State Survey of Housing Appeals Statutes

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Introduction

25 years ago, the U.S. Department of Housing and Urban Affairs (HUD) convened the Advisory Commission on Regulatory Barriers to Affordable Housing, bringing together a broad group of stakeholders to identify ways to improve regulatory conditions for affordable housing production. In its final report, *Not in My Back Yard: Removing Barriers to Affordable Housing*, the Commission noted that:

> ***[p]erhaps the most potent and, to date, intractable cause of regulatory barriers to affordable housing is NIMBY sentiment at the individual, neighborhood, and community levels. The 'NIMBY syndrome' is one of the most prominent barriers to affordable housing. Residents who say 'Not In My Back Yard' may be expressing opposition to specific types of housing, to changes in the character of the community, to certain levels of growth, to any and all development, or to economic, racial, or ethnic heterogeneity.***

Unfortunately, housing providers today face similar opposition for affordable housing proposals.[1] In recognition of this, the NAHB Board of Directors passed a Recommendation, Streamlining State and Local Permitting Requirements, in 2016. The recommendation directs NAHB staff to conduct research and develop targeted resources to streamline the residential land use planning approval and permitting processes.

This paper addresses one facet of the planning approval and permitting process, by focusing on unique **administrative or judicial processes** enacted by certain state legislatures. These **housing appeals statutes** aim to address the problem scenario where unreasonable opposition acts as a barrier to the production of affordable housing itself.

In addition to this paper, NAHB has other resources that look beyond housing appeals statutes. The Land Use 101 Toolkit and the Affirmatively Furthering Fair Housing webpage both address government regulations or processes that prevent the construction of housing. Of special relevance here is *Development Process Efficiency: Cutting Through the Red Tape* in the Land Use 101 Toolkit. This report highlights collaboration among developers, builders, land use officials and other stakeholders, providing 25 strategies and concrete case studies that have improved the review and approval process resulting in better control over housing costs. The report also provides guidance on a number of topics relevant here, including streamlining and consolidating the review process, creating a separate process of expedited review, creating accountability, making the process more user friendly, and more local and state level strategies.

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[1] Coincidently, the Obama White House released a Housing Development Toolkit in September 2016 and constituted an admission by the Obama administration that the discretionary review process can "predispose development decisions to become centers of controversy, and can add significant costs to the overall development budget due to the delay" and adds uncertainty to the production of affordable housing. While the report does not adequately provide solutions to unreasonable opposition, it is clear that passing legislation to encourage affordable housing opportunities can be a bipartisan effort.

State Review of Administrative Appeals Processes

NAHB staff found five states that provide such processes through state statute. This paper looks at the following programs:

- Massachusetts 40B
- Rhode Island's Low and Moderate Income Housing Act
- Connecticut Affordable Housing Appeals Act
- Illinois' Affordable Housing Planning and Appeal Act
- California's Housing Accountability Act.[2]

This paper does not provide a "one size fits all" model, as the unique characteristics of each state require careful consideration and tailoring. However, it's possible that a combination of existing processes will serve the needs in your state.

I. Massachusetts 40B

Massachusetts 40B has two major components. The first is that it allows for certain developers to submit a streamlined application for a comprehensive affordable housing development permit. Under 40B, a public agency, nonprofit organization or a "limited dividend organization" can submit a single application to the local zoning board of appeals.[3] Second, 40B provides for an independent administrative appeal with the Housing Appeals Committee (HAC), a body in the state's Department of Housing and Community Development. It is the independent administrative appeal that is the focus of this paper. A developer can make such an appeal if the board has attached "conditions and requirements as to make the building or operation of [low- or moderate-income] housing uneconomic."

There are certain exceptions in which developers will be unsuccessful in an appeal to the HAC. The statute explicitly states that if the locality denying or conditionally granting the permit already has low- or moderate-income housing[4], it then precludes an HAC challenge because the local board's decision is "consistent with local needs."

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[2] New Jersey's *Mount Laurel* doctrine, named after a series of lawsuits, requires local jurisdictions to provide realistic opportunities for a "fair share" of affordable housing. *Mount Laurel* is a judicial remedy, not one based in statute, like the five states discussed in this paper. Thus, discussion of *Mount Laurel* is excluded from this paper.

