

Note

Connecticut Retrenches: A Proposal To Save the Affordable Housing Appeals Procedure

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I. INTRODUCTION

The Connecticut General Assembly recently enacted significant changes to the state's Affordable Housing Appeals Procedure.¹ This Note explains why these amendments, which took effect on October 1, 2000, fail to advance the statute's original purpose of increasing the amount of low- and moderate-income housing throughout Connecticut.² The amendments, while purporting to help low-income housing consumers, are likely to slow considerably the construction of affordable housing in the state.

The Appeals Procedure was originally enacted to promote the construction of housing for low- and moderate-income families by providing developers an opportunity to obtain judicial review of towns' denials of their applications to develop affordable housing. The law applied both to nonprofit and public housing organizations and to private developers. It allowed private developers to appeal denials as long they placed restrictive covenants on twenty percent of the units in their

1. An Act Implementing the Recommendations of the Blue Ribbon Commission To Study Affordable Housing Regarding the Affordable Housing Appeals Procedure, 2000 Conn. Acts 206 (Reg. Sess.) (codified at CONN. GEN. STAT. § 8-30g (2001)).

2. The state's need for affordable housing continues to be substantial. A commission charged with evaluating the state's need for affordable housing estimated that, as of 1997, there was "a supply shortfall of 67,915 [housing] units [that would be affordable] for households [earning] between 0-80% of' area median income. REPORT OF THE BLUE RIBBON COMMISSION TO STUDY AFFORDABLE HOUSING 33 (2000) [hereinafter BLUE RIBBON COMMISSION REPORT].

development, creating so-called deed-restricted units.³ Since the procedure was enacted more than a decade ago, private developers have constructed by far the greatest number of housing units under the Appeals Procedure, more than nonprofit or public-sector housing developers. Studies have shown that not only the deed-restricted units that private developers have constructed under the Appeals Procedure, but also the market-rate units they have produced in the same developments, have provided cheaper housing than previously was available in many towns.⁴

The 2000 amendments to the Appeals Procedure impose more stringent requirements on private developers who want to bring appeals under the statute. The amendments increase the percentage of units to which a developer must attach restrictive covenants in order to qualify under the statute. They also require the developer to restrict the affordable units to even lower prices and for a longer period of years than before. Together, these new restrictions will significantly increase the costs of private development under the Appeals Procedure and slow the production of affordable housing in the state. The amendments may even be an intentional attempt to sabotage private developers, promoted by an alliance of affluent suburban towns and nonprofit housing organizations, both of whom would benefit from getting private developers out of the business of building affordable housing. But whatever the legislature's motivation, the amendments fail to further the goal of producing affordable housing because they cripple private developers.

Even if nonprofit developers were able to fill all of Connecticut's needs for low- and moderate-income housing by building deed-restricted units, this would not be a good solution. Connecticut's experiment with deed-restricted affordable units has been plagued with a variety of problems. Because developers have shown that they can provide moderate-income housing at market rates as long as they can build at reasonably high densities, Connecticut should allow developers to trigger the Appeals Procedure with proposals for medium- to high-density multifamily housing developments. This procedure would build on the successes of the Appeals Procedure while eliminating the problems created by deed-restricted housing units.

Connecticut's experience with creating and administering affordable housing units during the last decade is instructive for the many other states that have actively experimented with legislative, administrative, and judicial solutions to their own lack of affordable housing. These states'

3. The statute defines these as units in which the sale or rental price is restricted so that a person earning no more than eighty percent of the state's or region's median income (whichever is less) would spend no more than thirty percent of his or her yearly income on housing. CONN. GEN. STAT. § 8-30g(6) (2001).

4. *See infra* note 80 and accompanying text.

approaches have varied widely. Massachusetts and Rhode Island, for example, have created administrative appeals processes by which developers who apply to build deed-restricted affordable housing units may appeal the denial of these applications to an administrative appeals board.⁵

Other states have established agencies to oversee municipalities' planning and zoning decisions. Following the *Mount Laurel* cases,⁶ in which the New Jersey Supreme Court held that the state constitution mandated that suburban towns permit the construction of their "fair share" of the regional need for affordable housing, the state created the Council on Affordable Housing (COAH), a statewide regulatory agency charged with determining each municipality's "fair share" of affordable housing, and with approving the municipalities' plans for affordable housing.⁷ California, Florida, Oregon, and Washington all require municipalities to submit comprehensive plans that include an affordable housing element in which the municipality analyzes its current and future affordable housing needs and proposes a way to meet those needs.⁸

The judiciary has taken steps to deal with the problem of suburban "exclusionary zoning"⁹ in other states such as New Hampshire,¹⁰ New

5. MASS. GEN. LAWS ANN. ch. 40B, §§ 20-23 (West 1994); R.I. GEN. LAWS § 45-53-4 (1999). Both acts apply only to public agencies, nonprofit organizations, or limited-equity or limited-dividend organizations, and therefore do not extend to private for-profit developers. MASS. GEN. LAWS ANN. ch. 40B, § 21 (West 1994); R.I. GEN. LAWS § 45-53-4 (1999).

6. *S. Burlington County NAACP v. Township of Mount Laurel*, 456 A.2d 390 (N.J. 1983); *S. Burlington County NAACP v. Township of Mount Laurel*, 336 A.2d 713 (N.J. 1975).

7. N.J. STAT. ANN. §§ 52:27D-301 to -329 (West 1986). COAH's regulatory scheme overlays the scheme of judicial challenges that municipalities face after the *Mount Laurel* cases. If COAH certifies a municipality's "fair share plan," then that municipality is immune from *Mount Laurel* challenges for a period of six years. *Id.* § 52:27D-313.

8. CAL. GOV'T CODE §§ 65300, 65302 (West 1997) (requiring that all municipalities "adopt a comprehensive, long-term general plan for the physical development of the county or city" that must include a "housing element"); FLA. STAT. ch. 163.3177(6)(f)(1)(d) (2000) (requiring that all municipal comprehensive plans include a housing element that includes plans for the "provision of adequate sites for . . . housing for low-income, very low-income, and moderate-income families"); OR. REV. STAT. § 197.296 (1999); WASH. REV. CODE ANN. § 36.70A.070 (West 1991). These oversight programs vary in strength based on what action the state agency in charge may take if a municipality fails to comply with the "housing element" requirement. *Compare* FLA. STAT. ch. 163.3184(11)(a) (2000) (allowing the statewide planning agency to withhold funding from municipalities that fail to comply with the housing element requirement), *and* OR. REV. STAT. § 197.335(4) (1999) (same), *with* CAL. GOV'T CODE § 65585 (West 1997) (allowing the statewide planning agency to advise municipalities that their plan does not comply with the "housing element" requirement, but not giving the agency any power to require the towns to change municipal plans).

9. Legal commentators have used the term "exclusionary zoning" to refer to various municipal growth controls that slow development with the effect of excluding low-income persons. *E.g.*, Lawrence Gene Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent*, 21 STAN. L. REV. 767, 781 (1969); *see also* Robert C. Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 YALE L.J. 385, 390-402 (1977) (outlining growth-control mechanisms that municipalities have employed and examining their economic consequences).

10. *Britton v. Town of Chester*, 595 A.2d 492 (N.H. 1991) (providing a builder's remedy against a town that denied a permit to build multifamily housing).

York,¹¹ Michigan,¹² Pennsylvania,¹³ and Virginia.¹⁴ Basing their decisions on the limits imposed by the state or federal constitution,¹⁵ or by the state's zoning enabling act,¹⁶ these courts have invalidated suburban towns' attempts to limit the growth of affordable housing.¹⁷

Connecticut's approach is unique in that it has provided an effective remedy for the denial of affordable housing applications in the state's courts of general jurisdiction.¹⁸ Connecticut's experience with the Appeals Procedure during the last decade is instructive for other states not only because it shows the benefits and drawbacks of administering an affordable housing appeals procedure in the state's courts, but also because it

11. *Berenson v. Town of New Castle*, 341 N.E.2d 236 (N.Y. 1975) (invalidating a municipal zoning scheme that failed to allow any new multifamily residential developments).

12. *E.g.*, *Robinson Township v. Knoll*, 302 N.W.2d 146, 149 (Mich. 1981) (holding that the "per se exclusion of mobile homes . . . has no reasonable basis under the police power, and is therefore unconstitutional").

13. *E.g.*, *Surrick v. Zoning Hearing Bd.*, 382 A.2d 105 (Pa. 1977) (invalidating a township's regulations because they prevented the township from allowing for the construction of its "fair share" of multifamily housing); *Township of Willistown v. Chesterdale Farms, Inc.*, 341 A.2d 466 (Pa. 1975) (relying on the "fair share" theory to provide a builder's remedy against a township that zoned less than one percent of its area for multifamily housing); *Appeal of Girsh*, 263 A.2d 395 (Pa. 1970) (invalidating a municipal zoning scheme that did not provide for any multifamily housing); *Nat'l Land & Inv. Co. v. Kohn*, 215 A.2d 597 (Pa. 1965) (invalidating a zoning ordinance that imposed a four-acre minimum lot size for the construction of new housing units).

14. *Bd. of County Supervisors v. Carper*, 107 S.E.2d 390, 396-97 (Va. 1959) (invalidating a county zoning regulation that required larger minimum lot sizes in the western portion of the county than in the eastern portion of the county as an unconstitutional exercise of the police power).

15. *E.g.*, *Robinson Township*, 302 N.W.2d at 149 (invalidating an ordinance because it had "no reasonable basis under the police power"); *Surrick*, 382 A.2d at 110-11 (invalidating an ordinance on substantive due process grounds); *Carper*, 107 S.E.2d at 395-96 (same).

16. *E.g.*, *Britton v. Town of Chester*, 595 A.2d 492, 495-96 (N.H. 1991) (invalidating an ordinance because it failed to take into account regional community interests as required by the state's zoning enabling act).

17. There has been a notable tendency, however, for courts to cut back on their initial anti-exclusionary decisions by creating exceptions. For example, the highest courts in both Pennsylvania and New York have strictly limited the scope of their early opinions in this area. The Pennsylvania Supreme Court has limited the "fair share" doctrine from *Surrick* by holding that the "fair share" analysis applies only to communities that are "a logical area for growth and development." *Fernley v. Bd. of Supervisors*, 502 A.2d 585, 587 (Pa. 1985); see *In re Appeal of M.A. Kravitz Co.*, 460 A.2d 1075 (Pa. 1983). In *BAC, Inc. v. Board of Supervisors*, 633 A.2d 144 (Pa. 1993), Pennsylvania further limited the *Surrick* analysis to laws effecting "exclusions of classes of people" as opposed to "restrictions on uses of property." *Id.* at 147.

The New York Court of Appeals limited *Berenson* by holding that challengers to local zoning ordinances must demonstrate that the purpose of the ordinance was to exclude low- and moderate-income housing and that such housing is not available in other towns in the general region. *Robert E. Kurzius, Inc. v. Inc. Vill. of Upper Brookville*, 414 N.E.2d 680 (N.Y. 1980). The court further limited *Berenson* in *Suffolk Housing Services v. Town of Brookhaven*, 511 N.E.2d 67 (N.Y. 1987), in which the court rejected a developer's *Berenson* challenge on the ground that the plaintiffs had failed to "demonstrate that efforts by the Town caused the claimed shortage of shelter." *Id.* at 70.

18. While California provides an appeals procedure for affordable housing developers in the state courts, CAL. GOV'T CODE § 65589.5(h)(2) (West 1997), there has been very little activity under this procedure because the courts have been reluctant to invalidate local decisions. Ben Field, *Why Our Fair Share Housing Laws Fail*, 34 SANTA CLARA L. REV. 35, 54 (1993).

illustrates problems that are common to almost all statewide efforts to promote the construction and fair-share distribution of low- and moderate-income housing. These problems are linked to the deed-restriction devices used by most of the states that have enacted legislative schemes designed to promote affordable housing.¹⁹

There is a debate in the economic and legal literature over the real purpose and effect of “inclusionary zoning”²⁰ devices like the deed restrictions relied upon by Connecticut’s Appeals Procedure. Twenty years ago, Professor Robert Ellickson wrote the seminal piece on inclusionary zoning regulations, in which he argued that exclusionary municipalities were really using these devices to limit growth.²¹ Ellickson’s view has been widely adopted in the legal and economic literature.²² Fifteen years later, Andrew Dietderich published an essay responding to Ellickson’s critique, which outlined a theory of how inclusionary zoning devices that rely on the construction of deed-restricted units could benefit low- and moderate-income housing consumers.²³ This Note contributes to this dialogue by examining the problems that have arisen with the transfer and administration of deed-restricted housing units in Connecticut during the last decade.

