

Illinois' Affordable Housing Planning and Appeal Act: An Indirect Step in the Right Direction—A Survey of Housing Appeals Statutes

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I. INTRODUCTION

The United States faces an affordable-housing crisis.¹ The crisis means that for the fourteen million households below the poverty line, nearly two thirds of their monthly income is spent on housing.² The crisis impacts more than just the poor—fifty-two percent of American households have difficulty meeting their monthly housing expenses,³ and it is exacerbated by a severe shortage of safe, sanitary, low- and moderate-income housing.⁴ This shortage does not result from an unwillingness to construct such housing, however. Instead, municipalities, especially suburban municipalities, motivated by racism and classism, create insurmountable legal barriers to the construction of affordable housing,⁵ disguising their motives as a desire to preserve municipal resources and the environment.⁶ These barriers delay the construction of, and increase development costs

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1. Paul K. Casey, *Coming of Age*, 13 J. AFFORDABLE HOUSING & COMMUNITY DEV. 1, 2 (2003); see also Kenneth Forton, Note, *Expanding the Effectiveness of the Massachusetts Comprehensive Permit Law by Eliminating Its Subsidy Requirement*, 28 B.C. ENVTL. AFF. L. REV. 651, 653–56 (2001) (discussing the current affordable housing crisis).

2. Casey, *supra* note 1, at 2.

3. *Id.*

4. *Infra* text accompanying notes 16, 41, 62.

5. Forton, *supra* note 1, at 652.

6. See *id.*; Melinda Westbrook, *Connecticut's New Affordable Housing Appeals Procedure: Assaulting the Presumptive Validity of Land Use Decisions*, 66 CONN. B.J. 169, 173–75 (1992).

for, affordable housing, making such housing much more difficult to construct.⁷

Many states have attempted to counteract this “overregulation.” Massachusetts, Rhode Island, and Connecticut employ an affordable housing appeals procedure.⁸ The appeals procedure gives an affordable housing developer whose housing application is denied access to a special appeals process. The process reverses the traditional presumption that a municipality’s land use decision is valid and instead requires a municipality to justify its decision.⁹ These appeals procedures have had at least some success in building affordable housing in their respective states.¹⁰ Despite this, they have been the subject of much criticism, some justified.¹¹

Recently, Illinois implemented its own affordable housing appeals procedure (the “Illinois Act” or the “Act”).¹² Like the other appeals procedures, the Illinois Act provides a builder’s remedy for developers that wish to construct affordable housing.¹³ However, the Act contains significant differences from its East Coast counterparts. This note examines the Illinois Act in light of the other appeals procedures in order to determine whether it will suffer from the same faults and criticisms.

Part II of this note briefly describes the configurations of the Massachusetts, Rhode Island, and Connecticut appeals procedures and their effects on the affordable housing supply. Part III discusses criticism and praise of the appeals procedures. Part IV explores the configuration of the Illinois Act, predicts the reception it will receive

7. Forton, *supra* note 1, at 654.

8. *See infra* notes 15–29, 39–53, 61–78 and accompanying text.

9. Westbrook, *supra* note 6, at 172. Traditionally, land use officials are given tremendous deference to deny or approve housing applications; “unless [a] challenger can demonstrate that the local board [is] motivated by some improper purpose, or that its action [is] arbitrary or capricious or procedurally defective, the challenge . . . fail[s].” *Id.* at 177. Courts go “to great lengths to give planning and zoning board decisions ‘every presumption of validity.’” *Id.* Because a court’s review is limited to the record, local land use authorities further insulate their decisions by including very little of their rationale in the record of decision. *See id.* at 180 (discussing case in which local board denied affordable housing application without giving reasons for denial in order to avoid review).

10. *Infra* notes 30–38, 54–60, 79–84 and accompanying text.

11. *Infra* notes 85–108 and accompanying text.

12. 310 ILL. COMP. STAT. 67/1–50 (Supp. 2003).

13. *Id.* at 67/30.

based on evaluations of the other appeals procedures, and concludes that while the Illinois Act is a valuable tool for the construction of affordable housing, the Act's deviations from the other appeals procedures will do very little to temper problems with its own appeals process.¹⁴

II. OVERVIEW OF STATE APPEALS LAWS

A. Massachusetts' Comprehensive Permit and Zoning Appeals Act

Enacted in 1969, the Massachusetts Comprehensive Permit and Zoning Appeals Act¹⁵ ("Chapter 40B") was the first state statute to create a builder's remedy. It resulted from Massachusetts' recognition that there existed an "acute shortage of decent, safe and low and moderate cost housing."¹⁶ Its purpose was to "stimulate the production of affordable housing in conjunction with a state or federal subsidy program."¹⁷

Chapter 40B consists of a comprehensive permit component and an appeals component. The comprehensive permit component allows a public agency, limited dividend organization, or nonprofit organization¹⁸ that wishes to build low- or moderate-income housing

14. This note only gives a general overview of each state's appeals procedure and the issues that appeals procedures raise. However, many of the sources cited in this note provide a much more detailed analysis of specific states' appeals procedures and their issues.

15. MASS. GEN. LAWS ch. 40B, §§ 20–23 (2002).

16. MASS. REGS. CODE tit. 760, § 30.01(2) (2002).

17. MASS. DEP'T OF HOUS. & CMTY. DEV., GUIDELINES FOR HOUSING PROGRAMS IN WHICH FUNDING IS PROVIDED THROUGH A NON-GOVERNMENTAL ENTITY 2 (2003). Some argue that the requirement that affordable housing be tied to a subsidy program is misplaced. See, e.g., Sam Stonefield, *Affordable Housing in Suburbia: The Importance but Limited Power and Effectiveness of the State Override Tool*, 22 W. NEW ENG. L. REV. 323, 337 (2001) (arguing that the correct focus should be "on the affordability of the units, without regard to [how] the builder achieves that affordability").

Chapter 40B also aims to "provide a way for a municipality to have town boards and committees work cooperatively and simultaneously with the local ZBA to structure a project with at least 25% affordable units." Mass. Dep't of Hous. & Cmty. Dev., Chapter 40B Discussion Forum 4 (2001). Finally, Chapter 40B seeks to ensure that at least ten percent of the housing stock within all Massachusetts' municipalities is affordable. Terry J. Tondro, *Connecticut's Affordable Housing Appeals Statute: After Ten Years of Hope, Why Only Middling Results?*, 23 W. NEW ENG. L. REV. 115, 121 (2001).

18. Sam Stonefield, Professor of Law at Western New England College School of Law, notes that "[g]iven sufficient flexibility in the interpretation of the phrase 'limited dividend

to submit a single building application to the local zoning board of appeals (ZBA) in lieu of the several applications to different boards that are normally necessary.¹⁹ Chapter 40B directs the ZBA to notify the other boards about the application, to hold a public hearing on the application, and to grant or deny the application within forty days of the public hearing.²⁰ If the ZBA grants the application, a comprehensive permit (CP) is issued.²¹ If the ZBA denies the application or grants it with conditions that make the project “uneconomic,”²² the applicant may trigger the appeals component by filing an appeal with the Housing Appeals Committee (HAC).²³

Chapter 40B requires the HAC to hold proceedings on the appeal within twenty days after the appeal is filed and to render a decision on the appeal within thirty days after termination of the

organization’ and skill in drafting and planning, the [restrictions on who qualifies to apply for a CP] need not be a major barrier to participation in the affordable housing process.” Stonefield, *supra* note 17, at 336. Stonefield further notes that the restrictions still exclude smaller, private, single family homebuilders. *Id.* However, with the advent of the Massachusetts Local Initiative Program (LIP) which permits developers without a government subsidy to use the CP process if at least twenty-five percent of the units they propose are affordable and they receive approval of the chief elected official of the municipality, fully alleviates the exclusion of private developers from the affordable housing playing field. Sharon Perlman Krefetz, *The Impact and Evolution of the Massachusetts Comprehensive Permit and Zoning Appeals Act: Thirty Years of Experience with a State Legislative Effort to Overcome Exclusionary Zoning*, 22 W. NEW ENG. L. REV. 381, 390 n.49 (2001). For a thorough discussion of LIPs, see Forton, *supra* note 1, at 668–72.

