**The Nelson A. Rockefeller Center at Dartmouth College**

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# RESOLVING AFFORDABLE HOUSING DISPUTES

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*Identifying and Analyzing Alternative Dispute Resolution Processes for Vermont*

Prepared to the Vermont House of Representatives, Ways and Means Committee

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## EXECUTIVE SUMMARY

In Vermont, the affordable housing review process can take up to a decade, involving communities and developers in lengthy and expensive legal battles that can cause damage to all those involved. The authors of this report have been tasked with researching methods of streamlining the affordable housing review process so that, no matter what the outcome of a given case, a decision is rendered quickly and effectively. This report investigates the affordable housing review process in Vermont, alternative processes employed by other states, and the possible policies that Vermont may adopt based on these state case studies. The following analysis examines four state case studies—Massachusetts, Illinois, Connecticut, and Rhode Island—utilizing existing literature and personal interviews. The authors have spoken with non-profit organization leaders, policy makers, academics and community members who are all stakeholders in their states' affordable housing review processes. From this research, one finding comes through the most clearly: whether an individual is seeking to block or build an affordable housing project, a long, drawn-out review process harms the people on both sides and leaves communities in limbo. Increasing the efficiency of dispute resolution is therefore essential to all stakeholders.

## 1. INTRODUCTION

While this report is primarily concerned with the affordable housing review process, it is first necessary to understand and define affordable housing in general. "Affordable housing" is a term that carries distinct connotations depending on the context, and is often used in conjunction with "public housing," "low-income housing," and "workforce housing," among others. Public policy discussions of affordable housing at the state and national levels are fundamentally rooted in the federal government's 30 percent standard—that no more than 30 percent of a household's income should be spent on owning or renting a house. Vermont has adopted this standard in its legal procedures. Companies in the private sector also tend to use this metric as part of their assessment calculations of a potential buyer's ability to pay off a mortgage loan.

It is important to recognize the 30 percent standard's practical limitations, despite its ubiquity in public policy discussions. The 30 percent standard compares a household's income to the cost of the unit, along with other income categories.[1] It does not acknowledge the fact that lower-income families larger in size often have a harder time finding adequate housing options compared to a smaller family of the same income.[2] Nor does it address other external factors impacting a homeowner's available housing options, such as the commute time to work as well as the possible racial and socioeconomic discrimination in the housing market.[3]

Public policy discussions of affordable housing for middle- and lower-income households tend to break down into two main categories—low-income rental housing, and affordable

ownership housing. In either case, housing is generally made more affordable through the provision of subsidies, both to affordable housing occupants as well as producers.

*1.1 Identifying "low-income" households*

In discussing the types of affordable housing subsidies utilized by states like Vermont, it is important to distinguish "low-income" households from "moderate-income," "very low-income," and "extremely low-income" households. The US Department of Housing and Urban Development (HUD) has outlined several criteria to determine a household's eligibility for government-assisted housing subsidies, which also serve as a working definition of the "low-income" spectrum. Table 1.1 breaks down these terms more precisely.

**Table 1: Working definitions of moderate, low, very low, and extemely low incomes.**

| Income | Percent of Local Area Median Income |
|---|---|
| Moderate | 80-95 |
| Low | 50-80 |
| Very low | Less than 50 |
| Extremely low | Less than 30 |

*Source: Miles et al., "Real Estate Development: Principles and Processes." Urban Land Institute, 2007.*

The crucial measurement for these parameters is the local area median income. It is worth pointing out that "low-income" in one part of the country may carry a completely different definition in another part of the country. Though used at all levels of government, this "low income" standard does not take other financial measurements into account, such as employer benefits packages, enrollment in other government assistance programs, or ownership of other equity and assets.[4]

In many locations in the Northeast, along with other parts of the country, extremely low- and very low-income households are unable to effectively compete with other buyers for market-rate housing units.[5]

*1.2 The Vermont Situation Exemplified: Woodstock Safford Commons Case Study*

One particularly vivid example of the delays that occur under Vermont's current review process is the case of Safford Commons, an affordable housing project site purchased by the Woodstock Community Trust in 2005. The land was initially zoned for 72 units, though in response to neighbors' criticisms, the developers (Housing Vermont) decided to build only 36 units and leave the remainder of the land as green space. However, further engagement with the neighbors made it clear to the developers that a segment of the surrounding community did not want an affordable housing project in the neighborhood. Community members feared overcrowding in an area comprised mostly of single-family homes, as well as increased traffic. The neighbors took legal action, initially contesting the development of Safford Commons in the Environmental Court of

Vermont, and eventually appealing it to the Superior Court and the Vermont Supreme Court (see section 3.3 for a more thorough breakdown of the legal appeals process in Vermont).

