

# COMBATING EXCLUSION & ACHIEVING AFFORDABLE HOUSING: THE CASE FOR BROAD ADOPTION OF HOUSING APPEALS STATUTES

## INTRODUCTION

The United States has a serious affordable housing problem,<sup>1</sup> and by nearly every measure the problem is worsening.<sup>2</sup> Across the country, counties and municipalities have been unable to meaningfully address the widening gap between housing prices and earned wages.<sup>3</sup> A meager thirty-seven affordable and available rental homes exist for every 100 extremely low-income households.<sup>4</sup> One in seven renting families—or nearly eighteen million households—spend at least half of their income on housing.<sup>5</sup> Lofty housing prices not only lead to increased home insecurity, but also pressure families to forgo other essentials like food, healthcare, and clothing to maintain shelter.<sup>6</sup> Relatedly, home ownership is the bedrock of wealth accumulation in the United States and high housing costs further concentrate the country’s already top-heavy capital distribution.<sup>7</sup> These barriers to access have paired with discriminatory public policy to historically weaponize the housing market as a tool for segregation and

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1. . See JOINT CTR. FOR HOUS. STUDS. HARV. U., *THE STATE OF THE NATION’S HOUSING 1–2* (2020), [https://www.jchs.harvard.edu/sites/default/files/reports/files/Harvard\\_JCHS\\_State\\_Nations\\_Housing\\_2021.pdf](https://www.jchs.harvard.edu/sites/default/files/reports/files/Harvard_JCHS_State_Nations_Housing_2021.pdf). Housing stock shortages and wage stagnation are among the largest contributing factors to the housing affordability crisis. *Id.*

2. Kalimah Redd Knight, *The Lack of Affordable Housing is Getting Worse in the U.S.*, PHYS.ORG (June 3, 2020), <https://phys.org/news/2020-06-lack-housing-worse.html> [<https://perma.cc/XF8D-U33D>].

3. Inflation-adjusted median housing price has increased 121% nationwide since 1960 and median household income has increased just 29%. Leah Binkovitz, *Gap Between Income Growth and Housing Cost Increases Continues to Grow*, KINDER INST. (July 25, 2019), <https://kinder.rice.edu/urbanedge/2019/07/25/gap-between-income-growth-and-housing-cost-increases-continues-grow> [<https://perma.cc/E2PW-GLP8>].

4. ANDREW AURAND, DAN EMMANUEL, ELLEN ERRICO, DINA PINSKY & DIANE YENTEL, NAT’L LOW INCOME HOUS. COAL., *THE GAP: A SHORTAGE OF AFFORDABLE HOMES 1* (Mar. 2019), <http://landuselaw.wustl.edu/articles/AffordableHousingReport2019.pdf> [<https://perma.cc/ZUA9-KFEF>]. Extremely low-income renters are households with income at or below the Poverty Guideline or thirty percent of AMI (Area Median Income), whichever is higher. *Id.* It is estimated in 2019 that more than eleven million households qualified as extremely low-income. *Id.*

5. Spending more than fifty percent of household income is known as being “severely cost-burdened.” See *2020 State of the Nation’s Housing Report*, HABITAT FOR HUMANITY, <https://www.habitat.org/costofhome/2019-state-nations-housing-report-lack-affordable-housing> [<https://perma.cc/K2TN-9ZXL>].

6. MATTHEW DESMOND, *EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY 297* (2016).

7. ERIC BELSKY & JOEL PRAKKEN, HARV. UNIV. JOINT CTR. FOR HOUS. STUD., *HOUSING WEALTH EFFECTS: HOUSING’S IMPACT ON WEALTH ACCUMULATION, WEALTH DISTRIBUTION AND CONSUMER SPENDING* (2004), <https://www.jchs.harvard.edu/sites/default/files/w04-13.pdf> [<https://perma.cc/2X7D-BC2Q>].

oppression.<sup>8</sup> Local and state-sponsored exclusionary regulations have disproportionately placed the burden of low access to housing on people of color, closely linking housing shortages and high-cost living to socioeconomic and racial disparities in the United States.<sup>9</sup> Chronic lack of low- and moderate-cost housing is not an isolated policy issue; it is a deeply urgent, multidisciplinary crisis that underscores the most important social issues facing the United States, from police brutality and income inequality to public health and environmental justice.<sup>10</sup>

Federal, state, and local governments have employed several substantive efforts to increase access to affordable housing, including the Section 8 voucher program,<sup>11</sup> public housing projects,<sup>12</sup> and mandatory set-asides for new development.<sup>13</sup> Comprehensive housing reform requires a combination of diverse approaches, and these programs have demonstrated tangible strengths.<sup>14</sup> However, these initiatives have done little to address the serious procedural barriers to developing and maintaining low- and moderate-cost housing.<sup>15</sup> Lack of procedural protection is particularly salient because the municipalities vested with control over local development are often

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8. RICHARD ROTHSTEIN, *THE COLOR OF LAW* 41 (2017).

9. See *Racial Disparities Among Extremely Low-Income Renters*, NAT'L LOW INCOME HOUS. COAL. (Apr. 15, 2019), <https://nlihc.org/resource/racial-disparities-among-extremely-low-income-renters> [https://perma.cc/BY83-UZNP]. Local practices like racial covenants, and federally backed programs like red lining by the Federal Housing Administration provide salient examples of such exclusionary regulations. See Adam Walls, *Rethinking Affordable Housing*, YOUTUBE (Aug. 23, 2016), <https://www.youtube.com/watch?v=fZvKY9tb9Kw> [https://perma.cc/2VYF-ATSL].

10. See, e.g., Molly Solomon & Erin Baldassari, *Why the Fight Against Police Brutality is Also a Fight for Affordable Housing*, KQED (June 8, 2020), <https://www.kqed.org/news/11823182/why-the-fight-against-police-brutality-is-also-a-fight-for-affordable-housing> [https://perma.cc/8NXM-HLSU]; MyDzung Chu, *Why Housing Security is Key to Environmental Justice*, ENV'T HEALTH NEWS (Apr. 16, 2020), <https://www.ehn.org/affordable-housing-environmental-justice-2645687591.html> [https://perma.cc/27YG-6JCL].

11. *Housing Choice Vouchers Fact Sheet*, U.S. DEP'T OF HOUS. & URB. DEV. [https://www.hud.gov/topics/housing\\_choice\\_voucher\\_program\\_section\\_8](https://www.hud.gov/topics/housing_choice_voucher_program_section_8) [https://perma.cc/28NT-K29R].

12. *Policy Basics: Public Housing*, CTR. ON BUDGET & POL'Y PRIORITIES, <https://www.cbpp.org/research/policy-basics-public-housing> [https://perma.cc/FS2T-JWK2].

13. *The Set-Aside Requirement*, GROUNDED SOLS. NETWORK, <https://inclusionaryhousing.org/designing-a-policy/onsite-development/the-set-aside-requirement/> [https://perma.cc/4L7T-2Y6W].

14. See *supra* notes 11–13.

15. Perhaps due to a lack of political will, robust and sustaining funding of affordable housing through programs like Section 8 has not met need. Rather, most localities still rely on free market strategies for development, weakly supported with federal or state dollars. The permanency of such solutions remains in doubt. See Julie Gilgoff, *Local Responses to Today's Housing Crisis: Permanently Affordable Housing Models*, 20 CUNY L. REV. 587, 593 (2017). See also U.S. DEP'T. OF HOUS. & URB. DEV., "WHY NOT IN OUR COMMUNITY?": REMOVING BARRIERS TO AFFORDABLE HOUSING 3 (Feb. 2005), <https://www.huduser.gov/portal/publications/wnioc.pdf> [https://perma.cc/3CP5-5WCT].

exclusionary.<sup>16</sup> The implications of such exclusionary logic perpetuate the affordable housing crisis by obstructing access to low- and moderate-cost housing through procedural restrictions that render development impracticable or prohibited altogether.<sup>17</sup> Without procedural protections that hold local governments and leaders accountable, substantive housing policies remain vulnerable to systemic barriers.

A little-used legislative mechanism, known as a housing appeals statute, may help lessen the affordable housing problem by providing crucial procedural protections and substantive development incentives in exclusionary-prone communities.<sup>18</sup> Procedurally, housing appeals statutes create a comprehensive permitting process and appeal system to ensure municipalities with discriminatory approaches towards zoning do not unduly reject or delay affordable housing development.<sup>19</sup> These elements work in tandem: comprehensive permitting allows affordable housing developers to apply to one approval board instead of many, and the appeal system allows developers to petition a state board to review discriminatory local decisions. Substantively, housing appeals statutes often tie procedural oversight to mandatory minimum affordable housing development in municipalities.<sup>20</sup> Despite the first housing appeals statute being adopted over fifty years ago,<sup>21</sup> the tool has remained largely confined to New England states.<sup>22</sup> Housing appeals statutes have created controversy where enacted and local officials often disagree on the efficacy and legality of the statutory scheme.<sup>23</sup> This Note will outline the origin and current state of

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16. Emily Badger, *How 'Not in My Backyard' Became 'Not in My Neighborhood'*, N.Y. TIMES (Jan. 3, 2018), <https://www.nytimes.com/2018/01/03/upshot/zoning-housing-property-rights-nimby-us.html> [<https://perma.cc/SL6P-MLRK>].

17. DAVID M. GLICK, KATHERINE LEVINE EINSTEIN & MAXWELL PALMER, NEIGHBORHOOD DEFENDERS 146 (2019).

18. DANIEL R. MANDELKER ET AL., PLANNING AND CONTROL OF LAND DEVELOPMENT 395–97 (2020).

19. *See id.*; Gary Winfield, Opinion, *It's Not Perfect, But Affordable Housing Appeals Act Works*, CT NEWS JUNKIE (Jan. 24, 2017, 1:54 AM), [https://www.ctnewsjunkie.com/archives/entry/op-ed\\_its\\_not\\_perfect\\_but\\_affordable\\_housing\\_appeals\\_act\\_works/](https://www.ctnewsjunkie.com/archives/entry/op-ed_its_not_perfect_but_affordable_housing_appeals_act_works/) [<https://perma.cc/P9PW-4J4K>].

