Background Guide on How to Legalize Cellar Apartments in New York City

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"We really have effectively a 'Don't ask, don't tell' system . . . .
The only remedy is to vacate the unit, and that's what we're looking for a way out of."
- Brad Lander, Director of the Pratt Center

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The authors are Stein Scholars at Fordham University School of Law and wrote this report in connection with their enrollment in the Public Interest Lawyering Advanced Seminar. Working with Chhaya Community Development Corporation, the Pratt Center for Community Development, and the Urban Justice Center, the authors were tasked with researching and writing a report on the possibility of legalizing cellar apartments in New York City.

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Over the last thirty years, New York City ("NYC" or the "City") developed an unsafe, unsanitary, and unregulated housing underground. Over this period the City's growth in population substantially outpaced the construction of residential units and forced many new residents to seek alternative housing.[1] The simultaneous rise in median rent level exacerbated the problem for low-income individuals and drove them to lease unregistered units.[2] Landlords create these units without the approval of the NYC Department of Buildings by either placing an additional unit in the basement or attic of one- and two-family homes, or subdividing an apartment into several dwellings units.[3] These units, though sometimes run-down and cramped, provide an affordable alternative that many new residents feel is worth the trade-off.[4] As the Pratt Center for Community Development ("Pratt Center") and Chhaya Community Development Corporation ("Chhaya") put it, "[t]he combination of an increasing population and a decreasing number of affordable apartments available has led to the creation of a large number of illegal units."[5]

In addition to discomfort, these apartments pose significant safety concerns.[6] Confined quarters can lead to over use of electrical outlets or dangerous placement of space heaters that cause fires. A lack of light and ventilation can increase bacteria growth and cause unhealthy levels of air quality. In fact, over the past two decades numerous deaths have occurred as a result of fires in illegal units.[7] On top of posing serious health and safety issues, the dwelling units engender controversy in their neighborhoods. Many residents view the new residents who live in these units—often immigrants—as a drain on the educational and other services to their community.[8] These unregulated, sometimes lethal units present a significant public safety risk and policy concern, but also address a demand for housing. The units provide an affordable means of housing that is otherwise unavailable. Further, many of the units are deemed illegal

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[1] *See* Robert Neuwirth, Pratt Ctr. for Cmty. Dev. and Chhaya Cmty. Dev. Corp., *New York's Housing Underground: A Refuge and Resource* 2 (2008) [hereinafter Pratt-Chhaya Report]

[2] *See id.*

[3] Official Illegal Apartments Page of the Queens Borough President's Office, http://www.queensbp.org/content_web/housing/illegal_apts.shtml (last visited May 7, 2009) [hereinafter QBP Illegal Apartments Page]

[4] *See* Manny Fernandez, *Partitioned Apartments Are Risky, but Common in New York*, N.Y. TIMES, Feb. 23, 2009, at A21.

[5] Pratt-Chhaya Report, *supra* note 1, at 2.

[6] *See generally* Deborah Sontag, *For Poor, Life 'Trapped in a Cage'*, N.Y. TIMES, Oct. 6, 1996, at A1.

[7] *See, e.g.*, John Eligon & Mathew Warren, *Bronx Landlords Guilty in 2 Firefighters' Deaths*, N.Y. TIMES, Feb. 18, 2009, at A21 (detailing the case of two firefighters who died as a result of becoming disoriented while responding to a fire in a poorly ventilated illegal apartment); Thomas Lueck & Daryl Khan, *Boy, 1, Dies and 3 Are Hurt in Brooklyn Basement Fire*, N.Y. TIMES, May 8, 2007 *at* http://www.nytimes.com/2007/05/08/nyregion/08fire.html (reporting the death of an infant in an illegal basement apartment that had been cited for a violation the day before the fire); Patrick Healy, *Apartment Fire Kills 3 People in Queens*, N.Y. TIMES, Jan. 31, 2005, at B3 (describing the unsafe conditions that lead to three deaths in an illegal cellar apartment fire); Frank Bruni, *Not Just Shabby and Dismal, Illegal Apartments Can Kill*, N.Y. TIMES, Oct. 8, 1996, at B7 (covering a space-heater fire-related death at an illegal apartment in Queens).

[8] *See* QBP Illegal Apartments Page, *supra* note 3.

purely based upon statutory distinctions that inaccurately measure safety concerns.[9] The result is a market-fueled demand for illegal units that are occasionally unsafe, but often habitable with minor modifications; and a regulatory regime that does not distinguish between the two.

In the past New York City has attempted to combat its illegal housing problem with minimal success. In the late 90s the City increased enforcement and issued six-times more citations for illegal units.[10] However, despite government efforts, the number of illegal units continued to increase through the decade[11] and many cited owners simply failed to correct the violations.[12] Demand for the units simply outpaced government efforts. In fact, though the underground nature of this housing stock makes tracking the number of units an inexact science, recent estimates indicate that between 300,000 and 500,000 New Yorkers live in these units today.[13]

In the face of this growing problem the City has failed to find an effective solution. The problem is clear: a lack of available affordable housing drives people to search for low-priced but illegal apartments; landlords respond to this demand by unlawfully creating units that are both unsafe and a drain on local resources; in turn the City attempts to enforce its current laws but is met with limited success because the law fails to distinguish between safe and unsafe units and does not address the underlying demand.

The solution to this problem is not as illusive as previous efforts indicate. As this report will detail, jurisdictions around the country dealt with similar problems through "accessory dwelling unit" legislation.[14] This legislation is two-part: First, it makes comprehensive reform to the relevant building and zoning laws so that some regulations may be relaxed as long as doing so does not damage the health and sanitation of the residents or neighborhood. Second, accessory dwelling unit ("ADU") laws provide incentives for landlord to improve illegal units so that they can meet existing code, while also encouraging tenants of illegal apartments to come forward and put pressure on landlords to do so. Legalizing illegal dwelling units focuses on both improving some of the existing illegal dwelling stock so it meets code, and modifying the code in certain areas so some currently illegal dwelling units will automatically meet code.

This report provides a guide on how to legalize one category of illegal units: cellar apartments. Part One details how other jurisdictions approached ADU legislation and how New York City tackled an analogous problem with residential occupation of loft space. Taking a look at previous experiences, Part One highlights important practice and lessons that can provide a foundation for NYC ADU legislation. Part Two summarizes the current NYC laws governing illegal units and describes the constraints they place on potential ADU legislation. Part Three presents the legal framework for potential ADU legislation. Considering both state and local possibilities, Part Three identifies the manner in which potential legislation could amend existing laws and legalize cellar apartments. Finally, Part Four considers the tax incentives, enforcement

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[9] *See infra* PART TWO

[10] Vivian Toy, *Despite City Crackdown, Illegal and Overcrowded Apartments Survive*, N.Y. TIMES, Dec. 7, 1998, at B1.

[11] *See* Pratt-Chhaya Report, *supra* note 1, at 1.

[12] *See* Toy, *supra* note 10.

[13] Pratt-Chhaya Report, *supra* note 1, at 2-3.

[14] *See infra* PART ONE

issues, and policy debates that an ADU law must address. Together, the report presents a guide on how to approach a NYC ADU legalization effort. Using this report as a guide, New York City can begin to effectively address its underground housing problem.

A. The Laws of Other Jurisdictions

In order to understand the ADU legalization process and what New York City's ADU policies must contain, it is important to consider what has been successful and unfavorable in other jurisdictions' experiences. This section contains summaries of four jurisdictions that have enacted policies to legalize accessory dwelling units. The four jurisdictions, the State of Washington, the City of Santa Cruz, California, the City of Arlington, Virginia and Long Island, New York, have legalized ADUs in different ways and for different reasons. By reviewing the background of the ADU policy and how the ADU law works we can determine how, if at all, the laws of that jurisdiction can be transported to New York City, or what New York City can learn from their experience. Here, background information is vital to appreciate the needs and issues driving other ADU legislation. By understanding other jurisdiction's policy decisions and individual provisions enacted New York City can better tailor an ADU law to meet its own needs. This section reveals the needs and concerns that can be addressed by an ADU law, the opposition facing the legalization of ADUs, and various policy vehicles that can be used.

1. Washington State

a. Background

In the early 1990s the State of Washington confronted its housing crisis with a relatively new concept: the introduction of accessory dwelling units. Facing many problems similar to the current housing issues in New York City, the state felt ADUs were uniquely able to address multiple housing problems at once.[15]

First, many areas of the state faced an affordable housing crisis. The state saw ADUs as an attractive way to reduce housing costs and meet changing market demands because the units made more efficient use of existing housing stock; were more cost effective than constructing new buildings, thus leading to cheaper rental rates;[16] and were better integrated into the community when compared to housing projects or other forms of affordable housing.[17]

Additionally, demographic trends in the state were resulting in an increase in the number of smaller households and the existing housing stock did not properly reflect typical household sizes. The decrease in family size from an average of 3.09 persons in 1960 to 2.53 persons by 1990, was contributed to by numerous factors. Notable factors include: a growth in elderly population, an increase in the number of single-person households, a generally smaller family size and an increase in divorce rates. As a result of these demographic trends, Washington's housing

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[15] *See generally* Municipal Research & Services Center, Accessory Dwelling Units: Issues & Options 3-7 (Report No. 33, 1995) [hereinafter MSRC Report].

[16] *See id.* at 3 (noting that ADU units were 25-40% less expensive to create than new comparably-sized housing units).

[17] *See id.* at 3, 9-11 (highlighting ADUs as an attractive solution to affordable housing problems).

stock, which was built in the 1940s-60s, was actually able to accommodate households much larger than was currently needed. Again, ADUs offered an ideal solution. First, elderly populations who owned large houses but did not need to use the entire space were permitted to rent out units in their homes. Further, smaller families could rent out a unit in a larger-than-necessary residential house in order to help cover the cost of mortgage payments. An ADU category meant that a housing stock built for Post-War families could adequately accommodate current demographics.[18]

Finally, ADUs enabled cities to increase in size while complying with growth management laws that required communities to increase housing density. Along similar lines to the current New York City development plan, Washington felt it was important to grow in a manner that minimized environmental impact. ADUs increased the housing stock, thereby enabling the city to grow, but did so with minimal construction and without increasing through sprawl.[19] Due to this unique ability of ADU legislation to address multiple concerns, ADUs in many parts of the state were legalized through two state laws and multiple local ordinances.

b. How the Law Works

Washington accomplished ADU legalization through a unique combination of state and local laws. At the state level, laws were passed that encouraged, and in some cases, required, municipalities and counties to develop ADU legislation. Subsequently, individual jurisdictions passed ADU ordinances that touched on key facets of any potential New York law.

On the state level, the legislature passed two laws designed to eliminate regulatory barriers that unnecessarily limited affordable housing options and encouraged local municipalities to develop their own ADU laws. First, the Growth Management Act ("GMA") required large counties and cities to formulate growth plans and comprehensive regulations by which to achieve the measured targets. The plans had to contain: (1) inventory and analysis of existing and projected housing needs; (2) list of goals for housing preservation, improvement and development; (3) identification of adequate land for housing, especially low income housing, government assisted housing, special needs housing, and multi-family housing; and (4) a plan for meeting housing needs of all income groups.[20] Further, the law encouraged local jurisdictions to tackle affordable housing problems and strongly discouraged local jurisdictions from turning undeveloped land "into sprawling, low-density development[.]"[21] Subsequently, in 1993, the legislature passed the Housing Policy Act.[22] Seeking to reduce housing cost and increase housing quality in the state, the law highlighted the development of ADUs as an important way to achieve the goal.[23] The law mandated that ADUs be encouraged and allowed in single-family zones in cities with a population over twenty thousand[24] and required the state's Department of

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[18] *See id.* at 3-6 (detailing Washington's demographic shift and its relation to ADUs).
[19] *See id.* at 7-8 (discussing the Washington's Growth Management Act).
[20] *See* Growth Management Act, WASH. REV. CODE § 36.60A.070 (1990) [hereinafter GMA].
[21] GMA at § 36.70A.020.
[22] *See* Washington Housing Policy Act, WASH. REV. CODE § 43.63A.215 (1993) [hereinafter WHPA].
[23] *See id.* at § 43.63A.215(1)(b).
[24] *See id.* at § 43.63A.215(3).

Community, Trade and Economic Development to monitor and encourage the use of ADUs.[25] Thereafter, the Department created a model ADU ordinance which stated that municipalities should develop specific standards with respect to minimum lot size, maximum unit size, parking standards, setback and height requirements.[26]

In response to the statewide legislation, local jurisdictions began to adopt ADU legislation. Though each adopted a law that was tailored to the local community, the ordinances had many common traits. All the laws had a definition of ADU that limited them to single-family dwelling units.[27] Jurisdictions often differed in review and approval procedures. Many allowed development as a permitted use, as of right use so long as zoning and building code requirements were met, subject only to administrative review.[28] Others only allowed development as a conditional use, subject to an application process and public notification and/or hearing.[29] Further, many placed limitations on the size of the unit[30] and occupancy.[31] In order to control density, many laws regulate the number of units on a lot[32] and within a given area.[33] Additionally many laws address community concerns by providing parking requirements[34] and design and appearance standards in order to maintain the visual appearance of a neighborhood.[35] On top of these substantive requirements, many laws required administrative action both by owners, in the form of contracting requirements,[36] and by the government, through periodic

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[25] *See id.* at § 43.63A.215(1).

[26] *See* Wash. State Dep't of Cmty., Trade and Econ. Dev., Model Accessory Dwelling Unit Ordinance Recommendations (Jan. 1994) [hereinafter WA Model ADU Law].

[27] *See, e.g.*, BELLEVUE, WASH., CITY CODE § 20.20.120(A)(1); MERCER ISLAND, WASH., MUN. CODE § 19.04.0607(B); TACOMA, WASH. MUN. CODE §13.06.010(1)(c). This definition is very different from any that would likely be implicated in a New York law as New York City illegal ADUs are concentrated in non-single-family neighborhoods.

[28] *See, e.g.*, WA Model ADU Law, *supra* note 26, at (A).

[29] *See, e.g.*, Bellevue, Wash. Ordinance No. 4498 (Feb. 24, 1993) (requiring notification of all residence within two hundred feet of the ADU).

[30] *See, e.g.*, Bellevue, Wash. Ordinance No. 4498 (Feb. 24, 1993) (stating that ADUs must be at least 300 and not more than 800 square-feet); Tacoma, Wash. Ordinance No. 25624 (Nov. 21, 2006) (mandating that ADU units cannot exceed thirty three percent of the total square footage of the main building)

[31] *See, e.g.*, BELLEVUE, WASH., CITY CODE § 20.20.120(A)(3) (requiring the owner of the property to occupy either the accessory or main unit); SEATTLE, WASH., MUN. CODE § 23.44.025(A)(2) (placing similar requirements on the units); SEATTLE, WASH., MUN. CODE § 23.44.025(A)(3) (stating that no more than eight unrelated individuals may occupy the units).