David Roy, one of the Woodstock residents heavily involved in the Safford Commons project appeal process, said he felt that he and his neighbors "were put in a defensive mode immediately" while working with Housing Vermont.[6] Roy said residents also felt that they could not adequately contest the project due to the developers' superior legal power.

"Fighting [project proposals] is virtually impossible," said Roy. "We had help financially from an attorney, otherwise we couldn't have done this…[Housing Vermont had] big-dollar attorneys. Fortunately, we were luckier than most in that we had help that way."[7]

The Safford Commons project was ultimately approved after a nine-year litigation battle. Groundbreaking occurred in October 2014, and construction has since begun.[8] At this point, the project's legal, engineering and financing costs total $1.5 million, or $43,000 per unit of additional costs due to the legal challenges by the neighbors. This does not include construction, which bring the project's total development costs to $9.1 million.[9]

Roy and Housing Vermont officials both agreed that seemingly endless court battles are lose-lose situations involving valuable taxpayer dollars. Indeed, many nonprofit groups, Vermont state representatives, and academics agree that legislative action should streamline the affordable housing review and appeals process in a way that speeds the final decision while treating all stakeholders fairly. One piece of legislation submitted in February 2015 proposes giving affordable housing developments scheduling priority and requires a decision within 120 days. Though the bill, currently in committee, has raised concerns that the 120-day limit would be too short, its introduction exemplifies Vermont's willingness to reconsider the current the affordable housing review process.[10]

*1.3 Vermont's Housing Stock*

The context within which this review process occurs is one of a limited affordable housing stock across the state. Affordable housing is defined as less than 30 percent of income for a low- or moderate-income family, yet a report released by the Vermont Affordable Housing Coalition demonstrated that more than a quarter of Vermont renters pay more than 50 percent of their gross income in rent. Furthermore, 63 percent of extremely low-income renters end up spending more than half of their limited income on rent and utility costs.[11] This report, alongside publications from the National Low Income Housing Coalition, demonstrates that there were just 39 rental homes affordable and available for every 100 extremely low-income households in Vermont in 2012, the last year for which data was available. Extremely low-income households have incomes at or below 30 percent of area median income (approximately $21,000 a year). Statewide,

there is a need for 9,203 more rental homes to close the housing gap for extremely low-income renters.[12]

## 2. RESEARCH QUESTIONS AND METHODOLOGY

This study aims to determine ways that Vermont may conduct the review processes more efficiently for all involved stakeholders in affordable housing projects. As it functions currently, the review process is both costly and time consuming for stakeholders, including private developers and public citizen advocates. Three basic research questions guide the research process for this study:

1. Why is Vermont seeing these problems?
2. How have other states addressed affordable housing concerns?
3. What potential alternatives make the most sense for Vermont moving forward?

To answer these questions, in particular the latter two, the authors examine the cases of Massachusetts, Illinois, Connecticut, and Rhode Island. These four states have each implemented different forms of dispute resolution, with varying degrees of success, defined here as a more efficient and effective review process. This study analyzes the literature on these case studies and includes interviews with key individuals involved in state government, the nonprofit sector, the private sector, and academia. Studying multiple states' nuanced approaches to affordable housing review processes allows for a deep and dynamic analysis of the policy options available to Vermont.

## 3. LEGAL CONTEXT

Before studying the details of the review process, it is first necessary to examine affordable housing in a national context. The federal government's role in housing began around the turn of the twentieth century, when the government adopted Progressive-era policies that built and provided affordable housing. However, trends led to greater enthusiasm for using the tax code to support private development. During the twentieth century, key state legislation such as Vermont's Act 250 also solidified states' roles in providing affordable housing.