20. *See, e.g.*, 53 R.I. GEN. LAWS § 45-53-1 (2009). Note that satisfying “local need” for affordable housing in Rhode Island requires a baseline of ten percent low- or moderate-cost housing inventory in most municipalities. § 45-53-3(2)(i-ii).

21. Massachusetts passed section 40B or the “Anti-Snob Zoning Act” in 1969. *See* MASS. GEN. LAWS ch. 40B, §§ 20–23 (1998).

22. Just five states, Massachusetts, Connecticut, Rhode Island, Illinois, and most recently in 2020, New Hampshire, have adopted state statutory housing appeals boards. *See, e.g., id.*; CONN. GEN. STAT. ANN. ch. 126a § 8-30g (West 2021); 53 R.I. GEN. LAWS § 45-53-1 (2009); 310 ILL. COMP. STAT. ANN. §§ 67/1–67/50 (2021); N.H. REV. STAT. ANN. § 679:1–19 (2020).

23. *See, e.g.*, Trevor J. Brown, *NH Housing Appeals Board Gets Ready to Open for Business*, N.H. BUS. REV. (July 1, 2020), <https://www.nhbr.com/nh-housing-appeals-board-gets-ready-to-open-for-business/> [<https://perma.cc/E8YP-XT46>]; Sean Ghio, *The Facts About State's Affordable Housing*

housing appeals statutes; review the issues of legality posed by housing appeals boards; and analyze the statutes' efficacy. The final section of this Note will use the analytical framework laid out in this discussion to provide recommendations for model housing appeals legislation that prioritizes combating local exclusionary practices and achieving affordable housing policy.

### I. HOUSING APPEALS STATUTE BASICS

The power to regulate and oversee land development, control, and zoning is typically vested in local municipal councils and boards.<sup>24</sup> Most importantly for the purposes of affordable housing, local officials often regulate both development approval and what land can be used for such development.<sup>25</sup> For government officials or neighborhood organizers who harbor exclusionary sentiment, the local land use system is the primary tool for eliminating developments perceived to be unsavory or detrimental to the community.<sup>26</sup> Through a combination of neighborhood opposition and local executive discretion, affordable housing developments are frequently denied or approved with conditions that render the development impracticable.<sup>27</sup> Moreover, the process of permitting and defending

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*Statute*, CT MIRROR (July 21, 2017), <https://ctmirror.org/category/ct-viewpoints/the-facts-about-states-affordable-housing-statute/> [<https://perma.cc/8MXN-5ZVQ>].

24. See, e.g., *Zoning Section*, ST. LOUIS-MO GOV'T, <https://www.stlouis-mo.gov/government/departments/public-safety/building/zoning/index.cfm> [<https://perma.cc/QN5P-DWCA>]; *Denver Zoning Code*, DENVER, <https://www.denvergov.org/content/denvergov/en/community-planning-and-development/zoning/denver-zoning-code.html> [<https://perma.cc/TAA4-3N7S>]. Note, the governing and decision-making bodies controlling zoning approvals may be different between states. *Id.* Additionally, the amount of state oversight and control upon local municipalities differs among states.

25. MODEL STATUTE ON LOCAL LAND USE PROCESS § 101 (AM. BAR ASS'N 2008) [hereinafter ABA MODEL STATUTE].

26. This may take the form of concerns relating directly to the perceived population served by the affordable housing development (e.g., increased crime) or perceived economic detriments posed by the development (e.g., decreased property value or property taxes). See *NIMBY (Not in My Backyard)*, HOMELESS HUB, <https://www.homelesshub.ca/solutions/affordable-housing/nimby-not-my-backyard> [<https://perma.cc/W6PC-TDY6>].

27. Take for example, *Zoning Bd. of Appeals of Amesbury v. Hous. Appeals Comm'n*, where the local appeals board place ninety-four distinct conditions on the permit of a developer who wanted to preserve twenty-five percent of a forty-unit proposal for affordable housing. 457 Mass. 748 (2010). For more recent examples, see denials of affordable housing developments in New Jersey and Texas in 2020. Mike Davis, *Jackson Sued by Another Denied Housing Development – This Time Over Affordable Housing*, ASBURY PARK PRESS (Mar. 2, 2020, 10:57 AM), <https://www.app.com/story/news/local/communitychange/2020/02/06/jackson-new-jersey-lawsuit-housing-development/4679151002/> [<https://perma.cc/S2QG-6W54>]; Sally Grace Holtgrieve, *Affordable Housing Development Denied After Much Public Input at Georgetown City Council*, CMTY. IMPACT NEWSPAPER (July 15, 2020, 2:01 PM), <https://communityimpact.com/austin/georgetown/housing-real-estate/2020/07/15/affordable-housing-development-denied-after-much-public-input-at-georgetown-city-council/> [<https://perma.cc/3VC5-LX96>].

developments in front of local commissions and courts can be long and expensive.<sup>28</sup> Despite the progress of inclusive zoning movements and increased advocacy for affordable housing in municipal comprehensive plans, this exclusionary procedural practice remains highly prevalent.<sup>29</sup>

Implicit in the neighborhood protectionist's psyche is an acknowledgement of the need for affordable housing, but fear of the secondary effects of proximate development.<sup>30</sup> In other words, efforts to increase or preserve development of affordable housing are often systemically undermined before receiving an opportunity to succeed. This dynamic creates a threshold efficacy issue for substantive affordable housing initiatives: if municipalities regularly weaponize land use procedure to burden affordable housing development, increasing access to low- and moderate-cost housing enters gridlock.<sup>31</sup>

Housing appeals statutes combat prejudice frequently facing low- and moderate-cost housing by creating a state statutory mechanism aimed at protecting the procedural rights of affordable housing development at local municipal levels.<sup>32</sup> Housing appeals statutes create an appeals system, often paired with a comprehensive permitting process, to ensure municipalities with discriminatory approaches to land use decisions do not unduly reject or delay affordable housing development.<sup>33</sup> With slight variation based on jurisdiction, there are three primary goals of the housing appeals boards established by these statutes: first, to expedite low- or moderate-income housing development permits, circumventing the demanding process of gaining approval from several municipal boards; second, to establish a formal review process for local affordable housing decisions; and third, to provide significant authority to modify the decisions made by local housing commissions.<sup>34</sup> For example, should an affordable housing developer apply

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28. See Jacqueline Rabe Thomas, *Separated by Design: How Some of America's Richest Towns Fight Affordable Housing*, PROPUBLICA (May 22, 2019, 5:00 AM), <https://www.propublica.org/article/how-some-of-americas-richest-towns-fight-affordable-housing> [<https://perma.cc/KR8F-M967>].

29. See, e.g., Alexander Casey, Alena Marshak, Rose Rubel & Xinwei Wang, *Under One Roof: Analysis of City-Level Affordable Housing Commitments and Actions to Meet Housing Needs in King County*, HOUS. DEV. CONSORTIUM (June 3, 2016), <https://www.housingconsortium.org/wp-content/uploads/2014/03/Under-One-Roof.pdf> [<https://perma.cc/Z9DY-QVKL>].

30. See Alcynda Lloyd, *Americans Want More Affordable Housing, Just Not in Their Neighborhoods*, HOUS. WIRE (Aug. 5, 2019), <https://www.housingwire.com/articles/49776-americans-want-more-affordable-housing-just-not-in-their-neighborhoods/> [<https://perma.cc/XD86-DN2U>].

31. Thomas, *supra* note 28.

32. Winfield, *supra* note 19.

33. 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, 271 (2005).

34. MANDELKER ET AL., *supra* note 18, at 395.

to a local board for a project permit, and be granted a permit with so many conditions as to make the project infeasible, the housing developer could appeal to the state housing board to strike down or limit the local board's conditions.<sup>35</sup>

In addition to establishing appeals boards, many housing appeals statutes include minimum affordable housing inventory thresholds that help incentivize development by tying housing appeals requirements to certain percentages of affordable housing in the community.<sup>36</sup> Most housing appeals statutes impose a ten percent affordable housing requirement for each locality, and when such inventory is achieved the municipality will no longer be subject to state housing appeals board review as long as it is maintained.<sup>37</sup> This incentive structure is meant to substantively increase development within high-cost areas while also increasing procedural accountability on the local level.<sup>38</sup> Despite indications of positive impact on low- and moderate-housing stock, both the procedural and substantive oversight measures of housing appeals boards have engendered significant tensions between state and local governments.<sup>39</sup>

## II. THE ORIGIN & CURRENT STATE OF HOUSING APPEALS STATUTES

Massachusetts was the first state to implement a housing appeals statute in 1969.<sup>40</sup> The legislation was spurred by concerns that land allocations in growing suburbs had exclusively prioritized large single-family homes.<sup>41</sup> Section 21 of The Massachusetts Comprehensive Permit and Zoning Appeals Act (“Chapter 40B”), also known as the “Anti-Snob Zoning Act,” allows for “any public agency, limited dividend, or nonprofit organization proposing to build lower [sic] moderate-income housing”<sup>42</sup> to apply to their local appeals board for a single comprehensive permit.<sup>43</sup> Should an

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35. See *supra* note 27.

36. See *supra* note 20.

37. See, e.g., MASS. GEN. LAWS ch. 40B, § 20 (1998).

38. ABA MODEL STATUTE, *supra* note 25.

39. See Devitt, *supra* note 33, at 271.

40. ch. 40B, §§ 20–23.

41. Evelyn Keene, *State's 'Snob Zoning' Law: A Challenge to Suburban Beliefs*, BOSTON GLOBE, Jan. 4, 1970.

42. “The general rule of thumb is that at least 25 percent of a project’s units must be set aside for occupancy by low-and [sic] moderate-income persons or families, and that rent or sales levels must be set so they are affordable to persons or families earning not more than 80 percent of the area median income. . . .” MASS. CONTINUING LEG. EDUC., LOW-AND MODERATE-INCOME HOUSING: THE ANTI-SNOB ZONING ACT, LINKAGE, INCLUSIONARY ZONING, AND INCENTIVE ZONING (2021).