[32] *See, e.g.*, TUMWATER, WASH., MUN. CODE § 18.42.010(A) (limiting the number of ADUs per lot to one).

[33] *See, e.g.*, SEATTLE, WASH., MUN. CODE § 23.44.025 (regulating density of ADUs by prohibiting permits from being issued once twenty percent of units in a given area are ADUs).

[34] *See, e.g.*, SEATTLE, WASH., MUN. CODE § 23.44.025(A)(7) (requiring two off-street parking spaces per unit, but allowing for waiver by application); Tacoma, Wash., Ordinance No. 25624 (Nov. 21, 2006) (requiring one off-street parking space per unit).

[35] *See, e.g.*, SPOKANE, WASH., MUN. CODE § 11.19.3210(B)(5) (prohibiting an increase in total square footage of over ten percent); TUMWATER, WASH., MUN. CODE § 18.42.010(D) (prohibiting any increase in floor area).

[36] *See, e.g.*, EVERETT, WASH., ZONING CODE § 39.020(D)(13) (requiring homeowners to enter into an agreement binding them to comply with all ADU ordinance provisions and thus offering the city an extra avenue of enforcement).

review of the ordinances.[37] Finally, in terms of enforcement, many jurisdictions temporarily waived fines on illegal units who came into compliance with the new ADU provisions,[38] and greatly increased penalties after a grace period had lapsed.[39]

c. Connection with New York City

The Washington State ADU experience was by no means a complete success, but nonetheless can offer New York some valuable experience. One of the key omissions in the Washington State laws is there was no process by which statistics for the number of ADUs would be compiled. Initial studies suggested that changes would be in the range of 1 in 1000 single-family units,[40] but a precise number is unknown. Without vital statistics such as this it is impossible to see how effective the Washington ADU Model has been and thereby determine what, if any, provisions a New York law should emulate.

Theoretically, however, there are many similarities in the two jurisdictions. Both are concerned with affordable housing issues and seek a solution that integrates communities. Like New York currently, Washington was very concerned with sustainable development practices and sought to increase housing stock without increasing its footprint. However there are many components of the Washington laws that would simply not work in New York—most notably the requirement that the main unit be a single-family dwelling. Further, New York faces many unique issues that Washington did not fully address, including highly limited parking and the cellar status of many potential ADU units. Despite these differences there is much New York can learn from Washington. Perhaps most importantly, both have similar economic problems. Both are seeking to increase housing stock while limiting the use of government funds to achieve this objective. And—especially important in today's financial climate—both seek to help first-time buyers qualify for loans and offset mortgage payments due to guaranteed income from accessory units. Learning from these, and other jurisdictions' experiences, New York can craft a law that adequately addresses its needs.

2. Santa Cruz, California

a. Background

In addition to the State of Washington, Santa Cruz, California has developed one of the most famous ADU laws in the country. Santa Cruz is located seventy miles south of San Francisco. The city has a population of 56,000, median household income is $50,605 (for comparison, the national is $41,994), and the average home price in Santa Cruz is $700,000.[41]

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[37] *See, e.g.*, SEATLE, WASH., MUN. CODE § 23.44.025(F) (providing for automatic review of ADU ordinance).

[38] *See, e.g.*, MERCER ISLAND, WASH., MUN. CODE § 19.04.0607(D) (waiving fines on illegal units for owners who applied for permits within eighteen months); SEATLE, WASH., MUN. CODE § 23.44.025(A)(5) (allowing inspectors to certify a unit with a bit of discretion if full compliance was impractical but the unit was otherwise safe *and* the landlord applied for approval within eighteen months).

[39] *See, e.g.*, TACOMA, WASH., MUN. CODE § 13.06.196(c)(11) (increasing penalties after grace period had lapsed).

[40] *See* MSRC Report, *supra* note 15, at 19.

[41] *See* Santa Cruz California Economic Information, http://www.hellosantacruz.com/Economic.cfm (last visited May 8, 2009); *see also* Fred Bernstein *In Santa Cruz, Affordable Housing Without Sprawl*, N.Y. TIMES, Feb. 6, 2005, *available at* http://www.nytimes.com/2005/02/06/realestate/06nati.html?pagewanted=all&position=.

In 2002 Santa Cruz legalized ADUs and adopted incentives to encourage them.[42] At the time the California legislature had encouraged cities to lower barriers to ADU construction to accommodate population growth without increasing sprawl.[43] Santa Cruz received a $350,000 grant over three years to develop an ADU program from the California Pollution Control Financing Authority, though a grant program aimed at reducing sprawl.[44] Santa Cruz used a portion of the grant to hire architects to design building plans that property owners could use to develop ADUs. The plans were put into a book, and the city sold more than 200 copies for twenty-two dollars each through the city's website.[45]

ADUs were one way for the city to provide more rental housing as well as make home ownership more affordable.[46] Santa Cruz addressed community concerns with community workshops. The top issue discussed in the community workshops during preparation stages was protecting the privacy of neighbors, including views, acoustics, and entry routes.[47]

b. How the Law Works

The city's zoning ordinance governs development of ADUs in Santa Cruz.[48] ADUs must be on a lot that is at least 5000 square feet and zoned for single-family residences.[49] One ADU is permitted per lot.[50] Certain yard setbacks are required.[51] One parking space is required for a studio or one bedroom ADU and two parking spaces are required for a two-bedroom ADU.[52] The ADU must meet the requirements of the Uniform Building Code.[53] Additionally, the property owner is required to occupy either the primary or accessory dwelling.[54] The property owner also must send a notice to adjoining neighbors when applying to develop an ADU.[55]

In order to spur development of the units, Santa Cruz provided a book of architectural designs for ADUs to assist homeowners, which homeowners can buy on the city's website. Santa Cruz also provided a series of ADU design workshops on video and a Manual for homeowners to assist in the process of developing an ADU.

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[42] *See* SANTA CRUZ, CAL., ZONING ORDINANCE ch. 24.16 part 2 (2002), *available at* http://www.ci.santa-cruz.ca.us/pl/hcd/ADU/PDF/ADU_Zoning_Regulations.pdf

[43] *See* Fred Bernstein, *supra* note 41.

[44] *Id.*

[45] *Id.*

[46] CITY OF SANTA CRUZ, *Forward* to ACCESSORY DWELLING UNIT MANUAL (2003), *available at* http://www.ci.santa-cruz.ca.us/pl/hcd/ADU/PDF/ADU_Manual.pdf.

[47] CITY OF SANTA CRUZ, ACCESSORY DWELLING UNIT MANUAL 8 (2003), *available at* http://www.ci.santa-cruz.ca.us/pl/hcd/ADU/PDF/ADU_Manual.pdf.

[48] *Id.* at 2.

[49] *See* Santa Cruz, Cal., Zoning Ordinance ch. 24.16 part 2 (2002), *available at* http://www.ci.santa-cruz.ca.us/pl/hcd/ADU/PDF/ADU_Zoning_Regulations.pdf

[50] *Id.* at § 24.16.160 (4).

[51] *Id.* at § 24.16.160 (5).

[52] *Id.* at § 24.16.160 (1).

[53] *Id.* at § 24.16.160 (7).

[54] *Id.* at § 24.16.160 (8).

[55] *Id.* at § 24.16.160 (15).

Further, there are four incentive programs for property owners. Homeowners are offered mortgages of up to $70,000 at 4.5% in conjunction with a local credit union.[56] Santa Cruz County's Women Venture Project provides up to 50% salary assistance to builders using graduates of their training program.[57] Santa Cruz provides technical assistance grants of up to $100 an hour for a professional to help solve design problems.[58] The city also has a loan program that provides fifteen or twenty-year loans for homeowners at 80% of the area median income.[59]

Santa Cruz addresses affordability issues by allowing property owners to voluntarily participate in Santa Cruz's affordable housing program and offering incentives for participation in the program. Property owners who agree to rent the unit to a tenant household that is at or below 60% of the area's median income receive a partial reduction in fees associated with developing the unit (sewer and water connection fees and planning application and planning check fees).[60] Property owners who agree to rent only to a tenant household that is at or below 50% of the area median income receive total elimination of planning and building fees (sewer and water connection fees, planning application and planning check fees, building permit and plan check fees, park land and open space dedication in-lieu fees, parking deficiency fee, and fire fees).[61] In order to have the fees waived the property owner must agree to rent the ADU to the required income bracket for life. In the event this does not occur the property owner must pay the waived fees. With respect to monitoring, property owners are responsible for verifying the tenant's income, but Santa Cruz monitors for compliance and can require property owners to submit certifications as to who the tenant is, what the tenant's income is and the amount of rent being paid.[62]

c. Connection with New York City

The Santa Cruz ADU law provides certain incentives that would be beneficial if enacted as part of an ADU law in New York City, such as model architectural plans and loans and grants for architects and construction workers. Santa Cruz sought to provide incentives for landlords to develop units that did not already exist. In New York, the cellar units already exist as dwelling units and need to be brought within the zoning and building codes, but in many cases, changes needed to bring the units up to code are very expensive. Providing architectural plans and design workshops would be effective in New York, the plans would just need to be tailored to bringing existing units up to code, rather than building new units, as was done in Santa Cruz.

Santa Cruz's affordable housing program would be very useful for New York. Santa Cruz provided various levels of fee waivers to property owners renting to tenants below certain income levels. The permit process in New York will be very expensive and waiving fees would be an effective incentive for property owners to make these units affordable housing.

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[56] CITY OF SANTA CRUZ, *supra* note 47, at 4.
[57] *Id.*
[58] *Id.*
[59] *Id.* at 48.
[60] *Id.* at 47.
[61] *Id.*
[62] *Id.*

The Santa Cruz zoning provisions designed to address neighborhood concerns are also useful for New York. Santa Cruz allows ADUs only in areas zoned for single-family dwellings, which would be infeasible in New York City because those are not the neighborhoods in need of legal ADUs. Santa Cruz also requires the property owner to live in either the primary or accessory dwelling unit, and provide a parking space for the unit. The property owner is also required to send notice to adjoining neighbors when seeking permits to develop an ADU. These provisions should be contemplated for New York to ease neighborhood resistance. However, it may be more difficult in New York, where parking is extremely limited already, and one property owner often owns many houses and rents them all out, making it impossible for the owner to live in the primary or accessory unit.

3. Arlington, Virginia

a. Background

More recently, Arlington, Virginia approved an ADU law on July 19, 2008, which went into effect in January 2009.[63] Arlington is a suburb of Washington, DC and there are seven metro stations on the DC Metrorail located in Arlington County. Approximately 209,000 people live in Arlington.[64] The median household income in Arlington County is approximately $102,000, while the per capita income is approximately at $70,000.[65]

The city enacted its law because allowing accessory units would enable senior citizens to continue to live in their house, while allowing for someone to move in to take care of them.[66] Allowing ADUs would also increase the affordable housing in the area without requiring the government to spend money on it.[67] Finally, these rental units would also provide an additional source of income to help homeowners pay their mortgages.[68]

b. How the Law Works

The changes to the Arlington zoning code allowed for up to two persons, who may be unrelated to the homeowners, to be housed in the accessory dwelling.[69] In Arlington, ADUs are only permitted inside single-family detached houses (in a basement, on the second floor, or in an addition to the home). The homeowner must live in the main or accessory dwelling and must have lived there one year before approval of an accessory dwelling.[70]

The Arlington ADU law includes a number of restrictions meant to ensure that the character of Arlington's neighborhoods will not be harmed. Only one accessory dwelling would

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[63] Arlington County Housing Division, Zoning Ordinance Elements of Accessory Dwellings (2008), *available at* http://www.arlingtonva.us/Departments/CPHD/housing/pdf/page65473.pdf.

[64] Arlington Demographics, http://www.arlingtonva.us/Departments/CPHD/planning/data_maps/profile/page69131.pdf (last visited May 7, 2009).

[65] *Id.*

[66] Arlington, Va., Accessory Dwellings: Background on Development of Arlington's Zoning Ordinance Provisions, http://www.arlingtonva.us/Departments/CPHD/housing/hpp/page61595.aspx (last visited May 7, 2009) [hereinafter Background on Development of Arlington's Zoning Ordinance Provisions].

[67] *Id.*

[68] *Id.*

[69] Arlington County Housing Division, *supra* note 63.

[70] *Id.*

be allowed per lot, and only as a part of the main dwelling, not as a separate building. The size of the accessory dwelling is limited to no more than 750 square feet.[71] No more than two persons may live in the unit.

As part of the certification process, the zoning administrator will certify that the building code, zoning ordinance, and parking requirements are met before issuing an accessory dwelling permit.

Once a person applies for an ADU permit the parking situation in the area will be inspected. "If the block is more than 65% parked and there are one or two existing standard-sized off-street spaces, then those spaces must be maintained; and if there are no existing off-street standard-sized spaces, one off-street parking space must be created. The space added must be standard size. If existing spaces which are required to be maintained have direct access to the street, that accessibility must be preserved."[72]

The main implications of the building code are that the ADUs must: have two means of egress; all sleeping rooms must have a smoke detector and emergency exit window; the dwelling units must be separated from each other with fire rated wall and floor; depending on the alterations, a sprinkler system may need to be installed; ceiling height must be no less than seven feet; meeting the minimum light and ventilation requirement might require significant work in basement level apartments; and there needs to be separate mechanical, plumbing and electrical systems to each dwelling unit.[73]

c. Connection with New York City

Similar changes to the zoning code would probably need to be made to the zoning ordinances in NYC to allow for ADUs.[74] The opposition in Arlington and the city's solutions for those concerns might be potentially applicable in NYC. While Arlington did not offer incentives to spur homeowners to create ADUs, the city instead offered protection to critics of the new ADU zoning changes. Many people protested the changes because they feared overcrowding. To fight that criticism the city limited the expansion of ADUs to twenty-eight units in one year.[75] In addition, the board also planned a proposed zoning ordinance that would give penalties for zoning violations, including overcrowding.[76] The city created a complaint form for neighbors to report overcrowding or illegal accessory dwellings.[77]

4. Long Island, New York

a. Background

Like jurisdictions around the country, many New York towns have passed laws legalizing ADUs. In the past several years over seventeen towns and villages on Long Island have passed

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[71] *Id.*
[72] *Id.*
[73] *Id.*
[74] *See infra* Part II.A.
[75] Background on Development of Arlington's Zoning Ordinance Provisions, *supra* note 66.
[76] Press Release, Arlington, Virginia, Arlington County Board Approves Accessory Dwellings (Jul. 19, 2008), *available at* http://www.arlingtonva.us/Departments/Communications/PressReleases/64952.aspx.
[77] Background on Development of Arlington's Zoning Ordinance Provisions, *supra* note 66.

ADU laws. The Suffolk County Planning Department estimates that there are over 100,000 illegal dwelling units in Nassau and Suffolk Counties,[78] even though rental-housing stock makes up a smaller proportion of the overall housing stock in Long Island (roughly 18%), as compared to Westchester County (roughly 36%), and similar counties in the metropolitan area.