19. MASS. GEN. LAWS ch. 40B, § 21. This streamlined process helps to alleviate some of the problems with “overregulation.” The project must be eligible for a subsidy under a subsidizing agency to assist in the production of low or moderate income housing and the applicant must obtain a project eligibility letter to that effect in order to gain admission to the ZBA. MASS. REGS. CODE tit. 760, § 31.01(2). See Jonathon Douglas Witten, *The Cost of Developing Affordable Housing: At What Price?*, 30 B.C. ENVTL. AFF. L. REV. 509, 537–39 (2003), for an argument that the letter requirement “is a charade.”

20. MASS. GEN. LAWS ch. 40B, § 21. The time limit can be “extended by mutual agreement between the board and the applicant.” *Id.*

21. *Id.*

22. “Uneconomic” is defined as “any condition . . . that . . . makes it impossible for [the applicant] . . . to proceed in building or operating low or moderate income housing without financial loss, or for a limited dividend organization to proceed and still realize a reasonable return.” *Id.* § 20.

23. *Id.* § 22. The HAC is a five member board. Three members are appointed by the Director of the Department of Housing and Community Development and two are appointed by the Governor. MASS. HOUS. APPEALS COMM., HOUSING APPEALS COMMITTEE FACT SHEET 1 (2003).

proceedings.²⁴ During the proceedings, the HAC is limited to determining whether, from the ZBA's record, the ZBA's decision is "reasonable and consistent with local needs."²⁵ In the case of an approval with uneconomic conditions, the HAC must also determine whether the conditions actually make the project uneconomic.²⁶ To survive the HAC's review, the ZBA must show either that its decision is consistent with local needs²⁷ or "that there is a valid health, safety, environmental, design, open space, or other local concern . . . that . . . outweighs the regional housing need."²⁸ If the ZBA is unable to meet this burden of proof, it must issue a CP and modify or remove any uneconomic conditions it imposed on the project.²⁹

Chapter 40B has substantially impacted Massachusetts' affordable housing supply. Nearly thirty thousand new housing units exist as a direct result of it, and an additional 3600 units are under construction.³⁰ Approximately two-thirds of these units are

24. MASS. GEN. LAWS ch. 40B, § 22. The time limit can be extended by mutual agreement between the HAC and applicant. *Id.*

25. *Id.* § 23.

26. *Id.*

27. A ZBA denial is consistent with local needs when:

(1) at least 10% of its [municipality's] total housing stock consists of subsidized housing for low- and moderate-income households; (2) at least 1.5% of its [municipality's] land zoned for residential, commercial, or industrial use is used for such housing; or (3) a proposed development would result within one calendar year in the start of construction of low- and moderate-income housing on more than 0.3% of the [municipality's] land zoned for residential, commercial, or industrial use, or ten acres, whichever is larger.

Krefetz, *supra* note 18, at 388. For purposes of calculating whether a locality meets any of the exemptions, see MASS. REGS. CODE tit. 760, § 31.04 (2002). Other evidence that a ZBA's decision is consistent with local needs includes: (1) Recent progress made toward the ten percent minimum, *id.* § 31.07(1)(d); (2) the housing proposal is proportionally large compared to the locality's total housing units, *id.* § 31.07(1)(g); another application was filed by the developer no more than twelve months prior to the current application that contained no low or moderate income housing, *id.* § 31.07(1)(h); or the locality adopts an affordable housing plan, *id.* § 31.07(1)(i). These provisions "give an incentive to communities to take the initiative to develop a 'reasonable' amount of subsidized housing." Krefetz, *supra* note 18, at 388.

28. MASS. REGS. CODE tit. 760, § 31.06(5)-(8).

29. MASS. GEN. LAWS ch. 40B, § 23. "[V]ictory is almost certain" for an applicant on appeal. Witten, *supra* note 19, at 539-40; *see also* Krefetz, *supra* note 18, at 397-98 (stating that from 1969 to 2001 eighty-four percent of ZBA decisions were overruled).

30. CITIZENS' HOUS. & PLANNING ASSOC., THE RECORD ON 40B: THE EFFECTIVENESS OF THE MASSACHUSETTS AFFORDABLE HOUSING ZONING LAW 8 (2003) [hereinafter CHAPA

affordable.³¹ Thirty-three communities are above the exemption minima³² and twenty-three others are close to reaching the ten percent minimum.³³ Of the communities that have not reached the ten percent minimum, over eighty percent of the affordable housing built in them exists because of Chapter 40B.³⁴ Only forty-two out of Massachusetts' 351 communities have no subsidized housing at all,³⁵ and most of these communities are small, rural towns where housing costs are already low.³⁶ Over half of the affordable housing built is for families, approximately one-third is for the elderly, and one-tenth exists for special needs individuals.³⁷ Two-thirds of the affordable housing built was approved outright by the ZBA, while the remaining one-third resulted from HAC appeals.³⁸

B. Rhode Island's Low and Moderate Income Housing Act

Rhode Island's Low and Moderate Income Housing Act³⁹ (the "RI Act") is modeled after Chapter 40B.⁴⁰ Enacted in 1991, the RI Act

REPORT], available at <http://www.chapa.org/TheRecordon40B.pdf>. For an analysis of the evolution and increasing use of the use of Chapter 40B, see Krefetz, *supra* note 18, at 399–415.

31. CHAPA REPORT, *supra* note 30, at 9. The proportion of affordable housing units per Chapter 40B project decreased from earlier periods. See Krefetz, *supra* note 18, at 402. The majority of Chapter 40B housing now built is through the LIP process where private developers set aside only the minimum percentage required for affordable units. *Id.* at 410. While the quantity of affordable housing is sacrificed, quality may actually increase because smaller housing projects better blend with their surroundings, potentially lessening the stigma associated with affordable housing and its inhabitants.

32. See *supra* note 27.

33. CHAPA REPORT, *supra* note 30, at 20.

34. *Id.* at 8. For a description of the exemption minima, see *supra* note 27.

35. CHAPA REPORT, *supra* note 30, at 9.

36. Krefetz, *supra* note 18, at 393–94. This increase resulted in a more equitable distribution of affordable housing throughout Massachusetts. See CHAPA REPORT, *supra* note 30, at 9.

37. CHAPA REPORT, *supra* note 30, at 9.

38. *Id.* Krefetz found that the number of decisions denying CP applications decreased from over forty percent to twenty percent from 1969 to 1999. Krefetz, *supra* note 18, at 400. She theorizes that although most of the HAC decisions favored developers, municipalities were still able to construct time-consuming and expensive "roadblocks" to construction, demanding that the two parties "work out compromises acceptable to both sides to enable projects to go forward." *Id.* at 401. Of the appealed cases, eighty-four percent were in favor of the applicant. *Id.*; see also CHAPA REPORT, *supra* note 30, at 9.