### *3.1 Supply-Side Subsidy Programs: Public Housing and Low-Income Housing Tax Credit Program*

The federal government's project-based subsidy programs are a form of supply-side interventions, which are directed toward the construction or rehabilitation of new affordable housing units. Unlike tenant-based assistance that allows individuals to choose from among affordable housing options – such as the sought-after Housing Choice Vouchers – project-based programs are tied to specific properties and assist the tenants living there at any given time.[13]

The landmark legislation in this area is the Housing Act of 1937, a prominent subsidized housing program involving the development and operation of publicly constructed and owned housing units. In this New Deal-era program, the federal government paid for development costs, and local taxpayers were responsible for the operating costs of the affordable housing project. Section 8 of the act introduced two project-based programs, New Construction and Substantial Rehabilitation, affecting newly built and substantially rehabilitated properties. Congress repealed the New Construction and Substantial Rehabilitation programs in 1983, after which the Department of Housing and Urban Development could no longer fund new projects under these initiatives except for those affecting the elderly or handicapped. Project-based assistance remains part of Section 8, however, namely through vouchers allocated by states' public housing authorities.[14] Another key housing program dates to the Fair Housing Act of 1968, in which the federal government sought to increase housing affordability by introducing subsidies for operations in conjunction with new rent restrictions.[15]

*3.1.1 Low-Income Housing Tax Credit (LIHTC) Program*

Policy makers in the past two decades have tried to increase the production of affordable housing by attracting more private capital markets and construction expertise. This was done primarily through the Low Income Housing Tax Credit (LIHTC) program. Through the LIHTC program, the federal government annually provides a certain number of tax credits to each state based on the state's population. States then distribute the credit to developers.[16] The program requires that a certain percentage of units are both allocated to occupants making 60 percent or less of the median area income, and maintained according to appropriately market-adjusted rents.[17]

Experts largely agree that the LIHTC program has been more successful than earlier iterations, though some researchers say LIHTCs are not the best indicator of housing market strength. Recent research has found no significant relationship between the number of LIHTC units (and other subsidized units) built in a given state and the size of the state's current housing stock.[18]

*3.2 Demand-Side Subsidies: Section 8 Vouchers*

Literature consistently suggests that demand-side subsidies are the most successful of the federal government's housing programs. Under this policy, the federal government provides funds for very low-income households renting units approved by the local housing authority. In order to be eligible, tenants must meet the "very low" income standard determined by the Department of Housing and Urban Development (HUD). The initiative aims to turn to the private market to supply the housing.

In 1983, Congress introduced a flexible voucher program under Section 8 that allowed tenants to keep the savings if they could find a habitable unit that cost less than the free

market rate. For housing that cost more than the free market rate, tenants could live in these units if they covered the difference themselves.[19]

In Vermont, eleven Public Housing Agencies (PHAs) administer local housing vouchers. The PHAs receive federal funds from HUD. By law, a PHA must provide 75 percent of its voucher funds to extremely low-income applicants, whose incomes do not exceed 30 percent of the area median income. HUD calculates local area median incomes and releases the information to PHAs.[20]

*3.3 Act 250*

One significant piece of legislation affecting affordable housing in Vermont is Act 250, the state's land use law. The state legislature passed the legislation in 1970 in an effort to address growing concern over hastily built projects that were negatively impacting citizens' quality of life. According to Vermont's Natural Resources Board, which is in charge of administering Act 250, "the Act 250 program provides a public, quasi-judicial process for reviewing and managing the environmental, social and fiscal consequences of major subdivisions and developments in Vermont."[21] Yet while it is widely supported, the legislation can lead to delays in the review process. The bill established a statewide review process for any development project of 10 or more units, whether publicly or privately supported, though projects in designated downtown areas are exempted.[22] Developers must submit an application to one of nine District Environmental Commissions, dispersed across the state's 14 counties. Each Commission is comprised of three citizen Commissioners appointed by the governor of Vermont. In order to earn the necessary approval, projects must satisfy 10 criteria concerning protecting environmental, municipal, and aesthetic interests. Applicants must already possess the necessary local zoning permits or approvals from the state's Department of Environmental Conservation—many of which are used as metrics demonstrating compliance with the Commissions' criteria.[23]

Act 250 also establishes an appeals process for parties not satisfied with a Commission's ruling. Appeals are made to the Environmental Division of the State Superior Court, colloquially known as the Environmental Court, and then the State Supreme Court. Appeals must be made within 30 days after the decision date.[24] There is no time limit on the Court's decision.

