰¹ *Id.*

¹⁰² OFFICE OF POLICY DEV. & RESEARCH, *supra* note 55, at 2.

¹⁰³ JAY SHAFER, *THE SMALL HOUSE BOOK 120-90* (2009).

¹⁰⁴ *Accessory Dwelling Units*, HOUSINGPOLICY.ORG, www.housingpolicy.org/toolbox/strategy/policies/diverse_housing_types.html?tierid=42 (last updated May 16, 2011, 6:30 PM).

¹⁰⁵ Carol Estes, *Living Large in a Tiny House*, YES MAG. (Oct. 31, 2008), www.yesmagazine.org/issues/sustainable-happiness/living-large-in-a-tiny-house.

¹⁰⁶ TINY GREEN CABINS, tinygreencabins.com/faq/ (last visited Dec. 1, 2011).

¹⁰⁷ SHAFER, *supra* note 103.

¹⁰⁸ Telephone Interview with Jay Shafer, Author, *THE SMALL HOUSE BOOK* (Oct. 19, 2011).

new source of affordable housing for California, the Legislature will need to change the Building Code to allow micro-housing to be built as second units.

C. THE GREAT RECESSION AND HOW IT IS CHANGING OUR HOMES

Over the past four years, the United States' economy has experienced dramatic changes in homeownership due to mass foreclosures. This tumultuous period altered people's relationships to their homes.¹⁰⁹ National homeownership has declined since 2004, hitting record lows in 2011.¹¹⁰ In 2009, 19.4 million households paid more than half their income for housing.¹¹¹ More people across the United States are renting, as the sour economy leaves them unable to buy from the excess supply of housing.¹¹² Those still in their homes may be living on property worth less than the purchase price.¹¹³ Moreover, demographic changes in the next decade mean baby boomers will total 8.7 million of the nation's households, 3.8 million of whom will be looking for smaller accommodations through retirement and beyond.¹¹⁴

Micro-housing is part of an anti-consumer zeitgeist, which started before the housing market collapsed, to live without a mortgage.¹¹⁵ In his book, "The Small House Handbook," Jay Shafer, founder of Tumbleweed Tiny House Company, writes of his ten years in a ninety-square-foot house and the freedom it provided him to spend time and energy on pursuits other than material acquisition.¹¹⁶ Shafer's small house, built first in Iowa and then moved to California, was legally questionable in both places but tolerated by local officials.¹¹⁷ Shafer said he was motivated to build a small home out of a desire to own less and spread an anti-materialist ethos.¹¹⁸

More stories and examples of micro-housing have popped up over

¹⁰⁹ *Are Smaller Homes Here to Stay?*, SPUR.ORG (Nov. 18, 2010), www.spur.org/blog/2010-11-18/are-smaller-homes-here-stay.

¹¹⁰ JOINT CTR. FOR HOUS. STUDIES OF HARVARD UNIV., *THE STATE OF THE NATION'S HOUSING* 2012, at 3 (2012), *available at* www.jchs.harvard.edu/sites/jchs.harvard.edu/files/son2012.pdf.

¹¹¹ JOINT CTR. FOR HOUS. STUDIES OF HARVARD UNIV., *THE STATE OF THE NATION'S HOUSING* 2011, at 4 (2011), *available at* www.jchs.harvard.edu/sites/jchs.harvard.edu/files/son2011.pdf.

¹¹² *Id.* at 1.

¹¹³ *Id.* at 4.

¹¹⁴ *Id.* at 3.

¹¹⁵ Estes, *supra* note 105.

¹¹⁶ SHAFER, *supra* note 103, at 6-23.

¹¹⁷ Interview with Jay Shafer, *supra* note 108.

¹¹⁸ *Id.*

the past decade.¹¹⁹ A growing number of organizations are advocating for different models of shared and micro-housing throughout the United States, not only as a way to build more affordable housing but to stop growth-induced sprawl and its environmental consequences.¹²⁰ Micro-housing also recognizes that people have different needs throughout their lives and will not always want, or need, to live in a single-family home. The housing needs of a student are completely different from the housing one needs with a new family, or the housing one needs after retirement. An increasingly mobile workforce will benefit from a greater presence of micro-housing because it offers efficient, inexpensive space that can easily be converted to use by another occupant. With less space to fill, micro-housing offers an uncomplicated living arrangement with enough space to sleep, eat and clean.

Certainly, there are social barriers that hamper the construction of second units because of a perception that they are unattractive and cause congestion. In recognition of this bias, California law prevents local jurisdictions from adopting second unit ordinances that are so arbitrary, excessive, or burdensome that they unreasonably restrict a homeowner's ability to build a second unit.¹²¹ Though variances are one way that a locality can approve a micro-second unit, variances are rarely granted because of neighbors' concerns.¹²² The "Not in My Back Yard" (NIMBY) mentality can hinder this type of high-density residential development even though California's Housing Accountability Act of 2006 curbs a jurisdiction's limitations on high-density developments.¹²³ The type of housing (large, single-family) allowed under restrictive density zoning often reflects the anti-growth sentiments of NIMBYs who fight against new development in their communities.¹²⁴ NIMBY

¹¹⁹ See, e.g., Estes, *supra* note 105; Tom Meyers, *Tiny House Code Compliance—120 Square Feet Exemption?* SUSTAINABLE BUILDING CODES, (Nov. 11, 2010), sustainablebuildingcodes.blogspot.com/2010/11/tiny-house-code-compliance-120-square.html; Anita Hamilton, *Shrinking Down the House*, TIME, Aug. 14, 2006, available at www.time.com/time/magazine/article/0,9171,1226156-2,00.html.