The motivation behind legalizing ADUs in Long Island appears to be a combination of a desire to curb renting of illegal units and addressing a housing shortage. It is unclear if the legalization of ADUs was developed to resolve the problem of a lack of housing or as a mechanism to monitor and punish the rental of illegal units. The enforcement regimes enacted across numerous towns imply a strong desire to crack down on illegal units, as opposed to an overwhelming desire to ease strain on housing stock. Many proponents of legalizing the units concluded that illegal rentals could not be eradicated and reasoned that legalization was the only option for control. Furthermore, legalizing ADUs in certain Long Island towns was not a vast policy change because residents could already get permits for "Mother-Daughter" units and seniors could get permits to rent out space in their apartments.

Towns in Long Island have also used ADUs to address homeowners concerns. The Town of Riverhead passed an ADU law to make it easier for homeowners to meet their monthly costs,[79] and the town of East Hampton adopted an ADU law in order to streamline a process that would have been extremely complicated if carried out by individuals on their own.[80]

b. How the Laws Work

Approximately seventeen towns in Suffolk and Nassau counties amended their zoning code to permit ADUs.[81] In many of these towns and villages the units remain illegal and the town creates exemptions for those units that meet certain requirements. Some towns, such as the Town of Babylon, have passed a law authorizing a review board to issue permits to legalize accessory apartments that meet requirements. Other towns, like the Town of Brookhaven, require registration with town building officials in order to have a legal accessory unit. These towns have created enforcement regimes to penalize landlords who rent these units without having obtained a permit or registration status.

The Town of Babylon[82] generally penalizes illegal dwelling units but allows exemptions for those units that have a permit for an accessory apartment. The town's zoning code, which regulates rental units, allows for an exemption for accessory units that get a permit pursuant to the department of planning requirements. The Town of Babylon Department of Planning and Development explains that the ADU exemption to the zoning laws is *temporary* and does not create a guaranteed right.[83] The Babylon Department of Planning and Development lists fifteen

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[78] Dawn Wotapka Hardesty, *Long Island Towns, Villages Crack Down on Illegal Apartments*, LONG ISLAND BUS. NEWS, Feb. 9 2007.

[79] Valerie Cotsalas, *Legalizing In-Home Apartments*, N.Y. TIMES, Apr. 3, 2008.

[80] Janny Scott, *The Apartment Atop the Garage Is Back in Vogue*, N.Y. TIMES, Dec. 2, 2006.

[81] *See* City-Data.com, Local Town Codes for Listing Homes and Rentals, *available at* http://www.city-data.com/forum/long-island/342965-local-town-codes-listing-homes-rentals.html (May 31, 2008).

[82] TOWN OF BABYLON, N.Y., CODE, MULTIPLE DWELLINGS, Ch. 153 (2008).

[83] *See* Town of Babylon Department of Planning and Development, Application for an Accessory Apartment Permit.

requirements that an accessory unit must meet in order to be granted a permit. One of these requirements is compliance with the New York State Building Code and International Building Code.

In Huntington, the accessory apartment law also was included in the town's zoning code. The law[84] sets basic limitations for lot size, placement of entry to accessory unit and maximum occupancy of the unit. There is also a requirement that the house have a certificate of occupancy for three years or more. Accessory apartments cannot be legalized if ten percent or more of the lots within a one-half-mile radius of the subject parcel already contain accessory apartments.[85] Huntington's ADU law also states that any accessory dwelling unit must also be in compliance with New York State Building Code. Since creating the accessory dwelling unit law in 2002, as of 2007, the town of Huntington created 1800 legal accessory units.

Sag Harbor has developed an ADU program through creating a review board that authorizes permits for the units. The program recommends that preference be given to low- and middle-income residents, as well as ambulance corps, civil servants and those employed in local business.[86] The law provides that, after enactment, landlords have one year to bring an illegal unit up to code.[87] In the coming year, the town will review how successful it was in enforcing code provisions.

Long Island has enforced its permit laws through fines and through real estate agents. Huntington passed a law in 2005 making it illegal to collect rents from illegal apartment dwellers, authorizing officials to confiscate illegally collected rents (the confiscated funds are put into the town's affordable housing fund).[88] Many of Long Island's ADU laws prescribe fines between $500 and $5000 for violators. Some towns have begun to set out lists of "indicia" (utility meters, more than one satellite on a roof) in order to crack down on these units.

Various towns and villages created a program where real estate agents must verify to the town or village that the unit has a valid registration within five days of receiving commission on a sale or rental. Real estate agents failure to comply with the verification rules can result in fines and possibly jail time. The program uses real estate agents to inspect houses and apartment for illegal units and to verify that illegal units are not being rented—work that town governments have had difficulty doing. The Coalition of Landlords, Homeowners & Merchants has criticized town and village governments for compelling real estate agents to do the door-to-door inspections that the town governments lack the authority to do, constructively deputizing them.[89] Some towns and villages have yet to penalize any real estate agents under the law, and for many, enforcement still falls on town public safety departments, and punishment on landlords.

The ADU programs on Long Island have been met with mixed results, with some towns permitting hundreds of units, and others failing to offer effective incentives for legalization.

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[84] TOWN OF HUNTINGTON, N.Y., CODE § 198-134 (2008)

[85] *Id.*

[86] Marissa Maier, *Workforce Housing Bundled into New Code*, SAG HARBOR EXPRESS, Jan. 23, 2009.

[87] *Id.*

[88] Bernadette Starzee, *Demand for private houses containing a legal apartment is strong on Long Island*, LONG ISLAND BUS. NEWS, Jan. 20 2006.

[89] Dawn Wotapka Hardesty, *supra* note 78.

Riverhead, which has a permit program, has waived the fines for renting out illegal apartments where the owner agrees to bring the unit up to code.[90] The New York Times wrote that laws like the one in Riverhead have yet to incentivize owners to create these units in their homes in large part because of the cost to build units that are up to code, and because the addition of the unit would raise what the homeowner pays in property taxes.[91]

The Center for Regional Policy Studies at Stony Brook University explains that cellar apartments have not yet been legalized in Long Island because local residents shun the Hispanic immigrants who tend to occupy these units.[92] In many of these situations, landlords will rent out a cellar space to more than 20 people, which means that renters are really just paying for space for a mattress on the floor.[93]

c. Connection with New York City

The permit model used throughout Long Island may be transportable to New York City, but would require vast resources to set up a special permit review board and might be ungovernable due to the sheer volumes of units that would need permits. New York City currently attempts to penalize the rental of illegal units, but the enforcement is far from encompassing every illegal unit in the City. One feature of Long Island programs that could help enforcement in New York City is the practice of creating indicia of illegal dwelling that enforcement agents could use to ferret out illegal units. With specified indicia, it would be possible to create the tools to help the City discover these units, however, the city may not have the resources to use these tools or to enforce such a vast program.

A City program seeking to monitor a vast and unregulated network of real estate agents, as the Long Island laws do, could also be too vast to implement and would more than likely raise stringent opposition from real estate coalitions and organizations.

New York City could follow the Town of Babylon model and pass a law that creates an exemption to the zoning code that is *temporary*—and thus does not create a guaranteed right—and such units would still have to comply with the building code. The enforcement issue still represents a problem under this model.

Incentives used in Long Island could be offered in New York City, such as waiving the fines for renting illegal apartments if a property owner agrees to bring the apartment up to code, and giving preference under the law to low-and middle-income tenants.

New York City's ADU law must address the problems that have made the programs in Long Island unsuccessful. To the extent that the compliance with the building code could pose prohibitive expenses, the City could pass an amendment to the building code that reduces the stringency of the code or eases compliance where possible. New York City's ADU law should also address increases in property taxes for owners who add a legal ADU.

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[90] Valerie Cotsalas, *supra* note 79.
[91] *Id.*
[92] *Id.*
[93] *Id.*

5. Conclusion

Several patterns exist throughout other jurisdictions' experiences with ADU laws. While overall ADUs are used as a solution to address a housing shortage, there seems to be two separate driving forces for enacting ADU laws. First, in Washington and Santa Cruz, ADUs were seen as the solution to problems such as cost-effective affordable housing that is integrated into existing communities harmoniously, reducing urban sprawl and assisting with homeowners' mortgage payments by adding the rental income. ADUs were genuinely encouraged at both the state level, where model ordinances were enacted, and the local level, where zoning codes were relaxed and incentives offered the waiver of fees, and reduction of the units' capital costs.

In the other jurisdictions, Arlington and Long Island, ADUs were also used as a solution for overcrowding, but primarily as a vehicle to grasp control and stop the spread of illegal housing. These jurisdictions limited the number of ADUs that could be legalized and, in the case of Long Island, focused on the illegal status of ADUs and penalizing violators.

An ADU program in New York City should both provide a genuine solution to affordable housing and grasp control over the illegal housing market, in a way that reaches a happy medium. Financial incentives seem imperative to a successful ADU program, including the waiver of construction and permitting fees, property tax incentives and incentives to keep the units affordable for low-income tenants. New York City will also have to address the concerns of communities, which will be harder in New York City than in the other jurisdictions, because limiting ADUs to single-family homes and requiring parking and owner-occupancy would prove to be more complicated and less workable in the City, due to its size, density and lack of single-family dwellings.

B. Previous New York Precedent: The Loft Law

In addition to studying ADU laws in other jurisdictions we also wanted to look any relevant housing legislation in recent years in New York City. The Loft Law, enacted in 1982, is an example of changes made through legislation to the state Multiple Dwelling Law, in order to respond to a housing crisis affecting New York City. The Loft Law is important because of its precedential value in creating a temporary program to legalize apartments, similar to what we are proposing to do with the ADU law.

1. Background

In the 1970's, mainly in Soho, artists moved into commercial buildings that did not have certificates for residential occupancy. They began living in these lofts. The tenants, then, would spend money to renovate these lofts, but then would have no protection if the landlord wanted to evict them, because the apartments were illegal since there was no certificate of occupancy.[94]

[94] Real Estate, Q. &. A., N.Y. TIMES, May 11, 1997, *available at* http://www.nytimes.com/1997/05/11/realestate/q-a-964697.html.

2. Lower Manhattan Loft Tenants

The Lower Manhattan Loft Tenants is a community advocacy organization established in 1978.[95] The organization was founded to combat the evictions taking place in the loft apartments where the tenants had no rights. "Starting on a local level, LMLT [Lower Manhattan Loft Tenants] began to present loft tenants' views to their community boards, other tenant organizations, New York City Council members, and a mayoral task force. In 1979, they took the issue to Albany, where LMLT advocated the rights of loft tenants before the state legislature."[96] Using political connections the lobbyists got NYC mayor Ed Koch to sponsor a bill and push for its passage in Albany.[97] After the lobbying from this community organization, the state legislature amended the Multiple Dwelling Law to include Article 7-C and passed the Loft Law on June 21, 1982.

3. How the Loft Law Works

The legislative history of the Loft Law shows that it was enacted because of an "emergency . . . created by the increasing number of conversions of commercial and manufacturing loft buildings to residential use without compliance with applicable building codes and laws and without compliance with local laws regarding minimum housing maintenance standards."[98]

The Loft Law set standards for which apartments would be characterized as interim multiple dwellings.[99] If a unit could be characterized as an interim multiple dwelling, the law permitted occupation and rent collection within the buildings, and required the owner file for an alteration application (with the Department of Buildings).[100] There was some "compensation" for landlords included. The law reads, "[a]n owner of an interim multiple dwelling shall be exempt from paying a conversion contribution required by the zoning resolution of the city of New York for that portion of any building or structure determined by the loft board to be an interim multiple dwelling."[101] After compliance, the owner was also allowed to apply for an adjustment of rent based on that compliance. The law also provided protection for tenants. "[T]enants whose units qualify for protection under the new statute are rendered immune from eviction by reason of illegal occupancy."[102]

This law also established the Loft Board to oversee the process and resolve any problems.[103] The building had to be brought up to meet fire code and other safety requirements

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[95] Lower Manhattan Loft Tenants, LMLT Defines Itself!, http://www.lmlt.org/lmlt8.html (last visited May 7, 2009).

[96] Lower Manhattan Loft Tenants, Background, http://www.lmlt.org/lmlt1.html#BACKGROUND (last visited May 7, 2009).

[97] *Id.*

[98] N.Y. MULT. DWELL. LAW Art. 7-C (1982) [hereinafter MDL].

[99] *Id.*

[100] *Id.* at § 284.

[101] *Id.*

[102] *The Loft Law*, 4-30 NY Practice Guide: Real Estate § 30.02 (2008).

[103] MDL, *supra* note 98, art. 7-C § 282.

for residential buildings. The Loft Board would oversee the compliance with residential codes within these buildings.

As of 1997 there were approximately 5000 tenants living in 800 buildings governed by the Loft Law.[104]

4. Connection with Proposed ADU Law

The Loft Law can provide a model for the ADU law. It is another example where the housing laws were amended in NYC to meet a real housing demand. Similar to what we are proposing, the Loft Law created a program to legalize these buildings. They also established a board to oversee the conversion process, which could be a recommendation for an ADU law as well. Like we are proposing with the ADU law, the Loft Law included an application process as part of the conversion process for these apartments. Also, like ADUs, the loft buildings needed to be brought up to code to meet fire and other residential safety codes.

The real difference between the ADU law and the Loft Law is that before the Loft Law was enacted, there were many tenants living in each commercial building. Currently, there are probably more tenants in illegal basement apartments in the entire city, but not in each building. If there were a crackdown on illegal basement apartments, maybe only one family would be affected at a time, whereas with the loft law if there was a crackdown on one building a lot of tenants were affected at the same time.

5. Conclusion

The Loft Law is important as a research tool for proposing other housing law legislation. It shows the legislative process and how this law was changed. Furthermore, some of the provisions adopted in the Loft Law can also serve as precedent for similar changes we would like to add to an ADU law.

[104] Real Estate, Q. &. A., *supra* note 94.

As can be seen from Part One, most other jurisdictions legalized accessory dwelling units through their respective zoning codes, and required ADUs to comply with the state and local building codes. This section illustrates the constraints that cellar or basement ADUs face in the New York City zoning resolution and the New York City and State building codes. Background, definitions and provisions within each code that present issues for ADUs are described below, as well as potential solutions to address problem areas in a New York City ADU law.

Zoning presents two main constraints that any ADU law would need to address: floor area restrictions and restrictions on areas zoned for one- or two-family residences. Floor area restrictions are an obstacle for ADUs where the ADU adds to the floor area of the home, making it exceed the allowable floor area and thus creates a zoning violation. Cellar space has not generally been included in the floor area of a building, however, under the zoning code, required floor areas do apply to conversions or extensions of homes that increase the number of dwelling units. Therefore, an ADU law may need to exempt ADUs from adding to floor area, unless the home has excess floor area or the cellar was already counted in the floor area of the home, and an added ADU would not create a violation.