The review process made it easier for the state to manage the influx of potential projects and assess their long-term impacts. Act 250 has proven successful in its ability to effectively stop damaging projects. However, the requirements lengthen an already arduous local review process.[25] Not all affordable housing developers or citizen groups can afford years of litigation, especially when facing appeals to higher courts. The Safford Commons case, for example, saw its fate decided by the State Supreme Court after two rounds of appeals processes. One of the project's nine years fighting for approval was spent on solely awaiting a decision from the Environmental Court, only to see another appeal filed to the State Supreme Court.[26] While Safford Commons is an

anomaly, nothing prevents a similarly drawn-out case from reoccurring under the law as it currently stands.

## 4. STATE CASE STUDIES

*4.1 The Illinois Approach*

The state of Illinois has a history of promoting affordable housing over the resistance of local officials and community members. The Illinois model is important to consider because the state has found innovative ways to provide resources to help achieve specified goals, coupling statewide legislation with a move toward enabling local communities to tackle the issue more directly. In 1989, the state created the Illinois Affordable Housing Trust Fund, which currently underwrites roughly $30 million annually for investments in affordable housing.[27] Since 2000, the state has turned to both tax credits for investors and direct support for low-income renters.

One notable policy is the Affordable Housing Planning and Appeal Act (AHPAA), passed by the Illinois General Assembly in 2003. The Act seeks to increase community commitment to providing affordable housing, particularly the Chicago region.[28] The AHPAA identifies a category of "Non-Exempt Local Governments," which are incorporated municipalities of over 1,000 residents where less than 10 percent of the housing stock qualifies as affordable. These municipalities must submit a detailed Affordable Housing Plan to the Illinois Housing Development Authority, often with the assistance of state funding.[29] The submission must be made within 60 days of a plan's adoption or revision. As of 2013, 68 of the state's 1,296 municipalities met the non-exempt definition.[30] An amendment to the act allows neighboring non-exempt municipalities and others with less than 25 percent affordable housing – considered "At-Risk" communities under the act – to collaborate in order to reach the 10 percent mark collectively. Additionally, housing finance agencies assist developers building in at-risk and non-exempt communities by giving them preferences in the LIHTC allocations process.[31]

Among the non-exempt communities, reactions to the policy were mixed, with some protesting what they saw as an intrusion into local affairs and others saying the construction of enough affordable housing to exceed 10 percent would be economically unfeasible.[32] The Illinois Housing Development Authority has funded 25 developments in non-exempt communities, accounting for 1,900 units, and another 40 in at-risk communities.[33]

The Act also established a seven-member State Housing Appeals Board (SHAB) to hear appeals from developers alleging unfair denials or unfeasible conditions imposed by non-exempt municipalities during the review process. Developers filing appeals may request a decision on the matter, but there is no mandated timeline. Additionally, the developer must be the one to show the town acted unfairly, a burden of proof that has been reversed

elsewhere—most notably in Connecticut. The SHAB can deny an appeal if the municipality involved has adopted and successfully implemented its affordable housing plan, or if the decision was related to a public health and safety concern. The SHAB members must consist of the following: a retired judge, a county board member, an affordable housing developer and an advocate, and the following three members from non-exempt communities—a mayor or municipal council or board member, a planning board member, and a Zoning Board of Appeals member. No more than four of these members may be of the same political party. The Illinois Housing Development Authority's executive director serves as an eighth, nonvoting member. The positions are unpaid.

To date, the SHAB has not heard any appeals. The SHAB was set to go into effect in 2009, which some saw as an overlong delay from the Act's 2003 passage. It was not fully staffed until 2012, however, and its administrative rules were not finalized until 2013 – ten years after the AHPAA's passage.[34] In its 2011 progress report, the state's Housing Task Force identified three main obstacles to the SHAB's formation and functioning. These were based on the task force's experience seeking to fill the board. First, the task force believed that too many potential appointees were worried about a conflict of interest, given that they were required to be involved with local housing planning already. Second, the membership requirements were too specific and precluded otherwise qualified candidates from applying. Third, the limit on members sharing a political party was perceived as overly intrusive.[35] While a streamlined appeals process was a well-meaning development in state housing policy, designed to serve all stakeholders in a fair and efficient manner, the details of the plan resulted in its delay. If Vermont choses to adopt a similar procedure, it may wish to consider the effect that each detail can have on a policy's outcome, lest a delay-avoiding policy become delayed itself.