43. Note that the “local appeals board” referenced here is separate and distinct from the state housing appeals board mechanism that is the subject of this Note. “Local boards” in this case refer to any town or city board of survey, board of health, board of subdivision control appeals, planning board, building inspector of the officer or board having supervision of the construction of buildings or the power of enforcing municipal building laws, or city council or board of selectmen. To receive approval for a

application under section 21 of 40B be denied or heavily conditioned, the developer may appeal to the Housing Appeals Committee (HAC), which will assess the local board decision to determine if it made the proposed land use “uneconomic.”<sup>44</sup> The HAC may review the denial or conditions imposed by localities in light of local affordable housing needs,<sup>45</sup> and may draw conclusions regarding local authority to impose such conditions or grounds for denial.<sup>46</sup> Lastly, 40B requires the HAC to review an appeal within twenty days of receipt and render a decision within thirty days of the hearing’s termination.<sup>47</sup> Importantly, Massachusetts pairs its appeals process with a ten percent mandate of affordable housing in each municipality.<sup>48</sup> Only once a local municipality achieves ten percent affordable housing stock will it be exempted from HAC oversight.<sup>49</sup> The Massachusetts statute encompasses the prototypical features of most subsequent housing appeals statutes: a comprehensive permitting process for affordable housing developers that limits barriers to local approval; a separate speedy appeals board vested with the power to assess the validity of the local board’s decisions; and an exemption clause tied to mandatory minimum affordable housing stock.<sup>50</sup>

It took twenty years for another state to implement a housing appeals statute.<sup>51</sup> Connecticut passed the Affordable Housing Land Use Appeals Procedure in 1989 and took a slightly different approach than Massachusetts.<sup>52</sup> The Connecticut edition of the housing appeals statute first distinguishes itself by not establishing a comprehensive permitting process.<sup>53</sup> Additionally, instead of constructing a separate housing appeals

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typical application, a developer would need to apply to all these boards. *See* MASS. GEN. LAWS ch. 40B, §§ 20–21 (1998).

44. § 22.

45. *See infra* note 48 and accompanying text.

46. *See Zoning Bd. of Appeals of Amesbury v. Hous. Appeals Comm’n*, 933 N.E.2d 74, 85 (Mass. 2010).

47. § 22.

48. According to Section 20:

Requirements or regulations shall be consistent with local needs when imposed by a board of zoning appeals after comprehensive hearing in a city or town where (1) low or moderate income housing exists which is in excess of ten per cent of the housing units reported in the latest federal decennial census of the city or town or on sites comprising one and one half per cent or more of the total area zoned for residential, commercial or industrial use or (2) the application before the board would result in the commencement of construction of such housing on sites comprising more than three tenths of one per cent of such land area or ten acres, whichever is larger, in any one calendar year. . . .

§ 20 (emphasis added).

49. 760 MASS. CODE REGS. 56.03(1–3)(a) (2012).

50. *See* MASS. GEN. LAWS ch. 40B, §§ 20–23 (1998).

51. CONN. GEN. STAT. ANN. ch. 126a § 8-30g (2022).

52. *Id.*

53. *See* Devitt, *supra* note 33, at 267.

board, the Connecticut statute directs appeals of local housing commissions on conditioned or denied affordable housing developments to the presiding court that holds jurisdiction over the proposed development.<sup>54</sup> The Connecticut statute retains the Massachusetts ten percent affordable housing exemption structure and employs an explicit burden shifting scheme in which the local commission must defend its decision conditioning or denying the permit based upon sufficient evidence in the record.<sup>55</sup> In many ways, the structure of the Connecticut housing appeals board statute acts as a pared down version of the Massachusetts law and utilizes existing judicial systems to achieve similar ends.

Other states followed Massachusetts and Connecticut, each with their own customizations. Rhode Island passed the Low and Moderate Income Housing Act in 1991, which largely mirrors the Massachusetts 40B statute by establishing a comprehensive permitting process and separate housing appeals board with the power to enforce mandatory minimum “local needs.”<sup>56</sup> Rhode Island’s statute also incentivizes municipalities to develop an “approved affordable housing plan” by which the municipality and the housing appeals board can measure local housing deficiencies.<sup>57</sup> Illinois passed the Affordable Housing Planning and Appeal Act in 2003, which modeled its appeals structure off Chapter 40B, but instead of a comprehensive permitting process, the Illinois law requires a planning element for all municipalities similar to that used by Rhode Island.<sup>58</sup> Unless exempted for having an adequate amount of affordable housing, the Illinois statute required each municipality to create a comprehensive affordable housing plan by 2005.<sup>59</sup>

New Hampshire was the fifth and latest state to enact a housing appeals statute, “Chapter 678” in July 2020.<sup>60</sup> New Hampshire’s statute creates a housing appeals board similar to Massachusetts, Rhode Island, and Illinois, but it does not include a comprehensive permitting process or planning mandate.<sup>61</sup> Additionally, New Hampshire’s statute distinguishes itself from its four predecessors by not expressly acting as a mechanism to preserve

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54. CONN. GEN. STAT. ANN. ch. 126a § 8-30g(f) (2022).

55. See *infra* note 91 and accompanying text. See also Terry Tondro, *Connecticut’s Affordable Housing Appeals Statute: After Ten Years of Hope, Why Only Middling Results?*, W. NEW ENG. L. REV. 115, 121 (2001).

56. More specifically, a ten percent low- and moderate-cost housing stock requirement. See *supra* note 20 and accompanying text.

57. See 53 R.I. GEN. LAWS. § 45-53-6(d) (2006).

58. 310 ILL. COMP. STAT. ANN. 67/25(a) (West 2004).

59. See *infra* notes 143–144 and accompanying text.

60. N.H. REV. STAT. ANN. § 679:1–19 (LexisNexis 2020).

61. See Brown, *supra* note 23.

and create affordable housing.<sup>62</sup> Whereas all other extant housing appeals statutes make affordable housing central to their purpose, New Hampshire's law makes no mention of fulfilling local housing needs or prioritizing affordable housing development.<sup>63</sup> Functionally, the law operates as a generalized appeals process for all kinds of developers and land owners. Affordable housing advocates hope the statute will achieve the same procedural protections for low- and moderate-cost housing projects as statutes in other states despite the law not being linked to minimum affordable housing mandates or planning directives.<sup>64</sup>

In addition to appeals, permitting, and local mandate distinctions between the five states' housing appeals statutes, there is a notable divide among states in the constitution of board members. Housing appeals boards range in size, from three to seven members, and in source of appointment.<sup>65</sup> Most significantly, however, the statutes are split as to whether appeals boards should expressly include affordable housing advocates.<sup>66</sup> Rhode Island and Illinois explicitly reserve board positions for affordable housing advocates, and Massachusetts and New Hampshire do not.<sup>67</sup> This basic structural difference, as well as the distinctions between the five statutes' purposes, permitting, procedures, and exemptions, provide important context to the legal controversies and efficacy of housing appeals statutes. These statutory differences critically inform the components of potential model housing appeals legislation.

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62. Section 679:5 of the New Hampshire statute uses similar language to other housing appeals board statutes regarding the board's duties. In part it reads: "The board shall have the power and authority to hear and determine . . . whether the local land use board has imposed conditions of approval that render the proposal economically unviable; and whether denial by a local land use board was unreasonable or unlawful." § 679:5. However, the statute does not have a substantive affordable housing mandate (e.g., ten percent low- or moderate-income housing stock in each municipality), nor does it limit the appeals procedure to developers seeking to build affordable housing. *See id.*

63. *See id.*

64. Bob Sanders, *Housing Appeals Board Comes Under Fire at NH Senate Hearing*, N.H. BUS. REV. (Jan. 28, 2020), <https://www.nhbr.com/housing-appeals-board-comes-under-fire-at-nh-senate-hearing/> [<https://perma.cc/6END-7VWU>].

65. *See, e.g.*, MASS. GEN. LAWS ch. 23B, § 5A (1998); CONN. GEN. STAT. ANN. ch. 126a, § 8-30g(f) (West 2022); R.I. GEN. LAWS ch. 53, § 45-53-7(a)(1) (2009); 310 ILL. COMP. STAT. ANN. 67/50 (West 2021); N.H. REV. STAT. ANN. § 679:1-2 (LexisNexis 2020).

66. *See* sources cited *supra* note 65.

67. For example, Rhode Island's seven-person board calls for four local officials, one local zoning board member, one local planning board member, one city council member and one town council member. *See* 53 R.I. GEN. L. § 45-53-7(a)(1) (2009). Massachusetts's three-person committee consists of one employee or officer of the Department of Housing and Community Development, one member of a local board of selectmen, and one member of a city council or similar local governing body. *See* MASS. GEN. LAWS ch. 23B § 5A. Note, Connecticut uses its local courts to review appeals, so it does not have an appointed board. *See supra* note 54 and accompanying text.

### III. LEGAL CONTROVERSIES & CONSIDERATIONS

Although related in many ways to other widely used remedial legal mechanisms, housing appeals statutes occupy a unique space in land use law. Unlike many other affordable housing initiatives, housing appeals statutes are often both procedural and substantive in nature and consolidate traditionally distinct aspects of land control.<sup>68</sup> Given this unusual positioning in the statutory vernacular, several legal questions and considerations arise regarding housing appeals statute implementation. Although not exhaustive, three questions in particular are important for understanding the adoption, application, and performance of housing appeals statutes: first, what role should and can the state play in dictating municipal zoning policy through housing appeals statutes?; second, what are the standards of review and burdens of proof for housing appeals boards?; and third, who can participate in the housing appeals process?<sup>69</sup>

#### A. State & Municipal Control

Consistently the single largest controversy regarding housing appeals statutes is that they allow for state influence in what are typically local zoning and building approval decisions.<sup>70</sup> This concern has inspired significant legislative opposition from local officials and neighborhood groups in states with housing appeals statutes.<sup>71</sup> Municipal groups accurately point out that land use decisions deeply impact local community infrastructure, schools, and homes. Accordingly, they suggest regulation of such directly influential decisions should be made at the level with the most intimate knowledge of local needs. Exclusionary opinion, however, looms large in these opposition movements by crafting a perception that housing appeals statutes allow developers to ignore local zoning standards “carte blanche” and build residential “monstrosities.”<sup>72</sup> These arguments regularly

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68. See *supra* notes 44, 48 and accompanying text. See also Table 1 for a comparative chart of states’ procedural and substantive housing appeals statute elements.