¹²⁰ See, e.g., Meyers, *supra* note 119; Neal Gorenflo, *Policies for a Shareable City*, SHAREABLE: CITIES (Sept. 14, 2011, 3:37 PM), www.shareable.net/blog/policies-for-a-shareable-city#index; COHOUSING, www.cohousing.org (last visited June 15, 2012); *Rethinking Home Program*, THE SUSTAINABLE ECONOMIES LAW CENTER, www.theseclc.org/programs/rethinking-home/ (last visited Dec. 4, 2011).

¹²¹ Steven T. Mattas, *Housing and Other Specially Regulated Land Uses*, in CALIFORNIA LAND USE PRACTICE 228 (Adam U. Lindgren et al. eds., 2011) (citing CAL. GOV'T CODE § 65852.150).

¹²² Kmiec, *supra* note 62, at 2-3.

¹²³ CURTIN'S CALIFORNIA LAND USE AND PLANNING LAW 535 (2010).

¹²⁴ Edward H. Ziegler, *Urban Sprawl, Growth Management and Sustainable Development in the United States: Thoughts on the Sentimental Quest for a New Middle Landscape*, 11 VA. J. SOC. POL'Y & L. 26, 53 (2003).

sentiments are often an issue for mixed-use developments that blend residential and non-residential uses near what are usually exclusively residential neighborhoods.¹²⁵ NIMBYism is also an issue for developers who propose rental units in or near neighborhoods where few rental units exist, and it is associated with concerns over increased street parking often required by higher-density developments.¹²⁶

It will take concerted efforts to educate the public about micro-housing in their communities. Overcoming neighbors' concerns is possible, but California must first recognize that the housing needs of its residents are changing, not only because so many people have lost their homes, but also because the state needs a diverse menu of housing options for its residents. This means building smaller homes in places where people do not have to rely on cars as their primary mode of transportation. It also means the California Legislature must take a leadership role, encouraging micro-homes and limiting cities' abilities to discourage micro-housing and second units.

III. THE BENEFITS OF SMALL

A. MICRO-HOUSING CAN COUNTER SPRAWL

The past century of development in the United States is defined by sprawl and indulging Americans' desire for large homes and few neighbors.¹²⁷ The federal government, and many state governments, have long recognized sprawl's environmental problems, and, for the past twenty years, promoted development within communities as a way to grow without sprawl.¹²⁸ People experience quality-of-life issues because of sprawl and unrestrained growth,¹²⁹ and they often live in cities unable to pay for public services induced by sprawl.¹³⁰ Quality of life and hidden costs of sprawl include poor air quality, a car-dependent lifestyle, loss of open space, and intensive energy and water use.¹³¹ Still, sprawl has continued as people drive farther from home to work in order to live

¹²⁵ Tombari, *supra* note 9, at 12.

¹²⁶ *Id.*

¹²⁷ Douglas R. Porter, *Reinventing Growth Management for the 21st Century*, 23 WM. & MARY ENVTL. L. & POL'Y 705, 707 (1999).

¹²⁸ Pollard, *supra* note 22, at 252.

¹²⁹ *Id.* at 263.

¹³⁰ *Id.* at 264.

¹³¹ ETHAN N. ELKIND ET AL., CTR. FOR LAW, ENERGY & THE ENV'T, UNIV. OF CAL., BERKELEY & EMMETT CTR. ON CLIMATE CHANGE & THE ENV'T, UNIV. OF CAL., L.A., REMOVING THE ROADBLOCKS: HOW TO MAKE SUSTAINABLE DEVELOPMENT HAPPEN NOW 11 (2009), available at www.law.berkeley.edu/files/Removing_the_Roadblocks_August_2009.pdf.

in less-expensive housing.¹³² Sprawl means longer commutes and pollution, with miles traveled directly linked to local land-use planning decisions.¹³³ Emissions from cars are a leading cause of air pollution and contribute to climate change and poor health.¹³⁴ Highways built to transport people over greater distances degrade the environment by destroying wildlife habitat and water quality.¹³⁵ Low-density growth has contributed to a rate of land development exceeding population growth.¹³⁶ As a result, most people live in suburban and exurban households relying on two cars,¹³⁷ with ninety-three percent of American households owning cars.¹³⁸ Americans use a quarter of the world's fossil fuels,¹³⁹ and this level of consumption is environmentally unsustainable on a global level.¹⁴⁰ In California, transportation is the largest single source of greenhouse gas emissions.¹⁴¹ Curbing sprawl and the automobile-dependent lifestyle it produces is critical to reducing greenhouse gas emissions and fossil fuel use for private transportation.¹⁴²

However, convincing Americans to downsize counters housing trends of the past sixty years. In that time, the size of a new single-family home doubled even though the number of occupants declined.¹⁴³ Single-family homes have grown from 1,100 square feet in the 1940s and 1950s to 2,340 square feet in 2002 for an average of 2.62 family members.¹⁴⁴ In contrast, the average home size in Japan is about 1,400 square feet.¹⁴⁵ Larger homes of about 2,000 square feet require nearly 14,000 board-feet

¹³² Florence Wagman Roisman, *Sustainable Development in Suburbs and Their Cities: The Environment and Financial Imperatives of Racial, Ethnic, and Economic Inclusion*, 3 WIDENER L. SYMP. J. 87, 98-99 (1998).