Housing Coordination Services Manager Aisha Turner acknowledged the difficulty of forming the SHAB, but said that the lack of appeals could be a positive sign of developers feeling they have been treated fairly or hoping to avoid the reputational risk that comes with a lawsuit. She added that the Illinois Housing Development Authority, where she works, has heard little feedback on the matter from developers.[36]

*4.2 The Massachusetts Approach*

Before passing Chapter 40B, the affordable housing zoning law in Massachusetts, the Commonwealth dealt with issues in a similar manner to those in Vermont. Chapter 40B enables local zoning boards of appeals (ZBAs) to approve housing developments under more flexible terms if at least 20-25 percent of the units have long-term affordability controls and restrictions.[37] The law was passed in 1969 to help break down the barriers created by local zoning laws, review processes, and other restrictions that kept affordable housing projects from moving forward.

Similar to Illinois, Massachusetts has set a goal for 10 percent of the housing in all neighborhoods to be affordable for low and moderate-income families and individuals. Communities can use the less-restrictive provisions of Chapter 40B to gain approval for quality lower-cost housing proposals, and studies have shown that the law has generated affordable housing developments that could not have been built under standard zoning laws.

The review process for affordable housing development proposals is simplified and streamlined by Chapter 40B, which contributes to the program's success. Each proposal must first be approved by a state or federal housing program, and at least 25 percent of the units must be affordable to lower income households. Towns are allowed to establish a preference for local residents, and developers are limited in the amount of profit they can make. After the project is deemed eligible, it must be submitted to the local Zoning Board of Appeals (ZBA) which has the power to grant all local approvals necessary after consulting with other relevant boards, such as the Planning Board and Board of Health. The ZBA cannot deny a comprehensive permit outright unless the community is certified as being in compliance with its Affordable Housing Plan or if at least 10 percent of all housing units in the community are on the Subsidized Housing Inventory. Additionally, the developer must still obtain various permits required by state statutes, such as state highway access permits, wastewater disposal permits (Title 5), and a local building permit. State regulations and statutes, such as all building codes, remain fully in effect under the comprehensive permit. Obtaining these permits has not been a significant factor in inhibiting affordable housing in Massachusetts.[38] The ZBA also has the authority to apply more flexible standards than the strict local zoning by-law requirements.[39] This results in a more efficient process that allows projects to be approved on the local level with greater expediency. The ZBAs also work with town officials, developers, and community members to reach a consensus on the project's details.

If a ZBA rejects an affordable housing development, the applicant can appeal the decision to the State Housing Appeals Committee (HAC), which can overrule the local decision unless the project presents serious health or safety issues that cannot be mitigated. The HAC does not consider possible impacts on traffic, schools, community services, taxes, neighborhood aesthetics or home values. The right to appeal is only available in communities that have not met the standards of Chapter 40B. To reduce the number of appeals, a municipality must have 10 percent of its total housing qualifying as low-income housing.[40]

The program's results are well documented. Since the law was enacted in 1969, over 48,000 units in nearly 900 developments have been created. In the early 2000s, approximately 34 percent of all housing production in Greater Boston was directly attributable to Chapter 40B.[41] In the same decade, 82 percent of all new production of affordable housing units in communities below the 10-percent threshold were direct results of the law. Massachusetts currently has over 50 communities that have exceeded the 10 percent threshold, up from 23 in 1997. Thirty-eight more communities are at eight

or nine percent and are likely to reach the threshold goal soon. Another 50 communities are hovering around six or seven percent and are moving closer every day.[42] Many cities and towns, similar to those in Illinois, have created affordable housing committees that are responsible for planning and implementing a local strategy to build affordable housing complexes in their communities. Alongside its goals of generating new affordable housing units, Chapter 40B has created clear requirements for affordable housing appeals and lowered the number of appeals by prioritizing consensus-building and limiting the number of municipalities that can appeal. Additionally, by linking towns' eligibility to appeal to their affordable housing stock, it has aligned both of its main goals in a way that promotes affordable housing while limiting the number of appeals made throughout the state.