This Note discusses several problems that have resulted from Connecticut’s heavy reliance on deed-restricted units in its Appeals

19. *E.g.*, CAL. GOV’T CODE § 65915 (West 1997); MASS. GEN. LAWS ANN. ch. 40B, § 20 (West 1994); R.I. GEN. LAWS § 45-53-4 (1999).

20. The term “inclusionary zoning” is used to describe regulations that either require developers or provide incentives for developers to place price-restrictive covenants on a percentage of units in a new housing development. *E.g.*, William W. Merrill III & Robert K. Lincoln, *Linkage Fees and Fair Share Regulations: Law and Method*, in EXACTIONS, IMPACT FEES AND DEDICATIONS: SHAPING LAND-USE DEVELOPMENT AND FUNDING INFRASTRUCTURE IN THE DOLAN ERA 273, 273 (Robert H. Freilich & David W. Bushek eds., 1995).

21. Robert C. Ellickson, *The Irony of “Inclusionary” Zoning*, 54 S. CAL. L. REV. 1167 (1981). Ellickson argues that inclusionary programs “are essentially taxes on the production of new housing . . . [that] will usually increase general housing prices, a result which further limits the housing opportunities of moderate-income families.” *Id.* at 1170. Thus, he concludes that “most inclusionary ordinances are just another form of exclusionary practice.” *Id.*

22. *E.g.*, WILLIAM A. FISCHER, *THE ECONOMICS OF ZONING LAWS* 327-29 (1985); Quintin Johnstone, *Government Control of Urban Land Use: A Comparative Major Program Analysis*, 39 N.Y.L. SCH. L. REV. 373, 409-10 (1994); Jane E. Larson, *Free Markets Deep in the Heart of Texas*, 84 GEO. L.J. 179, 181 (1995); Carol M. Rose, *Property Rights, Regulatory Regimes and the New Takings Jurisprudence—An Evolutionary Approach*, 57 TENN. L. REV. 577, 588 n.49 (1990).

23. Andrew G. Dietderich, *An Egalitarian’s Market: The Economics of Inclusionary Zoning Reclaimed*, 24 FORDHAM URB. L.J. 23 (1996). Dietderich analyzes three different inclusionary zoning regimes: (1) a voluntary regime in which developers could negotiate to set aside a portion of deed-restricted units in exchange for permission to build a denser development (a “density bonus”); (2) a mandatory regime that would require developers to place deed restrictions on a portion of all new units, but would compensate developers with a density bonus; and (3) a mandatory regime that would require developers to create deed-restricted units, but would not compensate them with a density bonus. *Id.* at 45-102. He concludes that given the right set of underlying economic conditions, each regime has the potential to benefit low-income housing consumers. *See id.* at 103.

Procedure. These problems include: (1) that it is difficult for low- and moderate-income home buyers to get mortgage financing for deed-restricted units; (2) that it is difficult for state and local officials to monitor the price and income limits on deed-restricted units and their occupants; and (3) that deed restrictions may cause low- and moderate-income homeowners to lose equity in their homes due to interest rate fluctuations. These problems are likely to occur in all state and local affordable housing programs that rely on the creation of deed-restricted housing units.

In this Note, I argue that a better alternative would be for Connecticut to amend its Appeals Procedure so that developers could trigger it by proposing to construct market-rate multifamily housing above a specified density. This solution would not only avoid the problems associated with deed-restricted units, but would also be likely to produce more moderate-income housing by allowing developers to build multifamily housing at higher densities than towns would normally permit. This proposal relies on a longstanding literature that argues for the benefits of zoning deregulation,²⁴ including that deregulation is likely to decrease housing prices and lead to the creation of more low- and moderate-income housing.²⁵ This Note outlines a concrete way to implement the ideas proposed in this literature by arguing for a modest relaxation of the restrictions on the construction of higher density multifamily housing (that is, a partial zoning deregulation) within the structure of the Appeals Procedure.

24. *E.g.*, BERNARD H. SIEGAN, *LAND USE WITHOUT ZONING* (1972); Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681 (1973) (arguing that private covenants and common-law rules could provide a more effective substitute for zoning); Jan Z. Krasnowiecki, *Abolish Zoning*, 31 SYRACUSE L. REV. 719 (1980) (arguing that the advanced-planning approach to zoning should be rejected because it cannot work in developing communities); Bernard H. Siegan, *Non-Zoning Is the Best Zoning*, 31 CAL. W. L. REV. 127 (1994) (arguing that zoning distorts market decisions and raises housing prices).

25. *E.g.*, JEROME ROTHENBERG ET AL., *THE MAZE OF URBAN HOUSING MARKETS: THEORY, EVIDENCE, AND POLICY* 270 (1991) (noting that “various building and health codes and zoning regulations make it either literally impossible or prohibitively expensive to build housing units of qualities relevant to the demand of approximately the lower half of the income distribution”); Anthony Downs, *Regulatory Barriers to Affordable Housing*, 58 J. AM. PLAN. ASS’N 419, 420 (1992) (arguing that “[t]he biggest regulatory barriers to new lower cost housing are local zoning regulations that restrict the construction of medium-density, walk-up, multifamily housing units”); Larson, *supra* note 22, at 182 (finding very low housing prices in the unregulated *colonias* on the Texas-Mexico border); Bernard H. Siegan, *Non-Zoning in Houston*, 13 J.L. & ECON. 71, 142-43 (1970) (noting in his study of Houston, the only major nonzoned city in America, that “[t]he most measurable influence of zoning is its effect on multiple-family dwellings. If Houston had adopted zoning in 1962, this would probably have resulted in higher rents and a lesser number and variety of apartments and, in consequence, some tenants would have been priced out of the new apartment market. Most adversely affected would be tenants of average incomes”); *cf.* Paul Boudreaux, *An Individual Preference Approach to Suburban Racial Desegregation*, 27 FORDHAM URB. L.J. 533, 556-63 (1999) (arguing that permitting the construction of more multifamily housing in predominantly white suburbs would foster racial integration).

Part II of this Note provides a brief history of the original enactment of the Appeals Procedure, a description of how Connecticut's courts have implemented it, and estimates of the number of housing units that have been created as a result of the Appeals Procedure. Part III describes the problems that led the legislature to overhaul the statute in 2000. Part IV discusses why the 2000 amendments are likely to slow the development of affordable housing in Connecticut. Part V discusses the problems created by the deed-restricted units on which the amended statute relies heavily. Finally, Part VI proposes an alternative procedure that would allow developers to appeal the denial of proposals for market-rate multifamily housing developments above a certain density without having to create deed-restricted units.

II. THE AFFORDABLE HOUSING APPEALS PROCEDURE

In the late 1980s, Connecticut's legislators became concerned with what many viewed to be an affordable-housing crisis in the state.²⁶ The problem was affecting not only very poor people, but also those with moderate incomes, such as municipal employees, many of whom found themselves priced out of the Connecticut towns in which they worked during the buoyant 1980s real estate market.²⁷

The legislature convened a Blue Ribbon Commission in 1987 to study the extent of the need for affordable housing and to propose ways to address that need. By 1989, the Blue Ribbon Commission had produced two reports with numerous recommendations for a legislative program to address the state's affordable housing problem.²⁸ The central, and certainly the most enduring, piece of legislation to come from the 1987 Blue Ribbon Commission was the Affordable Housing Land Use Appeals Act,²⁹ which became effective on July 1, 1990.

While the primary goal of the statute was to increase the construction of low- and moderate-income housing in the state, it was probably also motivated by the idea that suburban towns should provide a "fair share" of

26. *E.g.*, Melinda Westbrook, *Connecticut's New Affordable Housing Appeals Procedure: Assaulting the Presumptive Validity of Land Use Decisions*, 66 CONN. B.J. 169, 169 (1992) (citing a 1988 state study that estimated that "among Connecticut's 169 municipalities, 169,000 households are in need of adequate shelter").

27. *E.g.*, Jack Cavanaugh, *Town Tries To Build Its Own Houses*, N.Y. TIMES, Nov. 29, 1987, § 23, at 1 (describing that in the town of Wilton, where the average home price was \$460,000, municipal employees could not afford housing at their \$30,000 salaries).

28. Westbrook, *supra* note 26, at 171.

29. An Act Establishing a State Affordable Housing Land Use Appeals Procedure and Concerning the Effect of Changes in Zoning or Inland Wetlands Regulations or Previously Filed Applications § 1, 1989 Conn. Acts 311 (Reg. Sess.) (codified as amended at CONN. GEN. STAT. § 8-30g (2001)). The statute is currently referred to as the "Affordable Housing Appeals Procedure."

the regional need for affordable housing. Both the 1969 Massachusetts “anti-snob” zoning law,³⁰ and New Jersey’s *Mount Laurel* cases³¹ and Fair Housing Act of 1985³² relied on the “fair share” model. These rules provided models for the commission that drafted Connecticut’s Appeals Procedure statute.³³ The Massachusetts statute set up an administrative appeals procedure that allows developers to challenge towns that prohibit low-income housing,³⁴ while New Jersey’s Fair Housing Act imposes affirmative duties on municipalities to construct a fair share of the low-income housing needed to satisfy regional needs.

The idea that benefits will accrue from the dispersal of low-income housing also underlies these anti-exclusionary-zoning statutes. New Jersey’s first *Mount Laurel* decision, which required towns to permit the construction of affordable housing, relied not only on the “fair share” concept, but also on an idea of “spatial deconcentration,” whereby “lower-income persons would be dispersed throughout the state, resulting in socio-economic integration [and] balanced communities.”³⁵ Studies have shown that concentrated poverty can have detrimental feedback effects on poor communities,³⁶ especially in public housing developments.³⁷ The commission that drafted the Connecticut legislation intended to use dispersal of low-income housing to “address a panoply of social ills,” including that “the lack of affordable housing contributes to de facto segregation along the vectors of both race and ethnicity.”³⁸

30. MASS. GEN. LAWS ANN. ch. 40B, §§ 20-23 (West 1994).

31. *S. Burlington County NAACP v. Township of Mount Laurel*, 456 A.2d 390 (N.J. 1983); *S. Burlington County NAACP v. Township of Mount Laurel*, 336 A.2d 713 (N.J. 1975).

32. N.J. STAT. ANN. §§ 52:27D-301 to -329 (West 1986).

33. Terry J. Tondro, *Fragments of Regionalism: State and Regional Planning in Connecticut at Century’s End*, 73 ST. JOHN’S L. REV. 1123, 1137-38 (1999) (“The [Blue Ribbon] Commission . . . considered the existing models for encouraging the development of affordable housing already developed by New Jersey and Massachusetts.”).

34. See generally Paul K. Stockman, Note, *Anti-Snob Zoning in Massachusetts: Assessing One Attempt at Opening the Suburbs to Affordable Housing*, 78 VA. L. REV. 535 (1992) (describing the development and administration of the Massachusetts “anti-snob” zoning appeals procedure).

35. Harold A. McDougall, *From Litigation to Legislation in Exclusionary Zoning Law*, 22 HARV. C.R.-C.L. L. REV. 623, 627 (1987).

36. E.g., DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* 167-76 (1993); WILLIAM JULIUS WILSON, *THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY* 137-44 (1987).