[3] A limited dividend organization refers to an entity, not a public agency or a nonprofit, which is eligible to receive a subsidy from a state or local agency for the purpose of the construction or rehabilitation of low or moderate income housing. For the purposes of this discussion, a limited dividend organization can be a for-profit developer that agrees to limit its profits for the affordable housing development.

[4] Which is defined as "in excess of 10 percent of the housing units reported in the latest federal decennial census of the city or town" or "on site comprising 1.5 percent or more of the total land area zoned for residential, commercial, or industrial use.

Table 1. Question and Answers for 40B

Massachusetts	
Name	40B
Link to Statute	http://www.mass.gov/hed/docs/dhcd/hac/zone.rtf
What Type of Low- or Moderate-Income Housing Project Qualifies?	The proposed project must: 1) be subsidized by the federal or state government under any program to assist the construction of low- or moderate-income housing; 2) include at least 25% units for families with incomes of less than 80% of the area median income (or at least 20% units for incomes at less than 50% of the AMI); 3) be built by any public agency, nonprofit, or limited dividend organization.
How Do Developers Apply for a Comprehensive Permit?	An applicant must first obtain a letter of eligibility from the state. This allows developers to then submit a single application to the local zoning board of appeals, which can grant, deny, or attach conditions to the permit by a majority vote. The local ZBA must begin a public hearing within 30 days of receipt of the application, and then must issue a decision within 40 days after ending the public hearing(s).
What if the Developer is Unhappy with the Permit Conditions or is Denied the Permit	The developer can either: 1) appeal the decision to court; or 2) appeal the decision to the **Housing Appeals Committee ("HAC")**, a body in the state's Department of Housing and Community Development. However, the developer can only appeal granted permits to the HAC if the local board attaches "conditions and requirements as to make the building or operation of [low- or moderate-income] housing uneconomic."
Housing Appeals Committee Criteria	When a permit has been denied or changed, the burden is initially upon the developer to prove that the denial makes the proposal uneconomic. However, The HAC "cannot vacate, modify, or remove board decisions or conditions that are *consistent with local needs*, even if the board decisions make the proposed development uneconomic."
What is *consistent with local needs*?	A local board's decision is consistent with local needs when the locality already has low- or moderate-income housing: 1a) in excess of 10% of the housing units reports in the latest

	federal decennial census of the city or town"; or 1b) on site comprising 1.5% or more of the total land area zoned for residential, commercial, or industrial use. Alternatively, the local board's decision is also considered "consistent with local needs" if the proposed development would result in new construction covering over 0.3% of all zoned land or 10 acres, whichever is larger, within one year.
What happens after the HAC renders its decision?	HAC can force the local commission to grant a permit or modify conditions on the development.
What about abutters' rights?	Some abutters still have the right to participate in the 40B process. First, while abutters have no right to appeal to the HAC, abutters *can participate* as interveners with the permission of the presiding officers in the HAC proceeding. *Taylor v. Board of Appeals of Lexington*, 451 Mass. 270, 275 (2008). HAC has the authority to grant abutters permission to participate in HAC proceedings as interveners. Further, "any person aggrieved by the issuance of a comprehensive permit or approval may appeal to [Superior] Court as provided [in statute]." *Standerwick v. Zoning Bd. of Appeals of Andover,* 447 Mass. 20, 26 (2006). For more, see *Eisai Inc. v. Housing Appeals Committee*, 89 Mass. App. Ct. 604 (2016).

40B certainly has some attractive components, as it was one of the first state-wide laws specifically providing developers of affordable housing with the opportunity to have their application heard in front of an independent and administrative appeals body. It also provides developers with some flexibility, as proposals for affordable housing can include either 25% affordable units at 80% of the Area Median Income (AMI), or 25% at 50% of the AMI.