¹³³ ELKIND ET AL., *supra* note 131, at 11.

¹³⁴ Roisman, *supra* note 132, at 98.

¹³⁵ *Id.*

¹³⁶ Ziegler, *supra* note 124, at 30.

¹³⁷ *Id.* at 32.

¹³⁸ JEFFERY MEMMOTT, BUREAU OF TRANSPORTATION STATISTICS, TRENDS IN PERSONAL INCOME AND PASSENGER VEHICLE MILES (Oct. 2007), *available at* www.bts.gov/publications/special_reports_and_issue_briefs/special_report/2007_10_03/pdf/entire.pdf.

¹³⁹ *The State of Consumption Today*, WORLDWATCH INST. (2004), www.worldwatch.org/node/810.

¹⁴⁰ *Id.*

¹⁴¹ ELKIND ET AL., *supra* note 131 at 4.

¹⁴² Ziegler, *supra* note 124, at 45.

¹⁴³ Alex Wilson & Jessica Boehland, *Small Is Beautiful: U.S. House Size, Resource Use, and the Environment*, 9 J. OF INDUS. ECOLOGY 277, 278 (2005), *available at* onlinelibrary.wiley.com/doi/10.1162/1088198054084680/pdf.

¹⁴⁴ *Id.*

¹⁴⁵ Nichola Saminather, *Builders Shrink "Great Australian Dream" as Housing Falts*, BLOOMBERG (Dec. 5, 2011, 5:01 AM), www.bloomberg.com/news/2011-12-04/builders-shrink-great-australian-dream-as-housing-falts.html.

of framing lumber, creating a larger surface area to heat and cool.¹⁴⁶ Even a 1,500-square-foot house with mediocre energy performance will use far less energy than a house twice the size with better energy efficiency.¹⁴⁷ Although average home size is expected to decline to 2,152 square feet by 2015, it will remain twice the size of a home built in the 1940s.¹⁴⁸ Micro-housing offers substantial energy savings because of its small size compared to a 2,000-square-foot home. To reduce the cost of building a micro-home, localities can waive or reduce permitting fees for micro-housing that supplements traditional energy with solar energy or uses solar energy exclusively. For example, solar hot water heaters can reduce annual costs for heating water by up to eighty percent.¹⁴⁹ Heating water can make up to twenty-five percent of a home's energy use.¹⁵⁰

Micro-homes create environmental benefits by reducing the raw materials needed for home construction. Smaller homes also mean fewer environmental resources are used making consumer products to fill these spaces.¹⁵¹ They also mean fewer impacts to wildlife habitat, hillsides and view sheds because they are well suited for existing communities built away from undeveloped open space.¹⁵² Single-family homes make up sixty-three percent of total dwelling units in the United States and create a litany of environmental problems, including run-off and growing energy consumption.¹⁵³ California will reap many environmental benefits from a greater presence of micro-second units, because they can be built in urban areas close to jobs.¹⁵⁴ The United States Environmental Protection Agency encourages localities to expand their stock of second units, because they increase neighborhood densities without new parcel development, in turn supporting more public-transit options.¹⁵⁵ There are fewer impacts to the environment from smaller homes because larger homes use more energy and require more raw materials to build.¹⁵⁶ Sprawl and the environmental degradation caused by building homes on

¹⁴⁶ Wilson & Boehland, *supra* note 143, at 278-79.

¹⁴⁷ *Id.* at 284.

¹⁴⁸ Dawn Wotapka, *The Shrinking American Home*, WALL ST. J. DEV. BLOG (Jan. 13, 2011, 1:21 PM), blogs.wsj.com/developments/2011/01/13/the-shrinking-american-home.

¹⁴⁹ Edna Sussman, *Reshaping Municipal and County Laws to Foster Green Building, Energy Efficiency, and Renewable Energy*, 16 N.Y.U. ENVTL. L.J. 1, 17 (2008).

¹⁵⁰ *Id.*

¹⁵¹ Nancy Kubasek, *From the Environment*, 35 REAL ESTATE L.J. 173, 176 (2006).

¹⁵² *Id.*

¹⁵³ Wilson & Boehland, *supra* note 143, at 278.

¹⁵⁴ *Building More Secondary Units: A Painless Way to Increase the Supply of Housing*, SPUR.ORG (Apr. 18, 2001), www.spur.org/publications/library/report/secondaryunits_080101.

¹⁵⁵ SMART GROWTH NETWORK, *GETTING TO SMART GROWTH 25-26* (2002), available at www.smartgrowth.org/pdf/gettosg.pdf.

¹⁵⁶ Wilson & Boehland, *supra* note 143, at 277.

undeveloped open space can be stopped, and micro-housing can be part of the solution.