37. Michael H. Schill, *Distressed Public Housing: Where Do We Go from Here?*, 60 U. CHI. L. REV. 497, 507 (1993) (“[H]igh concentration of poverty . . . generates social problems . . . both different in kind and magnitude from the problems faced by poor people in less concentrated settings.”); Michael H. Schill & Susan M. Wachter, *The Spatial Bias of Federal Housing Law and Policy: Concentrated Poverty in Urban America*, 143 U. PA. L. REV. 1285, 1290-95 (1995).

38. *Christian Activities Council, Congregational v. Town Council*, 735 A.2d 231, 255, 256 n.4 (Conn. 1999) (Berdon, J., dissenting) (citing the 1989 report from the Blue Ribbon Commission that drafted the original Appeals Procedure).

Connecticut's appeals statute uses a procedural approach to deal with the "not in my back yard" phenomenon of municipalities resisting the construction of low-cost housing. In cases reviewing the denial of affordable housing proposals, the statute does this by shifting the burden to the local zoning board to show that its decisions were valid.³⁹

A. *Which Proposals May a Developer Appeal?*

The Appeals Procedure allows developers to appeal from an adverse decision⁴⁰ by a municipal land use authority for two types of proposals. First, the developer may appeal if he or she proposed to construct "assisted housing," which the statute defines as "housing which is receiving, or will receive, financial assistance under any governmental program for the construction or substantial rehabilitation of low and moderate income housing, and any housing occupied by persons receiving rental assistance" under the federal Section Eight voucher program.⁴¹ Second, under the statute as it existed before the 2000 amendments, a developer could appeal the denial or constructive denial of a "set-aside development"

in which not less than twenty-five per cent of the dwelling units will be conveyed by deeds containing covenants or restrictions which shall require that such dwelling units shall be sold or rented at, or below, prices which will preserve units as affordable housing . . . for persons and families whose income is less than or equal to eighty per cent of the area median income, or eighty per cent of the state median income, whichever is less, for at least thirty years after the initial occupation of the proposed development.⁴²

39. CONN. GEN. STAT. § 8-30g(c) (1999). In this Part, I cite the 1999 Connecticut General Statutes to describe the Appeals Procedure as it existed prior to the 2000 amendments. The 2000 amendments left intact many of the sections of the statute cited in this Part, but in some cases reordered or renumbered them. When citing the 1999 code in this Part, I note where the language of a section has been subsequently amended. For a full description of the changes made by the 2000 amendments, see *infra* Section III.B.

40. The statute allows developers to appeal "any application made . . . in connection with an affordable housing development" that was "denied or . . . approved with restrictions which have a substantial adverse impact on the viability of the affordable housing development." *Id.* § 8-30g(a)-(b).

41. *Id.* § 8-30g(a)(3).

42. *Id.* § 8-30g(a)(1)(B). Initially, the state set the minimum percentage of deed-restricted units at twenty percent for at least twenty years. An Act Establishing a State Affordable Housing Land Use Appeals Procedure and Concerning the Effect of Changes in Zoning or Inland Wetlands Regulations or Previously Filed Applications § 1(a), 1989 Conn. Acts 311 (Reg. Sess.) (codified as amended at CONN. GEN. STAT. § 8-30g (2001)). In 1995, the legislature increased the requirements for "set-aside" developments by increasing the share of deed-restricted units to twenty-five percent and requiring that the units remain affordable for at least thirty years. The 1995 amendments also required that the price of these units be calculated based on eighty percent of the area's or the state's median income, whichever is less. An Act Modifying the State

The two categories of development proposals from which the Appeals Procedure provides an avenue for appeal apply to two very different sets of developers. The “assisted housing” appeals category serves mainly nonprofit organizations and government agencies seeking permission to build publicly funded housing. The “set-aside developments” category, which has generated the majority of appeals brought under the statute,⁴³ provides an incentive for private developers to fund the construction of price-restricted affordable housing units.

This Note focuses mainly on the private side of the Appeals Procedure, the appeals from proposals for set-aside developments. In addition to generating most of the appeals under the statute,⁴⁴ the set-aside developments category has also been the most controversial aspect of the Appeals Procedure, creating numerous proposals for its repeal or amendment.⁴⁵ The 2000 amendments to the statute focus largely on the set-aside developments category.⁴⁶ Finally, this part of the Appeals Procedure has a greater potential to generate the construction of affordable housing units than the “assisted housing” category because it provides private incentives to do so through an “implicit density bonus.”⁴⁷ While the

Affordable Housing Land Use Appeals Process § 1, 1995 Conn. Acts 280 (Reg. Sess.) (codified as amended at CONN. GEN. STAT. § 8-30g (2001)). In 1999, the legislature again increased the requirements for set-aside developments, requiring that at least ten percent of the units in a set-aside development be affordable to people earning sixty percent or less of the area’s or state’s median income, whichever is less. An Act Concerning Requirements Under the Affordable Housing Appeals Procedure and Jurisdiction over Affordable Housing Appeals § 1, 1999 Conn. Acts 261 (Reg. Sess.) (codified as amended at CONN. GEN. STAT. § 8-30g (2001)).

43. Bill Ethier et al., Survey of Development of Affordable Housing in Connecticut and Evaluation of Affordable Housing Land Use Appeals Act, 1990-96, at 6 (Feb. 1997) (unpublished manuscript, on file with the Office of Legislative Research, Connecticut General Assembly) (“The substantial majority of affordable housing developments proposed under the statute have been pursued by applicants proceeding without governmental subsidies or assistance”); see also *infra* Section II.D (providing the numbers of different types of housing units built under the Appeals Procedure).

44. Ethier et al., *supra* note 43, at 6.

45. During the 1997, 1998, and 1999 sessions, legislators introduced twelve bills to amend the part of the statute that addresses set-aside developments. JOHN RAPPAPORT, OFFICE OF LEGISLATIVE RESEARCH, NO. 99-R-0826, BILLS AFFECTING THE AFFORDABLE HOUSING LAND USE APPEALS PROCEDURE (1999), available at <http://www.cga.state.ct.us/ps99/rpt/olr/99-r-0826.doc>.

46. An Act Implementing the Recommendations of the Blue Ribbon Commission To Study Affordable Housing Regarding the Affordable Housing Appeals Procedure § 1(a)(6), 2000 Conn. Acts 206 (Reg. Sess.) (codified as amended at CONN. GEN. STAT. § 8-30g (2001)).

47. The incentive that private developers have to include affordable units is that it will enable them to construct housing developments at higher densities than would be permitted by the existing zoning regulations. This is an advantage for developers because the value of land generally increases as the allowable development density increases. *E.g.*, Theodore M. Crone, *Elements of an Economic Justification for Municipal Zoning*, 14 J. URB. ECON. 168, 170 (1983). This “density bonus” is “implicit” because, unlike many programs that contain a schedule of automatic density increases awarded for including different percentages of affordable housing in a development, Ellickson, *supra* note 21, at 1180, Connecticut’s program leaves it to the developers to propose a development’s design, with the maximum density limited only by reasonableness and feasibility.

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“assisted units” portion of the Appeals Procedure seeks to open the way for developments for which there is an independent source of public funds, the set-aside developments provision actually provides incentives directly to developers.

B. To Which Municipalities Does the Appeals Procedure Apply?

Certain towns are exempt from the Appeals Procedure. The procedure does not apply to towns

in which at least ten per cent of all dwelling units in the municipality are (1) assisted housing or (2) currently financed by Connecticut Housing Finance Authority mortgages or (3) subject to deeds containing covenants or restrictions which require that such dwelling units be sold or rented at, or below, prices which will preserve the units as affordable housing . . . for persons and families whose income is less than or equal to eighty per cent of the area median income.⁴⁸

The state’s Commissioner of Economic and Community Development maintains a list of towns that are exempt from the Appeals Procedure. As of April 2000, thirty of Connecticut’s municipalities were exempt from the Appeals Procedure.⁴⁹ The remaining 139 towns did not qualify for the exemption.⁵⁰

C. Review Procedure

Under the Appeals Procedure, developers may appeal in the Connecticut courts the denial of any affordable housing application. The biggest change that the Appeals Procedure made to the state’s procedure for reviewing local zoning decisions is that it placed the burden of proving the validity of the decision on the local zoning board itself.

In traditional zoning appeals, courts apply a highly deferential standard when reviewing the decisions of municipal land use authorities. Traditionally, in order to reverse a municipal land use commission’s quasi-legislative decision, such as a ruling on an application for a change in the zoning map, courts have required that the applicant demonstrate “that

48. CONN. GEN. STAT. § 8-30g(f) (1999). The procedure for calculating which towns are exempt from the statute was changed slightly by the 2000 amendments. For a description of these changes, see *infra* Subsection III.B.4.

49. Memorandum from Thomas J. Ciccalone, Executive Director, Public Affairs and Strategic Planning Division, Connecticut Department of Economic and Community Development (Apr. 11, 2000), <http://www.state.ct.us/ecd/Housing/appeals.htm> (last visited Mar. 29, 2001) [hereinafter Ciccalone Memorandum].

50. *Id.* at 7-8.

the commission has acted ‘arbitrarily[,] illegally . . . or in abuse of discretion.’”⁵¹ The standard for reversing a commission’s administrative decision, such as reviewing a special permit application, is lower, requiring that the applicant show that the commission’s decision was not supported by “‘substantial’ evidence in [the] record.”⁵² The courts treat both types of decisions as being presumptively valid; it is the applicant’s burden to show that they are not.⁵³

The Appeals Procedure provides specific instructions for courts reviewing the denial of applications that qualify under the statute. The statute shifts the burden of proof to the municipal land use authority to show that:

(A) the decision from which such appeal is taken and the reasons cited for such decision are supported by sufficient evidence in the record; (B) the decision is necessary to protect substantial public interests in health, safety, or other matters which the commission may legally consider; (C) such public interests clearly outweigh the need for affordable housing; and (D) such public interests cannot be protected by reasonable changes to the affordable housing development⁵⁴

1. *Supported by Sufficient Evidence in the Record*

The first prong of the review procedure requires zoning commissions to demonstrate that the reasons that they cited for denying the application were supported by “sufficient evidence in the record.”⁵⁵ The Connecticut Supreme Court has defined sufficient evidence as “less than a preponderance of the evidence, but more than a mere possibility.”⁵⁶ In other words, “the zoning commission need not establish that the effects it sought to avoid by denying the application ‘are definite or more likely than not’ to occur, but that such evidence must establish more than a ‘mere possibility’ of such occurrence.”⁵⁷

51. Kaufman v. Zoning Comm’n, 653 A.2d 798, 814 (Conn. 1995) (citation omitted).

52. *Id.* (citation omitted). *But see* Westbrook, *supra* note 26, at 177-78 (arguing that “Connecticut courts have not, in practice, sharply distinguished these standards”).

53. Blue Sky Bar, Inc. v. Town of Stratford, 523 A.2d 467, 473 (Conn. 1987) (stating that “[t]he party challenging the enactment bears the burden of overcoming th[e] presumption” of the local commission’s rationality); Kovacs v. City of Meriden, No. CV90-0235455, 1993 WL 137750, at *2 (Conn. Super. Ct. Apr. 27, 1993).

54. CONN. GEN. STAT. § 8-30g(c)(1) (1999). The standard of review under this section was changed by the 2000 amendments. For a description of this change, see *infra* Subsection III.B.2.

55. *Id.* § 8-30g(c)(1)(A).

56. Christian Activities Council, Congregational v. Town Council, 735 A.2d 231, 243 (Conn. 1999).

57. *Id.* (citation omitted).

This prong creates two requirements. First, the court will examine only the commission's stated reasons for rejecting the affordable housing application.⁵⁸ Second, the reasons must have at least some (that is, "sufficient") support in the record. In spite of this seemingly deferential standard of evidence, courts have often reversed commissions for a failure to state reasons that are supported by sufficient evidence in the record.⁵⁹

2. *Necessary To Protect Substantial Public Interests*

The second prong of the review procedure requires zoning boards to demonstrate that their decision is "necessary to protect substantial public interests in health, safety, or other matters which the commission may legally consider."⁶⁰ Interests that the courts have found to be substantial and legally permissible under this prong include insufficient water reserves,⁶¹ threats of contamination to the town's water supply,⁶² inability to provide safe sewage disposal,⁶³ threats to the preservation of open space,⁶⁴ and excessive building density or building height.⁶⁵ The courts have been particularly likely to find that an interest qualifies as a "substantial public interest" if there is additional evidence that it is not

58. *Id.* at 238 (holding that a town must make "a formal, official, collective statement of reasons for its actions" (citation omitted)).