69. See generally *State Survey of Housing Appeals Statutes*, NAT’L ASS’N HOME BUILDERS, <http://www.localhousingolutions.org/wp-content/uploads/2018/10/state-survey-of-housing-appeals-statutes-201706.pdf> [<https://perma.cc/7HG9-VRVN>].

70. See *Brown*, *supra* note 23; *Tondro*, *supra* note 55, at 147.

71. Most recently, the New Hampshire housing appeals statute weathered two last minute opposition bills in the beginning of 2020 aimed at repealing the housing appeals statute altogether. See *Brown*, *supra* note 23.

72. See *Ghio*, *supra* note 23; Alexis Harrison, Opinion, *Connecticut’s Affordable Housing Law Has Unintended Consequences*, CT MIRROR (Sept. 4, 2020), <https://ctmirror.org/category/ct-viewpoints/connecticuts-affordable-housing-law-has-unintended-consequences/>. [<https://perma.cc/G32D-6SGL>].

cite such local protectionism as a poorly veiled stand-in for racist and xenophobic sentiment.<sup>73</sup>

When facially challenged in court, however, housing appeals statutes have generally fared well. In the 1973 case *Board of Appeals of Hanover v. Housing Appeals Committee*, the Massachusetts Supreme Court upheld the statute, finding that “the Legislature’s adoption of an administrative mechanism designed to supersede, when necessary, local restrictive requirements and regulations, including zoning by-laws and ordinances, in order to promote the construction of low and moderate income housing . . . is a constitutionally valid exercise of the Legislature’s zoning power.”<sup>74</sup> The Massachusetts Supreme Court has historically adopted a rational basis test in evaluating the constitutionality of 40B, articulating the state only needs to show the statute is “a reasonable means to serve a legitimate public purpose.”<sup>75</sup> Rhode Island courts have adopted a similar standard of review for determining the constitutionality of its housing appeals statute, holding that the goal of providing “affordable, accessible, safe, and sanitary housing” is a valid legislative purpose achieved through reasonable ends.<sup>76</sup>

Similarly, in Connecticut, an early challenge to its housing appeals statute in *West Hartford Interfaith Coalition, Inc. v. Town of West Hartford*, led the court to adopt a deferential standard for housing appeals board decisions and the entire statutory scheme.<sup>77</sup> Like the Massachusetts Supreme Court, the Connecticut Supreme Court also found the state legislature’s intent was clearly to provide the ability for housing appeals boards to modify conditions and review denials of permits by local housing commissions, and that there was no other constitutional barrier to the statute.<sup>78</sup> The Connecticut, Rhode Island, and Massachusetts caselaw examples<sup>79</sup> illustrate the frequent challenges to whether the statutory scheme is an improper imposition of state legislative power. However, they also demonstrate that where housing appeals statutes are implemented,

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73. See, e.g., Keene, *supra* note 41. In discussing the then-recently passed Massachusetts 40B law, Keene described, “What many city officials fail to mention because it has become unpopular, is that they fear that low income housing in their own communities will make way for blacks from ghetto areas.” *Id.*

74. *Bd. of Appeals of Hanover v. Hous. Appeals Comm’n*, 363 Mass. 339, 385 (1973).

75. *Id.* See also *Simon v. Town of Needham*, 311 Mass. 560, 562 (1942).

76. See *Kaveny v. Town of Cumberland Zoning Bd. of Rev.*, 875 A.2d 1, 11 (R.I. 2005) (quoting 53 R.I. GEN. LAWS § 45-53-2 (2013)).

77. See *W. Hartford Interfaith Coal., Inc. v. Town Council of Town of W. Hartford*, 228 Conn. 498, 526 (1994). See also MANDELKER ET AL., *supra* note 18.

78. See *W. Hartford Interfaith Coal.*, 228 Conn. at 526.

79. At the time of this Note’s writing no facial attack to the current iteration of the Illinois Affordable Housing Planning and Appeal Act has been considered in Illinois courts. Moreover, due to its recent passage, no facial challenges exist in New Hampshire’s judicial system.

courts have consistently held that it is within the state's power to enact housing appeals boards to advance affordable housing interests.

### *B. Housing Appeals Board Judicial Burdens & Standards*

The standards of review and burdens of proof used by state housing appeals systems when evaluating whether an application was unduly rejected or encumbered are crucial to determining the power dynamic and results of the local zoning process.<sup>80</sup> The burden of proof question revolves around which party, the appealing developer or the local board, is required to show reasonable or unreasonable treatment of the development application.<sup>81</sup> Relatedly, the standard of review inquiry centers on what qualifies as a unreasonable condition or denial of an application.<sup>82</sup> Together, these inquires establish the legal foundation of housing appeals statutes and dictate party relationships to the system.

#### *1. Burdens of Proof*

The controversy over the burden of proof in housing appeals review played out vividly in Connecticut.<sup>83</sup> After initial cases broadly accepted the State's statutory appeals system,<sup>84</sup> the Connecticut Supreme Court held differently in *Christian Activities Council, Congregational v. Town of Glastonbury*.<sup>85</sup> Despite the state statute placing the burden of proof expressly on the local zoning commission to show its decision reasonable,<sup>86</sup> the court in *Christian Activities Council, Congregational* significantly lowered the commission's burden of proof to a "sufficient evidence" standard in the case of application denial or encumbrment.<sup>87</sup> This ruling paved the way for local zoning commissions to more easily satisfy their

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80. See *Quarry Knoll II Corp. v. Plan. & Zoning Comm'n of Town of Greenwich*, 256 Conn. 674, 716 (2001) (demonstrating that deference to local boards is a crucial purpose of the housing appeals statute).

81. See generally NAT'L ASS'N OF HOME BUILDERS, *supra* note 69.

82. See, e.g., Theodore C. Regnante & Paul J. Haverty, *Compelling Reasons Why the Legislature Should Resist the Call to Repeal Chapter 40b*, 88 MASS. L. REV. 77, 78 (2003).

83. See Tondro, *supra* note 54, at 147. See generally MANDELKER ET AL., *supra* note 18, at 392.

84. See *supra* note 77 and accompanying text.

85. See *Christian Activities Council, Congregational v. Town Council of Town of Glastonbury*, 735 A.2d 231 (Conn. 1999).

86. "The commission shall also have the burden to prove . . . that . . . the decision is necessary to protect substantial public interests in health, safety or other matters . . . [and] such public interest clearly outweigh the need for affordable housing; and such public interests cannot be protected by reasonable changes . . ." CONN. GEN. STAT. ch. 126a § 8-30g(g).

87. See Tondro, *supra* note 54, at 157.

burden and substantially undermined the remedial nature of the statute.<sup>88</sup> As the dissent in *Christian Activities Council, Congregational* notes, the majority ruling created a highly deferential standard for local commissions not aligned with the spirit of the statutory language to create affordable housing.<sup>89</sup> The ruling was deemed so detrimental to the purpose of the statute that a special committee on Housing appointed by the state's governor recommended and successfully advocated for the legislature to reinstate the more standard "preponderance" burden in 2000.<sup>90</sup> Currently, Connecticut maintains the burden of proof for determining reasonable conditions or denial of application on the local decision-making board by a preponderance of the evidence on the record.<sup>91</sup>

Other state housing appeals statutes have approached the burden of proof issue quite differently than Connecticut. Illinois's statute explicitly calls on the developer—not the local decision-making board or commission—to prove unfair denial or conditioned approval on appeal.<sup>92</sup> Similarly, New Hampshire adopts the appeals system of the state's superior court, which requires the petitioning party to specify why the denial or imposed conditions were unreasonable.<sup>93</sup> Massachusetts and Rhode Island both allow for their housing appeals boards to have independent or *de novo* review of the record to render their decisions.<sup>94</sup> However, in various scenarios, each state requires certain parties to carry different burdens of

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88. *Id.* As Professor Tondro explains:

The Christian Activities Council, Congregational interpretation leads to the anomalous situation in which a remedial statute designed to increase the amount of affordable housing ends up requiring a less demanding standard of judicial review of a commission's adverse decision than is presently required for similar land use decisions *not* involving affordable housing.

*Id.*

89. *See Christian Activities Council, Congregational*, 249 Conn. at 613. (Berdon, J., dissenting).

90. *See* Tondro, *supra* note 54, at 157–58.

91. *See supra* note 86.

92. "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." 310 ILL. COMP. STAT. § 67/30(b) (2013). *See also* Christian B. Hennon, *Home Sweet Home?: What Massachusetts Can Tell Us About the Prospects for the Illinois Affordable Housing Planning and Appeal Act*, 81 CHI.-KENT L. REV. 679, 686 (2006).

93. *See* N.H. REV. STAT. ANN. § 679:9; § 677:4. Note, sections 679:9 and 677:4 in conjunction appear to suggest a burden of proof on the developer, at least to develop a prima facie case; however, caselaw has not discussed the specifics of this burden.