Zoning restrictions in single- or two-family residential districts also present problems for ADUs. First, in many cases an ADU would make a residence a three-family unit in an area zoned for one- or two-family residences. Three-family residences in areas zoned for less are not specifically barred by the zoning resolution, however, three-family residences are multiple dwellings, and must comply with the multiple dwelling law,[105] while one- and two-family residences do not. Density restrictions, however, may create zoning violations for ADUs. There are specified minimum square footage requirements for dwelling units and there are specified maximum lot sizes. The minimum square footage of the units must fit into the lot size. If ADUs must meet the minimum lot size requirements, the lot may not be big enough to legally add an additional dwelling unit. Furthermore, zoning requires off-street parking for many residential districts. One potential solution to these restrictions is to include ADUs as an accessory use, not as an additional dwelling unit, and then ADUs would not have to meet every specified requirement that a dwelling unit must meet.

Building or construction code provisions make it illegal to live in a cellar, which is a story with more than half of its height below ground. Many potential ADUs in New York City are in cellars. One possible solution would be to address concerns, such as fire safety and ventilation, in each individual ADU, rather than a blanket prohibition as exists now.

ADUs will have to meet other building code requirements that might be difficult, such as having two means of egress, specified ceiling heights, light and ventilation requirements and fire safety requirements. Each of these requirements is addressed below, as well as potential solutions to each requirement for ADUs in New York City.

[105] *See infra* Part III.

A. Zoning Code

1. Background

The New York City Zoning Code does not expressly prohibit the use of cellars as living spaces. While a cellar is defined within the zoning code, it is prohibited by statute elsewhere in New York law, specifically in the Multiple Dwelling Law ("MDL") (*see infra* PART THREE B). In contrast to the MDL, the zoning code may impliedly permit using cellars as dwelling units: ZR 15-111 provides that "[d]welling units may be distributed anywhere within a building provided that any portion of a dwelling unit located in a cellar shall also comply provisions."[106] Nevertheless, while cellars are not expressly prohibited from being used as a dwelling space, there are a number of restrictions in the zoning code that might bring conversion of illegal cellar apartments into conflict with the zoning code. Specifically, use restrictions on areas zoned for one- or two-family homes, parking requirements for dwelling units, and floor area ratio restrictions each may pose an obstacle to converting cellars to lawful use. This section addresses each of those restrictions in turn, as well as discusses several other zoning restrictions that may be relevant to consider. Finally, this section ends with a discussion of the zoning code's accessory use category, and how that category may be transformed into a vehicle that could provide for the legal status of cellar apartments.

2. Definitions

Accessory Use. "[A] use conducted on the same zoning lot as the principal use to which it is related . . . and, . . . a use which is clearly incidental to, and customarily found in connection with, such principal use; and is either in the same ownership as such principal use or is operated and maintained on the same zoning lot substantially for the benefit or convenience of the owners."[107]

Basement. "[E]xcept where a base plane is used to determine building height, [a basement] is a story (or portion of a story) partly below curb level, with at least one-half of its height (measured from floor to ceiling) above curb level. On through lots, the curb level nearest to a story (or portion of a story) shall be used to determine whether such story (or portion of a story) is a basement."[108]

Cellar space. "[E]xcept where a base plane is used to determine building height, [a cellar] is a space wholly or partly below curb level, with more than one-half its height (measured from floor to ceiling) below curb level. On through lots, the curb level nearest to such space such space is a cellar."[109]

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[106] N.Y. CITY, N.Y., ZONING RES. § 15-111 (2008).
[107] *Id.* at § 12-10 (c).
[108] N.Y. CITY, N.Y., ZONING RES. § 12-10 (2004).
[109] *Id.*

3. Floor Area and Density Restrictions

a. Floor Area Restrictions

The zoning code imposes floor area restrictions,[110] which are bulk restrictions that control the size of buildings. The zoning code sets floor area ratio for every zoning use classification. Floor area restrictions set limits on the total floor area of a building on a particular lot. Each category of zoning use sets limits for the maximum floor area ratio for that use category. Floor area ratio (FAR) is the total floor area to the size of the lot (measured in square feet). The FAR of a lot is calculated by dividing the total floor area by the total area of the lot. So for a use category where the floor area ratio is .5, the floor area of a building on such a lot may not exceed 50% of the area of that lot. This restriction permits some flexibility as it allows builders the choose to build fewer stories covering more of the surface area of the lot or to build more stories covering less surface area of the lot.

The Floor Area restrictions, pursuant to ZR 23-20 and ZR 23-21, are relevant to a cellar legalization program because in converting a cellar to a lawful use dwelling, or potentially in converting it to a newly defined accessory use, the conversion may raise the total floor area of the building and thus may come into conflict with the zoning code. Currently, cellars are not counted for the purposes of calculating floor area,[111] but basements are.[112] ZR 23-21 provides that the required floor areas "applies to all conversions, extensions, or enlargements or existing buildings that increase the number of dwelling units or rooming units – as well as new developments."[113] The question arises whether legalizing illegal dwelling units would bring a house into conflict with the floor area restrictions of that lot. There are several possible ways legalizing such units would not create any issues with regard to floor area requirements.

First, with regard to basements, if the basement apartment were already counted in the floor area of the building, converting to an accessory use or a dwelling unit would bump into no restrictions under ZR 23-21, because the floor area of the building would not have changed.

Second, assuming legalizing cellar spaces means converting them so that they came within the definition of ZR 15-111 and ZR 23-21, buildings that have excess floor area may not come into conflict with the zoning code. The excess floor area capacity could be used to accommodate the conversion. For example, a building that is 1200 feet under capacity could accommodate a conversion of a space that is 1200 feet or under.

Third, assuming the building did not have floor area to spare, conversion of a cellar to a newly created accessory dwelling use could avoid floor area restrictions. ZR 23-21 states that the required floor area applies to conversion that "increase the number of *dwelling* units or *rooming units*." Were the illegal units to be qualified as *accessory use*, then presumably, they would not fall within the definition of dwelling or rooming units, and thus would be facially exempt from the restrictions of ZR 23-21. The problem with this interpretation is that because the converted space would be categorized as an accessory *dwelling* unit, a court could interpret that its status as

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[110] *See id.*
[111] *Id.*
[112] *Id.*
[113] *Id. at* § 23-21.

a dwelling unit, accessory or otherwise, would trigger the restrictions of ZR 23-21. In that case, amending the zoning code to include an accessory dwelling unit would also require an amendment to ZR 23-21 that created an exemption for accessory dwelling units from being counted as a dwelling unit for the purposes of meeting floor are requirements.

However, there is a basis for concluding that floor area restrictions would be irrelevant anyway. In *Raritan Development Corp v. Silva*,[114] the Court of Appeals refused to count a cellar that was being used as a dwelling unit as part of the building's total floor area, because to do so would be in contradiction of the plain language of statute and was not compelled by the purpose of FAR restrictions which regulate physical bulk and not population density. The Court of Appeals wrote "FAR calculations were not designed to control population."[115] In *Raritan* Department of Buildings rejected an architect's FAR calculations because it found that, notwithstanding the fact that the ground floor was a cellar, it was dwelling unit and thus should be counted in as part of the building's floor area. The DOB and Zoning Board of Standards and Appeals based such an interpretation on the statutory intent of the NYC Zoning Law, finding that cellars should be excluded in FAR calculations only where they are not used as dwellings. The Court of Appeals reversed, holding that the plain meaning of the statute governed, and that because FAR calculations were not designed to control population, [116] but were designed to regulate the physical bulk of the building, a space that is more than halfway underground would be excluded from FAR calculations. [117]

There are thus a number of ways of avoiding potential FAR restrictions. Conversion of cellars to lawful use may be able to avoid FAR restrictions by using any unused floor area of the building. Alternatively, by converting to an accessory dwelling unit category, converted units may avoid FAR restrictions because FAR does not currently cover accessory spaces. Additionally, even if a converted unit could not avoid coming under the zoning code's FAR restrictions, there is a strong argument that the Court of Appeals has settled the matter: FAR was intended to control the size of buildings and not population.

b. Density Restrictions

A similar issue is that a third dwelling unit in the cellar of a two-family home may be prohibited by density restrictions. All residential districts are confined to certain lot sizes and dwelling unit sizes for density purposes. These confinements may make it impossible to legally add a cellar dwelling unit without exceeding the maximum floor area allowed in the buildings. Every residential district has a specified minimum lot area for each dwelling unit. As this section previously discussed, the maximum number of dwelling units on a particular lot is determined by dividing the square footage of the zoning lot by the minimum square footage required for each dwelling unit.[118] For example, in residential district R4-1, the minimum lot area per dwelling unit

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[114] Raritan Dev. Corp. v. Silva, 689 N.E.2d 1373, 1376 (N.Y. 1997).

[115] *Id.*

[116] *Id.*

[117] *Id.* ("It is eminently logical that cellars, housing levels that are more than halfway below the ground, would be excluded from FAR calculations notwithstanding the actual or intended use of the space.").

[118] *See* N.Y. Dep't of City Planning, NYC Zoning Handbook: A Guide to New York City's Zoning Resolution (1990), *available at* http://www.tenant.net/Other_Laws/zoning/zontitl.html [hereinafter NYC Zoning Handbook]

is 970 square feet, therefore, in order for a particular lot in an R4-1 district to have three dwelling units, the lot would have to be at least 2,910 square feet, and that is assuming that all three dwelling units are the same size. The minimum lot sizes in R4-1 districts are 2,375 square feet for detached homes and 1,700 square feet for semi-detached homes. The minimum 2,910 square feet that would be required for three dwelling units is well above the minimum lot sizes for the district, which represents a problem if most lots are the minimum size. If lots are bigger than the minimum allowable size, and big enough to encompass three dwelling units (the square footage of the existing dwelling units plus at least the minimum square footage for an additional accessory dwelling unit) then these density restrictions do not present a constraint to a cellar legalization program. The same scenario exists for R4B districts, which have the same minimum square footage required (the difference is that attached homes are also permissible in R4B districts). Furthermore, each residential district has maximum lot coverage percentages (55% in R4B, R4-1 is controlled by minimum yard requirements), so the building cannot cover the entire lot—the lots would actually have to be bigger than reflected above.

4. Single or Two Family Residential Districts

a. Use Restrictions

A cellar used for living space in a single or two family home could face zoning constraints in residential districts where the use is restricted to single- or two-family residences. As a third unit the building, the cellar would raise the total number of dwelling units above the limit allowed by zoning use restrictions.

There are two residential use groups in the New York City Zoning Resolution. The Resolution lists residential uses that are permitted as-of-right in Use Group 1 and Use Group 2.[119] Use Group 1 is limited to single-family detached residences.[120] Use Group 2 specifies certain residential districts that are limited to single- or two-family residences.[121] Residential districts limited to single- or two-family residences are sprinkled throughout areas where illegal cellar dwellings are prevalent. For example, Jackson Heights, Queens, includes R4-1 and R4B districts, which are limited to single- or two-family residences.[122] These residential districts are of particular concern because the greatest number of illegal dwelling unit complaints to the Buildings Department comes from two-family homes that have been converted to "illegal threes."[123] Two family homes represent 27% of residences in New York City but represent 40% of all conversion complaints.[124]

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[119] N.Y. CITY, N.Y., ZONING RES. § 22-10 (2004). "As-of-right" uses comply with zoning regulations and do not require any discretionary action by the City. *See* NYC Zoning Glossary, http://www.nyc.gov/html/dcp/html/zone/glossary.shtml.

[120] N.Y. CITY, N.Y., ZONING RES. § 22-11.

[121] *Id.* at § 22-12 (R3-A, R3X, R4A and R5A are limited to single or two family detached residences; R3-1 and R4-1 are limited to single or two family detached or semidetached residences; and R4B is limited to single or two family residences that are detached, semidetached or attached).

[122] *See* N.Y. City, N.Y., Zoning Map 9d *available at* http://www.nyc.gov/html/dcp/html/zone/ zh_zmaptable.shtml.

[123] *See* Pratt-Chhaya Report, *supra* note 1, at 4.

[124] *Id.*

A zoning district's classification as a two-family district creates a bar to three-family homes.[125] The State Multiple Dwelling Law is largely responsible for current zoning constraints on three-family houses. Because the MDL designated three-family houses as multiple dwelling, these homes were lumped into the same category as apartment buildings. This state law designate had impact on how districts were classified in NYC's zoning ordinances. When the City created its new zoning code in 1961, classifying certain districts as single-family homes and others as two-family homes, multiple dwellings were restricted from being constructed in those districts. Fear of living next to apartment buildings drove districts to choose restrictive classifications that did not permit multiple dwellings.[126] As a result, districts that did not permit multiple dwellings constructively barred three-family homes, even though such homes were the not the apartment buildings that residents feared in the first place.

Presumably, three-family homes that meet certain safety standards may apply for a either a special permit or a variance to avoid prosecution for violating the zoning code, but more research is required to assess the current procedures for circumventing use restrictions. Currently, use restrictions may not serve as a basis for prosecuting illegal three. Nevertheless, restrictions against multiple dwellings in certain zoning districts could serve as a basis for prosecution of homeowners. Therefore, any cellar legalization program needs to take into account these potential use constraints in order to avoid a future basis of enforcement against tenants and landlords.

b. Parking Space Requirements for Dwelling Units

Most single- and two-family residential districts require one parking space for each dwelling unit.[127] If cellars used for living space are legally considered "dwelling units", property owners subject to this parking requirement will have to add another parking space, which could be costly or impossible. Therefore, any amendment to the zoning code as part of a cellar legalization program should contemplate exemptions from parking space requirements.

5. Quality Housing Program

The Quality Housing Program is designed to ensure that multi-family housing is compatible with existing neighborhoods and promote the security and safety of the residents.[128] The Program is mandatory in contextual R6 through R10 districts[129] to ensure that height factor

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[125] *See Fighting Illegal Conversions: A Comprehensive Guide for Communities*, Letter from Helen M. Marshall, Queens Borough President, to Concerned Citizens, *available at* http://www.queensbp.org/content_web/housing/illegal_apts.shtml.

[126] Roger Starr, *Stagnation by Regulation: The Sad Tale of the Three-Family House*, Manhattan Institute, Feb. 1997 *available at* http://www.manhattan-institute.org/html/cb_8.htm.

[127] For example, of the residential districts in Jackson Heights, Queens: R3-2, R-4, R4-1, and R4B require one parking space for each dwelling unit. R5 requires one space per dwelling unit in single, two and three family houses and for 85% of dwelling units in multiple dwellings. The rest of the residential districts have similar parking requirements as R5, one per dwelling unit or a certain percentage of dwelling units in larger buildings.

[128] N.Y. CITY, N.Y., ZONING RES. § 28-00 (2008); *see also* NYC Zoning Handbook, *supra* note 118.