At the same time, one of the major components of Chapter 40B is that it is limited to public agencies, nonprofit developers, and "limited dividend organizations." Limited dividend organizations include for-profit organizations that agree to limit their profits to a maximum of 20% in for-sale developments and 10% per year for rental developments. Some commentators claim that such limitations lower investor interest for 40B rental properties. It can be difficult for a developer to ascertain at the conceptual stage or while obtaining financing commitments whether or not they will need to utilize 40B's appeals provisions. Nonetheless, developers must make a determination well before they submit an application to the local government whether or not they will follow 40B procedures or not.

Additionally, 40B is not available for affordable housing developers when 10% of the housing stock in the jurisdiction is affordable, or if 1.5% of the area zoned for residential, commercial, and industrial is labelled as affordable. 40B is also limited to higher density projects; projects that are greater than .3% of the total land area zoned for residential commercial, or industrial use, or 10 acres (whichever is larger) developed for affordable housing in any one year do not

qualify for 40B. Thus, larger single family subdivisions will likely not be able to utilize such provisions. Some commentators claim that this results in more 40B proposal at high densities, as opposed to single family and/or townhome developments.

It is important to note that if the developer chooses to appeal to the HAC, the initial burden is on the developer to show why the conditions attached to a permit will make the project uneconomic. Connecticut, as discussed below, places the initial burden upon the municipality.

Finally, and of utmost importance, is the issue of abutters' rights. As explained in the table above, the HAC can allow abutters to participate in the administrative process, but it is not an absolute right under statute. Further, abutters also have the potential to participate in court proceedings if deemed by the court as "persons aggrieved" under 40B.

II. Rhode Island Low and Moderate Income Housing Act

The Rhode Island Low and Moderate Income Housing Act (LMIHA) was enacted in 1991, and is similar to Massachusetts Chapter 40B in many respects. LMIHA directs Rhode Island municipalities to achieve 10% of housing to be low and moderate income housing. LMIHA allows an applicant proposing to build low or moderate income housing to submit to a local review board a single application for a comprehensive permit, in lieu of submitting separate applications to local boards. Second, the applicant may appeal to the Rhode Island State Housing Appeals Board ("SHAB") if the local zoning board denies or approves the project with conditions that makes the project infeasible. Finally, for-profit developers have limited opportunities to utilize the program.

Table 2 – Question and Answers for LMIHA

Rhode Island	
Name	Rhode Island Low and Moderate Income Housing Act
Link to Statute	http://webserver.rilin.state.ri.us/Statutes/TITLE45/45-53/INDEX.HTM
What sort of Low- or Moderate-Income Housing Project Qualifies?	Low- or moderate-income housing means *any* housing built or operated by any public agency, nonprofit agency, limited equity housing cooperative, *or any private developer*, that is subsidized by a federal, state, or municipal government subsidy under any program to assist the construction or rehabilitation of housing affordable to low- or moderate-income households, as defined in the applicable federal, state or local law. In addition, the housing must remain affordable for a period of at least 30 years. At least 25% of the housing in the proposal must be low- or moderate-income housing.

Rhode Island	
	Importantly, a for-profit developer can submit an application, limited to 1% of year-round units in the local entity.
How Do Developers Obtain a Permit?	Developers must submit a single application to the local review board, which can grant, deny or attach conditions. For minor projects (as defined in the statute), the board must hold a public hearing within 95 days of the issuance of the certificate completeness, and within 120 days for major projects. The local review board may deny the request for the following reasons: 1) the city or town has an approved affordable housing plan and is meeting housing needs; 2) the proposal is not consistent with local needs, including, but not limited to, the needs identified in an approved comprehensive plan; 3) the proposal is not in conformance with the comprehensive plan; 4) the community has met or has plans to meet the goal of 10% of the year-round units (or 15% in the case of an urban town or city); or 5) concerns for the environment and the health and safety of current residents have not been adequately addressed.
What if the Developer is Unhappy with the Permit Conditions*, or* Is Denied the Permit	The developer can either appeal the decision to superior court; or appeal the decision to the State Housing Appeals Board (SHAB) within 20 days of the local board's decision.
Standard of Review for SHAB	In making a determination, the standards for SHAB's review of the developer's appeal include, but are not limited to: 1) The consistency of the decision to deny or condition the permit with the approved affordable housing plan and/or approved comprehensive plan; 2) The extent to which the community meets or plans to meet housing needs, as defined in an affordable housing plan, including, but not limited to, the 10% goal for existing low- and moderate-income housing units as a proportion of year-round housing; 3) The consideration of the health and safety of existing residents; 4) The consideration of environmental protection; and 5) The extent to which the community applies local zoning ordinances and review procedures evenly on subsidized and unsubsidized housing applications alike.
SHAB Decision and Subsequent Judicial Review Standards	SHAB can overrule or modify local decision. If appealed to superior court: The court shall not substitute its judgment for that of SHAB as to the weight of the evidence on questions of fact. The court