Another environmental benefit of micro-second units is their potential as residential infill development.¹⁵⁷ Infill is development that occurs on vacant, partially developed or under-used parcels located near developed areas¹⁵⁸—a natural partner to anti-sprawl growth.¹⁵⁹ Infill includes multi-story apartment buildings in urban neighborhoods¹⁶⁰ or revitalizing vacant downtown parcels with new mixed-use buildings. Examples of infill development include the Market Street Lofts in downtown Los Angeles, a vacant office building converted into a mix of condos and commercial space,¹⁶¹ and the Elliott Building in downtown Sacramento, a 1920s building converted into condos and commercial space.¹⁶² Like other sustainable development, infill's main feature is dense development close to transit centers that allow people to walk, bike, or take public transit to a variety of destinations.¹⁶³ Smaller-scale infill projects also include second units created from garage conversions and single-family homes built on vacant neighborhood lots with sustainable materials.¹⁶⁴

Infill development diminishes pressure to develop farmland and open space, and it encourages growth near transit lines, which reduces people's dependency on cars.¹⁶⁵ Sustainable development lowers the miles people drive in their cars.¹⁶⁶ America's largest urban areas, where most people have easy access to public transit, generated fifty-six percent of greenhouse gas emissions from highway transportation and residential buildings in 2005.¹⁶⁷ For the same year, an average urban resident produced 2.25 metric tons of carbon emissions from driving and energy

¹⁵⁷ Karen Chapple, *Studying the Benefits of Accessory Dwelling Units*, FRAMEWORKS (2011), ced.berkeley.edu/frameworks/2011/accessory-dwelling-units/.

¹⁵⁸ FREILICH ET AL., *supra* note 34, at 235.

¹⁵⁹ John D. Landis et al., *The Future of Infill Housing California: Opportunities, Potential, and Feasibility*, 14 HOUSING POL'Y DEBATE 681, 682 (2006), available at repository.upenn.edu/cgi/viewcontent.cgi?article=1038&context=cplan_papers.

¹⁶⁰ Meea Kang, *Barriers to Infill Development*, INST. URBAN REG'L DEV., iurd.berkeley.edu/news/bestpractices_1_Kang.pdf (last visited Dec. 7, 2011).

¹⁶¹ *Outstanding Infill: Housing and Downtown L.A.'s First Supermarket in 50 Years*, CAL. INFILL BUILDERS ASS'N, infill-builders.org/pdfs/Case-Study-Los-Angeles.pdf (last visited Jan. 13, 2012).

¹⁶² *Outstanding Infill: Capitalizing Infill near the State Capitol*, CAL. INFILL BUILDERS ASS'N, infill-builders.org/pdfs/Case-Study-Sacramento.pdf (last visited Jan. 13, 2012).

¹⁶³ ELKIND ET AL., *supra* note 131, at 12.

¹⁶⁴ *Infill Projects*, CITY OF SALINAS, www.ci.salinas.ca.us/services/commdev/infill_projects.cfm (last visited Jan. 13, 2012).

¹⁶⁵ Landis et al., *supra* note 159, at 682.

¹⁶⁶ ELKIND ET AL., *supra* note 131, at 5.

¹⁶⁷ *Id.*

consumption, compared to the average non-urban American, who produced 2.60 metric tons of carbon emissions.¹⁶⁸

Micro-second units built for infill make sense because micro-homes do not present a major drain on existing infrastructure.¹⁶⁹ They distribute less-expensive housing throughout residential neighborhoods because they cost less to build,¹⁷⁰ and they provide housing for a wide range of needs, including the elderly, adult children, and in-home health care providers.¹⁷¹ These units can also produce a reliable source of income as a rental property.¹⁷² Second units can serve as affordable housing for lower-income individuals, who are less likely to own cars.¹⁷³ Micro-second units built as infill make efficient use of infrastructure like roadways, because they can increase population densities to the levels that make public transit possible.¹⁷⁴ Buildings, transportation, land use, and infrastructure are primary areas communities in California can focus on to reduce their greenhouse gas emissions.¹⁷⁵

California has an abundance of space for new infill development. The Bay Area alone has an infill capacity of up to 700,000 housing units.¹⁷⁶ California has about 500,000 infill parcels that could accommodate 1.5 million housing units at current densities, representing about twenty-five percent of the state's housing needs over the next twenty years.¹⁷⁷ About 8,000 acres of California infill land is within a third of a mile of rail or ferry transit, and another 25,600 infill acres are within a quarter mile of high-frequency bus lines.¹⁷⁸ There are many challenges to realizing the state's infill housing potential, including minimum lot sizes and parking requirements, which often make infill development less affordable to private developers.¹⁷⁹ Additionally, local governments tend to favor single-use, car-dependent commercial developments because they pay more in sales tax revenue than infill

¹⁶⁸ *Id.*

¹⁶⁹ *Building More Secondary Units: A Painless Way to Increase the Supply of Housing*, SPUR.ORG (Apr. 18, 2001), www.spur.org/publications/library/report/secondaryunits_080101.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ MEMMOTT, *supra* note 138.

¹⁷⁴ KAREN CHAPPLE, INST. FOR URBAN AND REG'L DEV., UNIV. OF CAL., BERKELEY, "HIDDEN" DENSITY: THE POTENTIAL OF SMALL-SCALE INFILL DEVELOPMENT 1 (2011), *available at* iurd.berkeley.edu/publications/policybriefs/IURD-PB-2011-02.pdf.

¹⁷⁵ Sussman, *supra* note 149, at 2.

¹⁷⁶ Landis et al., *supra* note 159, at 685.

¹⁷⁷ *Id.* at 696.

¹⁷⁸ *Id.* at 695.