[129] Certain residential districts are termed "contextual" because they provide development opportunities designed to maintain the form and character of the existing community. Contextual districts are generally identified with the suffix A, B, X, or 1. *See* NYC Zoning Handbook, *supra* note 118.

regulations don't lead to buildings out of scale with the neighborhood. Under the Program, the maximum floor area may be reached in a building with fewer stories than would be permitted under height factor regulations.[130] The Program is optional in non-contextual R6 through R10 districts, allowing moderately larger but lower buildings where the developer determines it is appropriate. This program does not apply to single- or two-family residences, where most cellar accessory dwelling units exist, and thus is not anticipated to be an issue for legalizing cellar dwelling units.

6. Conclusion: Possible Solution Through the Zoning Code: Accessory Use

While the zoning code does not prohibit using cellars for living spaces, however, in defining a cellar, the zoning code defines a space that is then prohibited by the MDL , and other provisions of the zoning code—restrictions on FAR, on one- and two-family houses, as well as parking restrictions—create potential zoning restrictions on converted cellar apartments. One solution is to amend the definition of accessory use in ZR 12-10 to include accessory dwelling units. This program would mean adding cellar dwelling units to the principal residence under the "accessory uses" category of the zoning code, rather than legalizing the units as new and additional dwelling unit altogether.

Accessory uses are permitted as-of-right in both R1 and R2 use groups.[131] An accessory use is a use that is subordinate to and in connection with the principal use.[132] Accessory includes a number of uses, including a space used for living or sleeping accommodations for servants,[133] living or sleeping accommodations for caretakers,[134] living or sleeping accommodations in connection with commercial or manufacturing uses,[135] and other uses--the keeping of domestic animals,[136] swimming pools,[137] and a variety of storage purposes.[138] In contrast to living or sleeping accommodations, cellar units have full bathrooms and full kitchens, which means that they currently could not fit into the definition of accessory use. Furthermore, even as accessory uses, the dwelling spaces would have to comply with the building code habitability requirements.[139]

The next part discusses more fully how an accessory dwelling unit program would need to be coordinated with amendments to the building code and potentially to the MDL.

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[130] *Id.* ("For example, in an R7 district, under standard zoning, the maximum FAR of 3.44 is achieved only in a 14 story building. A six-story building would have an FAR of 2.88. However, under the contextual regulations, a six-story building could reach the full 3.44 FAR.").

[131] N.Y. CITY, N.Y., ZONING RES. §§ 22-11 - 22-12.
[132] *See* NYC Zoning Glossary, http://www.nyc.gov/html/dcp/html/zone/glossary.shtml.
[133] N.Y. CITY, N.Y., ZONING RES. § 12-10 (1) (2008).
[134] *Id.* at § 12-10 (2).
[135] *Id.* at § 12-10 (3).
[136] *Id.* at § 12-10 (4).
[137] *Id.* at § 12-10 (5).
[138] *See e.g., id.* at. § 12-10 (10).
[139] *See infra* PART TWO B. Construction (Building) Codes.

B. Construction (Building) Codes

1. Background

The New York City building regulations are contained in a body of laws called the construction codes. Along with the building code, the construction codes contain the fuel and gas, mechanical and plumbing codes as well as administrative provisions that govern all the individual codes.

The current NYC Construction Codes went into effect on July 1, 2008. Following an interim period where projects may choose to follow the new code or the older 1968 code, by July 1, 2009 all new projects must comply with the new code. The re-writing, the first major overhaul to the codes since 1968, began in 2002 as an effort to modernize the codes and bring it into line with internationally accepted standards.

The new codes, based on international models, expand requirements for fire protection, structural integrity and work-site accountability and are intended to focus the Building Department's enforcement work on the buildings and job sites that pose the most serious safety hazards to construction workers and the public. The majority of major changes relate to high-rise buildings as opposed to smaller residential structures, which any ADU law would likely deal with. The exception to this being fire safety requirements such as sprinkler and hard wired smoke detector regulations.

Despite the fact that construction codes went through a major overhaul last year they are periodically updated by the city via an amendment process. In fact, the 2008 code has already been updated numerous times since the law was initially signed. Therefore, despite the fact that another major overhaul is not in the works, any ADU amendments could be added. On top of this, Local Law 99/2005, mandates that the new building code be updated every three years through a formal evaluation process.

2. Definitions

The building code lays out definitions with respect to key ADU related terms:

Accessible Means of Egress. A continuous and unobstructed way of egress travel from any accessible point in a building or facility to a public way. Such way of egress travel may include an assisted rescue path.[140]

Basement. A story partly below the grade plane and having less than one-half its clear height (measured from finished floor to finished ceiling) below the grade plane.[141]

Cellar. The portion of a building that is partly or wholly underground, and having one-half or more of its clear height (measured from finished floor to finished ceiling) below the grade plane. Cellars shall not be counted as stories in measuring the height of buildings.[142]

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[140] N.Y. CITY, N.Y., CONSTRUCTION CODE. § 1002.1 (2008) [hereinafter BUILDING CODE]

[141] *Id.* at § 202.

[142] *Id.* at § 502.1.

Dwelling. A building or structure which is occupied in whole or in part as the home, residence or sleeping place of one or more families.[143]

Dwelling, Multiple. A dwelling which is either rented, leased, let or hired out, to be occupied, or is occupied, as the residence or home of three more families living independently of each other.[144]

Dwelling, One-family. Any building or structure designed and occupied exclusively for residence purposes on a long-term basis for more than a month at a time by not more than one family.[145]

Dwelling, Two-family. Any building or structure designed and occupied exclusively for residence purposes on a long-term basis for more than a month at a time by not more than two families.[146]

Dwelling Unit. A single unit consisting of one or more habitable rooms and occupied or arranged to be occupied as a unit separate from all other units within a dwelling.[147]

Grade Plane. A reference plane representing the level of the curb as established by the city engineer in the Borough President's office, measured at the center of the front of a building. Where a building faces more than one street, the grade plane shall be the average of the levels of the curbs at the center of each front.[148]

Habitable Space. All rooms and spaces within a dwelling unit in groups R or I-1, including bedrooms, living rooms, studies, recreation rooms, kitchens, dining rooms, and other similar spaces.

Exception: The following spaces within a dwelling unit shall not be considered habitable spaces:

1. A dining space 55 square feet or less located off a living room, foyer or kitchen;
2. A kitchenette;
3. A bathroom or toilet room;
4. A laundry room;
5. A corridor, passageway, or private hall'; and a foyer used as an entrance hall in a welling unit: not exceeding 10 percent of the total floor area of the dwelling unit; or not exceeding 20 percent of the floor area of the dwelling unit where every habitable room is at least 20 percent larger than the required minimum room sizes established by the *New York City Housing Maintenance Code*.[149]

Kitchenette. A space with less than 80 square feet of floor area which is intended, arranged, designed or used for cooking or warming food.[150]

Means of Egress. A continuous and unobstructed path of vertical and horizontal egress travel from any occupied portion of a building or structure to a public way. A means of egress consists of three separate and distinct parts: the exit access, the exit, and the exit discharge.[151]

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[143] *Id.* at § 202.
[144] *Id.* at § 202.
[145] *Id.*
[146] *Id.*
[147] *Id.*
[148] *Id.* at § 502.1.
[149] *Id.* at § 1202.1.
[150] *Id.* at § 1202.1.

Occupiable Space. A room or enclosed space, other than a habitable space, designed for human occupancy or use in which individuals may remain for a period of time for rest, amusement, treatment, education, dining, shopping, employment, labor or other similar purposes.[152]

Ventilation. The natural or mechanical process of supplying conditioned or unconditioned air to, or removing such air from any space.[153]

3. Key Distinction: Basement v. Cellar

Currently, it is legal to live a in a basement apartment provided it complies with zoning and building codes. However, it is illegal to live in a cellar apartment, period.[154] Within the building code the definition for basement is: a story partly below the grade plane and having less than one-half its clear height (measured from finished floor to finished ceiling) below the grade plane.[155] The definition of a cellar is: that portion of a building that is partly or wholly underground, and having one half or more of its clear height (measured from finished floor to finished ceiling) below the grade plane. Cellars shall not be counted as stories in measuring the height of buildings.[156] The only difference between cellar and basement is that a basement would have less than half its height below ground, and a cellar would have one half or more of its height below ground.

This basement/cellar distinction disqualifies many apartments from being legally rented. The proposed ADU law should urge for some loosening of this standard, at right around the 50% below grade level. Some concerns the HPD has regarding the currently illegal units are that, "[o]ccupants of illegal basement and cellar apartments face potential dangers such as carbon monoxide poisoning, inadequate light and ventilation and inadequate egress in the event of a fire."[157] If these are the concerns, an ADU law could require carbon monoxide detectors. Then, we proposed law would include some kind of inspection system in these cellar apartments to make sure on a case-by-case basis that light, ventilation and egress are adequate. Instead of a per se rule that cellar apartments are inhabitable, this new law could state that cellar apartments that meet code requirements can be safe for habitation. Such a permit and inspection process would make sure that these apartments are safe.

4. Relevant Specifications

a. Egress Related Requirements

One restriction to legalizing basement or cellar apartments is that two means of egress are required. According the building code, for occupancy of one to five hundred people a minimum

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[151] *Id.* at § 1002.1.

[152] *Id.* at § 1202.1.

[153] *Id.* at § 202.

[154] *See* MDL, *supra* note 98, at § 170-a (stating that "[t]he cellar shall not be used for any purpose other than household storage and mechanical equipment or appliances").

[155] *See* BUILDING CODE, *supra* note 140, at § 502.

[156] *See id.*

[157] NYC Dept. of Housing Preservation and Development, Illegal Basement and Cellar Conversions, http://www.nyc.gov/html/hpd/html/owners/illegal-conversions.shtml (last visited May 7, 2009).

number of two exits is required.[158] However, there are exceptions to the two-exit requirement. Table 1018.2 lists buildings that only require one exit.

For the requirements of the means of egress, according to section 1003.2, the means of egress shall have a ceiling height of no less than seven feet six inches. But, there is an exception in 1208.2 allowing the height in habitable basements to be no less than seven feet.

There are additional requirements for sleeping areas. According to section 1025.5, in addition to the other means of egress required, sleeping rooms need to each have windows for an emergency escape. The window needs to be a minimum horizontal area of nine square feet with minimum dimensions of thirty-six inches. However, there is an exception that an emergency escape route is not required in each bedroom if the building has an automatic sprinkler system.[159]

In proposing changes to the egress requirement for ADUs, we should stress that there are many exceptions to the two-exit requirement, and in many cases only one exit is required. The law would push for ADUs also be classified under the exceptions. For example, we can suggest that if the apartment is completely sprinklered, then it could be allowed to only have one means of egress. Additionally, since the apartments we are trying to legalize will include bedrooms, many of which must have the emergency window exit in each one, perhaps an exception could state that cellar/basements apartments can have one egress provided that they also have these bedroom window exits.

b. Interior Height and Width Requirements

The building code requires all rooms to meet minimum, specified dimensions. With respect to width, all habitable rooms except kitchens must be at least eight feet in any direction. Kitchens and kitchenettes must have a three-foot passageway between counter fronts and appliances or walls. However, certain exceptions to this rule exist: habitable dining spaces may be less than eight feet, half the bedrooms in a unit containing three or more must only be seven feet wide; certain other units may be six feet wide.[160]

With respect to height, all habitable areas must have a ceiling height of at least eight feet. Other rooms face less stringent requirements: occupiable spaces and corridors must have a ceiling height of seven feet six inches; and bathrooms and kitchenettes must have a height of seven feet. In addition, the building code makes other minimal exceptions for ceiling beams, girders and certain mezzanine levels.[161]

Finally, rooms are subject to total area requirements. Except for minor exceptions for open, adjoining rooms, all habitable rooms must have at least eighty square feet in floor area, and all dwelling units must have at least one habitable room of one hundred and fifty square feet.

c. Ventilation Requirements

In general, the building code requires all buildings to provide certain levels of ventilation. Areas not defined as habitable spaces—such as occupiable spaces, bathrooms and kitchens—are required to have certain levels of natural or mechanical ventilation in accordance with the *New*

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[158] BUILDING CODE, *supra* note 140, at § 1018.1.
[159] *Id.* at § 1025.5.
[160] *See id.* at § 1208.1.
[161] *See id.* at § 1208.2.

York City Mechanical Code, Section 403.[162] All habitable spaces are required to be provided with certain levels of natural ventilation.

If an occupiable space is ventilated through natural means the area must contain openings directly to the outdoors. These openings may include windows, doors, louvers, skylights, or other similar ventilating openings. Occupiable spaces are required to have a minimum openable area to the outdoors no less than four percent of the total floor area. If the ventilation occurs through an adjoining space, then the opening to the adjoining room must be unobstructed and have an area not less than eight percent of the floor area of the interior room, but not less than twenty-five square feet. In these instances of adjoining ventilation, the minimum openable area is based on the total floor area of all spaces being ventilated. Further, where ventilation openings to the outdoors occur below grade, the outside horizontal clear space measured perpendicular to the opening must be one and a half times greater than the depth of the opening.[163]

Habitable spaces are required to be naturally ventilated by windows and/or glazed doors. In habitable areas the minimum openable area must be five percent of the floor area, and each opening must be at least twelve square feet of glass, of which six square feet must be openable. If however the habitable area is partially ventilated through mechanical means supplying fresh air at minimum of forty cubic feet per minute then the free openable area may be reduced to two and a half percent of the floor area, with each opening not less than five and one half square feet. On top of these specific requirements, no part of any room may be more than thirty feet below a window opening unless the room also opens into a court.[164]

Basement and cellar kitchenettes and bathrooms must also be ventilated through natural means. In these spaces all openings must be windows. These windows must be at least five percent of the floor area of the bathroom, and must be at least three square feet, with a minimum openable area of one and a half square feet. Bathrooms may not be ventilated via adjoining spaces.[165]

In addition to these building code requirements, basements and cellars in particular are required to conform with §§ 27-2081-27-2087 of the *New York City Housing Maintenance Code* and §§ 26(8) and 34 of the *New York State Multiple Dwelling Law*.[166]

e. Lighting Requirements

The building code requires that every room and space in a building be provided with certain levels of artificial light, and every habitable room be provided with certain levels of natural light. In general, artificial lighting requirements are of minimal issue with respect to basement or cellar requirements because they offer an easily reached standard: 107 lux at a minimum height of thirty inches for rooms, with means of egress and stairways requiring slightly more artificial lighting.[167]

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[162] N.Y. CITY, N.Y, MECHANICAL CODE § 403 (2008).
[163] *See* BUILDING CODE, *supra* note 140, at § 1203.4.1.1.
[164] *See id*. at § 1203.4.1.2.
[165] *See id*. at §§ 1203.4.1.3 and 1203.4.1.4.
[166] *See infra* PART THREE.
[167] *See* BUILDING CODE, *supra* note 140, at § 1205.3.