Rhode Island	
	may affirm the decision of the SHAB or remand the case for further proceedings, or may reverse or modify the decision if substantial rights of the appellant have been prejudiced because of findings, inferences, conclusions, or decisions which are: 1) In violation of constitutional, statutory, or ordinance provisions; 2) In excess of the authority granted to the state housing appeal board by statute or ordinance; 3) Made upon unlawful procedure; 4) Affected by other error of law; 5) Clearly erroneous in view of the reliable, probative, and substantial evidence of the whole record; or 6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. Finally, any appeal from the superior court to the supreme court pursuant to this section shall be by writ of certiorari.
SHAB Board Details	7 members (4 local officials, 1 affordable housing developer, 1 affordable housing advocate, 1 business rep, 1 land use attorney), all appointed by governor, 3-year terms
What about abutters' rights?	Any aggrieved party, including abutters, may make a formal notice to SHAB to intervene on an approval or approval with conditions.

As mentioned before, there are more similarities than differences between LMIHA and 40B. Both include a comprehensive permit procedure and an administrative appeals process. Both program have a goal that 10% of the housing stock should consist of affordable housing.

One major difference is that LMIHA is available to any developer, unlike 40B where for-profit developers must agree to "limited dividend" caps on profits. The other primary difference is that abutters have the right to appeal a local approval to the SHAB, whereas in 40B abutters can participate in the administrative appeal only if the developer chooses to exercise the appeal.

The other differences lie in the details. For example, a Rhode Island court will not find in favor of an affordable housing developer when the proposal is not consistent with an "approved affordable housing plan" submitted by the municipality. Another difference is in timing. Massachusetts 40B requires the local zoning board to hold its first hearing within 40 days of a submitted application, while LMIHA provides the local government 95 or 120 days, depending on the scope of the project. Finally, LMIHA is unique in that if the developer chooses to go to state court after the SHAB decision, the standard of review is dictated by statute. Table 2 (above) describes six factors courts are to use in evaluating the SHAB decision.

III. Connecticut Affordable Housing Land Use Appeals Act (Section 8-30g)

Connecticut passed the Affordable Housing Land Use Appeals Act in 1990. It allows any developer of "assisted" or "set-aside" housing (defined in table below) to appeal to state courts from an adverse decision by a local land use authority. Importantly, the burden of proof during the appeal lies with the local jurisdiction. Here, the local jurisdiction must show in part (see table below for full list of criteria) that its decision to deny or attach conditions to the project are "necessary to protect substantial public interests in health, safety . . . ." This is in direct contrast to a usual appeal to an adverse decision by a local authority, where the burden of proof is usually on the developer to show that a local jurisdiction is acting arbitrarily when it denies or attaches conditions to a permit.

Table 3 – Questions and Answers on Connecticut's Section 8-30g

Connecticut	
Name	Connecticut Affordable Housing Land Use Appeals Procedure (Section 8-30g)
Link to Statute	https://www.cga.ct.gov/current/pub/chap_126a.htm
What sort of Low- or Moderate-Income Housing Project Qualifies?	"Affordable housing development" means a housing development that is assisted housing or a set-aside development. "Assisted housing" is housing that receives government assistance to construct or rehabilitate low- and moderate- income housing, or housing occupied by individuals receiving rental assistance (i.e., Section 8). A "set-aside development" is a project where at least 30% of the dwelling units are deed restricted as affordable for at least 40 years after initial occupancy. A developer can use the procedure only in those municipalities that the Department of Economic and Community Development (DECD) determines have little or no affordable housing stock. A municipality is subject to the procedure if less than 10% of its housing stock: 1) is assisted housing, 2) is financed by Connecticut Housing Finance Authority mortgages, 3) is subject to deeds and conditions restricting the sale or rental to low-and moderate-income people, or 4) consists of mobile homes or accessory apartments subject to similar deed restrictions. Additionally, a municipality qualifies for a four-year moratorium from the procedure by obtaining a certification