¹⁷⁹ *Id.* at 706.

development with its mixture of residential and commercial spaces.¹⁸⁰ But if all of California's 500,000 infill parcels were fully developed with housing, four million new units would be built, meeting California's housing needs over the next twenty years and protecting 350,000 acres of undeveloped land.¹⁸¹

There is political will behind infill development in California.¹⁸² California's growth priorities under the Transportation Planning, Traffic Demand Modeling, and Sustainable Communities Strategy Act of 2008 (SB 375), aimed at reducing vehicle emissions through better growth patterns that avoid sprawl¹⁸³ and promote infill development.¹⁸⁴ The law requires California's eighteen Metropolitan Planning Organizations (MPOs) to develop sustainable community strategies to reduce greenhouse gas emissions through more efficient development.¹⁸⁵ It also puts pressure on localities to produce more infill¹⁸⁶ and sets regional targets for reducing greenhouse gas emissions through plans devised by the MPOs.¹⁸⁷ The law's objectives are promoted through programs funded by Proposition 1C, a 2006 state housing bond, to support development of infrastructure and transit-oriented housing in infill areas.¹⁸⁸ SB 375 has been criticized for lacking any real legal requirements for local governments,¹⁸⁹ but it is a reflection of the public's larger concern over environmental pollution and awareness of how sprawl is linked to climate change.¹⁹⁰ California Air Resources Board's Climate Change Scoping Plan estimated that better land-use decisions could reduce greenhouse gases by five million metric tons by 2020.¹⁹¹ This scoping plan is part of California's Global Warming

¹⁸⁰ ELKIND ET AL., *supra* note 131, at 13.

¹⁸¹ Landis et al., *supra* note 159, at 715.

¹⁸² *Id.* at 685.

¹⁸³ FREILICH ET AL., *supra* note 34, at 90.

¹⁸⁴ CHRIS SCHILDT, CTR. FOR CMTY. INNOVATION, STRATEGIES FOR FISCALLY SUSTAINABLE INFILL HOUSING 1 (2011), *available at* communityinnovation.berkeley.edu/reports/Fiscally-Sustainable-Infill.pdf.

¹⁸⁵ CAL. GOV'T CODE § 65080(1)(F)(2) (Westlaw 2011). *See generally* MONICA ALTMAIER ET AL., INST. FOR URBAN & REG'L DEV., UNIV. OF CAL., BERKELEY, MAKE IT WORK: IMPLEMENTING SENATE BILL 375, at i (2009), *available at* sustainablecalifornia.berkeley.edu/pubs/SB375-FULL-REPORT.pdf.

¹⁸⁶ CHAPPLE, *supra* note 174.

¹⁸⁷ ELKIND ET AL., *supra* note 131, at 6.

¹⁸⁸ ALTMAIER ET AL., *supra* note 185, at ii.

¹⁸⁹ Ethan Elkind, *So Much for California's Anti-Sprawl Law*, LEGAL PLANET: THE ENVIRONMENTAL LAW AND POLICY BLOG (July 5, 2011), legalplanet.wordpress.com/2011/07/05/so-much-for-californias-anti-sprawl-law/.

¹⁹⁰ Pollard, *supra* note 22, at 267-68.

¹⁹¹ CAL. AIR RES. BD., CLIMATE CHANGE SCOPING PLAN: A FRAMEWORK FOR CHANGE 51 (2008), *available at* www.arb.ca.gov/cc/scopingplan/document/adopted_scoping_plan.pdf.

Solutions Act of 2006 (AB 32) and outlines the state's plan to achieve the law's greenhouse gas emissions limit.¹⁹² This law mandates that the state reduce its greenhouse gas emissions to 1990 levels by the year 2020, equivalent to a thirty percent reduction.¹⁹³ The law also calls for local governments to reduce greenhouse gas emissions by fifteen percent from 2005 levels by 2020.¹⁹⁴

Micro-housing matches the goal of sustainable development by directing growth within towns and cities and reducing the financial burden on cities and counties to pay for more services over a larger area.¹⁹⁵ Channeling growth into communities prevents the decay of urban and older suburban centers and ensures human-scale development that protects green spaces¹⁹⁶ from strip malls and cookie-cutter subdivisions. Compact growth consumes fewer resources than sprawl.¹⁹⁷ Supporting second-unit micro-housing, especially as infill development, will require California to change its attitude about growth. California would be well served by looking back a century, to when it allowed a mixture of uses on small lots with no setbacks, which is today often illegal under modern zoning codes.¹⁹⁸

B. DESPITE PROGRESS WITH SECOND UNITS, MICRO-HOUSING IS LEFT OUT

Second units are widely acknowledged to be an untapped source of housing in California. A 2010 development plan in San Mateo and Santa Clara counties assumes five percent of new housing production will come from second units over the next decade.¹⁹⁹ But building even a conventional second unit is not without challenges.²⁰⁰ California first changed its laws for second units in the 1980s by authorizing local agencies to create rules for second units as conditional uses.²⁰¹ A

¹⁹² *Id.* at ES-1.

¹⁹³ CAL. HEALTH & SAFETY CODE § 38501(e) (Westlaw 2007). *See also* ELKIND ET AL., *supra* note 131, at 4.

¹⁹⁴ CAL. AIR RES. BD., *supra* note 191, at ES-5.

¹⁹⁵ Pollard, *supra* note 22, at 252.

¹⁹⁶ *Id.* at 255.

¹⁹⁷ Duany & Talen, *supra* note 20, at 1448.