With respect to natural light in habitable spaces of basements or cellars, all openings must be windows and/or glazed doors. The total area of these openings must be at least ten percent of the floor area and each individual opening must be at least twelve square feet. Additionally, basement or cellar rooms within a multiple dwelling must have:

> [A]t least half of their height and all of their required window surfaces above every part of an "adequate adjacent space." Such "adequate adjacent space" shall be open to the sky and shall be a continuous surface area not less than 30 feet in its least dimension abutting at the same level or directly below the exterior walls of every part of the basement and cellar portions of such dwelling unit.[168]

f. Fire Safety and Sanitation Requirements

Fire safety and sanitation requirements acutely affect basement and cellar units. However, these are both issues that an ADU law probably should not and, for public policy reasons, cannot, compromise on. The building code currently requires that a basement or cellar apartment have a sprinkler system and this is a rule that should be enforced. The only exception may be building code section 901.6.2. This section states that supervisory service is not required for automatic sprinkler systems in one- and two-family homes.[169] Potentially, an ADU law could also add the accessory unit under this exception and not require supervisory service.

C. Conclusion

Both the zoning resolution and the construction codes have provisions that will operate as obstacles to legal ADUs in New York City. This Part has outlined the main constraints and potential solutions. For zoning constraints, the best option is to include ADUs under "accessory use" where the units would not presumably have to meet other requirements of actual dwelling units. Exactly how the accessory use provision would operate remains to be seen, as of now, there are no accessory uses that are used for dwelling (although some are used for sleeping accommodations). In the event that ADUs are not included as accessory uses, or ADUs, even as accessory uses, are still subject to floor area requirements or use restrictions, a zoning provision directly relating to ADUs could state that the units do not add floor area or an additional residence or dwelling unit to the existing space, this would make ADUs available to more homes. If ADUs are subject to the existing floor area restrictions and use restrictions, it will not be a complete block for ADUs in New York City, only those that cannot meet the requirements will be barred, which will be a substantial amount of units that will continue to add to the current problem of illegal rentals.

The main challenge with building code constraints is the balance of safety and economically feasible requirements for ADUs. The prohibition on cellar-dwelling is over-inclusive. Certain cellars will be able to meet safe light, air and egress requirements and should be legal dwelling spaces. An ADU law could ensure that legal cellar dwelling units are safe by requiring individual assessments for ADUs, or allowing for flexible standards. Flexible building

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[168] *Id.* at §1205.2.3.1.
[169] *Id.* at § 901.6.2.

code standards would include a range of distance that a dwelling unit could be below-grade instead of a prohibition on dwelling in spaces that are fifty-one percent below grade. Other building code requirements could also be flexible for ADUs, such as a range of natural light and ventilation requirements, or allowing for a bedroom window to be a second means of egress. Safety should not be sacrificed in order to make ADUs legal, and it need not be. There are various ways to ensure that cellar ADUs are safe and meet adequate standards, whether it be making the standards more flexible, changing the units themselves to bring them up to code or a little bit of both. Physically bringing the units up to code greatly increases the capital cost that property owners will have to pay, and then increases property taxes for the owners. Adding financial incentives for taxes and capital costs, such as grants for architects and construction workers, would make a New York City ADU program much more successful.

This section examines three options for legalizing cellar units. It suggests that action might be taken on either (or both) the state and city level. This first section examines a city law option. Taken without state enabling legislation this law would legalize these units and provide for procedure for converting units. This law would require being passed in conjunction with zoning and building code amendments.

The second section of this part provides an overview of the restrictions imposed by the state MDL law, and explains how cellar legalization could be made possible either by state law or despite state law. That section contemplates either (1) eliminating the ban on using cellars for dwelling space altogether (but which would require changes to the building code) or (2) passing an amendment to the MDL that authorizes local governments to create an accessory dwelling unit category in their zoning and building codes.

This part does not explicitly address a third option. Because cellars could hypothetically be legalized through an amendment to the zoning and building code, an ADU effort does not necessarily require either a state law or a general city law. However, as the following section on a city law discuses, the advantage of legalizing cellars through either a state or city law is that it provides advocates with a clear rallying point.

A. City Ordinance with Zoning and Construction Code Amendments

1. Overview

One method of creating an ADU category would be to pass a general city law authorizing such a program. This would be an alternative to state action discussed below. The AARP has created a guide that instructs policymakers to pass accessory dwelling unit programs on the city and state levels.[170]

While a city law can be passed without state legislation, it would still need to be passed in conjunction with amendments to building and zoning codes. Without state legislation a cellar legalization law would have to be created through an accessory dwelling unit category in the zoning code, as such a unit would be likely to escape the MDL's restrictions on using cellars as living spaces. A city law would legalize the use of cellar as living spaces pursuant to an amendment to the zoning code that creates an accessory dwelling unit, and which complies with new building code regulations.

This ordinance would state the specifics of what a homeowner must do to convert their cellars to an accessory dwelling unit. A permit would be necessary as the unit would have to receive a certificate of occupancy, and the City would want to ensure that it passes safety requirements set out in the building code.

[170] AARP, ACCESSORY DWELLING UNITS: MODEL STATE ACT AND LOCAL ORDINANCE 15-51 (2000).

2. Components

The law could have three basic components:

1. *Purpose.* The first section would set out the purpose of the law, which is to respond to the city's housing crises and address the safety hazards posed by New York City's housing underground.

2. Definition. Next the law would set out definitions. It could cross-reference to zoning code explaining that it applies to accessory dwelling unit category as defined in the local zoning code.

3. *Standards.* Next, while the law itself would not propose the standards that must be met to qualify as an accessory dwelling unit, it would cross-reference to the building code, which prescribes those standards.

4. *Permitting.* This section would set out the procedure for qualifying as an ADU. It would detail what steps must be taken to apply for a permit, and what agencies are responsible for administering it

5. *Affordability.* Whatever affordability provisions the law includes—both tax deductions for the landlord and rent affordability programs for tenants—could be provided for here.[171]

3. Benefits

There are a number of benefits to such a law. First, it would mean that advocates only need to lobby the city government, rather than a program the MDL which would require lobbying both state and city officials. Second, it could provide a rallying point on the local level. It would be difficult to line up advocates for an accessory dwelling unit program that was created just through action in the zoning and building codes without a general city law as a centerpiece. Whereas a general city law could be a signature effort to address the housing problem, giving advocates a single and simple point of reference in their efforts. Additionally, this law could provide for whatever administrative and permitting procedures that need to be set up, as well as put affordability provisions under one umbrella. Finally, were the City to also pass legislation providing for technical support in converting these units or providing funding for technical support, it could do so through this general law.

B. State Law Amendment to Multiple Dwelling Law

1. Introduction

An effort to undertake legalization of cellar apartments needs to answer a basic question: *must* the MDL be amended in order for a cellar legalization program to proceed on a city level, or, can a city program provide for legalization without any changes to the MDL? This report does not resolve this question. However, one thing is clear, an amendment to the MDL is at least one pathway for a cellar legalization program.

This section outlines the provisions of the MDL relevant to a cellar legalization program. Two restrictions in the MDL are of special significance: the prohibition on using cellars for

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[171] *See infra* PART FOUR A.

anything other than storage use and restrictions on converting to a lawful multiple dwelling. Any cellar legalization program will have to be designed to either circumvent these restrictions (perhaps through local accessory dwelling unit program) or will have to confront the MDL directly through either an amendment that creates an accessory dwelling use category in the MDL or removes the MDL's ban on cellar dwelling entirely. This section describes three main options:

1. Legalize cellar apartments through an accessory dwelling use category created in the local zoning code and take no action through the MDL;
2. Amend the MDL to authorize the creation of accessory dwelling use category by local zoning codes;
3. Eliminate the MDL ban on using cellars for dwelling use, and provide for their lawfulness while exempting them from local zoning constraints.

2. Background

A multiple dwelling is "a dwelling which is rented [or] leased . . . as the residence or home of three or more families living independently of each other."[172] Its current function is, along with the New York City Housing Maintenance Code and Multiple Residence Law, to delineate the minimum standards for light and air, fire protection and safety, and sanitation and health in various classes of dwellings. While it is a state law, it applies only to cities of with a population of over a million people.[173]

The MDL was created in the 1940s in response to the post-war housing shortage. At its passage, the purpose of the MDL was to legalize housing that could not otherwise meet zoning or building code requirements. For example, some wood frame houses, which were illegal at the time, were granted an exemption for a period of years under the MDL. Furthermore, the reason for a law with separate safety requirements for larger buildings lies in the notion that along with "a building's illegal increased occupancy [comes] additional fire and safety risks, for which the law mandates that multiple dwellings provide increased protection."[174]

3. Illegal Twos and Threes Under the MDL and De Facto Multiple Dwellings

Under Multiple Dwelling Law § 325 (1), every multiple dwelling must be registered as such and have a multiple dwelling registration on file with the Department of Housing Preservation and Development ("HPD"). If the owner does not comply with the registration requirement, Multiple Dwelling Law § 325 (1) provides that "no rent shall be recovered by the owner of a multiple dwelling who fails to comply with such registration requirements until he complies with such requirements."[175]

An illegal dwelling under the MDL is an illegal three when a certificate of occupancy allows one or two units, but the building contains three. A building may be a lawful multiple

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[172] MDL, *supra* note 98, at § 4 (7).

[173] *See id.* § 3 (11).

[174] *Mannino v. Fielder*, 629 N.Y.S.2d 651, 654 (N.Y. Civ. Ct. Kings 1995).

[175] MDL, *supra* note 98, at § 325(2). For an analysis of the intersection of "illegal threes" and summary nonpayment and holdover proceedings, see Gerald Lebovits & Daniel J. Curtin, Jr., *The Illegal Multiple Dwelling in New York City*, 32 N.Y. REAL PROP. J. 3, 83 Summer/Fall 2004.

dwelling or a de fact multiple dwelling. If it is an illegal or de facto multiple dwelling, landlords may not recover rent from these buildings which are illegally occupied. "Illegal twos"—when a certificate of occupancy permits one unit, but actually contains two—is not related to the MDL. Illegality in that situation is based on failure to obtain a certificate of occupancy, not a violation of the MDL.[176] Thus the MDL is implicated whenever there is an addition of an illegal unit to a legal two-family home (or in a hypothetical situation where two illegal units are added to a legal one-family home). This report focuses on illegal-threes consisting of two lawful family residences, and the addition of a third unlawful cellar unit.

There is at least some ambiguity as to whether an "illegal three" building constitutes a multiple dwelling. In *Mannino v. Fielder*, Kings County Civil Court found that an illegal three house was a *de facto* multiple dwelling unit, and thus had to comply with the MDL.[177] However, a Queens Civil Court ruled the opposite way in *Chan v. Kormendi*, reasoning, in part, that whether a building is a multiple dwelling is not just determined by whether there are three families living in the building independent of one another, but a court will also look at the intended use or design of the building, per § 4 (1) of the MDL.[178] In *Chan* the illegal three house was design as a two-family house, and the addition of the illegal third unit did not render the other two units illegal. That meant that the landlord could collect rent from the tenants who did not occupy the illegal third apartment. While this case dealt with the issue of a landlord's ability to collect rent in an illegal three situation, the court's reasoning suggests that an illegal three is not necessarily a de facto multiple dwelling. However, this point is probably of no significance to the illegal third unit since it still has to contend with the multiple dwelling's restrictions.

4. MDL Provisions Relevant to Illegal Threes and Cellar Apartments

a. Definition of Cellar and Prohibition as a Living Space.

The MDL bans the use of a cellar as a living space, and provides that it may not be used for any purposes other than for storage.[179] The MDL defines a cellar as an enclosed space in a dwelling that has "more than one-half of its height below the curb level; except that where every part of the building is set back more than twenty-five feet from a street line, the height shall be measured from the adjoining grade elevations calculated from final grade elevations taken at intervals of ten feet around the exterior walls of the building."[180] Furthermore, a cellar may not be counted as a story—potentially relevant for floor area ratio purposes.[181]

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[176] Gerald Lebovits & Daniel J. Curtin, Jr., *supra* note 175.

[177] 629 N.Y.S.2d 651.

[178] *Chan v. Kormendi*, 462 N.Y.S.2d 943, 944 (N.Y. Civ. Ct. Queens 1983).

[179] NY CLS Mult D. Art. 6.§ 170-a (6) (2009) ("The cellar shall not be used for any purpose other than household storage and mechanical equipment or appliances, and the cellar ceiling shall be fire-retarded."); *Accord North American Holding Corp. v. Murdock*, 167 N.Y.S.2d 120, 123 (N.Y. Spec. Term Bronx 1957) ("The Multiple Dwelling Law prohibits the use of cellar space for residential purposes.").

[180] MDL, *supra* note 98, art. 1 § 4 (34).

[181] *See supra* PART TWO A.

b. Prohibition on Converting to a Multiple Dwelling Using a Cellar Space.

The MDL provides for dwellings that are three stories or less in height, erected after 1929 as one or two-family dwelling, to be converted into multiple dwelling.[182] Such a converted building may not be occupied by more than three families in all, "with a maximum occupancy of two families on each floor in a two story building and one family on each floor in a three story building."[183] While cellars are not counted for the purposes of calculating the number of stories in a multiple dwelling, they may not be used for any purpose other than storage. Additionally, for the purposes of converting to a lawful multiple dwelling a building may not add any stories.[184]

Taken together, these provisions entail a number of prohibitions:

1. A cellar may not be used as a living or dwelling space;
2. Landlords wishing to convert an illegal three into a lawful multiple dwelling may not do so if one of the units is a cellar; and
3. A cellar may not be converted into a basement for the purpose of making the building eligible for conversion into a multiple dwelling.

This last restraint is triggered by restrictions on what may count as a story. Because a basement is counted as a story, whereas a cellar is not, conversion of a cellar into a basement adds a story to the building. And because of the MDL bar on adding stories to a building for the purposes of becoming a multiple dwelling, conversion into a basement is currently not a viable back door to lawful multiple dwelling status.

However, this constructive bar on conversion from a cellar to a basement will unlikely be an issue for many current illegal threes as the cost of conversion to a basement is itself already prohibitive. (Because the element of difference in grade is essentially an inflexible specification, most conversions would not attempt to change the grade of the building).

c. Registration Under the MDL

Every multiple dwelling must have a multiple dwelling registration on file with HPD. The purpose of the registration requirement, explained one court, is "to enable tenants and government authorities to readily contact owners or persons responsible for operation of multiple dwellings."[185] The MDL contemplates that in one- or two-family houses, there is no similar need to register because it is expected that the landlord lives on premises or that it is easier to contact that landlord.[186]

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[182] MDL, *supra* note 98, art. 1 § 4 (34).

[183] *Id.*

[184] MDL, *supra* note 98, at § 171-a ("To increase the height or number of stories of any converted dwelling or to increase the height or number of stories of any building in converting it to a multiple dwelling.").