	from DECD showing it meets a specific threshold of affordable housing units created since 1990.
How Do Developers Obtain A Permit?	Section 8-30g does not contain a comprehensive permit component, but an applicant must file an affordability plan with the development application.
What if the Developer is Unhappy with the Permit Conditions, Or Is Denied the Permit	The developer can either: 1) modify and resubmit the application; or 2) appeal the commission's decision to the presiding court in the district where the proposed development lies.
Administrative Appeals Body Criteria	N/A – Unlike 40B and LMIHA, there is no administrative appeals process.
Section 8-30g shifts the burden of proof to the municipality	*The crux of Section 8-30g is that it shifts the burden of proof from the applicant to the planning and zoning commission*. A municipality must meet certain criteria for a court to uphold the local commission's decision. First, it must prove that the record contains sufficient evidence to support its decision. Next, it must meet one of two sets of conditions. Under the first set, it must convince the court that: 1) the decision was necessary to protect substantial public interests in health, safety, or other matters the commission may legally consider; 2) these interests clearly outweigh the need for affordable housing; and 3) they cannot be protected by making reasonable changes to the proposed development. Under the second set, the municipality must prove that the proposed development is receiving no government funds and located in an industrial zone that specifically prohibits residential uses.

Section 8-30g is markedly different than Massachusetts 40B and Rhode Island's LMIHA. Section 8-30g does not include a comprehensive permit or an administrative appeals process; instead, what Section 8-30g does is allow *any* person filing an affordable housing application to appeal directly to Connecticut Superior Court when local zoning and planning commission decisions deny affordable housing or approve with infeasible conditions**. Importantly, the burden of proof switches from the developer to the local jurisdiction.** A developer can use Section 8-30g in situations where 10% or less of the overall housing stock in a municipality is considered affordable. Developments that receive government assistance to construct low and moderate

income housing and projects where 30% are deed restricted as affordable are eligible to use this process.

IV. Illinois Affordable Housing Planning and Appeal Act

The Illinois Affordable Housing Planning and Appeal Act (IAHPAA), unlike 40B and LMIHA, does not include a comprehensive permit procedure. Instead, IAHPAA contains a municipal planning component and a builder appeal component for affordable housing developers.[5] An "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." The builder's appeal is available for affordable housing developers "who believe that they have been unfairly treated" because their development contains affordable housing. 310 Ill. Comp. Stat. 67/10 (Supp. 2003).

Table 4 – Question and Answers – IAHPAA

Illinois	
Name	Illinois Affordable Housing Planning and Appeal Act
Link to Statute	310 Ill. Comp. Stat. 67/1-50 (Supp. 2003). http://www.ilga.gov/legislation/ilcs/ilcs3.asp?ActID=2477&ChapterID=29
Municipal Planning Component	AHPAA requires all nonexempt municipalities to develop and approve an affordable housing plan, which must contain: (1) a statement of the total number of affordable housing units that are necessary to exempt the local government; (2) an inventory of sites appropriate for affordable housing construction and of existing structures most appropriate for conversion or rehabilitation for affordable housing; (3) affordable housing incentives; and (4) a minimum goal that 15% of new housing units, or 10% of the entire housing stock, will be affordable, or that the percentage of affordable units will grow at least 3%. Local governments become exempt if at least 10% of the housing stock is affordable, as determined by the Illinois Housing Development Authority.

[5] For more on IAHPAA, see Jennifer Devitt, *Illinois' Affordable Housing Planning and Appeal Act: An Indirect Step in the Right Direction – A Survey of Housing Appeals Statutes*, 18 Wash. U.J.L & Pol'y 267 (2005), available at http://openscholarship.wustl.edu/law_journal_law_policy/vol18/iss1/12.