94. *See, e.g., JCM, LLC v. Town of Cumberland Zoning Bd. of Rev.*, 889 A.2d 169, 177 (R.I. 2005); *Brooks v. Bd. of Appeals of Town of Chelmsford*, No. 08 MISC 386133 AHS, 2011 WL 6927686, at \*6 (Mass. Land Ct. Dec. 29, 2011), *judgment entered*, No. 08 MISC 386133 AHS, 2011 WL 6928299 (Mass. Land Ct. Dec. 29, 2011), *aff'd sub nom. Brooks v. Bd. of Appeals of Chelmsford*, 82 Mass. App. Ct. 1123 (2012); *Henshaw v. Bd. of Appeals of Town of Tisbury*, No. 304282AHS, 2006 WL 2514177, at \*4 (Mass. Land Ct. Aug. 31, 2006), *judgment entered*, No. 304282AHS, 2006 WL 2514176 (Mass. Land Ct. Aug. 31, 2006); *Zoning Bd. of Appeals of Woburn v. Hous. Appeals Comm'n*, 92 Mass. App. Ct. 1115 (2017).

proof. Both states, for instance, place a burden of proof on the developer to demonstrate that it has qualified for the permit and that certain conditions placed on the development by local boards have rendered the project infeasible or uneconomic.<sup>95</sup> By contrast, sometimes both states place burdens of proof on the local commission or board. Rhode Island has stressed the duty of the local board to develop a robust record for review.<sup>96</sup> Massachusetts, on the other hand, has placed a burden on the local commission to prove that a denial is “consistent with local needs.”<sup>97</sup> The broad array of burdens placed on parties by housing appeals board statutes reflects various levels of deference given by housing appeals systems to municipal governments and aggrieved developers. Particularly when combined with standards used for judicial review by appeals boards, these levels of burdens have critical impact on the performance of housing appeals statutes.

## 2. *Standards of Review*

Each state statute has taken a unique approach to establishing which local appeals decisions or conditions qualify for reconsideration by a state housing appeals board. In concert with the burden of proof inquiry, these standards of review establish the scope of the statutes’ remedial capacity.<sup>98</sup> The five statutes currently enacted use a mixture of three primary standards for reviewing local board decisions: first, general reasonability and lawfulness of the local decision or conditions; second, whether the conditions imposed render the project uneconomic or infeasible; and third, consistency with either local needs for affordable housing or a statutorily mandated affordable housing plan.<sup>99</sup>

At the most elementary level, each state provides its housing board—or judicial equivalent—the ability to determine and measure the lawfulness and reasonability of a local board’s decision to deny or condition a development plan.<sup>100</sup> Where available, caselaw has upheld this function of the statutes, often identifying it as the primary purpose of the legislation.<sup>101</sup> Across statutes, reasonableness has been defined by whether the local board

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95. See, e.g., *Town of Coventry Zoning Bd. of Rev. v. Omni Dev. Corp.*, 814 A.2d 889, 906 (R.I. 2003); *Regnante & Haverty*, *supra* note 82, at 82.

96. See *Town of Cumberland Zoning Bd. of Rev.*, 889 A.2d at 177.

97. See *Regnante & Haverty*, *supra* note 82, at 78.

98. See generally NAT’L ASS’N OF HOME BUILDERS, *supra* note 69.

99. See *supra* note 65.

100. See *id.*

101. See, e.g., *Zoning Bd. of Appeals of Woburn v. Hous. Appeals Comm’n*, 92 Mass. App. Ct. 1115 (2017); *Autumn View, LLC v. Plan. & Zoning Comm’n of Town of E. Haven*, 193 Conn. App. 18, 30 (2019), *cert. denied*, 333 Conn. 942 (2019); *E. Bay Cmty. Dev. Corp. v. Zoning Bd. of Rev. of Town of Barrington*, 901 A.2d 1136, 1146 (R.I. 2006).

decision appears to include exclusionary motivation for a project that would otherwise satisfy local standards or promote local needs.<sup>102</sup> By positioning reasonability in relation to exclusion, this basic standard of review works to promote accountability for local boards and establishes a foundation for additional standards of judicial review.

Massachusetts, Rhode Island, Illinois, and New Hampshire all use the “uneconomic” or “infeasible” standard of review, particularly when analyzing conditions placed upon a development proposal.<sup>103</sup> Connecticut uses an adjacent “substantial adverse impact” standard.<sup>104</sup> Massachusetts and Rhode Island provide similar definitions for what qualifies as uneconomic or infeasible.<sup>105</sup> Housing appeals boards may modify a local board’s conditions on an approved proposal if they require development to operate at a financial loss, jeopardize the source of funding for the project, or substantially impact the size or character of the development.<sup>106</sup> The impact on the size or character of the development largely relates to substantially conditioning the income level, tenant type, or rental price of the development to the point at which the entire subsidy or purpose of the development—to provide affordable housing—is undermined.<sup>107</sup> New Hampshire and Illinois’s statutes do not opine on the specific definition of the “economically unviable” or “infeasible” standards, but they likely hold similar tenets to the contemporary Massachusetts and Rhode Island standards.<sup>108</sup> However, since the New Hampshire law in particular is unconnected to explicit language regarding affordable housing development or federal subsidy, when put into practice its “economically unviable”

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102. See, e.g., *Town of Coventry Zoning Bd. of Rev. v. Omni Dev. Corp.*, 814 A.2d 889, 899 (R.I. 2003) (“An ordinance or regulation is reasonable if it is not designed or intended to exclude low and moderate income residents from the community or to discourage or frustrate the likelihood of success of a project.”); *Zoning Bd. of Appeals of Holliston v. Hous. Appeals Comm’n*, 80 Mass. App. Ct. 406, 416 (2011) (“It has long been held that it is unreasonable for a board to withhold approval of an application for a comprehensive permit when it could condition approval on the tendering of a suitable plan that would comply with State standards.”).

103. See MASS. GEN. LAWS ch. 40B, §23 (utilizing the “uneconomic” standard); 53 R.I. GEN. LAWS § 45-53-6(c)(1-5) (utilizing the “infeasible” standard); N.H. REV. STAT. ANN. § 679:5(III) (utilizing the “not economically viable” standard); 310 ILL. COMP. STAT. § 67/30(b) (utilizing the “infeasible” standard).

104. CONN. GEN. STAT. ANN. ch. 126a § 8-30g (g) (“[A]ny person whose affordable housing application is denied, or is approved with restrictions which have substantial adverse impact on the viability of the affordable housing development or the degree of affordability of the affordable dwelling unites in a set-aside development”).

105. See MASS. GEN. LAWS ch. 40B, § 20; 53 R.I. GEN. LAWS § 45-53-3(5).

106. See sources cited *supra* note 105. See also *Zoning Bd. of Appeals of Amesbury v. Hous. Appeals Comm’n*, 457 Mass. 748, 750 (Mass. 2010); *E. Bay Cmty. Dev. Corp.*, 901 A.2d at 1146.

107. See *supra* note 103.

108. N.H. REV. STAT. ANN. § 679:5(III).

standard may approve of any local decision that does not force economic loss for the developer.<sup>109</sup>

The final cornerstone standard of review for housing appeals boards is consistency with either local needs or a local development plan.<sup>110</sup> The Massachusetts statute explains that the “consistent with local needs” standard takes into account whether requirements are “reasonable in view of the regional need for low and moderate income housing considered with the number of low income persons in the city or town affected.”<sup>111</sup> The housing appeals board may modify or strike any decision incompatible with these established needs.<sup>112</sup> Functionally, however, for Massachusetts, Connecticut, and Rhode Island, consistency is measured in relation to the ten percent statutory affordable housing mandate for each municipality.<sup>113</sup> That is, local needs are met when the ten percent threshold is passed and until that point the housing appeals board maintains judicial oversight over the municipality. In Rhode Island and Illinois, the consistency standard of review also incorporates the planning element of the statutes.<sup>114</sup> Both states’ housing appeals boards may use consistency with the local state-approved affordable housing plan as a measurement for whether to “affirm, reverse, or modify the conditions of, or add conditions to, a decision made by the [local housing board].”<sup>115</sup> The consistency standard of review allows housing appeals boards in these states to expand beyond mere stock percentages and develop more robust criteria by which a decision must be measured.<sup>116</sup> In addition to the reasonability and feasibility standards of review, the consistency standard defines the scope of these statutes and articulates the nature of their enforcement powers.

### C. *Standing Requirements: Who Can Participate?*

A final major distinction between current housing appeals statutes relates to how each law treats whether parties may use the system. This question is

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109. *Id.*

110. *See, e.g.*, MASS. GEN. LAWS ch. 40B, § 23; CONN. GEN. STAT. ANN. ch. 126a § 8-30g (g); 53 R.I. GEN. LAWS § 45-53-6(c)(1-5); 310 ILL. COMP. STAT. § 67/30.

111. MASS. GEN. LAWS ch. 40B, § 20.

112. *Id.*

113. *See* CONN. GEN. STAT. ANN. ch. 126a § 8-30g (k); 53 R.I. GEN. LAWS § 45-53-3(4)(i). *See also* JCM, LLC v. Town of Cumberland Zoning Bd. of Rev., 889 A.2d 169, 174 (R.I. 2005); Kenneth Forton, *Expanding the Effectiveness of the Massachusetts Comprehensive Permit Law by Eliminating Its Subsidy Requirement*, 28 B.C. ENV’T AFFS. L. REV. 651, 661 (2001).

114. *See supra* notes 57–59.

115. 310 ILL. COMP. STAT. § 67/30(f); *see also* 53 R.I. GEN. LAWS § 45-53-6(b).