¹⁹⁸ Pollard, *supra* note 22, at 262.

¹⁹⁹ GRAND BOULEVARD INITIATIVE, ECONOMIC AND HOUSING OPPORTUNITIES ASSESSMENT 12 (2010), available at www.mtc.ca.gov/planning/smart_growth/tap/ECHO_12-07-10.pdf.

²⁰⁰ KAREN CHAPPLE ET AL., INST. FOR URBAN & REG'L DEV., UNIV. OF CAL., BERKELEY, YES IN MY BACKYARD: MOBILIZING THE MARKET FOR SECONDARY UNITS 3 (2011), available at communityinnovation.berkeley.edu/reports/secondary-units.pdf.

²⁰¹ *Is This the Right Tool for You? Evaluation of Results, Analysis of Impacts*, TRANSFORM, www.transformca.org/ia/acssdwel/02.shtml#body (last visited Dec. 14, 2011).

conditional use is a type of land use that is not ordinarily permitted by zoning laws. A person requesting a conditional-use permit must go through a public hearing process before the locality will grant or reject the permit application.²⁰² The law was amended again in 2003 to require local agencies to allow second units as a right.²⁰³ Even though there is an emerging market for second units,²⁰⁴ the number produced prior to 2003 remained low, with only 658 applications approved statewide in 2001, and just two cities approving more than a fifth of those applications.²⁰⁵ There remains a large rental market for unpermitted illegal second units in places like Los Angeles and San Francisco because they are a cheap source of housing.²⁰⁶ Illegal second units provide about eight percent of San Francisco's housing stock.²⁰⁷ To avoid the continued growth of illegal second units, California law must make it easier for second units and micro-housing to be built.

Production of second units varies widely in California. The City of San Diego allows almost no legal secondary units,²⁰⁸ with already-built second units located in older neighborhoods.²⁰⁹ The City of Santa Cruz actively promotes second units within its residential neighborhoods.²¹⁰ In 2003, after the California Legislature changed its rules for second units, the San Diego City Council tightened its laws for second units.²¹¹ The San Diego City Council approved changes that included requiring property owners to replace garages converted into second units, restricting second units to lots twice the size of typical single-family homes, and banning the simultaneous production of a second unit and the primary dwelling.²¹² The San Diego City Council is considering easing its rules for second units, but there is much opposition from city residents concerned about increased neighborhood densities.²¹³

²⁰² *San Francisco Planning Department*, SF.GOV, www.sf-planning.org/index.aspx?page=2754 (last visited Dec. 14, 2011).

²⁰³ *Is This the Right Tool for You? Evaluation of Results, Analysis of Impacts*, *supra* note 201.

²⁰⁴ CHAPPLE ET AL., *supra* note 200.

²⁰⁵ *Is This the Right Tool for You? Evaluation of Results, Analysis of Impacts*, *supra* note 201.

²⁰⁶ CHAPPLE ET AL., *supra* note 200, at 4.

²⁰⁷ *Id.*

²⁰⁸ Dorian Hargrove, *South Park's Granny Flats—City Says Yea, Some Citizens Say Nay*, SAN DIEGO READER, Oct. 28, 2010, www.sandiegoreader.com/news/2010/oct/28/south-parks-granny-flats-city-says-yay-some-citize/.

²⁰⁹ Ann Jarmusch, "Granny Flat" Winners Make Additions Flat-Out Appealing, SAN DIEGO UNION TRIBUNE, Jan. 30, 2005, www.signonsandiego.com/uniontrib/20050130/news_1h30granny.html.

²¹⁰ CHAPPLE ET AL., *supra* note 200, at 4.

²¹¹ Hargrove, *supra* note 208.

²¹² *Id.*

²¹³ Adrian Florido, *Hey! Now Grandma Can Move in!*, VOICE OF SAN DIEGO (May 25, 2011,

Santa Cruz is considered a model for other California cities because it has a strong program to help residents build second units.²¹⁴ Santa Cruz created its Accessory Dwelling Unit Program to build more infill, second-unit housing, preserve the environment, and generate stronger demand for its transportation system.²¹⁵ Through its program, the city offers incentives for homeowners who build second units, including fee waivers for affordable rentals.²¹⁶ In 2003, the first year following adoption of the program, thirty-five second units were built, sizeable growth over the eight built in 2001.²¹⁷ At the time, the Santa Cruz estimated forty to fifty second units would be built per year.²¹⁸ With the success and recognition of Santa Cruz's second-unit program, more than eighty cities in California have requested copies of Santa Cruz's second-unit manual and rules.²¹⁹ Santa Cruz's program also proved successful in combating negative attitudes toward second units by offering floor plans and aesthetic guidelines.²²⁰ The program has also helped reduce the market for illegal housing long served by second units.²²¹ It also provided a way for one mother to have separate living space for her college-age son.²²²

Mark Primack, an architect and former Santa Cruz City Council member who oversaw approval of the city's accessory dwelling program, said the issue of micro-housing did not come up when the program was going through public hearings.²²³ While the program has helped serve the demand for second units in Santa Cruz, Primack said he does not expect micro-housing to be a big part of the city's future second-unit stock.²²⁴ "When you start talking about 200 square feet, you're talking about a single-car garage," Primack said.²²⁵ Though Santa Cruz's

8:38 PM), www.voiceofsandiego.org/survival/article_6ddf9da8-834d-11e0-a3e0-001cc4c002e0.html.