Illinois	
What if the Developer is Unhappy with the Permit Conditions, *Or* Is Denied the Permit	An affordable housing developer whose application is either denied or approved with conditions that in his or her judgment render the provision of affordable housing infeasible may, within 45 days after the decision, appeal to the State Housing Appeals Board challenging that decision unless the municipality or county that rendered the decision is exempt under Section 15 of this Act. The developer must submit information regarding why the developer believes he or she was unfairly denied or unreasonable conditions were placed upon the tentative approval of the development.
Burden Lies with the Developer	In such an appeal, the burden is on the developer to "submit information regarding why the developer believes he or she was unfairly denied or unreasonable conditions were placed upon the tentative approval of the development."
What can the court do?	The appellate court has the exclusive jurisdiction to review decisions of the board. Any appeal to the Appellate Court of a final ruling by the State Housing Appeals Board may be heard only in the Appellate Court for the District in which the local government involved in the appeal is located. The appellate court shall apply the "clearly erroneous" standard when reviewing such appeals.

As mentioned above, IAHPAA contains an appeals component available to any developer of affordable housing. The Housing Appeals Board then conducts a review to determine "whether the developer was treated in a manner that places an undue burden" on the development because it contains an affordable component. At least 20% of the dwelling units must be sold or rented at prices that preserve them as affordable housing for a period of at least 15 years. The IAHPAA also includes a planning component. Here, the Illinois Housing Development Authority determines whether certain municipalities are exempt from the act if they have met affordable housing requirements.

V. California Housing Accountability Act (HAA)

The HAA is often referred to as California's "Anti NIMBY law." *Schellinger Brothers v. City of Sebastopol*, 179 Cal.App.4th 1245, 1253 (2009). The purpose of the statute is "to limit the ability of local governments to reject or make infeasible housing developments … without a thorough analysis of economic, social, and environmental effects of the action. . . ." Id. In a nutshell the HAA limits local authorities by requiring a very specific set of findings that make it extremely difficult for Cities to reduce the density of a project for subjective reasons like neighborhood character, aesthetics, or other difficult-to-measure criteria.

For a local agency to condition approval of a housing project on reducing the density of that project to less than proposed and otherwise permitted by law, the agency must determine that

the project would have a "specific adverse impact on public health or safety" unless the density is reduced.

A. Table 5 – Question and Answers on California's HAA

California	
Name	Housing Accountability Act?
Link to Statute	http://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?lawCode=GOV&sectionNum=65589.5
What sort of Low- or Moderate-Income Housing Project Qualifies?	In *Honchariw v. County of Stanislaus* (200 Cal.App.4th 1066), an intermediate state court interpreted the HAA to apply to any housing development, not just affordable housing.
How is the HAA Enforced?	The HAA has to be enforced by a writ of administrative mandamus filed within 90 days after the highest local authority disapproves the application or conditionally approves it at a lower density.
What if the Developer is Unhappy with the Permit Conditions, Or Is Denied the Permit	Section 65589.5(j) of the Act states that when a proposed housing development complies with the applicable, objective general plan and zoning standards, but a local agency proposes to approve it only if the density is reduced, the agency must base its decision on written findings supported by substantial evidence that: 1) The development would have a specific adverse impact on public health or safety unless disapproved, or approved at a lower density; and 2) There is no feasible method to satisfactorily mitigate or avoid the specific adverse impact, other than the disapproval, or approval at a lower density. A "significant adverse impact" is defined as a "significant, quantifiable, direct and unavoidable impact, based on objective, identified written public health or safety standards, polices, or conditions as they existed on the date the application was complete." This is an incredibly high standard, in that it is difficult to imagine a scenario where a housing project would have a significant negative impact on public health.

Unlike the appeals boards in Massachusetts, Rhode Island, and Illinois, California's HAA does not provide for an independent appeals process. What HAA does it require a local government board to base its decision on specific written findings. If the locality has not made these findings, or the developer believes that the findings are not supported by the evidence, the developer can bring a case into court. It is important to note that California state courts have recognized that HAA applies to all housing, not just for affordable housing developments.