116. The planning elements for Illinois, for instance, require not only a ten percent affordable housing mandate in the jurisdiction, but also include “incentives that local governments may provide for the purpose of attracting affordable housing,” and “identification of lands within the jurisdiction that are most appropriate for the construction of affordable housing.” 310 ILL. COMP. STAT. § 67/25(b).

important for determining how broadly protections extend and therefore how efficacious the statutory scheme is. Most statutes do not allow every type of developer to take advantage of statutory permitting and procedural benefits.<sup>117</sup> Rather, they stipulate that a developer must qualify for such protections by providing a threshold amount of affordable housing, being federally funded, or having a certain organizational distinction.<sup>118</sup>

The spectrum of housing appeals board statute standing is bordered at the margins by the Massachusetts and New Hampshire statutes.<sup>119</sup> On the more restrictive side, Massachusetts limits eligible developers to public agencies, nonprofit organizations, and limited dividend organizations, all of which must be fundable by a “Subsidizing Agency under a Low or Moderate Income Housing subsidy program.”<sup>120</sup> On the expansive side of the spectrum, New Hampshire’s statute limits housing appeals board review to any final decision of “municipal boards, committees, and commissions regarding questions of housing and housing development.”<sup>121</sup> Despite echoing the same procedural language of the Massachusetts statute regarding the evaluation of permit denials and conditions, the New Hampshire law ties no function of its statute to the underlying goal of affordable housing.<sup>122</sup> Where the Massachusetts law limits eligible developers for the housing appeals process to specific organizations with certain profit caps and funding sources, New Hampshire places virtually no limitations on developer qualifications for its appeals process.

The Connecticut, Rhode Island, and Illinois appeals statutes fall in between the marginal examples set by Massachusetts and New

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117. See, e.g., MASS. GEN. LAWS ch. 40B, § 21; CONN. GEN. STAT. ch. 126a §§ 8-30g (1), (3), (6); 53 R.I. GEN. LAWS § 45-53-3(9); 310 ILL. COMP. STAT. § 67/15.

118. See sources cited *supra* note 117.

119. MASS. GEN. LAWS ch. 40B, § 21; N.H. REV. STAT. ANN. § 679:5(I).

120. 760 MASS. CODE REGS. 56.04 (2021). Note that a “limited dividend organization” is defined as any entity that “proposes to sponsor a Chapter 40B project; is not a public agency or nonprofit; and is eligible to receive a subsidy.” LOW-AND MODERATE-INCOME HOUSING: THE ANTI-SNOB ZONING ACT, LINKAGE, INCLUSIONARY ZONING, AND INCENTIVE ZONING, ZONE MA-CLE 5-1 § 5.4.2. Limited Dividend Organizations are “typically . . . limited to a profit of no more than 20 percent of total development costs.” § 5.10.6.

121. N.H. REV. STAT. ANN. § 679:5(I). This includes but is not limited to:

(a) planning board decisions on subdivisions or site plans; (b) board of adjustment decisions on variances, special exceptions, administrative appeals, and ordinance administration; (c) the use of innovative land use controls; (d) growth management controls; (e) decisions of historic district commissions, heritage commissions; and conservation commissions; (f) other municipal permits and fees applicable to housing and housing developments; (g) matters subject to the board’s authority may include mixed-use combinations of residential and nonresidential uses.

*Id.*

122. See *supra* notes 62–63.

Hampshire.<sup>123</sup> Rhode Island's statute is closest to Massachusetts's; it maintains the federal subsidy requirements, but adds the ability of private developers proposing qualified affordable housing projects to utilize the system in addition to public agencies, nonprofit organizations, and limited equity housing cooperatives.<sup>124</sup> Instead of placing profit limits on certain developers, the Rhode Island statute provides explicit direction as to how long units must remain affordable in order to qualify.<sup>125</sup>

The Connecticut statute expands slightly on the Massachusetts and Rhode Island models. Instead of designating specific developers, the Connecticut statute allows any developer who submits a qualifying "assisted housing" or "set-aside development" application to utilize the housing appeals process.<sup>126</sup> Under the Connecticut statute, an "assisted housing" application requires similar federal subsidy requirements to those imposed by Massachusetts and Rhode Island.<sup>127</sup> However, "set-aside development applications" are more inclusive of developers because they require no federal subsidy attachment.<sup>128</sup> Rather, they allow any developer who submits a project with thirty percent or more affordable housing units that remain affordable for at least forty years to use the appeals process.<sup>129</sup> The Illinois statute follows the same model as Connecticut: any "entity seeking to build an affordable housing development" is eligible for the appeals process.<sup>130</sup> Two categories of development qualify as approved affordable housing developments in Illinois. First, any housing project appropriately subsidized by the federal or state government; and second,

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123. See CONN. GEN. STAT. ANN. ch. 126a §§ 8-30g (1), (3), (6); 53 R.I. GEN. LAWS § 45-53-3(9); 310 ILL. COMP. STAT. § 67/15.

124. 53 R.I. GEN. LAWS § 45-53-3(9). Note, however, that the state of Rhode Island has placed some limitations on for-profit involvement, and even declared a year-long moratorium from for-profit applications under the statute due to "an unprecedented volume and complexity of development applications." § 45-53-4 (b)(1).

125. To qualify as low- or moderate-income housing, the development must include units that "will remain affordable through a land lease and/or deed restriction for ninety-nine (99) years or such other period that is either agreed to by the applicant and the town or prescribed by the federal, state, or municipal government subsidy program but that is not less than thirty (30) years from initial occupancy." 53 R.I. GEN. LAWS § 42-128.2-3. Federal subsidy requirements govern income maximums for individuals to be eligible for affordable housing. See, e.g., *Operating Subsidies for Affordable Housing Developments*, LOC. HOUS. SOLS., <https://www.localhousingolutions.org/act/housing-policy-library/operating-subsidies-for-affordable-housing-developments-overview/operating-subsidies-for-affordable-housing-developments/> [https://perma.cc/X7DN-EJF7].

126. CONN. GEN. STAT. ANN. ch. 126a §§ 8-30g (1), (3), (6).

127. § 8-30g (3).

128. § 8-30g (6).

129. Families must "pay thirty per cent or less of their annual income, where such income is less than or equal to eighty percent of the median income." *Id.* Where units are conveyed by deeds containing covenants or restrictions, fifteen percent of the units must be sold or rented to families whose income is less than or equal to sixty percent of the median income and the other fifteen percent or more must go to families at or below eighty percent of median income. *Id.*

130. 310 ILL. COMP. STAT. § 67/15.

any housing in which at least twenty percent of the dwelling units are affordable and will remain so for fifteen to thirty years.<sup>131</sup> In this way, both the Illinois and Connecticut statutes provide more expansive, nonentity-based standing for the appeals process, while maintaining the affordable housing structure the New Hampshire law lacks.

A final important consideration of housing appeals judicial standing is whether abutters can intervene against a decision approving an affordable housing development.<sup>132</sup> In such a scenario, the appeals process is flipped on its head. Rather than providing procedural protections for affordable housing developers, an aggrieved third party attempts to use the appeals system to stop the development of affordable housing. In at least two states, Massachusetts and Rhode Island, abutters are allowed to intervene against an approved affordable housing project.<sup>133</sup> In contrast to the majority of standing requirements of housing appeals boards, which largely revolve around eligible developers, abutter standing can operate as an extension of exclusionary practice against affordable housing development. When comprehensively measuring participatory requirements of housing appeals statutes, it is important to incorporate adversarial abutter involvement in addition to typical developer standing.

#### IV. EFFICACY OF HOUSING APPEALS BOARDS

Housing appeals statutes have proven to be effective tools for increasing low- and moderate-cost housing stock. The Massachusetts statute is often lauded as one of the most impactful affordable housing initiatives in the state's history.<sup>134</sup> The program is credited with creating over sixty thousand affordable units across the state and has helped increase the Massachusetts affordable housing stock to 10.1% as of the end of 2020.<sup>135</sup> Other states have

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131. *Id.* The affordability requirements are fifteen years in the case of owner-occupied housing and thirty years in the case of rental housing. *Id.*

132. See NAT'L ASS'N OF HOME BUILDERS, *supra* note 69.

133. See, e.g., Taylor v. Bd. of Appeals of Lexington, 451 Mass. 270, 272 (2008); JCM, LLC v. Town of Cumberland Zoning Bd. of Rev., 889 A.2d 169, 172 (R.I. 2005).

134. 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, 393 (2001).

135. See DEP'T OF HOUS. & CMTY. DEV., CHAPTER 40B SUBSIDIZED HOUSING INVENTORY (SHI), <https://www.mass.gov/doc/subsidized-housing-inventory/download> [<https://perma.cc/5L8M-GZTS>]; CITIZENS' HOUS. & PLAN. ASS'N, CHAPTER 40B FACT SHEET, [https://www.chapa.org/sites/default/files/40%20B%20fact%20sheet\\_0.pdf](https://www.chapa.org/sites/default/files/40%20B%20fact%20sheet_0.pdf) [<https://perma.cc/PHE6-EBK8>]; see also Christophe Courchesne, *What Regional Agenda?: Reconciling Massachusetts's Affordable Housing Law and Environmental Protection*, 28 HARV. ENV'T L. REV. 215, 232 n.76 (2004) (noting that at the time of 40B's passage only two municipalities met the ten percent affordability threshold).

seen demonstrated results since the passage of their own statutes. Illinois's efforts removed twenty-two jurisdictions from their nonexempt list between 2013 and 2018 for achieving at least ten percent affordable housing inventory.<sup>136</sup> As of 2010, only eight Rhode Island municipalities had not made at least "adequate progress" towards their affordable housing plan goals, and twenty out of thirty-nine communities were exempt or showing "good" to "excellent" progress on their five-year housing plans.<sup>137</sup>

Although all states with housing appeals statutes have seen progress in affordable housing development since their enactment,<sup>138</sup> some results have been lackluster. Connecticut's law, which was enacted over thirty years ago, is estimated to only have produced roughly five thousand affordable housing units.<sup>139</sup> Moreover, the state has not increased the number of towns past the ten percent exemption threshold in over two decades.<sup>140</sup> In Rhode Island, after initial progress in high need areas,<sup>141</sup> affordable housing growth has stagnated in recent years.<sup>142</sup> In Illinois, the appeals board successfully encouraged municipalities to develop effective affordable housing plans in years immediately after the legislative enactment, but recently many localities have exploited the Illinois Housing Development Authority's relative lack of executive power to skirt their planning obligations.<sup>143</sup> Since

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136. Compare 2018 ILL HOUS. DEV. AUTH., REPORT OF NON-EXEMPT LOCAL GOVERNMENTS, <https://df7qosnywqs6g.cloudfront.net/wp-content/uploads/2015/07/2018-NELG-List-Final.pdf> [<https://perma.cc/E5U5-E9BF>], with ILL HOUS. DEV. AUTH., AFFORDABLE HOUSING PLANNING AND APPEAL ACT: 2013 NON-EXEMPT LOCAL GOVERNMENT HANDBOOK 35–37, <https://www.ihda.org/wp-content/uploads/2016/03/Final2013AHPAANELGHandbook.pdf> [<https://perma.cc/8G2W-9PLC>].