²¹⁴ *Second Units*, CAL. DEP'T OF HOUS. & CMTY. DEV. (May 6, 2010), www.hcd.ca.gov/hpd/housing_element2/SIA_secondunits.php.

²¹⁵ Patricia E. Salkin, *Zoning for An Aging Population*, 3 AM. LAW OF ZONING § 21:8 (5th ed. 2011), available at Westlaw AMLZONING § 21:8.

²¹⁶ *Id.*

²¹⁷ *Accessory Dwelling Unit Program*, SMART GROWTH, www.smartgrowth.org/pdf/cs_018_SantaCruz.pdf (last visited Dec. 14, 2011).

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ Fred A. Bernstein, *In Santa Cruz, Affordable Housing Without the Sprawl*, N.Y. TIMES, Feb. 6, 2005, available at www.nytimes.com/2005/02/06/realestate/06nati.html.

²²¹ *Id.*

²²² *Id.*

²²³ Telephone Interview with Mark Primack, Santa Cruz architect (Nov. 28, 2011).

²²⁴ *Id.*

²²⁵ *Id.*

program does not set a minimum size for second units, Primack said that California's Building Code makes it difficult to build a second unit smaller than 300 square feet because of space requirements for a kitchen and bathroom.²²⁶

On its face, state law makes plain that second units are important and needed, but in practice localities have great discretion with rules for second units.²²⁷ The California Building Code still plays a role at the local level by mandating minimum room sizes. The Santa Cruz Municipal Code follows the California Building Code's minimum room size requirement, preventing a homeowner from building a micro-second unit unless she or he receives a special permit from the city after going through a public hearing.²²⁸ Santa Cruz's ordinance limits the size of a second unit to 500 square feet and requires a minimum lot size of 5,000 square feet.²²⁹ A second unit may be up to 800 square feet on a larger lot.²³⁰

Mary Alsip, an associate Santa Cruz city planner, said one person approached the city with plans to build a second unit that was about 200 square feet but was told to revise the plans because of problems meeting building code requirements.²³¹ "We come to find out that the building code does have minimums and one of their minimums basically says 220 square feet of useable living area that doesn't include" counter space, bathrooms and hallways, Alsip said.²³² "It's quite a large unit that is required to be built," she said.²³³ Economics present a big hurdle to making micro-housing a viable option for second units, Alsip added, because city fees alone for conventional second units can run up to \$15,000, with another \$300,000 needed for construction costs.²³⁴

Santa Cruz has taken a flexible approach with some of its second-unit requirements²³⁵ but mandates minimum setbacks and requires one parking space per bedroom.²³⁶ Santa Cruz also requires that the homeowner occupy either the second unit or the primary home.²³⁷ Other

²²⁶ *Id.*

²²⁷ *Is This the Right Tool for You? Evaluation of Results, Analysis of Impacts*, *supra* note 201.

²²⁸ SANTA CRUZ, CAL., MUN. CODE § 24.16.130 (2003), available at www.codepublishing.com/ca/santacruz/html/santacruz24/SantaCruz2416.html#24.16.130.

²²⁹ CITY OF SANTA CRUZ, ACCESSORY DWELLING UNIT MANUAL 3 (2003), available at www.cityofsantacruz.com/Modules/ShowDocument.aspx?documentid=8875.

²³⁰ *Id.*

²³¹ Telephone Interview with Mary Alsip, Associate Santa Cruz City Planner (Dec. 5, 2011).

²³² *Id.*

²³³ *Id.*

²³⁴ *Id.*

²³⁵ CITY OF SANTA CRUZ, *supra* note 229, at 10.

²³⁶ *Id.*

²³⁷ *Id.* at 63.

California cities place similar requirements on second units. For example, in Berkeley, one study estimated that the city has 4,000 single-family homes that could accommodate second units, but in order to build a second unit, a property must have two parking spaces.²³⁸ Santa Cruz limits the minimum size of a second unit to 300 square feet²³⁹ and requires a minimum lot size of 4,500 square feet for a second unit.²⁴⁰ El Cerrito mandates a conditional use permit for a secondary unit that does not meet the city's standards; obtaining a permit requires a \$930 fee and a public hearing.²⁴¹

The great variation between localities and their rules for second units (especially for micro-housing) underscores the need for the Legislature and state regulators to change the Building Code because the current regime gives localities too much discretion in their rules for second units. This lack of uniformity is a primary reason why California has so few second units and so many legal issues surrounding micro-housing built, whether built as second units or not. The California Legislature needs to change state law so that model cities like Santa Cruz can allow property owners to develop legal and attractive micro-housing as second units.

C. BUILDING MICRO-HOUSING IN CALIFORNIA'S NEIGHBORHOODS

The City of Santa Cruz is a model for second-unit development. But its rules encouraging second units also highlight the shortcomings of California law for micro-housing as second units because the California Building Code places limits on how small a second unit can be. The California Legislature must change its laws to allow for second-unit micro-housing because it will take too long to end longstanding practices at the local level.²⁴² Uniformity in the law is also necessary to ensure that every community in California provides for its share of micro-housing. Regional and statewide growth plans are preferable to the ad hoc and often shortsighted decisions made at the local level.²⁴³

Changing the California Building Code is a direct way to achieve more environmentally friendly home construction.²⁴⁴ The Legislature and state regulators must change the Building Code to allow for

²³⁸ CHAPPLE, *supra* note 174.