[185] *Chan v. Kormendi*, 462 N.Y.S.2d 943, 974 (N.Y. Civ. Ct. Queens 1983).

[186] *Id.*

5. Two Unresolved Questions: Does the MDL Absolutely Prohibit Cellars as Living Space, and Accessory Use Encompassing Cellar Space

In an unpublished opinion, *Fazio v. Kelly*,[187] a State Island Civil Court implied that both owners of basement and cellars may apply for certificate of occupancy in either a basement or cellar. In *Fazio* the court wrote that: "No owner … of any building shall permit any person to occupy a cellar as defined in Multiple Dwelling Law 4(37) for living purposes unless a permit has been issued…. (24 RCNY Health Code 131.07)." This implies that occupancy of cellar space is not as of right, but may be permitted by the local zoning authority.[188] However, on the face of § 4 (34)(6) of the MDL, it appears that the MDL absolutely prohibits using the cellar for any purpose other than household storage or for mechanical appliance.

Additionally, there are two unresolved issues relating to accessory use that might influence the appropriate pathway on the state level. First, it is unclear whether the provisions of the zoning code that allow for accessory use (consisting of living or sleeping accommodations for servants) permits such accessory use in cellar spaces. We have not found any information that answers the question whether or not a cellar may be counted as an accessory use. Thus, further research must be conducted as to whether the accessory use under zoning code contemplates use in a cellar. Second, even if the zoning code does contemplate cellars as appropriate spaces for accessory use, it is also unclear whether the MDL's ban on using cellar spaces for anything other than storage would, by extension, ban accessory dwelling use that encompasses cellar spaces. This matter also needs to be resolved.

6. Using (and/or Not Using) the MDL to Legalize: Three Pathways to Legalization

This section discusses three scenarios for how the MDL might come into play, or be left out of, an effort to legalize cellar apartments: (1) Legalize cellar apartments through an accessory dwelling use category created in the local zoning code and take no action through the MDL; (2) Amend the MDL to authorize the creation of accessory dwelling use category by local zoning codes; (3) Eliminate the MDL ban on using cellars for dwelling use, and provide for their lawfulness while exempting them from local zoning constraints. Regardless of which option a legalization effort pursues, each one entails amendments to local building code in order to set adequate safety standards for converted cellar apartments.

Option 1. Local Effort Only: ADU Program. Amend local zoning and building codes to permit accessory use to encompass cellars → No change to MDL required.

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[187] 2003 NY Slip Op 51276U, *9-*10 (N.Y. Civ. Ct. Richmond 2003).

[188] "No owner … of any building shall permit any person to occupy a cellar as defined in Multiple Dwelling Law 4(37) for living purposes unless a permit has been issued . . . ." 24 RCNY HEALTH CODE 131.07. This section applies to one and two family homes as well as multiple dwellings. It should be noted that the Multiple Dwelling Law distinguishes between a 'cellar', see MDL, *supra* note 98, at § 4(37), and a basement, see MDL, *supra* note 98, at § 4(38). Although the parties referred to the apartment as being in the 'basement' there is no evidence before the court from which it can be determined if it is a 'basement' or a 'cellar.' In any case a permit is needed before legal occupancy of either a basement or cellar is permitted. *See* MDL, *supra* note 98, at § 34 and 300(5).

Assuming that the MDL's ban on using cellar spaces for dwelling does not extend to accessory units, creation of an accessory use category through the local zoning code may function as a back door for legalization of cellar apartments without requiring amendment to the MDL. Theoretically, by creating a new legal category under the zoning code cellar apartments may be converted into a quasi-cellar status, one that meets the requirements of the building code—new requirements that are created especially for this use—but is neither a cellar nor a basement. This legal category would thus not be subject to the MDL's restrictions on cellars, nor would it be subject to the MDL's restrictions on adding stories to a building in converting to a multiple dwelling, because the quasi-cellar unit would not count as a basement. This report also assumes that an accessory category that encompassed a cellar would not be counted as a separate dwelling unit for the purposes of one- and two-family zoning use restrictions.

This option would create a legal fiction permitting three types of spaces below the first floor of a home: basement (legal for dwelling), cellar (illegal for dwelling), and accessory dwelling unit (legal for dwelling). Proponents of such a reform could argue that any alterations that must be made to a cellar in order for it to conform to this accessory use transform it from the traditional notion of a cellar, thus leaving behind any restriction that come with being defined as a cellar. However, this option is contingent on a legal theory that the MDL does not control accessory use.

Assessment. The problem with this option is that a court could interpret this accessory/quasi cellar use as either a cellar or a basement. A court could find that a dwelling unit must fit into either the MDL's basement or cellar category. Perhaps the a policy motivation for this rule would be that local governments are not permitted to *sub silentio* overrule the MDL by creating new legal categories, and that such a category must be created on the state level. Therefore, any ADU effort outside of the MDL requires substantial research into how courts might respond.

Summary. Pass amendment to zoning ordinance altering the definition of accessory use, and simultaneously amend the local building code to provide for building specifications of accessory dwelling units. The zoning and building provisions would cross-reference each other.

Option 2. Local and State Effort: ADU Program. Amend local zoning and building codes to permit accessory use to encompass cellars → Amend MDL to permit accessory unit dwelling.

If the MDL does impliedly prohibit using an accessory use category to encompass cellar units, it controls, preempting local law: where local and state law is inconsistent on an issue, state law controls, despite Municipal Home Rule.[189] If this were the case, an amendment to the MDL could address the MDL restriction against using cellar space as dwelling by permitting dwelling in

[189] *See Albany Area Builders Ass'n v. Guilderland*, 546 N.E.2d 920, 922 (1989) ("The preemption doctrine represents a fundamental limitation on home rule powers . . . . While localities have been invested with substantial powers both by affirmative grant and by restriction on State powers in matters of local concern, the overriding limitation of the preemption doctrine embodies 'the untrammeled primacy of the Legislature to act with respect to matters of State concern.'").

an accessory use unit as defined by local zoning codes. Either way, the zoning code will have to be amended so that accessory use includes accessory dwelling units.

Assuming that the MDL would not currently allow for a local zoning code to redefine accessory use to encompass cellars, another option is to amend the MDL. A category could be added to the MDL that permits cellar spaces to be used for accessory dwelling. This provision could then cross-reference to local zoning and building codes, leaving it to local zoning and building authorities to define what may lawfully be construed as an accessory dwelling unit. Because accessory use is not counted as a dwelling unit—a legal theory that has not been tested—it would, like in option one above, avoid (1) a converted home from being counted as a multiple dwelling; and (2) avoid being counted as a three-family dwelling and thus be exempt from zoning use restrictions in zoned two-family neighborhoods.

This option would not actually legalize the use of cellar apartments as dwelling units, but would create a separate category that provides for conversion from an unlawful cellar unit to a third category. It would thus legalize cellar apartments conditionally, leaving it to local authorities to enact provisions that breath life into the program.

Assessment. The benefit of this approach is that it:

1. Leaves it to localities to opt into the program by granting them discretion to create an accessory dwelling unit category. Thus, it does not attempt to re-write housing across the state, but would leave it local government to determine whether or not such a program meets their needs.
2. It avoids changing local zoning law and overriding local zoning codes. An accessory use under local zoning code may not be counted as a story or as a formal "dwelling unit" within the meaning of the MDL. This means that opting into an ADU program would not add a third "*dwelling*" unit to a home—again, a theory that has not yet been tested—meaning that conversion to an ADU would not trigger zoning restrictions. Thus although the units are termed accessory *dwelling* units, their legal status would be as something other than a dwelling unit.
3. Additionally, because such a home would formally contain only two dwelling units, it would not be subject to the other restrictions of the multiple dwelling law, which include registration as a multiple dwelling.

Potential Shortcomings. By leaving it up to localities to create this program, it could potentially never be used. It would have to be followed by local effort to create ADUs through the zoning code, and define what specifications they would meet through the building code. Further, by delegating authority to define the safety specifications of an ADU, the state could potentially encourage the creation of a balkanized system of safety regulations for ADUs. Left to define their own safety requirements for such units, localities could potentially water-down any safety requirements provided for through the MDL.

Summary. (1) Amend the MDL to include accessory dwelling use. Then (2) pass a zoning ordinance altering the definition of accessory use, and simultaneously amend the local building code to provide for building specifications of accessory dwelling units. The zoning and building provisions would cross-reference each other.

Option 3. Local and State Effort: Cellar Legalization Program. Amend the MDL to rescind the prohibition on using cellars as dwelling spaces → Leave it to the local building authorities to define safety requirements for cellar units.

An altogether different option would be to eliminate § 170-a (6) of the MDL, lifting the ban on using cellar dwelling. This approach would not require any changes to the zoning code, because landlords wishing to use cellars for living space would not need to proceed through an accessory dwelling program. Thus this pathway would not be an accessory dwelling unit program, but would instead be a cellar legalization program.

However, because cellars do not necessarily meet safety standards, this effort—like the options one and two—would have to be accompanied by a simultaneous amendment to the local building code, which sets out safety standards for converted cellars. Furthermore, because addition of a unit in many cases would increase the number of families from two to three, converted units could come into conflict with local zoning use restrictions. Therefore, a cellar legalization amendment to the MDL should include language that permits a zoning override of local zoning laws and should make reference to basement apartments so that they too can avoid zoning restrictions.

Added to the MDL could be a provision that states as follows:

> *As of [date], any two-family home where the use of cellar or basement space would add a dwelling unit to the building will be allowed to apply for registration as a legal multiple dwelling, assuming compliance with local building code, but notwithstanding restrictions of local zoning resolutions. Any building that contains (1) such a complying cellar space, or (2) any building containing a basement apartment already in compliance with building code, may apply for registration as a multiple dwelling and will not be subject to local zoning constraints pertaining to one- to two-family residential districts.*

This pathway would avoid creating a quasi-legal status for cellar apartments that an ADU program would create. Instead, it would legalize cellar dwelling use in situations where they meet the new standards as promulgated in the local building code.

Assessment. While such a program contains many advantages, it could engender stiff political opposition. First, although the MDL does have the inherent authority to override zoning authority, local officials may take umbrage at a state effort to usurp their power. Second, in addition to focusing political energy on a state effort to pass a cellar legalization law, community groups would also still have to lobby on the local level for changes to the local building code. Thus, this two-front effort would require significant and sustained political mobilization. In light of these obstacles, it might be more advisable to take action just on the local level through option one.

Summary. Simultaneously (1) Amend the MDL to eliminate § 170-a (6), which the bans dwelling in cellar apartments; (2) include in an amendment to the MDL a provision that authorizes the use of cellar apartments for dwelling, and which exempts cellar and basement apartments applying for multiple dwelling certification from local zoning constraints; and (3) amend local building codes so that they contain specifications for meeting lawful dwelling use.

C. Housing Maintenance Code Amendments

1. Pathway: Change the HMC so as to Redefine the Term "Household."

An alternative method of legalization for cellar units is to broaden the definition of family in the Housing Maintenance Code ("HMC"), so that dwellers in cellar units would not be counted as separate families for the purposes of zoning code. (The HMC sets the warranty of habitability standards for New York City residences.) This proposal would only affect zoning code and multiple dwelling law restraints on the number of families permitted in a given house. This proposal bears considerable weaknesses and is not recommended.

Under the zoning code, residences may be counted as a house if they consist of one to two families (or households), but become multiple dwellings if there are more than two families (households) residing in the house. This means that the tenants living in a three-family home zoned for two-family residence and which is not registered as a multiple dwelling, will be in violation of the zoning code, regardless of whether all three units meet the requirements of the building code.[190]

If households were redefined so as to encompass tenants who are not related by blood, but have less traditional ties, like kinship or tribal ties, then technically they may be counted as one household. This is relevant because the zoning code defines families according to the definition of households, and households are defined in the HMC.[191] Thus, if the HMC expanded the definition of households, and the tenants in a cellar of a house that already consisted of two units were counted as part of one of the other households then there would be no violation of zoning code use restrictions.

This HMC solution would thus provide a solution only in terms of violations of the zoning code; many units could still be in violation of the building code and as well as the MDL's prohibition on dwelling in cellars. Thus this HMC method of legalization would still require changes to the building code and MDL.

The practical effect of this legislative pathway could be significant for immigrant communities. It is possible that many of the illegal cellar tenants in immigrant communities have a kinship or tribal tie to another family in their residence. Assuming residents could establish or verify their kinship ties to another family in the house, they would be exempt from zoning violations. If this change to the HMC were made tenants would still have to contend with the MDL's bar on dwelling in cellars and building code violations.

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[190] *But see Chan v. Kormendi*, 462 N.Y.S.2d 943, 944 (N.Y. Civ. Ct. Queens 1983) (holding that presence of one illegal unit did not affect the legal status of the two other lawful units).

[191] A family is (i) a single person, or (ii) two or more persons related by blood or marriage or who are parties to a domestic partnership, occupying a dwelling unit and maintaining a common household with not more than two boarders, roomers or lodgers; (iii) not more than three unrelated persons occupying a dwelling unit and maintaining a common household. A boarder, roomer or lodger is a person who pays a consideration for living within the household and does not occupy such space as an incident of employment. Foster children lawfully living with the family in accordance with the provisions of the social services law are considered to be members of the family. A common household is deemed to exist if every member of the family has access to all parts of the dwelling unit." N.Y. CITY, N.Y., HOUSING MAINTENANCE CODE § 27-2004 (4) (2008).

2. Criticism

This proposal is seriously flawed. First, it is not clear how such a law is preferable to an ADU program discussed above; this HMC option would still mean that the building code and MDL need to be amended, and yet the HMC would only provide coverage to those residents who could establish a kinship tie with other residents in their home. It is thus less inclusive than an ADU program would be. Second, it could lead to potential overcrowding in all houses. If family were defined so loosely, then it could potentially permit dozens of individuals who are not related by blood but tied by kinship to occupy one house at once. Under the newly defined guise of household, these residents could effectively live in dormitory situations. Because they would fit the new definition of household, dozens of families could live in one house without coming into conflict with the zoning code. This could lead to disastrous and overcrowded situations.

Finally this proposal could lead to serious constitutional violations. It would incentive landlords to select tenants on the basis of their race or ethnicity, leading to widespread discrimination. Under such a program, it would only be a matter of time before a resident brought an equal protection claim against a landlord.

D. Conclusion

An advocacy campaign that attempted to legalize cellar apartments could use any one of the aforementioned pathways. Taken without state enabling legislation, a city law passed in conjunction with zoning and building code amendments could legalize the apartments and provide a procedure for converting units. Alternatively, cellar legalization can occur via an amendment to the state MDL. Such an amendment would need to eliminate the ban on cellars altogether, and rely on local amendments to building codes, or passing an amendment that authorizes local governments to create an accessory dwelling unit category in local zoning and building codes. There are positive and negative aspects of each pathway but the intertwined nature of housing regulations mean that a legalization effort will likely have to address both local and state law.