59. *E.g.*, *Charles E. Williams, Inc. v. New Milford Planning Comm'n*, No. CV 9804922285, 2000 WL 775643, at *10 (Conn. Super. Ct. May 26, 2000); *Thompson v. Zoning Comm'n*, No. CV 990494184, 2000 WL 73519, at *13 (Conn. Super. Ct. Jan. 11, 2000) (finding no "quantifiable probability of harm to any public interest").

60. CONN. GEN. STAT. § 8-30g(c)(1)(B) (1999).

61. *Carr v. Bridgewater Planning & Zoning*, No. 980442227, 1999 WL 391584, at *5 (Conn. Super. Ct. June 4, 1999) (finding that the lack of a potable water supply outweighed the need for affordable housing); *Christian Activities Council v. Town Council*, No. 541990, 1996 WL 532485, at *3 (Conn. Super. Ct. Sept. 12, 1996) (finding that the threat to a potential future water supply was a legitimate public interest that outweighed the need for affordable housing), *aff'd on other grounds sub nom. Christian Activities Council, Congregational v. Town Council*, 735 A.2d 231 (Conn. 1999); *Greene v. Ridgefield Planning & Zoning Comm'n*, No. CV 90-04421315, 1993 WL 7560, at *7 (Conn. Super. Ct. Jan. 6, 1993) (finding that a concern that town water could not be provided to a new development without obtaining an additional water source was a substantial public interest that the commission could consider).

62. *Carr*, 1999 WL 391584, at *7-8 (finding testimony that a septic system would likely contaminate the town's water supply to raise a substantial public interest); *Fairfield 2000 Homes Corp. v. Town of Newtown Planning & Zoning Comm'n*, No. CV9705787565, 1999 WL 186768, at *8 (Conn. Super Ct. Mar. 22, 1999) (same).

63. *Nucera v. Zoning Comm'n of Stratford*, No. CV 970565039, 1998 WL 470587, at *15 (Conn. Super. Ct. Aug. 3, 1998) (stating that the commission could consider the capacity of the sewer system); *D'Amato v. Orange Planning & Zoning Comm'n*, No. CV 92-05064265, 1993 WL 45042, at *7 (Conn. Super. Ct. Feb. 5, 1993) (same).

64. *Christian Activities Council*, 735 A.2d at 251-54; *see also Dime Sav. Bank v. Durham Planning & Zoning Comm'n*, No. CV 94-0536676, 1995 WL 548755, at *6-7 (Conn. Super. Ct. Sept. 12, 1995) (holding that preserving land for commercial and industrial development could outweigh the need for affordable housing if the site's conditions were favorable for commercial or industrial development).

65. *Nucera*, 1998 WL 470587, at *13-15 (finding that the commission could permissibly consider building density and heights).

merely pretextual, such as historical documentation that the town intended to preserve the land for a particular use.⁶⁶

Interests that courts have found are not “substantial public interests” for the purposes of the statute include the fiscal impact on the municipality’s school system,⁶⁷ a town’s desire to adhere completely to its prior zoning regulations (including preexisting local affordable housing regulations),⁶⁸ and negative effects on the value of neighboring properties.⁶⁹

3. *Public Interests Clearly Outweigh the Need for Affordable Housing*

The third prong of the review procedure requires zoning commissions to demonstrate that sufficient evidence existed in the record for the commission reasonably to have determined that the public interests cited “clearly outweigh” the need for affordable housing.⁷⁰ With respect to this element of the test, courts have focused mainly on how towns are to define their need for affordable housing. For much of the life of the statute, courts have defined need as a regional or statewide need. Some courts held that the

66. *Christian Activities Council*, 735 A.2d at 251-54 (affirming on the ground that the town had a legitimate public interest in preserving the parcel as open space in light of the repeated expression of that interest since 1971); *United Progress, Inc. v. Borough of Stonington Planning & Zoning Comm’n*, No. CV 92-05133925, 1994 WL 76803, at *18-19 (Conn. Super. Ct. Mar. 4, 1994) (finding valid the town’s expressed desire to preserve a site for industrial uses due to the fact that the site had been used for industry since the mid-1800s).

67. *Barberino Realty & Dev. Corp. v. Town Plan & Zoning Comm’n*, No. CV 93 05268415, 1994 WL 547537, at *10 (Conn. Super. Ct. Sept. 23, 1994) (“Neither sections 8-2 or 8-30g expressly or impliedly permit a rejection of an affordable housing application premised on the impact of additional students on the school system.”); *Pratt’s Corner P’ship v. Southington Planning & Zoning Comm’n*, No. CV92 05088775, 1993 WL 229752, at *6 (Conn. Super. Ct. July 21, 1993) (rejecting the commission’s reliance on the burdens of the development on the local education system); *TCR New Canaan Inc. v. Planning & Zoning Comm’n*, No. CV 384353, 1992 WL 48587, at *25 (Conn. Super. Ct. Apr. 1, 1992) (“It has long been clear that zoning policy may not be based on fiscal considerations such as whether a particular residential development will result in added [educational] costs to the town.”). *But cf. Dime Sav. Bank*, 1995 WL 548755, at *6-7 (finding that preserving land for commercial and industrial development for fiscal reasons may be permissible).

68. *Town Close Assocs. v. Planning & Zoning Comm’n*, 679 A.2d 378, 381 n.8 (Conn. App. Ct. 1996) (holding that the commission’s desire not to depart from its existing affordable housing regulations was not a substantial public interest for the purposes of the statute); *Wisniowski v. Planning Comm’n*, 655 A.2d 1146, 1151 (Conn. App. Ct. 1995) (“[T]he plain and unambiguous language of § 8-30g does not contemplate a denial of an affordable housing subdivision application on the ground that it does not comply with the underlying zoning of an area.”).

69. *Vineyard Constr. Mgmt. Corp. v. Town of Trumbull*, No. 0492251, 1999 WL 566967, at *5 (Conn. Super. Ct. July 23, 1999) (holding that concerns over neighbors’ property values were not a substantial public interest); *Pratt’s Corner P’ship*, 1993 WL 229752, at *6 (“Under § 8-30g the significance of protecting property values as a substantial public interest falls to a lower level in the hierarchy of importance.”). *But cf. Griswold Hills Newington Ltd. v. Newington Town Planning & Zoning Comm’n*, No. CV 940540954S, 1996 WL 24569, at *6 (Conn. Super. Ct. Jan. 6, 1996) (“[A] zoning authority may have a legitimate public interest in protecting property values.”).

70. CONN. GEN. STAT. § 8-30g(c)(1)(C) (1999).

need was defined by the exemption provisions in the statute itself.⁷¹ Therefore, if a town lacked an exemption from section 8-30g, then courts presumed the town had a substantial need for affordable housing. Others held more generally that the Act contemplated “need” as the municipality’s fair share of the regional or state-wide need for low- and moderate-income housing.⁷² The Connecticut Supreme Court in *Christian Activities Council*, however, determined that “the need for affordable housing is to be addressed on a local basis.”⁷³ This decision functionally overruled the standard that lower courts were implementing, and narrowed the applicability of the Appeals Procedure. It was probably one of the main factors motivating the legislature to appoint a second Blue Ribbon Commission in 1999.⁷⁴

4. *Public Interests Cannot Be Protected by Reasonable Changes*

The fourth prong of the review procedure requires local commissions to show that the public interests that they cite as grounds for refusing the application “cannot be protected by reasonable changes to the affordable housing development.”⁷⁵ This section serves the dual purposes of encouraging local land use boards to negotiate with applicants and discouraging the boards from “loopholing” by objecting on grounds that are valid, but that could be cured with reasonable changes to the project. Courts have applied this prong by distinguishing between features in an application that are plan-specific (which could be changed while remaining at the

71. *Griswold Hills Newington Ltd.*, 1996 WL 24569, at *7 (holding that the zoning board had no “right to disagree with the Department of Housing’s designation of [the town] as a non exempt community”); *see also* *W. Hartford Interfaith Coalition v. Town Council*, 636 A.2d 1342, 1354 n.23 (Conn. 1994) (stating that the fact that the town’s percentage of housing that qualified as affordable “falls far below the 10 percent figure needed . . . to qualify under the . . . exemption . . . [provides] sufficient evidence of local need”).

72. *Kaufman v. City of Danbury Zoning Comm’n*, No. CV92 0507929 S, 1993 WL 316792, at *9 (Conn. Super. Ct. Aug. 13, 1993) (noting that “[t]he legislature was very careful in writing the statute not to restrict the scope of the need for affordable housing only to the municipality”); *Pratt’s Corner P’ship*, 1993 WL 229752, at *2 (“The General Statutes are replete with forceful legislative expressions of the long standing statewide need for affordable housing . . .”).

73. *Christian Activities Council, Congregational v. Town Council*, 735 A.2d 231, 249 (Conn. 1999). *Christian Activities Council* involved an appeal brought by the Christian Activities Council, Congregational (CACC), an organization that sought to construct single-family low- and moderate-income housing in the town of Glastonbury. *Id.* at 236. CACC contracted with a public water company to purchase 33.42 acres of vacant land, but conditioned the contract on CACC’s ability to get a zone change and approval for the construction of at least twenty-six affordable housing units. *Id.* Glastonbury’s town council refused to rezone the parcel of land and CACC appealed the decision to the superior court, which dismissed the appeal, and eventually to the Connecticut Supreme Court. *Id.* The Connecticut Supreme Court affirmed the superior court, and in the process narrowed the standard of review and scope of the definition of “need for affordable housing” under the statute. *See infra* Subsection III.A.2. *See generally* Tondro, *supra* note 33, at 1143-46 (discussing the background and likely effects of *Christian Activities Council*).

74. BLUE RIBBON COMMISSION REPORT, *supra* note 2, at 28, 60.

75. CONN. GEN. STAT. § 8-30g (c)(1)(D) (1999).

proposed site) and features that are site-specific (which could not be altered given the existing site). If a court finds that an objectionable feature is site-specific, it is much more likely to find in favor of the zoning board than if it finds that the feature is plan-specific.⁷⁶

D. *Outcomes*

The clearest way to measure the Appeals Procedure's success in increasing the number of lower-cost housing units across the state is to measure the number of existing units that would not have been produced had the Appeals Procedure not been in place. The few attempts to quantify the results of the Appeals Procedure in this way have suffered from different shortcomings, but they provide an idea of the number of units that have been constructed as a result of the Appeals Procedure.

In 1996, several members of the original Blue Ribbon Commission attempted to count the number of housing units produced under the statute. This group surveyed planners and regional and local officials in all of the towns in the state that were not exempt from the Appeals Procedure as of 1996 to try to calculate the overall number of affordable units created between 1990 and 1996 in two different categories: "(1) developments proposed and constructed . . . through local cooperation or settlement, . . . and (2) developments whose zoning approval was litigated and the result of a court order."⁷⁷

The study concluded that, between 1990 and 1996, "at least 1,041 affordable housing units [were] approved without resort to the statute or by local negotiation and settlement, and at least another 586 units have received some form of zoning approval through litigation under the Act."⁷⁸ These numbers include only those units that would qualify as "affordable" under the statute, that is, government-funded or deed-restricted units. The study also found that 833 market-rate units had been built as part of developments that contained deed-restricted units,⁷⁹ and that 541 more market-rate units had been approved by a court but had not yet been built.