*4.3 The Connecticut Approach*

Connecticut, the state with the second-highest levels of income inequality,[43] has taken a unique "stick-and-carrot" approach to affordable housing legislation. The "stick" for the state's 169 towns is the Affordable Housing Land Use Appeals Act of 1990, which reverses the burden of proof when a municipality denies a developer's application to construct affordable housing. Under the law, also known as section 8-30g, a municipality must show its denial was "necessary to protect substantial public interests in health, safety…and such public interests clearly outweigh the need to for affordable housing."[44]

On the developers' end, 30 percent of the units in the proposed project must be affordable. Meeting the definition of affordable requires half of the units to be priced at eighty percent of the state or area median income, whichever is lower, and the other half at sixty percent. Courts have sided with developers over towns in around two thirds of the appeals made. In cases that pass through the courts—superior, appellate, and supreme—each appeal can take 12 to 18 months, but most cases settle before reaching this point.[45]

In passing this policy, Connecticut sought to address what it described as an "unequal distribution of wealth and resources caused in part by towns' exclusionary land use decisions, which has created an imbalance between the housing needs of low-income, urban minorities and the housing opportunities of their more affluent, white, suburban neighbors."[46] However, this imbalance remains. Additionally, the law continues to face resistance, with opponents citing a desire to give towns more control over the process, a fear of profit-hungry developers, an interest in avoiding overcrowding, and a decline in the value of nearby housing.[47] David Fink, policy director at the nonprofit Partnership for Strong Communities, said resistance arises because towns "don't like the loss of control; they don't like the change."[48] While towns in which 10 percent of all housing qualifies as affordable are exempt from the law, this describes just 31 of 169 towns.[49]

Balancing the "stick" of section 8-30g is the "carrot" of the Incentive Housing Zones (IHZ) policy, implemented in 2008. Part of the Connecticut Housing Program for Economic Growth, commonly known as HOMEConnecticut, the policy incentivizes

towns to create zones with greater population density, streamlined permitting processes, and more affordable housing. IHZ approval takes a maximum of 90 days, with a preliminary decision issued within 60 days. Towns that engage in this process receive grant funds from the Department of Housing before, during and after the zone's development. The policy's standard of affordability is lower than 8-30g's, with at least 20 percent of the zone's units made affordable to those earning eighty percent of the area median income or less. As of January 2015, 69 towns have created IHZs, though current state budgetary constraints have decreased the amount of funding available.[50] Additionally, many of these zones have not been developed, according to Michael Santoro, director of the Department of Housing's Office of Policy, Research and Housing Support.

Experts interviewed recommended similar policies for other states, as the dual approach of positive and negative incentives has been especially effective. The fast IHZ approval timeline and the frequency of settlements under 8-30g have streamlined Connecticut's affordable housing development process. Additionally, "it's pushed towns to create a lot of housing that they wouldn't otherwise have created," Fink said. One important distinction for other states to consider is that both 8-30g and IHZ are rooted in Connecticut's strong tradition of home rule, or towns' authority over local governance. As Vermont is not a home rule state, the policies would require modifications. However, the "stick and carrot" approach to affordable housing may be adapted to other states and has seen generally, if not uniformly, positive results.

*4.4 The Rhode Island Approach*

Processing an affordable housing proposal in Rhode Island takes no longer than five months, a stark contrast from the years-long process that often occurs in Vermont. This fast-moving process is outlined in the Low and Moderate Income Housing Act of 1991, which, among other things, required the state's municipalities to dedicate 10 percent of their overall housing stock to low and moderate income housing (LMIH). The Act is allows for-profit, non-profit, or limited dividend developers to apply to a municipality for a single comprehensive permit for rental housing development if at least 20 percent of the units are subsidized by a federal or state program. Like other states, Rhode Island also has an appeals process for developers whose applications are turned down at the municipal level. The appeals process goes through the State Housing Appeals Board, which has the authority to override a local board's rejection of the comprehensive permit. This must occur in a timely manner, with appeals filed within 20 days of the denial notice and a hearing held by the SHAB with 20 days of the filing of the applicant's statement. The SHAB has 30 days to issue a decision after the hearing, and then judicial review can be sought in the Superior Court within 20 days of that decision. Judicial review is conducted without a jury.