39. R.I. GEN. LAWS § 45-53 (Supp. 2004).

40. However, recent amendments to the RI Act have altered the appeals process considerably, causing the RI Act's procedures to deviate from Chapter 40B's procedures.

reflects Rhode Island's recognition that "there exists an acute shortage of affordable, accessible, safe, and sanitary housing . . . [and] that it is necessary that each city and town provide opportunities for the establishment of low and moderate income housing" ⁴¹ The RI Act seeks to create "housing opportunities for low and moderate income individuals" in every municipality, to rehabilitate existing housing, and to assimilate "low and moderate income housing into existing developments and neighborhoods." ⁴²

Like Chapter 40B, the RI Act consists of both a comprehensive permit component and an appeals component. The comprehensive permit component allows any affordable housing applicant ⁴³ whose project consists of at least twenty-five percent affordable housing to submit a single housing application to the local review board (LRB) "in lieu of separate applications" to multiple boards that are normally necessary. ⁴⁴ Upon submission, the application is reviewed for completeness. ⁴⁵ Once the application is certified as complete, the RI Act requires the LRB to notify other interested boards about the application, to hold a public hearing on the application, and to render a decision granting or denying the application within ninety-five days of the issuance of a certificate of completeness for minor projects and within 120 days of the issuance of a certificate of completeness for major projects. ⁴⁶ If the LRB grants the application, a CP is issued. If the LRB denies the application or grants it with conditions that make

41. R.I. GEN. LAWS § 45-53-2.

42. *Id.*

43. The RI Act does not define "applicant." Previous versions of the RI Act permitted public agencies, nonprofit organizations, limited equity housing cooperatives, and private developers to apply for a CP. R.I. GEN. LAWS § 45-53-4 (2002). Hence, it is likely that the RI Act generally imposes no restriction on the type of developer that can utilize the CP and appeals processes. However, there is currently a moratorium on applications from private developers, which will last until at least January 31, 2005. R.I. GEN. LAWS § 45-53-4(b) (Supp. 2004).

44. R.I. GEN. LAWS § 45-53-4(a). Similar to Chapter 40B, the RI Act requires the project to be eligible for a subsidy under a state or federal program that assists in the production of low or moderate income housing. R.I. CODE R. 96 090 3.02(i) (2003). Some argue that this requirement is misplaced. See Stonefield, *supra* note 17.

45. R.I. GEN. LAWS § 45-53-4(a)(2). For application requirements, see *id.* § 45-53-4(a)(1). Applications that are found incomplete may be resubmitted. *Id.* § 45-53-4(a)(2).

46. *Id.* § 45-53-4(a)(4). The time limit can be extended by mutual agreement between the LRB and applicant. *Id.* For the definition of a minor or major development, see *id.* §§ 45-23-32(21)–(22), (24)–(25) (2002).

the project “infeasible,”⁴⁷ the applicant may file an appeal with the State Housing Appeals Board (HAB).⁴⁸

The RI Act instructs the HAB to hold proceedings on the appeal within twenty days after it has been filed and to render a decision on the appeal within thirty days of the proceedings.⁴⁹ During the proceedings, the HAB is limited to determining whether, from the LRB’s record, the LRB’s decision was “consistent with an approved affordable housing plan,⁵⁰ or if the town does not have [such a plan] . . . consistent with local needs.”⁵¹ If the LRB’s actions are unreasonable and inconsistent with both local plans and local needs, the HAB may approve the application, deny the application,⁵² approve the application with conditions, or modify or remove any infeasible conditions.⁵³

47. “Infeasible” is defined as “any condition . . . that . . . makes it impossible for [the applicant] to proceed in building or operating low or moderate income housing without financial loss.” *Id.* § 45-53-3(3). This definition is very similar to Chapter 40B’s definition of “uneconomic.” *See supra* note 22.

48. R.I. GEN. LAWS § 45-53-5. The HAB is a seven-member board consisting of four local officials from different municipalities, “[one] affordable housing developer[,] [one] affordable housing advocate[,] [one] representative of the business community[,] and, [one] attorney knowledgeable in land use regulation.” *Id.* § 45-53-7(a)(1).

49. *Id.* § 45-53-5(c). The time limit can be extended by mutual agreement between the HAB and applicant. *Id.*

50. An “approved affordable housing plan” is defined as “an affordable housing plan that has been approved by the director of administration as meeting the guidelines for the local comprehensive plan,” as defined in the Rhode Island Comprehensive Planning and Land Use Act, *id.* §§ 45-22.2-8 to -12 (2002). *Id.* § 45-53-3(7).

51. *Id.* § 45-53-6(b). The LRB’s decision is “consistent with local needs” when:

Low or moderate housing exists which is: (A) in the case of an urban city or town which . . . [is composed of] rental units . . . [that] comprise twenty-five percent (25%) or more of the year-round housing units; is in excess of fifteen percent (15%) of the total occupied year-round rental units, or (B) in the case of all other cities and towns, in excess of ten percent (10%) of the year-round housing units

Id. § 45-53-3(2)(i). The LRB’s decision is also “consistent with local needs” if a city or town “has promulgated zoning or land use ordinances . . . which ha[ve] been adopted and approved pursuant to [the Rhode Island Comprehensive Land Use and Planning Act], and the housing element of the comprehensive plan provides for low and moderate income housing [according to the numerical elements listed in § 45-53-3(2)(i) above].” *Id.* § 45-53-3(2)(ii).

52. Allowing the HAB to deny the application even when the LRB cannot support its decision is unique to the RI Act. Presumably, it will give the HAB more creativity in fashioning a remedy.

53. *Id.* § 45-53-6(d).

The precise effect of the RI Act on Rhode Island's affordable housing supply is unknown. However, the affordable housing supply increased by nineteen percent in the ten years subsequent to the RI Act's enactment.⁵⁴ This figure constitutes approximately 5500 affordable housing units.⁵⁵ As of 2001, ten out of Rhode Island's thirty-nine towns were exempt from the appeals procedure because they met one of the statutorily enumerated exceptions.⁵⁶ Seven more towns were near reaching the ten percent minimum.⁵⁷ During this period, the HAB heard twelve appeals: eight LRB decisions were overturned; one decision was upheld; and one decision was remanded.⁵⁸

Interestingly, since the RI Act's passage, Rhode Island has experienced an increase in pro-affordability zoning in municipalities.⁵⁹ This phenomenon presumably gives municipalities another avenue by which they can defend against the LRB's actions.⁶⁰

C. Connecticut's Affordable Housing Land Use Appeals Procedure

Connecticut's Affordable Housing Land Use Appeals Procedure⁶¹ ("Section 8-30g") differs slightly from the Massachusetts and Rhode Island procedures. Enacted in 1989 in response to Connecticut's concern over its affordable housing crisis,⁶² Section 8-30g was

54. STUART MECK ET AL., REGIONAL APPROACHES TO AFFORDABLE HOUSING 149 (2002).

55. *See id.*

56. *See id.* at 149–50. Five towns met the ten percent exemption minimum while the other five towns met the rental unit minimums. *Id.* at 149.

57. *See id.* at 150–51. Of the seven, four have affordable housing stocks between six and eight percent, and three have affordable housing stocks between eight and ten percent. *See id.*

58. *Id.* at 149. Two additional decisions were found not to be properly before the HAB and two others were pending on appeal at the time the statistics were collected. *Id.*

59. *Id.* at 151. As of 1999, nearly half of Rhode Island's municipalities had adopted some form of legislation to provide for affordable housing. *Id.*

60. *See supra* note 51.