137. R.I. OFF. OF HOUS. & CMTY. DEV., AFFORDABLE HOUSING PROGRESS REPORT, <https://ohcd.ri.gov/online-resources/affordable-housing-progress-report> [<https://perma.cc/N6TT-7ARH>].

138. Note the absence of New Hampshire from this discussion due to the statute being too novel to produce adequate data for efficacy measurement.

139. See, e.g., Ghio, *supra* note 23; *The 8-30g Statute Builds Housing Opportunities and Should Remain Unchanged*, HOMECONNECTICUT (Mar. 13, 2017), [https://www.pschousing.org/files/HC\\_8-30g\\_FactSheet.pdf](https://www.pschousing.org/files/HC_8-30g_FactSheet.pdf) [<https://perma.cc/GU6F-3UVK>].

140. Compare CONN. STATE DEP'T OF HOUS., 2019 AFFORDABLE HOUSING APPEALS LIST – EXEMPT MUNICIPALITIES (2019), <https://portal.ct.gov/-/media/DOH/2019-Appeals-List-for-online.pdf> [<https://perma.cc/6AY2-4VAE>], with CONN. STATE DEP'T OF HOUS., 2002 AFFORDABLE HOUSING APPEALS PROCEDURE LIST (2002), [https://portal.ct.gov/-/media/DOH/Housing\\_Reports/Copyofappealslist2002pdf.pdf](https://portal.ct.gov/-/media/DOH/Housing_Reports/Copyofappealslist2002pdf.pdf) [<https://perma.cc/7FWM-F4JL>].

141. Ellen Callahan, *Will an Increase in Profits Increase Affordable Housing? Examining the Limited Dividend Requirement of Chapter 40b of the Massachusetts General Laws*, 50 SUFFOLK U. L. REV. 649, 662–63 (2017).

142. See *Low & Moderate Income Housing By Community Dashboard*, RIHOUSING, <https://www.rihousing.com/low-mod-income-housing/> [<https://perma.cc/SQR5-2BJT>].

143. Karen Berkowitz, *Many Towns Snub State's Affordable Housing Mandate*, CHI. TRIB. (Aug. 7, 2015, 5:17 PM), <https://www.chicagotribune.com/suburbs/highland-park/ct-hpn-suburbs-affordable-housing-mandate-tl-0813-20150807-story.html> [<https://perma.cc/5L44-553N>].

the Authority has no punitive capabilities to compel municipal participation, the state's appeals board has gone shockingly unutilized.<sup>144</sup>

Due to housing appeals statute's roots in procedural protection and self-advocacy, it is often difficult to measure their performance solely by number of units produced.<sup>145</sup> Some of the most powerful force of housing appeals statutes comes from engendering political will for affordable housing development. While estimates show only a modest number of units built directly as a result of the Connecticut statute, it is estimated that the law has encouraged thousands more low- and moderate-income housing developments through local initiative.<sup>146</sup> In states with strong planning initiatives, like Illinois and Rhode Island, the process and development of those plans has redefined the landscape of local accountability for affordable housing and introduced mechanisms by which such accountability can be measured.<sup>147</sup> These states show that the efficacy of housing appeals statutes is measured not just with procedural protections or units built, but also within the political process. Housing appeals statutes offer a tool that elevates the priority of affordable housing in local municipalities and works to engender long lasting behavioral change.

#### V. CONSIDERATIONS & COMPONENTS OF A MODEL HOUSING APPEALS BOARD STATUTE

Housing appeals board statutes clearly provide promise for achieving affordable housing. Their dynamic approach to both procedural and substantive aspects of development offer a compelling and relatively cheap tool for promoting equitable housing policy. At its core, a model housing appeals statute would retain the same basic structure as most of the current iterations: establishing a distinct, speedy appeals board vested with the power to review local land use decisions that deny or unduly condition affordable housing developments.<sup>148</sup> As the guiding questions of Part IV

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144. Natalie Moore, *With No Oversight, Illinois Cities Flout State Law That Encourages Affordable Housing*, WBEZ CHI. (Jan. 21, 2021, 6:00 AM), <https://www.wbez.org/stories/with-no-oversight-illinois-cities-flout-state-law-that-encourages-affordable-housing/7d298f69-113e-4541-9132-9af59d6b3667> [https://perma.cc/JY7A-3WTZ]. New changes to the Illinois law, however, aim to strengthen enforcement power of the Illinois Housing Development Authority. See Natalie Moore, *Illinois Lawmakers Strengthen a Law that Requires Some Cities to Submit Affordable Housing Plans*, WBEZ CHI. (June 8, 2021, 6:00 AM), <https://www.wbez.org/stories/illinois-lawmakers-strengthen-a-law-that-requires-some-cities-to-submit-affordable-housing-plans/eec5d624-2f6c-4943-9e71-f019fbbe3370> [https://perma.cc/T249-QWXC].

145. See Krefetz, *supra* note 134, at 394.

146. See HOMECONNECTICUT, *supra* note 139.

147. See Erika Barber, *Affordable Housing in Massachusetts: How to Preserve the Promise of "40b" with Lessons from Rhode Island*, 46 NEW ENG. L. REV. 125, 151 (2011).

148. See *supra* note 34 and accompanying text.

illustrate, none of the existing statutes capture all components of a successful, purpose-driven model housing appeals statute. Accordingly, comparative analysis of the current statutes provides salient lessons that should inform model legislation. By combining and fine-tuning key substantive and procedural elements from these laws, housing appeals boards can be effectively scaled across the country as a valuable instrument of comprehensive housing reform.<sup>149</sup>

#### A. Substantive Components

Although the central function of the housing appeals board is to provide procedural protections for affordable housing development, housing appeals statute efficacy is closely linked its substantive measures.<sup>150</sup> Three components used in current statutes provide the type of substantive incentive to engage developers and municipalities in affordable housing development: first, comprehensive permitting systems;<sup>151</sup> second, mandatory minimum housing stock exemptions;<sup>152</sup> and third, planning elements.<sup>153</sup>

The comprehensive permitting system included in the Massachusetts and Rhode Island statutes acts as a catalyst for encouraging affordable housing development. By consolidating expensive, laborious permitting requirements, the system incentivizes the incorporation of low-cost housing and reduces barriers to development. Without a comprehensive system, local governments may still weaponize the complicated permitting process to exclude or make economically unviable projects deemed unfavorable.<sup>154</sup> Statutes without such a provision leave a gap in procedural protections for developers. Additionally, this cost benefit to developers can act as a serious economic incentive to include affordable housing in a development proposal.<sup>155</sup> In this way, the comprehensive permitting system is an excellent opportunity to symbiotically protect and promote the interests of affordable housing. In other words, this key component directly combats the

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149. Compare these recommendations to the Model Legislation outlined by the American Planning Association (APA). There are some common components between the APA's model and those outlined in this Note below, but many components, such as mandatory planning elements, expansive standing requirements, and smart minimum thresholds, are not included. GROWING SMART LEGISLATIVE GUIDEBOOK: MODEL STATUTES FOR PLANNING AND THE MANAGEMENT OF CHANGE 4-107 (Stuart Meck ed., 2002).

150. See MANDELKER ET AL., *supra* note 18.

151. See *supra* note 43 and accompanying text.

152. See *supra* notes 48–49 and accompanying text.

153. See *supra* notes 57–59 and accompanying text.

154. See Barber, *supra* note 147, at 130 (noting that disqualification from the comprehensive permitting process can increase pre-development costs between twenty and thirty-five percent).

155. *Id.* at 130–31.

threshold buy-in issue that many states face when it comes to encouraging low- and moderate-cost housing development.

The mandatory minimum housing stock exemption gives housing appeals board statutes the necessary gusto to increase the number of affordable units on the ground. By setting a minimum affordable housing threshold and allowing reprieve from appeals scrutiny once that threshold is achieved, housing appeals statutes create accountability for municipal governments. History has shown that most municipalities lack the political will to prioritize or even consider affordable housing development.<sup>156</sup> By tying precious municipal autonomy to state-mandated quota, housing appeals boards effectuate sustainable and equitable housing development in the face of exclusionary principles. New Hampshire's lack of this function likely spells doom for its statute's ability to drive affordable housing development against reluctant municipalities.<sup>157</sup> Put simply, there will be no mechanism to compel rapid departure from the status quo. In this way, the mandatory minimum stock exemption is absolutely necessary to successful model legislation.

Each state statute that includes a mandatory minimum—Massachusetts, Rhode Island, Connecticut, and Illinois—all use ten percent as the threshold for a municipality to qualify as an “exempt local government.”<sup>158</sup> There is indication, however, that the ten percent figure is both arbitrary and inflexible. Even in states that generally perform well in affordable housing metrics, the threshold number should be higher than ten percent.<sup>159</sup> For example, Massachusetts's current statewide affordable housing rate is 10.1%,<sup>160</sup> but it only has forty-eight affordable and available homes for every one hundred living under thirty percent AMI, and only sixty-two per every one hundred living between thirty-one and fifty-one percent AMI.<sup>161</sup> Model housing appeals legislation must measure housing need statewide and then set a threshold number based on those findings. Moreover, states implementing housing appeals statutes should consider smart boundaries for affordable housing incentives, where municipalities would have to

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156. *See supra* notes 16–17 and accompanying text.

157. *See supra* note 61.