Since its passage, the Act has been amended five times. The most important revision came in 1999, when the state provided an alternative for urban cities or towns to the 10

percent threshold and immunity from the developer appeals. The act now provides that an urban city or town must have 5,000 occupied year-round rental units, which must comprise 25 percent or more of the municipality's year round housing units and the low and moderate income units must comprise 15 percent or more of the rental stock. This amendment essentially created a higher standard for urban municipalities. Legislators also amended the Act to limit the abilities of municipal review boards to deny requests for LMIH permits only under the following circumstances:

1. The municipality has an approved Affordable Housing Plan and is meeting the housing needs of the citizens
2. The proposal is inconsistent with the local plan
3. The proposal is inconsistent with local needs
4. The community has met or has plans to meet the goal of 10 percent of the year round unites or, in the case of an urban city or town, 15 percent of the occupied rental housing unites as being LMIH
5. Concerns for the environment and health and safety of current residents have not been adequately addressed

Beyond the efficient appeals process, the effectiveness of the Rhode Island act has been questionable. Only 15 of 39 cities or towns are in compliance with the 10 percent LMIH goal. At least seven municipalities have been granted exemptions because of the small size of their rental/LMIH stock. While the Act has failed to spur affordable housing developments throughout the state, urban areas seem to be benefitting most from the requirements of state law. The fifteen municipalities in compliance with the goal were also the most urban areas in Rhode Island. Data show that these areas had 75 of the total number of LMIH units in the state, while they only occupy 14 percent of the land. Data also show that the municipalities that have met the state's housing goal are denser, have smaller white populations, and lower median incomes.

## 5. POLICY OPTIONS

### *5.1 Create a Strict Appeals Timeline*

First, Vermont could pass legislation creating a strict timeline for the appeals process. Each step would occur within a maximum number of days, preventing a case like Safford Commons from occurring again. Rhode Island, for example, has chosen to take this approach. With appeals filed within 20 days, a hearing held within another 20, a board decision in 30 days, and a 20-day deadline to appeal the Superior Court, the process takes no longer than five months. If Vermont were to adopt a similar approach, it would need to select a timeline tailored to the volume of appeals heard and the system's capacity. Therefore, the exact numbers chosen are flexible, and need not conform to Rhode Island's timetable. Setting a deadline for decisions on appeals could help provide a timely and effective process for developers and community members alike.

Looking to the other end of the process, legislators could set a limit on the time in which developers receive an initial decision. Legislators may face resistance to this approach, however, as evidenced by the reaction to the recently introduced H.B. 234, which proposes giving affordable housing proposals priority in scheduling appeals and requires a decision within 120 days after submitting an application. In a Vermont Public Radio article on the bill, Vermont Natural Resources Council executive director Brian Shupe was quoted saying that the proposal could unfairly favor developers and make a complex process too rushed.[51]

*5.2 Set 10-Percent and 20-Percent Standards*

As Massachusetts, Illinois, and other states have done already, Vermont could enable the District Environmental Commissions to approve housing developments under more flexible terms, if at least 20 to 25 percent of the units have long-term affordability controls and restrictions. This links the state's goal of creating more affordable housing with its goal of streamlining the review process. Under this option, towns are allowed to establish a preference for local residents. As demonstrated successfully in states like Massachusetts, the boards work with town officials, the developers, and community members to reach a consensus on the details of the project. This ensures that community members get a say in what the project will be like. The involvement of local players in the process, ensuring that local community members are involved with (but not unnecessarily slowing) the process could be compatible with Vermonters' high levels of involvement in community affairs.

A related option is tying a municipality's status in the appeals process to its current affordable housing stock and future plans. For example, in Illinois, the AHPAA identifies a category of "Non-Exempt Local Governments," which are incorporated municipalities of over 1,000 residents where less than 10 percent of the housing stock qualifies as affordable. These municipalities must submit a detailed Affordable Housing Plan to the Illinois Housing Development Authority, often with the assistance of state funding.[52] If a town that has completed such a plan faces an appeal from a developer whose proposal it has rejected, the SHAB can deny the developer's appeal. Similarly, Massachusetts' Chapter 40B stipulates that a municipality with under 10 percent affordable housing stock may not appeal to developers. While the 10- and 20-percent numbers are flexible, the option presented here for Vermont to consider is one that ties a town's current affordable housing stock and its plans to increase it to the affordable housing review and appeals process.