61. CONN. GEN. STAT. ANN. § 8-30g (West Supp. 2004). For an exceptional breakdown of Section 8-30g, see Westbrook, *supra* note 6, at 174–96.

62. *See* Robert D. Carroll, Note, *Connecticut Retrenches: A Proposal to Save the Affordable Housing Appeals Procedure*, 110 YALE L.J. 1247, 1253 (2001). Carroll suggests that Section 8-30g was also motivated by the "fair share" principle enunciated in New Jersey's *Mount Laurel* cases, *S. Burlington County NAACP v. Township of Mount Laurel*, 456 A.2d

intended to encourage towns to participate in voluntary state inclusionary housing initiatives and to persuade local land use commissions to consider affordable housing needs.⁶³

Unlike the Massachusetts and Rhode Island procedures, Section 8-30g does not contain a comprehensive permit component. Instead, it may be used by any person⁶⁴ filing an affordable housing application with any housing commission.⁶⁵ It requires that the person submit an affordability plan with the application.⁶⁶ If the commission grants the application, a permit is issued to the developer. If the commission denies the application or grants it with conditions that have a “substantial adverse impact on the viability of the affordable housing development,” the applicant may modify and resubmit the application⁶⁷ or appeal the commission’s decision to the presiding court in the district where the proposed development lies.⁶⁸

390 (N.J. 1983); *S. Burlington County NAACP v. Township of Mount Laurel*, 336 A.2d 713 (N.J. 1975), and the belief that spatial deconcentration alleviates the “social ills” that result from concentrated poverty. *Id.* at 1253–54.

63. Westbrook, *supra* note 6, at 186–87.

64. “Person” is defined as “any individual, partnership, corporation, association, governmental subdivision, agency, or public or private organization.” CONN. AGENCIES REGS. § 8-30g-1-11 (2002).

65. “Affordable housing application” is defined as any application that proposes an affordable housing development. CONN. GEN. STAT. ANN. § 8-30g(a)(2). “Affordable housing development” is defined as a “proposed housing development which is (A) assisted housing, or (B) a set-aside development.” *Id.* § 8-30g(a)(1). “Assisted housing” is defined as “housing which is receiving . . . financial assistance under any governmental program for the construction . . . of low and moderate income housing.” *Id.* § 8-30g(a)(3). “Set-aside development” is defined as:

[A] development in which not less than thirty per cent of the dwelling units will be conveyed by deeds containing covenants or restrictions which shall require that, for at least forty years after the initial occupation of the proposed development, such dwelling units shall be sold or rented at, or below, prices which will preserve the units as [affordable].

Id. § 8-30g(a)(6).

66. *Id.* § 8-30g(b)(1). The affordability plan must contain specific information about the housing development. *Id.* Types of information required by the affordability plan include: (1) the name of a person who will ensure that the affordability plan is carried out; (2) a marketing plan; (3) samples of the sales prices and rents; (4) a time line of the construction and marketing; and (5) drafts of regulations, conditions, deeds, covenants and other provisions. *Id.* The Commissioner of Economic and Community Development may also require that additional criteria be included in the plan. *Id.* § 8-30g(b)(2).

67. *Id.* § 8-30g(h). Resubmitting the application does not affect the person’s ability to appeal the commission’s decision. *Id.*

68. *Id.* Unlike Chapter 40B and the RI Act, a Section 8-30g applicant appeals to a court,

The court must hear the appeal “as soon . . . as is practicable.”⁶⁹ On appeal, the commission has the burden of proving from evidence in the record that either: its decision is necessary to protect substantial public interests⁷⁰ that outweigh the need⁷¹ for affordable housing, which cannot be protected by reasonable changes to the project,⁷² and sufficient evidence supports its decision,⁷³ or that the project results in the construction of affordable housing in an area that is zoned for industrial use and that such affordable housing is not assisted housing.⁷⁴ However, a commission is exempt from the appeals procedure for the four years after its municipality receives a certificate of affordable housing project completion,⁷⁵ which is awarded to municipalities that construct new affordable housing that constitutes more than two percent of the municipalities’ total dwelling units.⁷⁶ A commission is also exempt from the appeals

not to a housing appeals committee. The commission that drafted Section 8-30g “believed that creating a state-level appeals board with the power to override local zoning decision would be politically and administratively difficult . . . which would create the negative ‘symbolism of a state take-over of local government.’” MECK, *supra* note 54, at 154 (quoting Tondro, *supra* note 17, at 1138–39). The judges that hear appeals are chosen by the Chief Court Administrator and appeals are considered “privileged cases” that are to be heard expeditiously. CONN. GEN. STAT. ANN. § 8-30g(f).

69. CONN. GEN. STAT. ANN. § 8-30g(f).

70. See Carroll, *supra* note 62, at 1259–60, for examples of substantial public interests.

71. Unlike Chapter 40B and the RI Act, Section 8-30g does not define “need.” In *Christian Activities Council, Congregational v. Town Council*, the Connecticut Supreme Court stated that “the need for affordable housing is to be addressed on a local basis.” 735 A.2d 231, 249 (Conn. 1999). Carroll argues that “[t]he effect of determining need locally is to reinforce the behavior of exclusionary municipalities. If a town has engaged in successful exclusionary strategies in the past, so that only affluent people are living in the town, then by definition the town has little or no need for affordable housing.” Carroll, *supra* note 62, at 1274.

72. Section 8-30g “is silent on what would constitute ‘reasonable changes,’ but the thrust of the provision is to encourage negotiation between commissions and developers.” Westbrook, *supra* note 6, at 193. Carroll agrees that the purpose of this requirement is to encourage negotiation. Carroll, *supra* note 62, at 1261.

73. See Westbrook, *supra* note 6, at 189–90, for a description of the meaning of “sufficient evidence.” Westbrook concludes that while the “sufficient evidence” standard was intended to be distinguishable from, and less rigorous than, a “substantial evidence” standard, “[i]n the context of [the] appeal procedure, the ‘sufficient evidence’ requirement may, in fact, be a very tough standard to meet.” *Id.*

74. CONN. GEN. STAT. ANN. § 8-30g(g). For a definition of “assisted housing,” see *supra* note 65.

75. *Id.* § 8-30g(l).

76. *Id.* § 8-30g(l)(4)(A). A municipality is also eligible for a certificate if affordable housing constitutes seventy-five housing unit equivalent points. *Id.* Instructions to compute

procedure if the property subject to the application lies in a municipality in which at least ten percent of the housing units are affordable.⁷⁷ If the commission cannot satisfy any of these standards, the court must revise, remand, or reverse the commission's decision.⁷⁸

Section 8-30g is responsible for the construction of some affordable housing in Connecticut. As a result of Section 8-30g, the state's affordable housing stock increased by 10,000 units between 1990 and 1998.⁷⁹ In 2003, twenty-nine communities were above the exemption minima and twenty-six others were near reaching the ten percent minimum.⁸⁰ Only one community had no affordable housing at all, although in thirteen others, less than one percent of the total housing stock was affordable.⁸¹ By 2000, seventy-four communities had enacted some form of pro-affordability zoning—eleven as a direct result of Section 8-30g.⁸² Of the total number of Section 8-30g units built, two-thirds were approved outright or resulted from negotiations between the developers and municipalities.⁸³ The other one-third resulted from court decisions overturning the commission's denial of a project.⁸⁴

housing unit equivalent points are found in the Regulations of Connecticut State Agencies. CONN. AGENCIES REGS. § 8-30g-6.