76. *Compare, e.g.,* *Christian Activities Council v. Town Council*, No. 541990, 1996 WL 532485, at *7 (Conn. Super. Ct. Sept. 12, 1996) (finding "that loss of potential public water supply is . . . a site-specific issue" and upholding the zoning commission's decision), *with* *T & N Assocs. v. New Milford Planning & Zoning Comm'n*, No. CV 980492236S, 1999 WL 1077588, at *5 (Conn. Super. Ct. Nov. 10, 1999) (holding that the commission's concerns about drainage and sewerage were plan-specific and finding in favor of the developer). *See generally* *Christian Activities Council*, 735 A.2d at 262 (Berdon, J., dissenting) ("Plan-specific problems may be eliminated by 'requiring reasonable design modifications' [but] [s]ite-specific problems, in contrast, can only be avoided by denying the application." (citation omitted)).

77. *Ethier et al., supra* note 43, at 4.

78. *Id.* at 5.

79. Of these 833 units, 523 resulted from negotiated approvals from zoning boards and 310 resulted from court-ordered approvals. *Id.* at 9-12.

The study also concluded that these market-rate units “although . . . not priced low enough to qualify as affordable housing units under the statute, are less expensive than much of the other housing product available in the host community.”⁸⁰

Connecticut’s Office of Legislative Research updated this report during the summer of 2000 by following up on all reported cases brought under section 8-30g to determine the number of affordable units constructed after court-ordered approvals under the statute. The study concluded:

Since 1990, the courts have ruled favorably for the developer with respect to 27 projects that were appealed under the procedure. . . . Developers have completed seven of these, accounting for 666 units, 218 of which are affordable. . . . Five projects are under construction (299 total units, 166 affordable), 12 are on the drawing boards (842 total units, 275 affordable), and three have been canceled.⁸¹

These numbers do not include estimates of housing units (deed-restricted or otherwise) that were negotiated and approved out of court.

These studies demonstrate two important phenomena. First, around two-thirds of the affordable housing units approved during the period from 1990 to 1996 were approved without the developer going to court. Second, market-rate units constituted a substantial majority of the units developed in connection with the Appeals Procedure during this period, and many of these units provided less expensive forms of housing than had previously existed without resorting to public funding or deed restrictions.⁸² This may result from the fact that many private developers have used the statute as a wedge to get approvals for dense multifamily developments, which generally sell at lower per-unit prices than large-lot single-family units.

These findings are significant because they show that, when allowed to build at higher densities, developers can and will construct housing that is less expensive than the housing available in the surrounding community. They also show that section 8-30g seems to be changing the behavior of local zoning commissions without developers always having to go to court. Together, these findings suggest that section 8-30g could provide a framework for relaxing the large-lot and single-family zoning requirements

80. *Id.* at 5. Timothy Hollister, a Hartford land use attorney and member of the 1999 Blue Ribbon Commission, also confirmed that he had observed this phenomenon of the market-rate units developed under the Appeals Procedure being less expensive than the housing in the host town. Telephone Interview with Timothy Hollister, Partner, Shipman & Goodwin, Hartford, Conn. (Dec. 1, 2000).

81. JOHN RAPP, OFFICE OF LEGISLATIVE RESEARCH, NO. 2000-r-0607, HOUSING PROJECTS DEVELOPED UNDER THE AFFORDABLE HOUSING LAND USE APPEALS PROCEDURE 8 (2000), available at <http://www.cga.state.ct.us/2000/rpt/olr/htm/2000-r-0607.htm>.

82. See discussion *infra* Section VI.A.

imposed by exclusionary municipalities, thereby providing a source of new moderate-income housing without having to use deed restrictions.

III. THE SECOND BLUE RIBBON COMMISSION AND THE 2000 AMENDMENTS

Almost as soon as the legislature enacted the Appeals Procedure, there were numerous calls for its repeal or amendment. This Part discusses the events that led to the creation of a new Blue Ribbon Commission in 1999, including the dissatisfaction of planning and zoning officials and the Connecticut Supreme Court's decision in *Christian Activities Council*. It then examines the recommendations of the Blue Ribbon Commission Report and the resulting changes that the legislature made to the statute.

A. *Seeds of Discontent*

1. *Municipal Planning Officials*

Professional planners in several Connecticut towns have expressed continuing dissatisfaction with the Appeals Procedure. My interviews with planning officials revealed that planners' concerns center around two issues.⁸³ They expressed concerns that (1) the procedure acts as a "zone busting" device that gives developers unwarranted windfall profits and allows them to exercise too much leverage over local zoning boards; and

83. I attempted to contact planning officials from all of the municipalities that are listed by the Connecticut Department of Economic Development (DECD) as having deed-restricted units. I interviewed municipal officials from Bridgeport, Cheshire, East Windsor, Fairfield, Farmington, Glastonbury, Madison, Manchester, Milford, New Haven, Newtown, Norwalk, Plainville, Shelton, Stamford, Vernon, West Hartford, Westbrook, and Wilton.

I selected the set of planners to interview from the DECD's 2000 list that catalogues the amount of affordable housing in each Connecticut municipality. Ciccalone Memorandum, *supra* note 49. The DECD keeps statistics on the housing stocks in each of Connecticut's 169 towns, including the number of affordable deed-restricted units that exist in each community. I chose to interview officials from the thirty-two towns that were listed by the DECD as having deed-restricted housing units. I chose this set because the officials in the towns were the people most likely to have experience both with monitoring and administering deed-restricted units (because these are the towns that actually contain such units), and with working within the structure of the Appeals Procedure (because it seemed likely that the units were created pursuant to the statute).

I contacted planning officials from all thirty-two of the towns in this set. Of these thirty-two, nineteen were willing to do interviews. Some of the remaining thirteen, while unable to do interviews, sent me information, including their towns' inclusionary zoning ordinances, which I discuss in Section V.A.

While any interview data are vulnerable to the biases of the interview subjects, this sample is relatively balanced because it contains officials both from towns that are exempt from the Appeals Procedure (such as Bridgeport, Stamford, and New Haven, which contain much public and deed-restricted affordable housing), and from those that are not exempt from the Appeals Procedure (such as Madison and Wilton, which contain very little affordable housing). Statutes that attempt to distribute a "fair share" of affordable housing throughout a region or state naturally pit the suburbs against the cities. Therefore, it is important to capture voices from both groups, which the interview set does.

(2) the exemption calculation is unfair because it does not count ordinary low-priced housing units unless they are deed-restricted or publicly funded. A 1996 survey of town and city planners in the Hartford region found that the members of that group expressed similar concerns.⁸⁴

The Appeals Procedure gives developers an extra bargaining chip in their negotiations with municipal land use boards by allowing them to threaten to invoke the procedure by including deed-restricted units in their proposal. Not surprisingly, municipal planning officials and the boards they work with do not like this partial loss of negotiating power.

Milford's Assistant City Planner expressed frustration at the amount of leverage that developers have under the Appeals Procedure to prescribe the density and location of their development. He said that, under the statute, the developer gets to choose the density bonus to award to himself.⁸⁵ Newtown's Director of Community Development said that the statute takes away towns' ability to regulate the pace of their development and places it in the hands of developers.⁸⁶

Several planners also expressed concerns that the procedures used to calculate which towns are exempt from the statute are unfair. Some said that the exemption calculation is confusing for municipalities and difficult for the state to administer accurately.⁸⁷ Several others said that the exemption calculation is flawed because it fails to count low-cost units that would meet the price requirements for "affordable housing" but do not meet the statute's deed restriction or public funding requirements.⁸⁸

84. Peter J. Vodola, *Connecticut's Affordable Housing Appeals Procedure Law in Practice*, 29 CONN. L. REV. 1235, 1264-75 (1997); see also Tondro, *supra* note 33, at 1140 (stating that "[p]lanners were among the Appeals Act's most outspoken critics").

85. Telephone Interview with Peter Crabtree, Assistant City Planner, Milford, Conn. (Nov. 22, 2000). Many "inclusionary zoning" regulations contain a graduated density-bonus schedule. Ellickson, *supra* note 21, at 1180. In contrast, section 8-30g allows developers to propose developments at whatever density they want as long as their proposal includes a set-aside of twenty-five percent (now thirty percent) deed-restricted units. CONN. GEN. STAT. § 8-30g (2001).

86. Telephone Interview with Elizabeth Stocker, Director of Community Development, Newtown, Conn. (Nov. 21, 2000).

87. Telephone Interview with Peter Crabtree, *supra* note 85 (saying that he feels sorry for the person who has to do the exemption calculations for section 8-30g); Telephone Interview with Dorothy Wilson, City Planner, Norwalk, Conn. (Nov. 16, 2000) (stating that the exemption calculation is difficult to understand and that the DECD has made several mistakes calculating Norwalk's exemption).

88. Telephone Interview with Don Foster, Town Planner, West Hartford, Conn. (Nov. 16, 2000) (stating that West Hartford has "a very high inventory of units that meet the affordable pricing criteria" but are not counted because they are not deed-restricted); Telephone Interview with Ken Leslie, Town Planner, Glastonbury, Conn. (Oct. 27, 2000) ("We approved a condo project about three years ago where the initial sales price was \$80,000. We were offering single-family condo units at prices below what qualified as 'affordable.' We did more for affordable housing from '96 to '98 in condo sales than we did in the prior ten years [in government-funded and deed-restricted units]."); Telephone Interview with Rick Schultz, Town Planner, Shelton, Conn. (Oct. 26, 2000) ("Shelton has three trailer parks with units that average at \$80,000 each. All of our trailer parks, because they are not deed-restricted, do not get counted toward the total."); see also Vodola, *supra* note 84, at 1268 (stating that some planners he interviewed "noted that it

Legislators have expressed this local dissatisfaction with the Appeals Procedure by introducing numerous bills to amend or repeal the statute. Legislators introduced sixty-three of these bills during the 1997, 1998, and 1999 sessions.⁸⁹ The vast majority of these bills would have weakened private developers' ability to build housing under the statute by (1) increasing the requirements for "set-aside" developments;⁹⁰ (2) easing the standards by which towns could become exempt from the procedure,⁹¹ or (3) altering the burden of proof to benefit local zoning commissions.⁹²

2. *The Connecticut Supreme Court's Ruling in Christian Activities Council*

The Connecticut Supreme Court's decision in *Christian Activities Council, Congregational v. Town Council*⁹³ was the event that directly prompted the legislature to charge a second Blue Ribbon Commission with overhauling the Appeals Procedure.⁹⁴ *Christian Activities Council* interpreted two different provisions in the statute in ways that some claimed would render the Appeals Procedure completely ineffective.⁹⁵

First, the court determined that a municipality's "need for affordable housing,"⁹⁶ which a reviewing court must balance against a commission's reasons for denying an application, "is to be addressed on a local basis"⁹⁷ rather than as a portion of the regional or statewide need. As Justice Berdon pointed out in dissent, the majority's interpretation of "need" seemed to undermine the overall purpose of the statute. He argued "that a local focus . . . would threaten the development of affordable housing in

did not make sense for a law that relied upon private sector solutions to the affordable housing problem to define affordable housing as only those units that were subsidized by the public sector or, essentially, taken out of the market through deed restrictions").

89. RAPP, *supra* note 45, at 1.

90. *Id.* at 5-6. This category of proposed bills illustrates a fundamental defect embedded in the Appeals Procedure. Because the Appeals Procedure functions largely by imposing requirements on private developers, legislators may undermine the statute by increasing these requirements while at the same time sanctimoniously stating that they are making a greater commitment to low-income housing needs.

91. *Id.* at 4.

92. Several of these bills proposed to shift the burden of proof from towns to developers, essentially making affordable housing appeals the same as appeals from all other zoning decisions. *Id.* at 7-8.

93. 735 A.2d 231 (Conn. 1999).

94. BLUE RIBBON COMMISSION REPORT, *supra* note 2, at 28, 60.

95. *E.g.*, *Christian Activities Council*, 735 A.2d at 255 (Berdon, J., dissenting) (arguing that the majority's ruling cripples the affordable housing statute); Tondro, *supra* note 33, at 1142 (stating that *Christian Activities Council* "dealt perhaps a mortal blow to the Affordable Housing Appeals Act's effort to employ a means for spreading affordable housing throughout a region").