158. *See, e.g.*, 310 ILL. COMP. STAT. § 67/15.

159. *See* ANDREW AURAND, DAN EMMANUEL, DANIEL THREET, IKRA RAFI & DIANE YENTEL, NAT'L LOW INCOME HOUS. COAL., THE GAP: A SHORTAGE OF AFFORDABLE HOMES 8 (2020), [https://reports.nlihc.org/sites/default/files/gap/Gap-Report\\_2020.pdf](https://reports.nlihc.org/sites/default/files/gap/Gap-Report_2020.pdf) [<https://perma.cc/G6HF-4296>]. West Virginia holds the crown for having the most affordable and available rental homes per one hundred extremely low-income renter households with sixty-two. Only eight other states have fifty or more. *Id.*

160. *See supra* note 135 and accompanying text.

161. *The Gap: Massachusetts*, NAT'L LOW INCOME HOUS. COAL., <https://reports.nlihc.org/gap/2019/ma> [<https://perma.cc/LY74-LK3S>].

obtain certain percentages of extremely low, very low, and low-income housing to qualify for exemption. Perhaps in such a scenario each municipality would be responsible for fifteen percent extremely low-income housing (less than thirty percent AMI), ten percent very low income (less than fifty percent AMI), and five percent low income (less than eighty percent AMI) on a graduated scale. This scheme would increase housing stock in a more targeted manner while also decreasing pressure on availability in lower income strata. Such a scheme may prove more cost-effective than a blanket increase as well, depending on the metrics used to define affordability in the state. Regardless, model housing appeals legislation aimed at promoting low-cost housing development should move away from an arbitrary figure and towards smart exemption thresholds that reflect actual need in the state.

Lastly, incorporating a state-approved planning element is fundamental to housing appeals sustainability. Encouraging municipalities to generate their own plan for satisfying local needs works to engender political buy-in for equitable housing at best and begrudging, but positive, reprioritization of affordable housing at worst.<sup>162</sup> Either way, the most sustainable way forward in conquering exclusionary land use policy is to provide agency to municipalities in crafting affordable housing directives. However, as seen with the stalling of the Illinois statute's planning mandate, it is important that the state agency enforcing the statute have legitimate power to enforce local plans and appeals procedure.<sup>163</sup> Moreover, thoughtful guidelines for state approval of plans that focus on affordable housing development first, is crucial to reaping the benefits of a planning directive in model legislation.

### *B. Procedural Components*

The procedural elements of housing appeals statutes provide the basic framework for anti-exclusionary policy across municipalities. Similar to the substantive components, current statutes illustrate three primary procedural elements should be used in purpose-driven model legislation: first, a burden shifting scheme away from appellants and towards localities; second, incorporating local plan consistency standards of review; and third, expanding developer standing while still maintaining the primacy of affordable housing.

Whether and to what extent an appealing developer must defend its proposal in front of a housing appeals board greatly impacts the efficacy of the procedural protection. Confusingly, multiple states like New Hampshire and Illinois place burdens on the developer to prove why a local land use

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162. See Barber, *supra* note 147, at 143.

163. See *supra* notes 143–144.

decision was improper.<sup>164</sup> Such a structure seemingly lets the local decision-making body off the hook for defending their decision and severely undermines the accountability central to the purpose of the statute. To avoid this issue and strengthen procedural protections for affordable housing developers, model legislation should follow the precedent set by Connecticut's statute.<sup>165</sup> In the case of local decisions that heavily conditioned or denied an affordable housing application, the Connecticut law places the burden of defending that decision squarely on the shoulders of the municipality.<sup>166</sup> Adopting this automatic burden shifting scheme promotes justice by aligning procedural mechanics with anti-exclusionary statutory objectives. Fundamentally, it runs counter to the spirit of the statute to require an impinged developer to explain why their proposal should have been accepted. Rather, the Connecticut scheme assumes qualification of affordable housing proposals and reflects deference to developers that promotes equitable policy.

In addition to an appropriate burden-shifting scheme, current statutes illustrate that robust housing appeals boards must use three standards of review when evaluating local decisions. First, boards must review whether the decision was reasonable and lawful; second, if conditions were placed on the project, boards must consider if the conditions were so burdensome as to make the project infeasible or uneconomic; and third, boards shall assess whether the municipal decision coincides with threshold requirements and local plans. Only Rhode Island and Illinois's statutes incorporate all three of these elements in their review formula.<sup>167</sup> As these states show, all three standards are necessary because they each provide unique procedural protections essential to driving housing equity. The unreasonable and unlawful standard offers a baseline of accountability applicable to all denials and conditions.<sup>168</sup> The infeasible or uneconomic standards protect specifically against municipalities weaponizing conditioning and local permitting processes as strategic exclusionary tactics.<sup>169</sup> Lastly, as discussed in the substantive component analysis, consistency with local threshold needs *and* an approved affordable housing plan give statutes necessary force and encourages municipal involvement.<sup>170</sup> Without all three standards of review, a model housing appeals statute

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164. See *supra* notes 92–93 and accompanying text.

165. See *supra* note 91 and accompanying text.

166. See *supra* note 91 and accompanying text.

167. See 53 R.I. GEN. LAWS § 45-53-3(5); 310 ILL. COMP. STAT. § 67/30.

168. See *supra* note 100 and accompanying text.

169. See *supra* note 103 and accompanying text.

170. See *supra* notes 156, 162 and accompanying text.

would hold developers vulnerable and miss an opportunity to engage local land use policy.

The last major procedural component, standing requirements, vary significantly across the current housing appeals board statutes.<sup>171</sup> Nonetheless, a model statute serious about promoting affordable housing should take a more expansive view of standing, rather than a narrow one. However, a statute should not be so expansive as to dilute the cause of affordable housing as New Hampshire's law does.<sup>172</sup> The Illinois statute provides the best example of striking the balance between under- and over-inclusion of participants in the appeals board system. The Illinois system removes the federal funding and profit limit qualifications Massachusetts places on developers and focuses instead on providing its own definition of what qualifies as affordable housing.<sup>173</sup> In doing so, Illinois opens the protections of the statute to as many developers as possible while still maintaining a firm focus on the statute's affordable housing purpose. One area for further consideration, however, is whether measures for what qualifies as affordable housing should be raised, thereby increasing the share of affordable housing in new developments. For example, the Illinois statute allows developers to qualify for the appeals process if they are federally subsidized or have proposals in which at least twenty percent of the dwelling units are deemed affordable.<sup>174</sup> Increasing either the number of units to qualify, or the length of time those units must stay under covenants to remain affordable, may be justified to meet local needs. However, these considerations should be balanced by potential diminished returns on some developer buy-in should the number be placed too high.

The final important consideration of standing is whether abutters should be able to intervene to contest a local board's approval of an affordable housing project.<sup>175</sup> To achieve the most protective policy for affordable housing development, model legislation should consider precluding abutters' ability to intervene in approved decisions at all. More realistically, however, placing a high burden of proof on intervening abutters would help maintain remedial options for truly aggrieved parties while also promoting the equitable spirit of the statute.

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171. See *supra* note 118 and accompanying text.

172. See *supra* note 121 and accompanying text.

173. See *supra* note 131 and accompanying text.

174. 310 ILL. COMP. STAT. § 67/15.

175. See *supra* note 132 and accompanying text.

## CONCLUSION

The United States' affordable housing crises has no simple fix. Lack of housing is too vast and systems perpetuating inequity are too ingrained in American policy for a one-size-fits-all solution. However, housing appeals statutes provide a realistic and cost-effective mechanism for attacking two of the most urgent issues facing the achievement of affordable housing policy: exclusionary procedural practices and low housing stock. In turn, housing appeals statutes work to undermine socioeconomic and racial inequality. Although housing appeals statutes bring up several controversial legal issues, comprehensive model legislation can take on those concerns without diluting affordable housing efforts. Most notably, model housing appeals statutes should consider the use of several substantive and procedural components to achieve maximum impact, including a consolidated permitting process, smart mandatory housing stock thresholds, state-approved equitable housing plans, appellant burden shifting, comprehensive standards of review, and liberal standing requirements for developers. In addition to the tested foundation of the basic housing appeals board, these components will strengthen future housing appeals statutes. Although housing appeals statutes are just one piece of the puzzle, they provide an opportunity for many states to take a meaningful and immediate step towards overcoming exclusionary municipal practices and achieving housing equity.

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<b>TABLE 1: Housing Appeals Statutes Substantive and Procedural Comparative Chart</b>						
<b>State</b>	<b>Substantive Elements</b>			<b>Procedural Elements</b>		
	<i>Comprehensive Permitting Process</i>	<i>Mandatory Minimum Housing Stock</i>	<i>Mandatory Planning Element</i>	<i>Burden of Proof</i>	<i>Standards of Review</i>	<i>Standing Requirement(s)</i>
<b>Connecticut</b>	No	Yes, 10%	No	Local Board must justify decision by a preponderance of evidence on the record	1) General reasonability and lawfulness 2) Substantial adverse impact 3) Consistent with local needs	Any developer who submits a qualified assisted housing or set-aside development
<b>Illinois</b>	No	Yes, 10%	Yes	Developer must prove unfair denial or conditioning	1) General reasonability and lawfulness 2) Infeasible 3) Consistent with local plan	Any entity seeking to develop affordable housing
<b>Massachusetts</b>	Yes	Yes, 10%	No	<i>De novo</i> review with varied burdens	1) General reasonability and lawfulness 2) Uneconomic 3) Consistent with local needs	Only eligible developers of federally subsidized public, non-profit, and limited dividend organizations
<b>New Hampshire</b>	No	No	No	Developer must prove unfair denial or conditioning	1) General reasonability and lawfulness 2) Uneconomic	All developers
<b>Rhode Island</b>	Yes	Yes, 10%	Yes	<i>De novo</i> review with varied burdens	1) General reasonability and lawfulness 2) Infeasible 3) Consistent with local plan	Only eligible federally subsidized public and private organizations