77. CONN. GEN. STAT. ANN. § 8-30g(k).

78. *Id.* § 8-30g(g).

79. MECK, *supra* note 54, at 154.

80. Conn. Dep't of Econ. & Cmty. Dev., Appeals List, 1 (2003), available at http://www.ct.gov/ecd/lib/ecd/2003_affordable_housing_appeals_list.xls. In nineteen of the municipalities, the affordable housing stock is between six and eight percent. *Id.* In the remaining seven, the affordable housing stock is between eight and ten percent. *Id.* These numbers are slightly down from 2002. See Conn. Dep't of Econ. & Cmty. Dev., Appeals List, 1 (2002), available at http://www.ct.gov/ecd/lib/ecd/appeals_list_2002.xls.

81. See *id.* However, many of these communities are smaller and more rural which is typically indicative of lower housing costs and demands. *Id.*; see also Krefetz, *supra* note 18, at 393–94.

82. MECK, *supra* note 54, at 155. Another study found that forty-five towns enacted such regulations in response to Section 8-30g. *Id.*

83. *Id.*

84. *Id.* By 1999, the courts had heard thirty-five appeals. In ten, the courts upheld the commissions' denials; in twenty, the courts overruled the denials; and in five, the courts upheld the commissions' approval against appeals by "affected" citizens. *Id.*

III. PRAISES AND CRITICISM OF THE APPEALS PROCEDURES

A. *The Criticism*

Criticism of the appeals procedures range from pragmatic concerns to constitutional challenges.⁸⁵ The more common criticisms are discussed below.

Both proponents and opponents of the appeals procedures have legitimate pragmatic concerns about the procedures (and affordable housing in general). They argue that “low-income households are likely to increase the demand for [a municipality’s] public services without contributing significantly to local tax revenues” that pay for such services.⁸⁶ They also argue that affordable housing may lead to a decline in property values, which in turn would increase animosity towards affordable housing projects and their tenants.⁸⁷

Land use officials also have many criticisms of the appeals procedures. First, they dislike that the procedures eliminate the deference that is usually given to them in granting or denying housing applications.⁸⁸ Traditionally, courts have been extremely

85. For an elaboration of various constitutional challenges to the appeals procedures, see Witten, *supra* note 19, at 541–46. Witten argues that the appeals procedures violate procedural and substantive due process and that they create an unconstitutional “giving.” *Id.*

86. Note, *State-Sponsored Growth Management as a Remedy for Exclusionary Zoning*, 108 HARV. L. REV. 1127, 1127 (1995) [hereinafter *State-Sponsored Growth Management*]. However, this concern is rooted in affordable housing itself. It arises regardless of whether affordable housing is built using an appeals procedure.

87. See Forton, *supra* note 1. These concerns have never been held to be a legitimate reason for denying affordable housing. Carroll, *supra* note 62, at 1259. For an analysis finding that affordable housing has only negligible negative effects on housing values, see GEORGE C. GALSTER, A REVIEW OF EXISTING RESEARCH ON THE EFFECTS OF FEDERALLY ASSISTED HOUSING PROGRAMS ON NEIGHBORING RESIDENTIAL PROPERTY VALUES 4, 26 (2002), available at [http://www.realtor.org/research.nsf/files/galsterreport.pdf/\\$FILE/galsterreport.pdf](http://www.realtor.org/research.nsf/files/galsterreport.pdf/$FILE/galsterreport.pdf).

88. Peter J. Vodola, Note, *Connecticut’s Affordable Housing Appeals Procedure Law in Practice*, 29 CONN. L. REV. 1235, 1264–67 (1997); see also Carroll, *supra* note 62, at 1264–66. Carroll explains that planning officials find that “the procedure acts as a ‘zone busting’ device that gives developers unwarranted windfall profits and allows them to exercise too much leverage over local zoning boards.” *Id.* at 1264–65. However, planning officials have more control than they think. In Massachusetts, Rhode Island, and arguably Connecticut, a municipality that has a comprehensive plan that includes affordable housing may legitimately deny affordable housing. *Supra* notes 27, 50–51, 75–76 and accompanying text. Moreover, if the municipality “takes some initiative and manages the process well, it can shape a more creative housing proposal than otherwise might be built under ‘as-of-right’ zoning.” Werner Lohe, *Command and Control to Local Control: The Environmental Agenda and the*

deferential to local land use officials, allowing the officials to deny housing applications with little reason and with no evidence to support their decisions.⁸⁹ The appeals procedures change this by requiring that the officials have both a valid reason for denying affordable housing applications and evidence on the record to support the denial.⁹⁰

Second, land use officials complain that the procedures allow developers to evade intelligent planning principles⁹¹ and environmental concerns.⁹² They assert that the procedures give developers “a gun . . . that they can use against the town whenever they want,” effectively “‘elevating’ affordable housing over proper land use planning.”⁹³ While officials disagree over whether the construction of affordable housing is even a legitimate goal, all agree that municipalities need to retain more control over new housing developments.⁹⁴

Finally, land use officials complain that the appeals procedures are unfair. They protest that the ten percent exemption minimum is arbitrary, arguing that a municipality’s actual affordable housing need should be computed.⁹⁵ They further complain that market rate

Comprehensive Permit Law, 22 W. NEW ENG. L. REV. 355, 359 (2001).

89. Westbrook, *supra* note 6, at 176–78. Westbrook states that the Blue Ribbon Commission that recommended Section 8-30g “found that ‘many times the local commissions’ decisions elevate vaguely-stated and relatively unimportant concerns over the need to build affordable housing. At the same time, courts have not rigorously required commissions to give reasons for their decisions or to persuasively support them.” *Id.* at 173 (quoting BLUE RIBBON COMMISSION ON HOUSING A-7 (1989)). She explains that the appeals law changed this, resulting in courts taking a closer look at the commissions’ rationales for their decisions as well as the evidence supporting their decisions. *Id.* at 178–81.

90. *See supra* notes 24–29, 48–51, 70–74 and accompanying text.

91. *See* Witten, *supra* note 19, at 512; *see also* Vodola, *supra* note 88, at 1266–67. One Connecticut planner states that Section 8-30g “helps create ‘instant ghettos’ while proper planning could provide for affordable housing that is integrated well with the rest of the community.” *Id.* However, all the procedures have some form of exemption for municipalities that either begin building affordable housing on their own or that have a legitimate plan in place to build affordable housing. *See supra* notes 27, 50–51, 75–77 and accompanying text. This means that the municipality can control where affordable housing is built and what is built around it.

92. *See* Witten, *supra* note 19, at 531.

93. *See* Vodola, *supra* note 88, at 1265–66.