96. CONN. GEN. STAT. § 8-30g (c)(1)(C) (1999).

97. *Christian Activities Council*, 735 A.2d at 249.

wealthier towns. Because they have few low income residents, such towns could claim that they have no (local) need for affordable housing.”⁹⁸

Second, the court decreased the level of review that the lower courts had effectively been applying to cases brought under the Appeals Procedure. The court found that the “sufficient evidence” standard stated in section 8-30g(c)(1)(A) should also apply to sections 8-30g(c)(1)(B), (C), and (D).⁹⁹ The court held that its task in reviewing whether a zoning commission carried its burden under section 8-30g(c) “is not to weigh the evidence itself[, but] rather . . . to review the evidence and determine whether . . . there was sufficient evidence for the commission reasonably to have concluded”¹⁰⁰ that each element was fulfilled.

While it is not always clear what standard of review the lower courts have been applying under the Appeals Procedure, the rule announced in *Christian Activities Council* lowered it to somewhere close to the “abuse of discretion” standard traditionally applied to appeals from legislative decisions of local land use authorities.¹⁰¹ It was for this reason that Justice Berdon predicted that the majority’s ruling on this standard of review would “rip[] the soul out of affordable housing in the state of Connecticut.”¹⁰²

B. *The Second Blue Ribbon Commission and Public Act 00-206*

Faced with mounting dissatisfaction and uncertainty about the future of the Appeals Procedure following *Christian Activities Council*, the legislature created a second Blue Ribbon Commission in 1999, which it charged with researching the state of affordable housing in Connecticut and with recommending specific revisions to the Appeals Procedure.¹⁰³

Drawing on the many amendments proposed during the preceding years and on the changes made by *Christian Activities Council*, the Blue Ribbon Commission recommended changes to the Appeals Procedure in four main areas.¹⁰⁴ The legislature enacted these recommendations with only a few exceptions.

98. *Id.* at 261-62 (citing *W. Hartford Interfaith Coalition, Inc. v. Town Council*, 636 A.2d 1342, 1349 (Conn. 1994)).

99. *Id.* at 245.

100. *Id.*

101. *Id.* at 242-43.

102. *Id.* at 255 (Berdon, J., dissenting).

103. An Act Establishing a Blue Ribbon Commission To Study Affordable Housing, 1999 Conn. Acts 15 (Reg. Sess.).

104. The 2000 Report also proposed several other changes to the state’s affordable housing policy, including creating several financial incentives for municipalities to construct affordable housing. BLUE RIBBON COMMISSION REPORT, *supra* note 2, at 14-17. I discuss only the changes the report recommended to the Appeals Procedure.

1. *Reversing Christian Activities Council*

The Commission recommended that the legislature should reverse both of the major holdings of *Christian Activities Council*. It proposed for the legislature to specify that the need to which section 8-30g(c) referred “is a regional need, not a local or statewide need”¹⁰⁵ by inserting the word “regional” before “need.” It also proposed to heighten the level of review by requiring a court to “determine, as a matter of law, whether the commission has met the last three elements of CGS § 8-30g(c)(1) regarding the burden of proof.”¹⁰⁶

The legislature implemented the Commission’s recommendation that the statute specify that the court is to conduct its own review of the record to determine whether a zoning board’s decisions met the standards laid out in sections 8-30g(c)(1)(B), (C), and (D).¹⁰⁷

The House of Representatives, however, chose not to reverse *Christian Activities Council*’s interpretation that the “need” to which section 8-30g(c) referred should be interpreted as “local need.” Instead, explained Representative Flaherty, “the amendment leaves to judicial construction what constitutes housing need.”¹⁰⁸

2. *Increasing the Requirements for Set-Aside Developments*

The report recommended that the legislature increase the requirements for deed-restricted units in set-aside developments in three ways. First, the Commission proposed to increase the minimum percentage of deed-restricted units in a qualifying application from twenty-five percent to thirty percent.¹⁰⁹ Second, the Commission proposed to increase the percentage of units that must be priced at or below rates that are “affordable” for tenants or owners earning less than or equal to sixty percent of the lesser of the region’s or the state’s median income.¹¹⁰ The existing law required that ten percent of the total units be restricted to this price level; the Commission recommended increasing this to fifteen percent.¹¹¹ Third, the Commission

105. *Id.* at 10.

106. *Id.* at 12.

107. The legislative history indicates that the legislators were not very clear on what standard they want the courts to employ, but intimated that they would like to return to the situation before *Christian Activities Council* when “sometimes towns . . . prevailed and sometimes towns . . . lost.” *Hearing Before the Select Comm. on Hous.*, 2000 Gen. Assem., Reg. Sess. (Conn. 2000) (statement of Robin Pearson, Co-Chair of the 2000 Blue Ribbon Commission).

108. Connecticut House of Representatives (transcript of Apr. 28, 2000) (statement of Rep. Flaherty), available at <http://www.cga.state.ct.us/2000/trn/H/2000HTR00428-R00-TRN.htm> [hereinafter “House Debate”]. For a discussion of the House’s deliberations on this issue, see *infra* Section IV.B.

109. BLUE RIBBON COMMISSION REPORT, *supra* note 2, at 9.

110. *Id.*

111. *Id.*

proposed to increase from “at least 30 years to at least 50 years from initial occupancy the period during which . . . affordable units in a set-aside development must be subject to maximum rental or sales price restrictions.”¹¹² The legislature enacted all of these recommendations, except that it extended the minimum time limit for deed restrictions to forty years instead of the recommended fifty.¹¹³

3. *Developer Submission Requirements*

The legislature enacted the Commission’s proposal to give local zoning boards the power to require the proponent of an affordable housing development to submit a conceptual site plan detailing the design of the proposed development.¹¹⁴ The legislature also adopted an amendment requiring applicants to submit an “Affordability Plan” requiring applicants to “designat[e] . . . a person, agency, or entity responsible for administering the plan, including complying with income limits and sale or rental restrictions” and to submit plans for the marketing, initial sale and resale of deed-restricted units.¹¹⁵

4. *Changing the Standards for Exemptions and Moratoria*

The Commission recommended that the Appeals Procedure be amended to require the state to use the number of housing units listed in the last decennial U.S. Census as the denominator for calculating the town’s percentage of affordable units when determining which towns are exempt from the Appeals Procedure. The Commission also recommended that the legislature establish a way for towns to earn a three-year moratorium from the statute based on a weighted point system (that is, lower-priced deed-restricted units get more points).¹¹⁶ The legislature enacted both of these recommendations.¹¹⁷

IV. POTENTIAL PITFALLS IN THE 2000 AMENDMENTS

The 2000 amendments to the Appeals Procedure fail from a policy perspective because they decrease the likelihood that dense multifamily

112. *Id.* at 11.

113. An Act Implementing the Recommendations of the Blue Ribbon Commission To Study Affordable Housing Regarding the Affordable Housing Appeals Procedure § 1(a)(6), 2000 Conn. Acts 206 (Reg. Sess.) (codified at CONN. GEN. STAT. § 8-30g (2001)).

114. *Id.* § 1(c).

115. *Id.* § 1(b)(1).

116. BLUE RIBBON COMMISSION REPORT, *supra* note 2, at 13.

117. An Act Implementing the Recommendations of the Blue Ribbon Commission To Study Affordable Housing Regarding the Affordable Housing Appeals Procedure §§ 1, 7.

housing will be developed. The category in which the largest number of housing units have been created under the Appeals Procedure has not consisted of deed-restricted or government-funded units, but rather of multifamily market-rate units produced as part of set-aside developments. These units are frequently less expensive than the housing that was previously available in the community in which they were built.¹¹⁸ The 2000 amendments fail because they ignore the importance of these units and because they effect changes that are likely to decrease production by private developers under the Appeals Procedure.

Two features of the amendments in particular have the potential to slow considerably the rate of development under the Appeals Procedure. The first is that the amendments tighten the requirements for deed-restricted units in set-aside developments. This is likely to reduce substantially the number of housing units that private developers create under the statute. The second feature is the failure of the amendments to define whether the “need” referred to by section 8-30g(c) is local, regional, or statewide. If, as seems likely, the courts continue to interpret “need” as “local need,” then this will give wealthy towns the power to slow all development under the statute by claiming that their local need is insubstantial.

A. *More Stringent Requirements for Set-Aside Developments*

The increased requirements for set-aside developments place a significant burden on private developers. It is intuitive that raising the minimum percentage of deed-restricted units from twenty-five percent to thirty percent and increasing the number of units that must meet the low-income affordability criteria (based on sixty percent of median income) from ten percent to fifteen percent will decrease or erase developers’ profits and diminish incentives for private developers under the Appeals Procedure. The surprising thing is that developers,¹¹⁹ town planners,¹²⁰ and Blue Ribbon Commission members all acknowledge that increasing these requirements is likely to decrease private development under the Appeals

118. Ethier et al., *supra* note 43, at 2; *see also* Telephone Interview with Timothy Hollister, *supra* note 80 (stating his observation that the market-rate units in multifamily developments created under the statute are usually less expensive than the available housing in the host town).

119. Eleanor Charles, *State Expected To Change Affordable Housing Law*, N.Y. TIMES, Feb. 13, 2000, at 11 (“By agreeing with low-income housing proponents and creating more onerous income restrictions, the [Blue Ribbon] [C]ommission has produced a chilling effect on the private sector,” said Samuel Fuller, regional vice president of AvalonBay Communities, builders of luxury rental complexes.”).

120. *Id.* at 9 (quoting Diane Fox, the Greenwich town planner, who stated: “The increase in units, . . . and the increase from 30 to 50 years during which affordable units must remain so may give more teeth to the municipalities.”); Telephone Interview with Mark Pellegrini, Town Planner, Manchester, Conn. (Nov. 15, 2000) (“My personal opinion on these latest changes is that they set the bar so high that developers will not even mess around with the procedure.”).

Procedure substantially. Some even say that the purpose of the amendments was to prevent private development under the statute.¹²¹

Mark Forlenza, a regional Vice President of the national real estate development company AvalonBay Communities, testified before the General Assembly's Select Committee on Housing that under the new requirements, it would have been financially infeasible for his company to develop Avalon Hills, its 168-unit apartment complex in Orange, Connecticut. "What the new legislation would do would require us to pay \$600,000 less for the land to make this an economically viable development," said Forlenza.¹²² Forlenza told me that because the amendments shift five percent of the units in a development from the market-rate category to the low-income category (based on sixty percent of median income), it will be very difficult for private developers to build any developments in southern Connecticut under the Appeals Procedure.¹²³

Timothy Hollister, a Hartford land use attorney who was a member of the Blue Ribbon Commission, agreed that for some communities, the heightened requirements for set-aside units would "effectively restrict[] private developers from bringing these appeals."¹²⁴

Several participants have described the amendments as the result of a coalition formed between nonprofit organizations and exclusionary suburban towns, which was designed to decrease the amount of private development under the Appeals Procedure.¹²⁵ Forlenza called the amendments "an interesting compromise between two seemingly opposite parties."¹²⁶ Towns are happy with the decrease in the threat from private developers, and nonprofits now face less competition in the construction of affordable housing.¹²⁷ "Towns don't want low-income housing at all, and housing advocates want even deeper subsidies for low-income housing," said Gurdon Buck, a land use lawyer with the Hartford firm of Robinson & Cole who testified before the Blue Ribbon Commission.¹²⁸ Larry Kluetsch, the director of the nonprofit Mutual Housing Association of Southwestern

121. See *infra* notes 127-130 and accompanying text.

122. *Hearing Before the Select Comm. on Hous.*, 2000 Gen. Assem., Reg. Sess. (Conn. 2000) (statement of Mark Forlenza, Vice President, AvalonBay Communities).

123. Telephone Interview with Mark Forlenza, Vice President, AvalonBay Communities, Wilton, Conn. (Dec. 7, 2000).

124. Telephone Interview with Timothy Hollister, *supra* note 80. The Blue Ribbon Commission Report also concedes that the increased set-aside requirements "may prove to be a disincentive to private developers." BLUE RIBBON COMMISSION REPORT, *supra* note 2, at 23.