²³⁹ *See id.*

²⁴⁰ CHAPPLE ET AL., *supra* note 200, at 4.

²⁴¹ *Id.* at 5.

²⁴² Pollard, *supra* note 22, at 276.

²⁴³ *Id.* at 280.

²⁴⁴ Sussman, *supra* note 149, at 13.

150 GOLDEN GATE UNIV. ENVIRONMENTAL LAW J. [Vol. 6

residential dwellings smaller than 300 square feet because otherwise cities and towns are limited in their approval of such structures and could violate the Building Code if they allow micro-housing in their neighborhoods. The Building Code and zoning rules should be modified as follows:

- Allow for second units smaller than 300 square feet, including space for a kitchen and bathroom as a right;
- Provide incentives for green micro-housing similar to a priority permitting program San Francisco offers for all new or renovated buildings that meet Gold Leadership in Energy and Environmental Design status or an equivalent program;²⁴⁵
- Change parking requirements for second units to allow for shared car programs, like Zipcar, in place of a parking space,²⁴⁶ or provide homeowners with an array of options to meet the parking requirement that do not mandate providing space on the property;²⁴⁷
- Increase allowable density for micro-housing by reducing setback requirements and eliminating or reducing minimum lot-size requirements;
- Waive or reduce permitting fees for micro-housing that supplements traditional energy with solar energy or uses solar energy exclusively;
- Waive fees for micro-housing that does not require a sewer hook-up but uses a composting toilet,²⁴⁸ a grey water system, or similar water recycling setup. Waiving these fees can make micro-housing much more affordable. For example, the City of Santa Cruz imposes a battery of fees for second units, with homeowners required to pay \$2,349 (in 2003) just for water hook-ups;²⁴⁹ and
- Remove owner-occupancy requirements for the second unit and the attached primary residence.

Other changes include a simplified architectural review²⁵⁰ and

²⁴⁵ *Id.* at 18. See generally *What LEED Is*, U.S. GREEN BLDG. COUNCIL, www.usgbc.org/DisplayPage.aspx?CMSPageID=1988 (last visited Aug. 12, 2012).

²⁴⁶ CHAPPLE, *supra* note 174.

²⁴⁷ CHAPPLE ET AL., *supra* note 200, at 14.

²⁴⁸ Adam Fisher, *Humanure: Goodbye, Toilets. Hello, Extreme Composting*, TIME, Dec. 4, 2009, www.time.com/time/magazine/article/0,9171,1945350,00.html.

²⁴⁹ CITY OF SANTA CRUZ, *supra* note 229, at 58.

²⁵⁰ *Second Units*, *supra* note 214.

waiving or reducing administrative use permit fees. The state should also take the lead promoting micro-housing for second units through a program modeled on Santa Cruz's approach, which provides a manual and other resources that help dispel negative perceptions.

IV. CONCLUSION: A DIMINUTIVE FUTURE

Small houses suffer from an image problem in America's conspicuous-consumption society, where a large house with five-star amenities is a symbol of success and personal achievement.²⁵¹ To change this attitude, it helps to focus on what small homes are not: expensive to build, maintain and own, and laborious in their upkeep.²⁵² Though micro-housing represents the extreme limit in home size,²⁵³ we should not scoff at the idea that they may provide much-needed housing for students, single adults, the elderly, and mobile labor. Living with less does not mean living poorly. Micro-housing is a movement to reconsider what a home is, the materials needed to build a home, and the amount of home required for a person to live comfortably.²⁵⁴ There are numerous examples of micro-housing that are flexible enough to provide dining space for up to five in less than 100 square feet.²⁵⁵

Building small homes in California is not an impossible feat, but it requires the support of government on all levels. Cubix Condos in San Francisco is an example of the type of micro-housing that can be built with this support.²⁵⁶ These condos, all under 350 square feet, were made possible because the city designated them "single room occupancy," which allowed the developer to avoid the parking requirements and the Building Code room requirements of traditional residential developments.²⁵⁷ Cubix Condos is aimed explicitly at providing more middle-class housing in San Francisco and a start to homeownership (as their owners eventually moving into larger dwellings), with 2011 selling prices of \$200,000.²⁵⁸

²⁵¹ Rybczynski, *supra* note 11, at 64.

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ Anita Hamilton, *Shrinking Down the House*, TIME MAG., Aug. 14, 2006, available at www.time.com/time/magazine/article/0,9171,1226156-2,00.html.

²⁵⁵ *Technical Specification, MICRO COMPACT HOME*, www.microcompacthome.com/company/?con=ts (last visited Dec. 14, 2011).

²⁵⁶ James Temple, *Home, Small Home: 250 Square Feet in SoMa*, S.F. CHRON., Aug. 24, 2008, www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2008/08/24/BUTM12GQMI.DTL.

²⁵⁷ *Id.*

²⁵⁸ CUBIXSF, www.cubix-sf.com (last visited Dec. 14, 2011).

152 GOLDEN GATE UNIV. ENVIRONMENTAL LAW J. [Vol. 6

The desire to own an affordable home is not confined solely to cities. Providing micro-housing in all of California's neighborhoods is an important step to end decades of excess defined by sprawl, McMansions, and environmental damage. Micro-housing is about acknowledging how our housing needs change over time and making available to everyone the choice to live independently.