Further, any developer of housing can utilize rights provided under the Act, not just public agencies or nonprofit developers.

Should My State Implement an Administrative Appeals Statute For Housing?

The state appeals statutes described above are not without controversy and criticism, and new efforts to implement a state appeals statute in other states will likely be met with significant resistance. As an example, in 2003, over sixty bills were introduced in the Massachusetts legislature to revise, weaken, or repeal 40B.[6] With that said, state appeals statutes can be a benefit in providing affordable housing. For example, as of 2009, Massachusetts 40B created 48,000 units in 900 projects, including 26,000 affordable units. This accounts for 34% of all housing production and 80% of all rental housing production in the Greater Boston area.[7]

At the very least, any new effort to implement an affordable housing administrative appeals process must include consideration of the following:

- Characteristics of local jurisdictions subject to statute
- Local jurisdiction exemptions from affordable housing statute
- Whether the statute applies to "affordable" or all housing
- When the statute only applies to affordable housing, the kind of low- or moderate-income housing project that qualifies
- The land use permit applications and/or local decisions that are covered under statute (e.g., zone changes, site plan applications, variances, etc.)
- Whether the statute provides for an administrative appeal (see 40B) or instead directs courts to apply a statutory burden of proof (see Connecticut's Section 8-30g)
- The standards of review/burden of proof for either the administrative body or the judiciary
- Who and under what circumstances can appeal to the administrative body
- Whether abutters and other neighborhood groups can appeal to the administrative body or it is the administrative body's decision
- Which party bears the burden of proof
- The makeup of an administrative board, if used.

Additionally, any new procedure must take into account concerns from both developers and local jurisdictions. Hearings before a state administrative board can be costly, and can *add* to

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[6] Christophe Courchesne, *What Regional Agenda?: Reconciling Masschusetts's Affordable Housing Law and Environmental Projection*, Harvard Environmental L. Rev., Vol. 28, 215, 216 (2004).

[7] Alexandra DeGenova*, On the Ground: 40B Developers Before and After*, Tufts University, May 2009, available at http://community-wealth.org/content/ground-40b-developments-and-after.

legal expenses particularly when the state administrative board's decision is not final and can be appealed to the courts. This is the case in under the Rhode Island program, where any aggrieved party, including abutters, may make a formal notice *to* the administrative body to intervene on a local government's approval or approval with conditions. The Rhode Island program also provides a right of appeal *from* the administrative body's decision to the courts for any aggrieved party. It is important that if your state is considering such a program, that the program does not add to the financial and time burdens of the permit application process.

Local officials and planners are often hostile to such efforts because of a state administrative body's authority to override local land use and housing decisions.[8] Some planners believe "that it gives the applicant an opportunity to force municipalities to accept land use proposal that violate good planning principles because the applicant can win an appeal regardless of the merit of the proposal."[9] Additionally, some local officials even believe that state appeals statutes allow developers to push through market rate projects, by threatening to submit affordable housing projects if the market rate project is denied.[10] Finally, some land use officials argue that appeals procedures are fundamentally unfair.[11] Most of the state statutes have a minimum affordable housing requirement, and many land use officials believe that these minimums are arbitrary and do not account for a specific municipalities affordable housing need.[12]

Conclusion

The states that have enacted administrative appeals statutes recognize a joint obligation between states, local jurisdictions, and housing providers to provide affordable housing. Each program is both praised and criticized. A new effort in a state without such process will require careful consideration of what has worked and what hasn't in each program, with the ultimate goal of increasing the production of affordable housing units.

If you have further questions or would like to explore implementing a housing appeals statute in a state currently without such a statute, then contact NAHB Staff Counsel Devala Janardan (djanardan@nahb.org) at 202-266-8335 or NAHB Vice President of Intergovernmental Affairs Karl Eckhart (keckhart@nahb.org) at 202-266-8319 for more information.

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8 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, 128 (2001), available at http://digitalcommons.law.wne.edu/lawreview/vol23/iss1/4/.

9 *Id*.

10 *Id*.

11 Dewitt at 280.

12 *Id*.