125. Telephone Interview with Gurdon Buck, Partner, Robinson & Cole, Hartford, Conn. (Oct. 24, 2000).

126. Telephone Interview with Mark Forlenza, *supra* note 123.

127. Telephone Interview with Gurdon Buck, *supra* note 125.

128. *Id.*

Connecticut, admitted that “for the nonprofit community, these changes are good because we face less competition from private developers.”¹²⁹

Buck said that he thought that the main objective of the amendments was to make deed-restricted units as difficult to sell as possible.¹³⁰ Manchester’s Town Planner, Mark Pelligrini, echoed this, saying that the latest changes to the requirements for set-aside developments “set[] the bar so high that developers will not even mess around with the procedure.”¹³¹ When I asked him whether he thought this was intentional, he replied, “No one will tell you that. I think that on a political level a compromise was achieved. But on an economic level, . . . the new law is a stopper.”¹³²

While this compromise may suit exclusionary towns and nonprofit developers, it is unlikely to benefit low- and moderate-income housing consumers. Nonprofits are unlikely to be able to make up the decrease in the number of affordable units produced in connection with private set-aside developments. Blue Ribbon Commission member Timothy Hollister said that he does not “expect that nonprofit developers will step into the breach and make up the difference” in the decreased production from for-profit developers.¹³³ Hollister noted that nonprofits have never brought a significant number of the appeals under the statute and that the amendments give them no new incentives to do so.¹³⁴ Perhaps more importantly, the amendments are also likely to sacrifice an even greater number of medium- and high-density multifamily market-rate units that have been produced under the statute in connection with set-aside developments.

B. *Need: Local, Regional, or Statewide?*

The second potential pitfall in the 2000 amendments is the failure to define the term “need” after the Connecticut Supreme Court ruled in *Christian Activities Council* that the term referred to “local need” for the purposes of the Appeals Procedure.¹³⁵ The legislature chose not to take the Blue Ribbon Commission’s recommendation that it redefine the “need” referred to in section 8-30g(c) as “regional need.” Legislators paid little attention to the potential effects of this omission in the debates, but it is likely to slow the pace of housing development under the Appeals Procedure significantly.

129. Telephone Interview with Larry Kluetsch, Executive Director, Mutual Housing Association of Southwestern Connecticut (Dec. 1, 2000).

130. Telephone Interview with Gurdon Buck, *supra* note 125.

131. Telephone Interview with Mark Pellegrini, *supra* note 120.

132. *Id.*

133. Telephone Interview with Timothy Hollister, *supra* note 80.

134. *Id.*

135. *Christian Activities Council, Congregational v. Town Council*, 735 A.2d 231, 249 (Conn. 1999).

The question of whether the “need” for affordable housing that a local zoning commission is to balance against its reasons for denying an affordable housing application is “local need” or some broader regional or statewide need was a central issue in *Christian Activities Council*. The Town of Glastonbury argued that the need should be defined locally, and that under that standard, its own need would be minimal. Examining the statute’s legislative history, the court agreed, holding that need should be defined as “local need” for the purposes of section 8-30g.¹³⁶ This ruling substantially narrowed the standard of review that the lower courts had been applying.¹³⁷

The Blue Ribbon Commission recommended that the legislature reverse the court’s position by inserting the word “regional” before “need” in section 8-30g(c), but the House of Representatives declined to do so on the ground that “the word regional could be misinterpreted to imply that a suburban town has no duty to meet regional housing needs if a nearby center city has a substantial amount of low income housing.”¹³⁸

The legislature’s solution was to punt the issue to the courts. “By deleting the word,” explained Representative Flaherty, “the amendment leaves to judicial construction what constitutes housing need.”¹³⁹ Flaherty added that he expected that “housing need will be interpreted by the courts in a manner consistent with the zoning enabling act.”¹⁴⁰ The zoning enabling act states that a municipality’s zoning “regulations shall . . . encourage the development of housing opportunities, . . . for all residents of the municipality *and the planning region in which the municipality is located.*”¹⁴¹ According to Hollister, proponents of the regional interpretation are relying on this language in section 8-2 to convince the courts that the “need” referred to by section 8-30g(c) is not strictly local.¹⁴²

Letting the courts determine the scope of the “need inquiry,” however, is a risky strategy for regionalists, since the Connecticut Supreme Court has already ruled that the statute defines need locally.¹⁴³ It seems highly unlikely that the court will reverse that interpretation given that the

136. *Id.*

137. See *supra* notes 71-72 and accompanying text; see also Tondro, *supra* note 33, at 1143 (“In *Christian Activities Council v. Town Council of Glastonbury*, the court watered-down a town’s obligation to support affordable housing to the level it existed prior to the adoption of the Act . . .”).

138. House Debate, *supra* note 108 (statement of Rep. Flaherty).

139. *Id.*

140. *Id.*

141. CONN. GEN. STAT. § 8-2(a) (2001) (emphasis added).

142. Telephone Interview with Timothy Hollister, *supra* note 80.

143. *Christian Activities Council, Congregational v. Town Council*, 735 A.2d 231, 249 (Conn. 1999).

legislature considered changing the wording of the statute to “regional need,” but decided against it.

The effect of determining need locally is to reinforce the behavior of exclusionary municipalities. If a town has engaged in successful exclusionary strategies in the past, so that only affluent people are living in the town, then by definition the town has little or no need for affordable housing. Faced with a low level of need, a local land use commission can recite almost any legally permissible reason for turning down an affordable housing application and find that it “clearly outweighs” the town’s need for affordable housing.

V. WHY DEED-RESTRICTED UNITS ARE NOT THE SOLUTION

The 2000 amendments are likely to result in the production of fewer multifamily market-rate units and probably fewer deed-restricted affordable units in Connecticut. Even if they were to increase the number of deed-restricted affordable units significantly, however, there are substantial problems with the transfer and administration of deed-restricted units that preclude the deed-restriction device from providing a good long-term solution to the state’s need for moderate-income housing.

A. *Inclusionary Zoning in Connecticut*

Connecticut has had more than a decade of experience with deed-restricted affordable housing units. The legislature began to encourage the production of deed-restricted units in 1988 by enacting a statute that allows municipalities to promulgate “inclusionary zoning” regulations, which provide exemptions from regular density limits when a developer agrees to produce deed-restricted affordable housing.¹⁴⁴

These local inclusionary zoning programs produced a variety of deed-restricted units that are subject to different requirements.¹⁴⁵ I attempted to

144. CONN. GEN. STAT. § 8-2g (2001).

145. Municipal inclusionary zoning regulations vary widely. Some towns provide density bonuses (although they do not guarantee project approval) for deed-restricted units with less stringent restrictions than those required in the Appeals Procedure. *E.g.*, Town of Fairfield, Regulations for Designed Residence District § 10.6.9 (providing a fifty-percent density bonus for developments in which not less than twenty percent of the total number of units will be affordable at eighty percent of the median income for at least twenty-five years after initial occupancy); Town of Glastonbury, Planned Area Development Zone Pad § 4.12.3 (1989) (providing a variable density bonus that increases as the percentage of deed-restricted units increases, with twenty percent as the minimum percentage of restricted units); Town of Newtown, Zoning Regulations §§ 4.22.411, 4.22.414 (1994) (applying a formula similar to Fairfield’s, but requiring that deed-restrictions remain in place for at least twenty years after initial occupancy).

Wilton has inclusionary zoning regulations that are stricter than section 8-30g. The town requires that 100% of the units in an affordable housing zone be deed-restricted. Town of Wilton, Zoning Regulations §§ 29-5.A(7)(a)(3), .B(9)(c)(1) (2000). It is unclear, however, whether this

contact all of the towns that were listed by the DECD as having deed-restricted units that qualify under section 8-30g in order to learn about their experiences with administering these units.¹⁴⁶

B. *Problems with Deed-Restricted Units*

My discussions with town planning and zoning officials and land use attorneys revealed three main problems with limiting resale prices through the use of restrictive covenants. First, potential buyers of deed-restricted units have experienced problems with getting mortgages on these properties. Second, it is difficult for municipalities to monitor and enforce the maximum price and income restrictions attached to deed-restricted properties. Third, because resale prices for deed-restricted units fluctuate not only with the median income of the region or state, but also with interest rates, rising interest rates could cause a moderate-income homeowner to lose significant equity if forced to sell his or her home.

1. *Mortgage Financing*

Town planners told me that some moderate- and low-income buyers have experienced difficulties getting mortgages to finance the purchase of deed-restricted properties.¹⁴⁷ Mortgage lenders may be reluctant to make loans based on these deed-restricted properties for several reasons. First, mortgage lenders often require buyers to purchase mortgage insurance when buyers make less than a twenty-percent down payment on the property.¹⁴⁸ The new amendments to the Appeals Procedure impose maximum allowable down payments on the deed-restricted units.¹⁴⁹ The problem arises because mortgage insurers will not insure properties that are subject to maximum resale price restrictions.¹⁵⁰ This problem may be partly solved because lenders are able to get credit under the Community Reinvestment Act (CRA) if they make loans on these affordable

requirement is actually legally meaningful, since towns may not turn down affordable housing applications solely because they do not comply with the town's underlying affordable housing regulations, as long as they comply with section 8-30g. *Town Close Assocs. v. Planning & Zoning Comm'n*, 679 A.2d 378, 381 n.8 (Conn. App. Ct. 1996).

146. For a list of the towns contacted in the telephone survey, see *supra* note 83.

147. Telephone Interview with Jeff Ollendorf, Planner, Farmington, Conn. (Oct. 25, 2000) (stating that there "was some trouble getting mortgages, particularly from those [lenders] who want to sell [their mortgages] on the secondary market"); Telephone Interview with Richard Pfurr, Planner, Cheshire, Conn. (Oct. 26, 2000) (stating that "people had trouble getting mortgages on these properties").

148. Telephone Interview with Timothy Hollister, *supra* note 80.

149. An Act Implementing the Recommendations of the Blue Ribbon Commission To Study Affordable Housing Regarding the Affordable Housing Appeals Procedure § 1(b)(2)(A), 2000 Conn. Acts 206 (Reg. Sess.) (codified at CONN. GEN. STAT. § 8-30g (2001)).

150. Telephone Interview with Timothy Hollister, *supra* note 80.

properties.¹⁵¹ However, given the experiences of some Connecticut towns, the CRA may not provide a complete solution.¹⁵²

A second potential problem for mortgage lenders is that it is unclear whether they can foreclose on deed-restricted properties. According to Buck, “by requiring that the purchaser be one of the target classes, you exclude the possibility of the lender foreclosing—there is no security.”¹⁵³ The Appeals Procedure is silent on the issue of whether a lender may foreclose on deed-restricted properties. The Town of Madison deals with this issue in its inclusionary zoning regulations by terminating the covenant restricting resale price in the event that a lender forecloses. Madison’s regulations provide that “title restrictions . . . will automatically terminate if . . . [t]he title to the mortgage is transferred by foreclosure or deed-in-lieu of foreclosure” to a federally insured lending institution.¹⁵⁴ This rule takes care of the problem of lender uncertainty, but the cost of a rule like this is that it removes the price restrictions from the property, which the lender could then resell at market rates. From a town’s perspective, it would also have the drawback of removing the unit from being counted toward an exemption or a moratorium from section 8-30g.

There is no similar rule in section 8-30g or under most local inclusionary zoning regulations, and it is not entirely clear what happens to deed-restricted properties when a lender forecloses. Timothy Hollister, a member of the Blue Ribbon Commission, said that banks could foreclose on the properties, but would have to sell them to buyers with incomes low enough to qualify under the Appeals Procedure.¹⁵⁵ This would make the properties unattractive collateral from a bank’s perspective. Mike Santoro, of the Connecticut Department of Economic Development, said that lenders are generally required to get a court to remove a restrictive covenant when foreclosing on a deed-restricted property. According to Santoro, this would also disqualify the units from counting toward a town’s moratorium under section 8-30g.¹⁵⁶

151. 12 U.S.C. § 2901(b) (1994). The CRA requires federal banking regulators to “encourage . . . [financial] institutions to help meet the credit needs of the local communities in which they are chartered consistent with the safe and sound operation of such institutions.” *Id.* The CRA provides that regulators should evaluate an institution’s performance under the statute and take it into account when licensing the expansion of regulated institutions. § 2903(a)(2).