94. *Id.*

95. *See* Witten, *supra* note 19, at 527 n.80. Witten argues that this aim “can hardly be considered a ‘goal’” because the ten percent threshold is chosen arbitrarily and does not tie affordable housing need with housing development. *Id.* Some critics argue that “[t]he strength

housing is unjustifiably excluded from the definition of affordable housing⁹⁶ and that many other key terms in the procedures are “imprecise,” which leads to unpredictable and inequitable results.⁹⁷ Moreover, both proponents and opponents of the appeals procedures agree that the procedures do not give enough credit to municipalities that have made a good faith effort to build affordable housing.⁹⁸ Pundits recommend that the state and federal government provide more incentives to “do the right thing.”⁹⁹

Developers have their own complaints about the appeals procedures. Many find that the appeals process takes too long.¹⁰⁰ They argue that appeals litigation is expensive and that decisions in their favor are not enforced.¹⁰¹ They also complain that the process leads to ill will towards them, citing that judges are “unfriendly to

of . . . [New Jersey’s] Fair Housing Act is that it assigns power to an administrative agency to evaluate housing needs and to formulate a consistent and rational fair-share distribution.” *State-Sponsored Growth Management*, *supra* note 86, at 1136. For problems with using actual need to determine a municipality’s affordable housing requirements, see *supra* text accompanying note 71. Stonefield suggests that “as between the 10% standard and the more elaborate New Jersey approach, the clarity and simplicity of the 10% standard is preferable.” Stonefield, *supra* note 17, at 340. Tondro defends the ten percent threshold as a compromise; the exemption exists both because it is unfair to force a municipality with “that much affordable housing” to prove that it denied applications for proper reasons, and because it ensures that other municipalities that have not met the threshold “pull their weight.” Tondro, *supra* note 17, at 121.

96. Vodola, *supra* note 88, at 1263; see Carroll, *supra* note 62, at 1265. *But see* Tondro, *supra* note 17 (explaining how this concern can be addressed).

97. Vodola, *supra* note 88, at 1263.

98. *Id.* at 1267; see also Witten, *supra* note 19, at 535. The exemption criteria in all three procedures give municipalities incentives to build affordable housing. See *supra* notes 27, 49–51, 75–76 and accompanying text. While towns that are very near the ten percent exemption minimum but have not built affordable housing within a given year are the most likely to receive “unfair” treatment, towns that have made a decent attempt at constructing affordable housing within a given year are generally allowed an exemption from the appeals procedures in their state. Vodola, *supra* note 88, at 1267–68.

99. See Krefetz, *supra* note 18, at 415–16; Stonefield, *supra* note 17, at 353–54; *State-Sponsored Growth Management*, *supra* note 86, at 1136–37. “State and federal actions and funding programs need to be expanded, including more direct subsidies for the construction of low-income housing and offsetting funds for services, which could come in the form of additional local aid to towns that encourage, or at least approve, proposals for such housing.” Krefetz, *supra* note 18, at 416.

100. Vodola, *supra* note 88, at 1283–86.

101. See Krefetz, *supra* note 18, at 404. “[L]ocal communities ha[ve] demonstrated that they [can] ‘lose the battle but win the war’ by dragging out the proceedings through lengthy court appeals, which often result[s] in developers either not being able to sustain the carrying costs over time or losing their land options or financing.” *Id.*

affordable housing” developments, that town officials harbor animosity towards such developments and their developers, and that municipalities’ inhabitants are angry about the effects of affordable housing on their infrastructure and property values.¹⁰²

Proponents of the appeals procedures suggest that the procedures simply need to be improved. They call for more empirical studies concerning the effects of the procedures,¹⁰³ asserting that studies will not only enable the legislatures to assess the procedures’ impacts,¹⁰⁴ but also add legitimacy to the procedures by educating people about the procedures’ existence, effects, and results. Other individuals, acknowledging that racial integration is another—albeit unenumerated—goal of the procedures, argue that the procedures need to address the goal head on, rather than masking it behind issues of classism.¹⁰⁵

Finally, some scholars complain that the procedures address the wrong problem.¹⁰⁶ These scholars argue that the appeals procedures create only a private right to construct affordable housing while ignoring the moral responsibility of both the state and its towns to provide affordable housing.¹⁰⁷ They contend that practical, enforceable legal obligations must be imposed on both the state and its towns to ensure that these entities meet their responsibilities, promoting the “communitarian moral principle” that every person is responsible for the well-being of every other person.¹⁰⁸

102. Vodola, *supra* note 88, at 1284.

103. Krefetz, *supra* note 18, at 417–18; *see also* Florence Wagman Roisman, *Opening the Suburbs to Racial Integration: Lessons for the 21st Century*, 23 W. NEW. ENG. L. REV. 65, 101–02 (2001); Stonefield, *supra* note 17, at 350–51. These studies require manpower and financing for which states may not have the wherewithal.

104. Krefetz, *supra* note 18, at 417–19.

105. Roisman, *supra* note 103, at 105–06. If this is not done, it is likely that suburban homes will go to “deserving” families already residing in the municipality rather than predominantly minority families residing in more urban areas. *Id.* Stonefield also adopts this idea, finding that such mobility “can open the doors to . . . an urban family otherwise priced out of that American dream . . . provide modest steps towards racial integration and the reduction of racial isolation . . . [and] strengthen cities by reducing the hypersegregation and concentration of very poor individuals . . . in urban areas.” Stonefield, *supra* note 17, at 346–47.

106. *See generally* Stonefield, *supra* note 17, at 341–49 (discussing the pros and cons to creating a private right instead of a public obligation).

107. *Id.*

108. *Id.* at 354. Stonefield argues that by requiring each town to acknowledge a need for affordable housing and to decide how best to meet its needs, “the communitarian moral

B. The Praises

Despite the many criticisms of the appeals procedures, it is impossible to ignore that they have achieved some success. All of the procedures have promoted the development of affordable housing within their states.¹⁰⁹ Many affordable housing developers claim that their projects never would have been approved without the procedures¹¹⁰ and that the procedures force municipalities to be more aware of, and to take greater responsibility for, the creation of affordable housing.¹¹¹ Moreover, municipalities are now more willing to negotiate with affordable housing developers, leading to an “everybody wins” or at least an “everybody is content” situation.¹¹² There is no doubt that negotiation leads to projects that blend better with their surroundings, which preserves local autonomy and removes the stigma attached to the projects’ residents.

IV. ILLINOIS’ AFFORDABLE HOUSING PLANNING AND APPEAL ACT

A. Description

Illinois’ Affordable Housing Planning and Appeal Act¹¹³ went into effect January 1, 2004. The Act responds to Illinois’ findings that there exists a shortage of affordable housing in the state and that action is necessary to assure that such housing exists for the workforce and retirees.¹¹⁴ It seeks to encourage municipalities to construct affordable housing sufficient to meet their needs and to provide “affordable housing developers, who believe that they have

principle that most strongly supports the suburban affordable housing movement and best accommodates . . . the competing interest in local autonomy” is supported, while also “converting the override tool from the private . . . builder[’s remedy] into the public obligation owed by state and local government[s].” *Id.*

109. See *supra* notes 30–38, 54–60, 79–84 and accompanying text.

110. Vodola, *supra* note 88, at 1264.

111. See Westbrook, *supra* note 6, at 196. This phenomenon is evident in the creation of comprehensive plans and pro-affordability legislation within municipalities. See *supra* notes 59 and 82 and accompanying text.

112. See Krefetz, *supra* note 18, at 401–03.

113. 310 ILL. COMP. STAT. 67/1–50 (Supp. 2003).

114. *Id.* at 67/5.

been unfairly treated” because their development contains affordable housing, with a remedy.¹¹⁵

Unlike the Massachusetts and Rhode Island appeals procedures, the Illinois Act does not contain a comprehensive permit component.¹¹⁶ Instead, it consists of a planning component and an appeals component. The planning component requires the Illinois Housing Development Authority to determine which municipalities are exempt from the Illinois Act.¹¹⁷ It further requires all non-exempt municipalities to approve an affordable housing plan by April 1, 2005.¹¹⁸

The appeals component applies to any “affordable housing developer,”¹¹⁹ seeking approval to build an “affordable housing development.”¹²⁰ If an approving authority¹²¹ denies the affordable housing developer’s application or approves the application with conditions that, in the developer’s judgment, make constructing affordable housing infeasible,¹²² the developer may, between the

115. *Id.* at 67/10.