In addition to considering changes to the actual building and zoning codes and other laws, when proposing a new ADU law, it is also important to consider policy considerations and how the new law will be implemented. This section discusses issues for the ADU law to address regarding affordability and enforcement. Then, it analyzes broad policy issues to consider.

A. Affordability and Tax Incentives

Another concern is that low-income, particularly vulnerable tenants currently live in these illegal apartments. If the apartments are legalized, landlords may be able to charge more money and the tenants will be forced to move. Therefore, any ADU legalization effort should include affordability incentives.[192]

It is not clear how big of a concern affordability needs to be. In 1995 Washington State conducted a comprehensive report on ADUs and found that "[s]tudies have shown that ADUs rent for less than average market rent levels."[193]

1. Precedence in Other Cities

Santa Cruz set up some incentives for affordable rents. This can be a model for affordability incentives in NYC. For example, "[a]ccessory units proposed to be rented at affordable rents as established by the city, may have development fees waived."[194] The development fees that would be waived include: 1. Sewer and water connection fees for affordable units affordable to low and very low-income households; 2. Planning application and planning check fees for projects that are one hundred percent affordable to low and very low-income households; 3. Building permit and plan check fees for units affordable to very low-income households; 4. Parkland and open space dedication in-lieu of fee for units affordable to very low-income households; 5. Parking deficiency fee for units affordable to very low-income households; and 6. Fire fees for those units affordable to very low-income households.[195] Our proposed law could propose some fee waivers for landlords who maintain affordable rents on their apartments.

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[192] Please note that New York City itself has various programs set up to help low-income tenants pay rent. The Section 8 program provides vouchers to low-income tenants. NYC, however, along with many other localities, have made it illegal for a landlord to refuse to accept Section 8 vouchers. So, if ADU units are legalized, if the apartment falls within the guidelines of the Section 8 voucher affordability guidelines, the landlord would be required to accept the voucher as rental payment.

[193] MSRC Report, *supra* note 15, at 14.

[194] SANTA CRUZ, CAL., ZONING ORDINANCE ch. 24.16 part 2 (2002), *available at* http://www.ci.santa-cruz.ca.us/pl/hcd/ADU/PDF/ADU_Zoning_Regulations.pdf

[195] *Id.*

2. SCRIE and DRIE Programs

Another suggestion is to expand the SCRIE (senior citizen rent increase exemption) and DRIE (disability rent increase exemption) programs to include low-income households. Senior citizens or disabled people who rent regulated apartments and meet certain income requirements are eligible for these programs.[196] If the landlord owns a rent-regulated apartment, they are allowed to increase the rent periodically.[197] The SCRIE and DRIE programs protect those tenants from having to pay those increases.[198] In exchange, "[t]he City of New York then gives [the landlord] a dollar-for-dollar property tax abatement credit (TAC) that makes up for the rent monies [the] tenants have been exempted from paying."[199]

For a type of program like this to reach more people, the idea is to create another category similar to senior citizens and disability rent increase exemption, like a low-income tenant rent increase exemption. This new program could be applied in the ADU apartments. The ADU then would have to be a rent-regulated apartment,[200] and the tenant would have to meet certain income requirements. Then, the tenant could be exempt from rental increases and the landlord could receive a tax credit to make up the difference in rental payment.

Alternatively, it might be possible to create a less formal tax incentive system for landlords who keep ADU rents at low levels.

3. Avoiding Displacement of Tenants

We also think it is important that current tenants can remain in their apartments while the ADUs are being legalized. There is precedence for this in NYC law. With the Loft Law, commercial buildings were being illegally resided in. NYC passed the Loft Law to convert these buildings into habitable residential buildings. The landlords had a grace period of three to five years to convert the apartments.[201] Tenants could remain living there during the conversion and would continue to pay rent.[202]

We would like a similar program set up where landlords converting illegal basement or cellar apartments into legal ADUs would have a certain amount of time to implement the changes, during which time the current tenants could remain in the apartment and continue to pay rent. This would avoid displacing low-income tenants.

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[196] NYC Dept. for the Aging, SCRIE Made Easy, http://www.nyc.gov/html/dfta/html/scrie/scrie.shtml (last visited May 7, 2009).

[197] *Id.*

[198] *Id.*

[199] NYC Dept. for the Aging, *supra* note 196.

[200] There is some precedence for this. Once loft apartments were legalized they became rent stabilized. Lower Manhattan Loft Tenants, Background, http://www.lmlt.org/lmlt1.html#BACKGROUND (last visited May 7, 2009). However, most ADU buildings would not have more than six apartments in each building, and generally, rent regulated buildings have over six units per building. *See* NYC Rent Guidelines Board, http://www.housingnyc.com/html/guide/basics.html (last visited May 7, 2009). This standard would need some tweaking if it were to apply to ADUs.

[201] Lower Manhattan Loft Tenants, Background, *supra* note 200.

[202] *Id.*

B. Enforcement

In addition to providing tax incentives to maintain the affordability of ADUs, potential legislation must address enforcement issues. As mentioned above, New York City's enforcement of zoning and building code violations have been ineffective and at times inept.[203] The current enforcement mechanisms are not only unsuccessful and blatantly flouted but do not adequately address tenants needs. By taking a look at current enforcement mechanisms and comparing them with the policies of other jurisdictions New York City can mold a strengthened enforcement regime and ensure increased compliance with a new ADU law.

1. Current New York City Enforcement

Currently, the NYC Department of Buildings is responsible for investigating complaints of illegal apartments. The Department does not actively monitor for violations but instead relies on a complaint report procedure to find illegal apartments.[204] Once a complaint is lodged, an inspector from the Department's Quality of Life Task Force visits the property to determine if the residence is in compliance with zoning and building regulations.[205] If the unit is found in violation then the inspector will issue a violation notice.[206] Upon receipt of the notice the owner is required to attend a hearing at the Environmental Control Board ("ECB").[207] After the hearing, fines are levied and vary depending on the nature of the offence: The fine for a first offence related to an illegal conversion violation ranges from $250 to $2500. Fines for a second offense within eighteen months range from $1000 to $10,000. And for a third offence within an eighteen-month period the fines are between $5000 and $15,000. In addition, the owner can be fined an additional $100 per-day until the illegal condition is uncorrected.[208] Either removing the illegal unit or applying for the proper permits can correct the violation.[209] However, this second option is not available for cellar apartments because they are *per se* illegal,[210] and landlords must go through a lengthy eviction process before they can begin work.[211] Despite these expensive penalties, landlords continue to ignore the violation notices and fines.[212] The fact remains; sporadic and inconsistent complaint-driven enforcement policy gives relatively little incentive to remedy the problem once the fine has been paid.

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[203] *See supra* notes 9-11 and accompanying text.
[204] QBP Illegal Apartments Page, *supra* note 3.
[205] *Id.*
[206] *Id.*
[207] Chhaya CDC, *Are You Renting an Apartment in Your Home? Have You Received a Violation?* 2 (Unpublished brochure on file with Chhaya).
[208] QBP Illegal Apartments Page, *supra* note 3.
[209] *Id.*
[210] *See supra* PART TWO B.
[211] Chhaya CDC, *supra* note 196, 4-5.
[212] *See supra* notes 9-11 and accompanying text.

2. Other Jurisdictions' Enforcement Mechanisms

Other jurisdictions addressed enforcement issues in a myriad of ways. In Washington State many jurisdictions temporarily waived fines on illegal units that came into compliance with the new ADU provisions, and greatly increased penalties after a grace period had lapsed.[213] Likewise, Arlington created a system of fines for zoning violations and provided for a complaint review process.[214] Though these provisions seem to have met relative success in their jurisdictions, New York City has already failed with similar policies. The strict and innovative enforcement policies Long Island are more illustrative of what a potential NYC law needs. There ADU regulations are enforced through two novel fines: a clause that authorizes city officials to confiscate illegally collected rents and place the confiscated funds into the town's affordable housing fund; and a program where real estate agents must verify that a unit has a valid registration within five days of receiving commission on a sale or rental or face monetary and criminal penalties.[215] Using these, and other innovative ideas New York City must re-think the enforcement provisions of an ADU law in order to increase compliance.

3. Proposed New York City Enforcement Policy

Simply fining the landlord and forcing eviction does nothing to address the underlying housing shortage and merely punts on the core problem: tenants will simply move into another illegal unit and wait for the Building Department to evict them from that unit. A more successful enforcement mechanism addresses the underlying problem by legalizing safe units—so as to reduce the total number of units that must be monitored—and simultaneously increasing monitoring and penalties. This two-fold approach to enforcement can increase compliance and avoid the blatant defiance that previously impeded New York City's enforcement policies. Inspectors should be shifted from the current, complaint-driven inspection schedule and begin to monitor key neighborhoods where infractions are well documented. Random spot checks will decrease the incentive to pay the fine without remedying the underlying code violations. Further, after an initial grace period that will allow owners to bring existing units within the terms of an ADU law, fines should be increased and accompanied by innovative collection methods. Illegal rents should be seized, real estate agents held accountable, tax liens placed on non-compliant properties, and the City should try similar inventive mechanisms it uses to enforce other laws. But such increase in enforcement should be accompanied by a full-fledged effort to educate the public on the new law, and provide technical and financial assistance to owners willing to convert their units. This two-fold effort will decrease the number of illegal units thereby freeing inspectors to concentrate on enforcing the heightened sanctions.

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[213] *See supra* notes 37-38 and accompanying text.
[214] *See supra* notes 75-76 and accompanying text.
[215] *See supra* notes 87-88 and accompanying text.

C. Policy Considerations

As with most substantive changes to housing law, there are strong policy arguments both for and against the legalization of ADUs. Below are some policy issues to consider when preparing to advocate for legislative change.

1. Safety

Criticism. ADU opponents will argue that these units are not safe.

Response. For those units that are currently not safe, legalizing these units would mean bringing them up to code and thus making them safer. Currently these units are unregulated. Legalizing the apartments would allow for their regulation. They key point is an ADU law does not need to mean watering down existing standards.

2. Cost of Modifications to Units

Criticism. The modifications required will be so expensive that landlords will not opt into the program.

Response. Many people would sign up to make these changes because it is a good investment. Even if these costs exceed $10,000, the return on the investment over a long period of time will be greater. Furthermore, the ratio of increase in property taxes to increase in value of home will be large enough that the increase in taxes will not act as a disincentive. Additionally, the fines for these units have become so astronomical that landlords are currently losing money because either they do not rent the units out of fear of the fines or they currently are losing money by paying such fines. If some tax breaks and fee waivers from Part Four-A are adopted, that could also make these units more affordable for landlords.

3. Provision of city services

Criticism. If you increase neighborhood density, ADUs will put a strain on city services.

Response. ADUs would increase the city's tax base both by increasing property taxes and by providing tenants with more stable housing sources, in turn making them more productive to the local economy. Additionally, as many ADUs would require construction, legalizing ADUs could be a boon for the construction industry, creating an additional source of tax revenue.

4. Neighborhood Density

Criticism. Related to the provision of city services is the argument that ADUs will adversely impact the current zoning scheme. Opponents will likely use overcrowding as an argument against an ADU law. Opponents may use arguments for more restrictive zoning as a proxy for hostilities towards immigrants.

Response. Environmentalists and proponents of sustainable development will argue that increased density is good for the city. This smart growth argument is essentially that more density decreases the carbon footprint of the city. It would prevent more waste and pollution from increased construction, prevent the outward expansion of the city that increases transportation needs and subsequently increases energy consumption and carbon dioxide emissions. Increasing density as an alternative to constructing new buildings also has the

advantage of reducing energy consumption as it requires less energy to heat an additional space in an existing building, than to heat an entire new one. This argument appears to reflect the City's current thinking about Smart Growth.

5. Tenant's Rights

Criticism. Landlords will oppose an ADU law because it increases legal rights of tenants.

Response. It can be argued that tenants in illegal units already have legal rights. As the law currently stands, illegality of unit is a defense to non-payment**.** Half the cases in Queens County court concern illegal tenants, and in many of those cases where the landlord sues for non-payment of rent, the tenants claim illegality as a defense, and often times this defense works.

D. Conclusion

In addition to technical changes to the law, the proposed law should also consider affordability and enforcement provisions. These provisions would protect tenants and provide incentives for landlords to legalize their ADUs. Finally, considering policy issues can help to answer any questions legislators might have and also help preempt any opposition to the proposed changes. Taking a holistic approach that addresses all of these concerns can make the proposed legislation successful.

Illegal cellar apartments are a growing problem that New York City has failed to adequately address. Currently, a lack of available affordable housing drives people to search for low-priced but illegal apartments. In turn, landlords respond to this demand by unlawfully creating units that are often unsafe and an unmeasured drain on local resources. Attempting to regulate the units, the City tries to enforce its current laws but is met with limited success because the law fails to distinguish between safe and unsafe units and does not address the underlying demand. The problem has been well documented in local media reports but as of yet no solution has been found.

This is partially due to the fact that previous efforts have improperly framed the issue and lumped all cellar apartments in one category regardless of the level of habitability. With their report Chhaya and the Pratt Center presented an innovative solution: legalize cellar apartments so they can be more closely regulated while increasing the legal availability of affordable housing. Building on their effort, this report attempts to lay the groundwork for and provide background legal information to such a legalization effort.

As this report detailed, jurisdictions around the country dealt with similar problems through "accessory dwelling unit" legislation. Innovative efforts from Santa Cruz's affordability incentives to Long Island's enforcement mechanisms can provide a guide for New York City's legalization effort. However, in many respects New York City is unique. Local zoning and building regulations are particularly stringent and nuanced. Further, the underground nature of the cellar units makes safety issues such as egress and ventilation more complex. Any NYC ADU legalization effort will have to strike a balance between increasing the available housing stock while avoiding watering down necessary safety standards.

In this effort, New York City's cellar apartments can be legalized either though a local city ordinance or amendments to state Multiple Dwelling Law but both efforts must be accompanied by modifications to the building and zoning code. Without zoning code modifications many units will face floor area and one- or two-family residences restrictions that will make legalization impossible. Likewise, without building code modifications cellar apartments are *per se* illegal. Regardless of the desired pathway, legalization is a viable and attractive alternative to the status quo.

Finally, efforts to legalize cellar and other accessory dwelling units must take into account numerous non-technical factors. Previous laws have failed because of a lack of innovative enforcement and failure to adequately deal with the underlying market-demand for affordable housing. Similarly, as other jurisdictions have shown, legalization efforts must include adequate financial incentives for the landlords. Without tax or other benefits property owners may very well ignore regulations. In the end a legalization effort will not be without its challenges. Numerous entrenched interests who are satisfied with the status quo will find any effort at modification to be unsatisfactory. However, with appropriate language and incentives, as well as a positive policy framework, New York City's ADU legalization can finally address the problem of illegal cellar apartments.