*5.3 Shift the Burden of Proof*

One possible change to the Vermont appeals process is shifting the burden of proof from developers to municipalities. Instead of developers being required to prove why their applications were unjustly denied, municipalities would have to show why their denials were necessary. Connecticut has used this approach since 1990, requiring municipalities

to show their denial was in the interest of public health and safety if that municipality falls has fewer than 10 percent of units designed as affordable housing. Though most cases settle out of court, the stricter requirements create more clear-cut definitions of which types of cases will be successful in the appeals process. Similarly, Rhode Island has created a five-part list of acceptable reasons for towns to deny a developer's proposal. This list is more flexible than the Massachusetts policy, as it allows municipalities to deny proposals inconsistent with the affordable housing plans they had created. Such policies have faced resistance, however, due to the decreased flexibility given to communities. Additionally, changing the burden of proof may not initially speed up the appeals process as courts begin creating precedents for future cases. Despite this possible setback, creating a clear-cut list of reasons for denying a developer's approval—as restrictive or expansive as that list might be—could help create clearer outcomes and expectations throughout the process. Furthermore, shifting the burden of proof could create a more efficient process in the long run, despite initial hurdles, as it may reduce the number of cases. However, empirical support for this is currently limited. As more data from Rhode Island and Massachusetts become available over the next couple years, this claim can be further evaluated.

*5.4 Use a "Stick-and-Carrot" Approach*

Next, Vermont could adopt a similar approach to the stick-and-carrot system used in Connecticut, providing incentives for towns as well as stricter measures for those that lack affordable housing options. In Connecticut, section 8-30g acts as the "stick," giving towns with low affordable housing stock higher standards to meet when denying affordable housing proposals, while the Incentive Housing Zones are the "carrot," offering towns funding and fast-track approval for zones that include affordable housing. While this does not directly change the appeals process, the system could encourage towns to work more closely with the developers to ensure a mutually acceptable outcome, allowing the towns to earn the available incentives and avoid the potential downsides of denying proposals. When looking at Connecticut's Incentive Housing Zones and 8-30g, however, Vermont would need to be aware of how Connecticut's home rule status affects the policies' town-centered structure. The fact that Vermont is not a home rule state does not prevent it from adopting a similar policy, however, given that the affordable housing process does center on individual municipalities.

*5.5 Ensure Community Input*

A policy option that tackles this issue would have to provide some sort of mechanism for community input. This has shown to be instrumental in the longevity of effective legislation in other New England states. This aspect of policy will be particularly important in Vermont, due to the significance of citizenry involvement in town policy, as exemplified in town meetings.

The Safford Commons case shows the importance of neighborhood residents voicing their opinions in a productive dialogue with developers and other project stakeholders. When interviewed, David Roy, one of the residents involved in the Safford Commons appeal, said he and other citizens feel that "the system is forced upon you." An effective policy option might seek to balance streamlining the appeals process with ensuring community input.

*5.6 Balance Detail and Efficiency*

Though Vermont is unlikely to set up an entity modeled after Illinois' State Housing Appeals Board, given that its own appeals infrastructure is already in place, the Illinois case nonetheless offers valuable lessons for Vermont. The SHAB was not set to begin hearing cases until six years after the legislation establishing it, which was already perceived as too long of a delay, and then was not fully operational for another four years after that due to strictly detailed requirements about the board's composition. Ensuring that any new procedures it establishes will become effective in a timely manner, and that the timelines it sets are realistic, is an important consideration. While clearly detailed procedures are important, too much detail can hinder the creation of an effective process. Second, ensuring that any new procedures maintain an open dialogue with developers and municipalities that will allow the state to gauge the legislation's on-the-ground impact is also important. Illinois did not know why the SHAB had not seen any appeals—a knowledge gap that precludes the state from fully assessing its actions and may be preventing it from enacting necessary changes to the law.

## 6. CONCLUSION

Vermont is at a turning point in its affordable housing review process. With cases like Safford Commons in mind, legislators and stakeholders are ready to consider potential methods of streamlining Vermont's system of reviewing potential affordable housing projects. The policy options proposed in this report—all based on four states' experiences amending their own review processes—provide state and local policymakers with viable alternatives to the current practices employed by the state in resolving affordable housing disputes. While all of the options are not as clearly adaptable to the policy environment in Vermont, each provides an interesting and thought provoking alternative to the status quo in Vermont. Each proposal possesses a sense of the importance of building and maintaining an efficient and equitable review process. Such review processes seek to treat all parties fairly, from community members to developers and town officials, and provide all stakeholders with timely decisions. Achieving these goals in Vermont, the state and its communities will be better able to set and meet affordable housing goals, whatever those may be, and Vermont residents will feel empowered by the process. Affordable housing decision-making is complicated, balancing the needs and interests of numerous parties, and the state is working to make the process as fair, equitable, and efficient as possible. We hope that the policy options presented in this report will assist policymakers in their efforts to achieve statewide affordable housings goals.

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