116. Both the Massachusetts and Rhode Island appeal procedures contain planning components as well. Each procedure grants an exemption to a municipality that has adopted an “affordable housing plan” and is making steps towards achieving that plan. MASS. REGS. CODE tit. 760, § 31.07(i) (2002); R.I. GEN. LAWS § 45-53-3(2)(ii) (1999).

117. 310 ILL. COMP. STAT. 67/20(a).

118. *Id.* at 67/25(a). The Illinois Act sets out specific requirements that the affordable housing plan must contain. *Id.* at 67/25(b).

119. “Affordable housing developer” is defined as “a nonprofit entity, limited equity cooperative or public agency, or private individual, firm, corporation, or other entity seeking to build an affordable housing development.” *Id.* at 67/15.

120. An “[a]ffordable housing development” is defined as housing that is

subsidized by the federal or [s]tate government or . . . in which at least 20% of the dwelling units are subject to . . . restrictions that require that the . . . units be sold or rented at prices that preserve them as affordable . . . for a period of at least 15 years, in the case of for-sale housing, and at least 30 years, in the case of rental housing.

Id. “Development” is defined as:

any building, construction, renovation, or excavation or any material change in the use or appearance of any structure or in the land itself; the division of land into parcels; or any change in the intensity or use of land, such as an increase in the number of dwelling units in a structure or a change to a commercial use.

Id.

121. “Approving authority” is defined as “the governing body of the county or municipality.” *Id.*

122. In the Act, the developer’s judgment appears to be a completely subjective standard. Moreover, the term “infeasible” is not defined. This combination may permit developers to

years 2006 and 2009, submit information to the state Housing Appeals Board (HAB)¹²³ regarding the authority's action. Beginning in 2009, the developer may appeal the approving authority's decision to the HAB.¹²⁴

The Act mandates that the HAB render a decision on the appeal within 120 days of its receipt.¹²⁵ The Act also instructs the HAB to conduct a de novo review to determine "whether the developer was treated in a manner that places an undue burden¹²⁶ on the development due to the fact that the development contains affordable housing."¹²⁷ Significantly, the developer bears the burden of demonstrating that the project was unfairly denied or that unreasonable conditions were placed on it.¹²⁸ If the HAB finds that the developer's application was unfairly denied or granted with infeasible conditions, the HAB may reverse or modify the authority's decision.¹²⁹ However, if at least ten percent of the municipality's housing stock is affordable,¹³⁰ if the developer's application is denied

abuse the appeals process, which could lead to animosity towards the Act.

123. The HAB consists of seven voting members and one non-voting member. 310 ILL. COMP. STAT. 67/50. The voting members are appointed by the Governor and are comprised of a retired circuit or appellate judge, a zoning board of appeals member, a planning board member, a mayor or municipal council member, a county board member, an affordable housing developer, and an affordable housing advocate. *Id.* The non-voting member is the Chairman of the Illinois Housing Development Authority. *Id.*

124. *Id.* at 67/30.

125. *Id.*

126. The Illinois Act does not define "undue burden."

127. 310 ILL. COMP. STAT. 67/30(c).

128. *Id.* All other appeals procedures shift the burden of proof to the municipality. *Supra* notes 28, 51, 74 and accompanying text.

129. 310 ILL. COMP. STAT. 67/30.

130. "Affordable housing" is defined as "housing that has a sales price or rental amount that is within the means of a household that may occupy moderate-income or low-income housing," meaning that no more than 30% of a household's gross annual income can be used towards housing or rental expenses. *Id.* at 67/15. "Moderate-income housing" is defined as "housing that is affordable according to the federal Department of Housing and Urban Development, for either home ownership or rental, and that is occupied, reserved, or marketed for occupancy by households with a gross income that is greater than 50% but does not exceed 80% of the area median gross household income." *Id.* "Low-income housing" is defined as "housing that is affordable, according to the federal Department of Housing and Urban Development, for either home ownership or rental, and that is occupied, reserved, or marketed for occupancy by households with a gross household income that does not exceed 50% of the area median gross household income." *Id.* "Area median household income" is defined as "the median household income adjusted for family size for applicable income limit areas as determined annually by the federal Department of Housing and Urban Development under

or approved with infeasible conditions because it does not conform with requirements that protect the general welfare,¹³¹ or if the municipality has implemented and met the stated goals of an affordable housing plan, the HAB must dismiss the appeal.¹³²

B. Predictions

The Illinois Act will endure many of the same criticisms as the other appeals procedures and will incite new criticisms of its own.¹³³ It raises the same pragmatic concerns as the other appeals procedures.¹³⁴ The construction of low and moderate income housing, or any housing for that matter, increases the demand for a municipality's public services. As a matter of progressive tax rates, people residing in low and moderate income housing likely contribute less to the revenues used to fund such services than people in higher income brackets. Moreover, despite conflicting research on the effect of affordable housing on surrounding property values,¹³⁵ people continue to believe that the value of their property is negatively impacted by affordable housing. This belief will not change until societal stereotypes about low or moderate income housing change. However, state and federal incentives that reward municipalities for building affordable housing can alleviate some of the infrastructure and public service funding problems¹³⁶—this alone may lead to less stereotypical, negative feelings towards affordable housing and its tenants. The Illinois Act does not provide such incentives.¹³⁷

Section 8 of the United States Housing Act of 1937." *Id.* (citation omitted). The procedure for determining the ratio of affordable housing stock to total housing stock is set out in 310 ILL. COMP. STAT. 67/20.

131. *Id.* at 67/30. The Illinois Act refers to such regulations as "non-appealable local government requirements" and defines them as "all essential requirements that protect the public health and safety, including any local building, electrical, fire, or plumbing code requirements or those requirements that are critical to the protection or preservation of the environment." *Id.* at 67/15.

132. *Id.* at 67/30.

133. *See supra* notes 85–108 and accompanying text.

134. *See supra* notes 86–87 and accompanying text.

135. *See GALSTER, supra* note 87.

136. *See supra* notes 98–99 and accompanying text.

137. Illinois provides financial incentives to developers to build affordable housing. *See,*

Moreover, while the Act contains many provisions that permit municipalities to exempt themselves from the appeals procedure, municipalities will still view the Act as undermining local autonomy.¹³⁸ Unlike the other procedures, the Act shifts the burden of proof back to the developer to show that the housing application was unfairly denied.¹³⁹ The Act also permits a municipality to completely exempt itself from the appeals process simply by implementing an affordable housing plan.¹⁴⁰ Finally, it permits municipalities to enact “non-appealable local government requirements” with which all affordable housing developments must comply.¹⁴¹ Hence, if local land officials “take control,” the only autonomy lost will be caused by the officials’ own error. However, officials in Massachusetts, Rhode Island, and Connecticut also have many options for exempting their municipalities from the appeals process,¹⁴² and they still view the appeals procedures as removing local control.¹⁴³ Accordingly, it is likely that Illinois officials will also be “blind” to their own control.¹⁴⁴

The Act will also be viewed as unfair for the same reasons critics allege that the other appeals procedures are unfair.¹⁴⁵ Similar to the

e.g., 310 ILL. COMP. STAT. 65/1 to /17 (2002) (providing money for the construction and rehabilitation of affordable housing). However, these incentives focus on the wrong entity. While incentives must be given to developers to encourage them to build affordable housing, they also must be given to municipalities where affordable housing is built. It is only then that municipalities can counteract the infrastructure concerns espoused by affordable housing opponents. *See supra* note 99.

138. *Supra* notes 88–90 and accompanying text.

139. *See supra* note 128. The shift of the burden of proof to municipalities is the most criticized feature of the procedures. However, shifting the burden of proof back to the developer seems contrary to the very purpose and structure of an affordable housing appeals procedure. *See supra* notes 88–90 and accompanying text.

140. *See supra* note 132. All non-exempt municipalities are required to develop a plan. *Supra* note 118.

141. *Supra* note 131 and accompanying text.

142. *Supra* notes 27–28, 50–51, 70, 73–77 and accompanying text.

143. *Supra* notes 88–90 and accompanying text.

144. The same can be said for arguments that the appeals procedures allow developers to circumvent good planning principles and environmental concerns. *See supra* notes 91–94 and accompanying text. Unlike the other appeals processes which allow an appeals board to circumvent local zoning and environmental ordinances, the Illinois Act recognizes such concerns as legitimate reasons to deny an affordable housing application. *See supra* notes 27, 50–51, 75–76 and accompanying text for a description of the manners by which municipalities may avoid the appeals procedures.

145. *Supra* notes 95–99 and accompanying text.

other appeals procedures, the Illinois Act does not use a municipality's actual affordable housing need to determine exemptions; instead, it "arbitrarily" exempts municipalities whose total housing stock is at least ten percent affordable.¹⁴⁶ Also, similar to the other appeals procedures, the Act excludes market rate housing from the definition of affordable housing,¹⁴⁷ and it does not define many key terms, such as "infeasible" and "undue burden."¹⁴⁸ Moreover, like Rhode Island, it gives little credit to municipalities making good faith efforts to build affordable housing, exempting municipalities only if they achieve the ten percent minimum or have adopted and implemented an affordable housing plan.¹⁴⁹

Additionally, the Act actually exacerbates problems with litigation costs.¹⁵⁰ The Act's appeals process is inherently longer than any of the other states' processes because each appeal is a *de novo* review, rather than a review of the record.¹⁵¹ Moreover, the HAB must render its decision within 120 days of the appeal's filing, which is nearly two-and-one-half times as long as any of the other procedures.¹⁵²

Nor will the Illinois Act alleviate ill will towards affordable housing developers. Ill will arises from stereotypical views of

146. *Supra* note 132. However, this arbitrary minimum may be a "blessing in disguise." See text accompanying *supra* note 95.

147. *Supra* note 96.

148. *Supra* notes 97, 122, 126 and accompanying text. Approving authorities will probably also take issue with the provision permitting affordable housing developers to determine whether conditions imposed by the authority make the project "infeasible," arguing that the lack of definition of "infeasible" allows developers to inappropriately appeal authority decisions. *Supra* note 122.

149. See *supra* notes 27–28, 50–51, 70–77, 130–32 and accompanying text. The deadlines for creating an affordable housing plan were also likely to be viewed as unfair. The Act required that all non-exempt municipalities create an affordable housing plan by April 1, 2005. *Supra* note 118. However, the determination of exempt and non-exempt municipalities began in October 2004. *Supra* note 117. This left non-exempt municipalities only six months to create an acceptable affordable housing plan.

150. *Supra* notes 101–02 and accompanying text.

151. *Supra* notes 25, 51, 74. The overall effect of a *de novo* review is difficult to determine. On the one hand, it does not give the approving authority any incentive to create a complete record of its decision. On the other hand, if an approving authority's record is incomplete, it still permits the HAB to look at the totality of the circumstances in determining whether an application was denied "due to the fact" that it contained affordable housing. *Id.*; 310 ILL. COMP. STAT. 67/30.

152. See *supra* notes 24, 49, 69 and accompanying text. This delay can lead to loss of financing for the affordable housing project. See *supra* text accompanying note 101.

affordable housing tenants as well as the negative effects of affordable housing on a municipality. Because the primary goal of the Act is to construct affordable housing, the Act will breed contempt rather than mitigate it.¹⁵³

Finally, the Act may actually make it more difficult to construct affordable housing. It shifts the burden of proof back to the developer to show that an application's denial was "due to the fact" that the development contained affordable housing.¹⁵⁴ This burden shift is an impediment for affordable housing development because of courts' traditional deference to the decisions of local land use officials.¹⁵⁵ Moreover, the HAB may define the phrase "due to the fact" narrowly to require that affordable housing be the dispositive factor for the denial of an affordable housing application.¹⁵⁶ This, coupled with the burden shift to the developer, establishes a potentially insurmountable threshold for a developer, and places municipalities in a similar position to the one they occupied prior to the Act.¹⁵⁷

153. See *supra* note 102 and accompanying text; *supra* notes 86–87 and accompanying text. Ill will arising from the loss of local control may be alleviated, but as long as affordable housing opponents have viable arguments, or at least harbor prejudices against affordable housing, ill will towards affordable housing developers will exist. *Id.*

154. *Supra* note 127.

155. See *supra* text accompanying notes 9, 90. While the HAB is expected to conduct an independent review, the past deference given to municipalities and the mere onus placed on the developer to overcome the initial burden make it likely that the HAB will not be nearly as liberal in its decisions as other states appealing authorities. See *supra* notes 38, 58, 84.

156. There is no evidence which indicates how the HAB will interpret the phrase "due to the fact." In fact, there is little Illinois case law that interprets the phrase. However, in order to implement the purposes of the Act, the HAB should interpret the phrase broadly.

157. See *supra* notes 5–7 and accompanying text. Moreover, until 2009, the Act only permits developers to report to the HAB that their application was denied "due to the fact" that it contained affordable housing. *Supra* note 124. It offers no incentives for developers to do this and it is unlikely that a developer will still desire to build its development in 2009 when it can actually appeal the authority's decision. See Krefetz, *supra* note 18 (discussing the additional expenses that delay may cause). Burned once, it is doubtful that developers will want to be reminded of their denial as they go through the procedural hassle of reporting the authority to the HAB, while receiving nothing in return. Finally, since the appeals portion of the Act does not go into effect until 2009, it is quite possible that it could be repealed before then. 310 ILL. COMP. STAT. 67/30. Currently, it merely threatens municipalities to get an affordable housing plan in place with the promise that if they fail, a few years from now they could be punished. *Id.* However, if the threat of the appeals procedures results in the creation of affordable housing plans and, as a result, affordable housing, then the Act has done its job, perhaps with much less controversy than any of the other appeals procedures.

V. CONCLUSION

The Illinois Act's deviations from the Massachusetts, Rhode Island, and Connecticut appeals procedures will do little to temper the criticisms of its own appeals process. Despite the Act's strides to accommodate local land use officials, the officials will still view the appeals process as a usurpation of their authority. Moreover, the Act does nothing to alter stereotypical views of affordable housing and its tenants, and, unless the HAB interprets the Act's language broadly, the Act will promote affordable housing development no better than the legislative scheme Illinois previously had in effect.

However, despite the criticisms that the Illinois Act will foster, its enactment reveals Illinois' recognition that the provision of affordable housing is every municipality's obligation. This recognition alone moves Illinois one step closer to the "communitarian moral principle"¹⁵⁸ that the well-being of others is a public obligation.

158. See *supra* note 108 and accompanying text.