152. Telephone Interview with Jeff Ollendorf, *supra* note 147; Telephone Interview with Richard Pfurr, *supra* note 147.

153. Telephone Interview with Gurdon Buck, *supra* note 125.

154. Town of Madison, Affordable Housing District Regulations § 26.3(4) (1994).

155. Telephone Interview with Timothy Hollister, *supra* note 80.

156. Telephone Interview with Mike Santoro, Department of Economic and Community Development, Hartford, Conn. (Oct. 26, 2000).

2. *Monitoring Price and Income Limits*

A second reason why deed-restricted units are an impractical long-term solution to the shortage of moderate-income housing is that they are difficult for municipalities to monitor and administer fairly and accurately. Until 1996, the state did not require any verification that deed-restricted units were being rented or sold at restricted prices to renters or buyers with incomes that were low enough to qualify under the statute. Since 1996, section 8-30h has required landlords who are renting deed-restricted affordable units to file yearly certifications that their rent levels and renters' incomes comply with the restrictions.¹⁵⁷ There is no such certification process for for-sale units, however. Towns are responsible for making sure that their price remains below what the deed restrictions specify, and for monitoring how people are chosen to purchase the below-market units.

While some towns' inclusionary zoning regulations provide that developers must file plans that detail how the deed-restricted properties will be sold and resold so that they may remain qualified as deed-restricted units under the Act,¹⁵⁸ most of the town officials with whom I spoke were not aware of how, if at all, their town monitors the transfer of these deed-restricted units.

In some towns, municipal officials are responsible for approving the transfer of deed-restricted units.¹⁵⁹ Other towns delegate responsibility for monitoring these units to local nonprofit organizations.¹⁶⁰ Others rely on the condominium associations in which the deed-restricted properties are located.¹⁶¹ Most towns, however, are not involved in monitoring the transactions at all, and rely on the individual owners to make sure that they are reselling the units at prices and to buyers consistent with the deed restrictions.¹⁶²

157. CONN. GEN. STAT. § 8-30h (2001).

158. Inclusionary zoning regulations in some towns require developers to form a contract with the town specifying how the deed-restricted properties will be administered. Town of Farmington, *Affordable Housing Zone Regulations* § 25(D); Town of Newtown, *Zoning Regulations* § 4.22.200(4) (1994).

159. Telephone Interview with Ken Leslie, *supra* note 88 (stating that the local housing authority does a sale-price review when deed-restricted properties come up for sale); Telephone Interview with Jeff Ollendorf, *supra* note 147 (same).

160. Telephone Interview with John Bossi, Town Engineer, Plainville, Conn. (Nov. 15, 2000) (stating that the town delegates the responsibility of administering deed-restricted units to a local nonprofit organization); Telephone Interview with Mark Pellegrini, *supra* note 120 (same); Telephone Interview with Don Poland, Town Planner, East Windsor, Conn. (Nov. 21, 2000) (same).

161. Telephone Interview with John Bossi, *supra* note 160.

162. Telephone Interview with Don Foster, *supra* note 88 (stating that West Hartford relies on self-monitoring to maintain the conditions on deed-restricted properties); Telephone Interview with Elizabeth Stocker, *supra* note 86 (same).

The 2000 amendments to the Appeals Procedure attempt to give towns greater powers to enforce the price and resident restrictions on deed-restricted units. The amended statute requires proponents of affordable housing developments to submit a plan designating those who will be responsible for monitoring the deed-restricted units.¹⁶³ As long as towns receive credit toward the exemption and moratorium simply by sending copies of the restricted deeds to the state, without having to demonstrate compliance,¹⁶⁴ however, there is little incentive for towns to spend resources on monitoring. Therefore, there is no information about whether the deed-restricted units actually remain affordable. Even if the towns were equipped to monitor the initial sale and subsequent transfer of deed-restricted units, it is unclear that it would be worth the cost, given the alternative of relying on denser development of multifamily market-rate units to fill the need for moderate-income housing.

3. *Interest Rate Fluctuation*

A third general problem with deed-restricted properties arises because the maximum sale price for these units is inversely related to the prevailing interest rate for mortgages. Maximum resale prices are calculated under the statute by taking, for example, sixty percent of the state median income and determining how much a buyer earning that amount could pay toward mortgage payments so that the yearly payments would not exceed thirty percent of his or her income.¹⁶⁵ Thus, the lower the prevailing interest rate for mortgages, the greater the maximum allowable price. The problem arises when a buyer buys during a time when mortgage interest rates are low and then must sell when interest rates go up. In this case, a buyer would lose a significant amount of the equity in his or her home.

The price restriction in general, and this risk posed by rising interest rates in particular, go against the longstanding policy of using homeownership as a tool to develop savings.¹⁶⁶ This additional risk may also increase the difficulty of getting mortgages on deed-restricted properties.¹⁶⁷

163. CONN. GEN. STAT. § 8-30g(b)(1) (2001).

164. Mike Santoro, the official in the Department of Economic and Community Development responsible for overseeing the exemption calculation, said that towns get credit toward the ten-percent exemption from section 8-30g by sending the DECD copies of deeds containing restrictions that comply with the requirements of the Act. Telephone Interview with Mike Santoro, *supra* note 156.

165. CONN. GEN. STAT. § 8-30g(a)(6) (2001); *see also Understanding the Amendments to Connecticut's Affordable Housing Act*, Sept. 8, 2000, available at <http://www.cga.state.ct.us/hsg/830gConference.htm> (providing a sample calculation).

166. Thomas Scheffey, *A Housing Bill To Live With*, CONN. L. TRIB., May 15, 2000.

167. Telephone Interview with Gurdon Buck, *supra* note 125.

VI. AN ALTERNATIVE PROCEDURE

Most of the housing units produced under the Appeals Procedure have been market-rate units built by private developers in connection with set-aside developments.¹⁶⁸ These market-rate units are frequently built at a higher density than would have been allowed if the builder had not invoked the Appeals Procedure. Anecdotal evidence suggests that the market-rate units produced under the statute have frequently provided housing at lower prices than were previously available in the host municipality.¹⁶⁹

Deed-restricted units can present significant problems. These include difficulty with getting mortgages on deed-restricted properties, high administrative costs, and uncertainty about whether the properties remain in the hands of qualifying tenants and owners. By increasing the number of deed-restricted units required in set-aside developments, the 2000 amendments to the Appeals Procedure threaten to slow considerably the rate of multifamily housing construction in Connecticut, while at the same time potentially increasing the number of deed-restricted units built. The outcomes of the last decade of experience with the Appeals Procedure and the problems with deed-restricted units suggest that the 2000 amendments to the statute move away from achieving the goal of creating more housing units for low- and moderate-income families in Connecticut. A better solution to Connecticut's affordable housing shortage would be for the legislature to scrap the system of creating deed-restricted set-aside units in favor of a builder's remedy that would be triggered by proposals to build multifamily developments above a certain density.

A. *Will Higher-Density Multifamily Housing Be Cheaper?*

To know whether such a proposal makes sense, a threshold question must be resolved: whether an increase in the construction of multifamily housing built at higher densities than would be otherwise allowable is likely to lead to a decrease in housing costs. The 1997 study observed that the market-rate units produced under the Appeals Procedure have tended to cost less than other units in the surrounding town.¹⁷⁰ Other factors also suggest that increasing the density of development and encouraging the production of multifamily housing could lower housing costs.

168. See *supra* Section II.D.

169. Ethier et al., *supra* note 43, at 2; see also Telephone Interview with Timothy Hollister, *supra* note 80 (observing that the market-rate units built under the statute are often less expensive than the housing that was already available in the host town).

170. Ethier et al., *supra* note 43, at 2.

1. *Economies from Using Less Land and Grouping Housing Units*

While the price of land typically increases as it is zoned for higher-density uses,¹⁷¹ developers can experience significant cost savings from using less acreage per housing unit. Additionally, medium- and high-density multifamily housing is cheaper to build than large-lot single-family housing because of technical economies that arise in the housing construction process. These economies result from the developers' ability to build fewer streets and to use common connections to utilities such as sewers, drainage, water, gas, and electricity.¹⁷² One study estimated that these savings could range from around twenty-five percent in the case of simply clustering single-family housing to sixty-seven percent in the case of medium-density low-rise apartment buildings.¹⁷³ In the case of a competitive housing market, the bulk of these savings would be passed along to the buyers of the housing units.

2. *Increased Supply/Filtering Effects*

Increasing the permissible density of housing construction is also likely to increase the supply of housing in a given municipality. This is significant because, other things being equal, it will decrease the average price of housing. The theory of filtering is a corollary to the idea that an increase in the supply of housing will decrease average housing prices. This theory argues that production of any housing units will eventually benefit households that consume the bottom range of housing. As new housing is produced, consumers of higher-end housing will move out of their old homes and into new units. This transaction will continue as people "trade up," eventually benefiting the households at the bottom of the income range.¹⁷⁴ While there is empirical evidence that suggests that filtering does take place in some housing markets,¹⁷⁵ the theory has been widely

171. *E.g.*, Crone, *supra* note 47, at 170. If this were not true, then the builder's remedy that the set-aside provisions rely on would be unlikely to produce any units. The developers bring suits under the Appeals Procedure because they are compensated by the increased density at which they can develop the land.

172. Dietderich, *supra* note 23, at 51.

173. ALAN MALLACH, INCLUSIONARY ZONING HOUSING PROGRAMS: POLICIES AND PRACTICES 60 (1984).

174. *E.g.*, Ellickson, *supra* note 21, at 1185 ("As time passes, any individual housing unit tends to filter downward in relative quality as its components depreciate, and as its layout and equipment become obsolete.").

175. *E.g.*, JOHN C. WEICHER, HOUSING: FEDERAL POLICIES AND PROGRAMS 25-26 (1980); Brian J.L. Berry, *Ghetto Expansion and Single-Family Housing Prices: Chicago, 1968-1972*, 3 J. URB. ECON. 397, 416-17 (1976) (finding that the construction of new housing in Chicago suburbs decreased the price of housing in the inner city); John C. Weicher & Thomas G. Thibodeau, *Filtering and Housing Markets: An Empirical Analysis*, 23 J. URB. ECON. 21, 37 (1988) (concluding that "[f]iltering does occur in housing markets, and it is important quantitatively").

criticized.¹⁷⁶ One ground on which commentators have criticized filtering theory is that the production of luxury housing is too far removed from consumers of low- and moderate-income housing to have any practical effect on them.¹⁷⁷ In the case of the production of high-density multifamily housing, however, this might prove less of a criticism, since the trickle-down effect described by filtering theory would have less distance to go in order to affect low- and moderate-income households.¹⁷⁸

B. *The Multifamily Housing Appeals Procedure*

Here I outline what the Appeals Procedure would look like if it were triggered by proposals for medium- to high-density multifamily housing developments instead of set-aside developments. I am not suggesting that multifamily market-rate units can serve the housing consumers at the lowest end of the economic spectrum. It may be that public funding is the only way to house the very poor. Therefore, these changes should apply only to the part of the statute that deals with proposals for set-aside developments and would leave intact the portion dealing with proposals for public housing projects.¹⁷⁹

176. *E.g.*, ROTHENBERG ET AL., *supra* note 25, at 33 (“Substantial disagreement surrounds the notion of filtering in the housing literature.”); Dieterich, *supra* note 23, at 45.

177. *E.g.*, ROTHENBERG ET AL., *supra* note 25, at 519; Dieterich, *supra* note 23, at 44-45. Professor Jerome Rothenberg and his co-authors developed a theory of urban housing markets that assumes that housing units are segmented into different submarkets. They defined those submarkets as collections “of all dwellings in a metropolitan area whose . . . attributes . . . are evaluated as a whole by demanders and suppliers as closely equivalent.” ROTHENBERG ET AL., *supra* note 25, at 1. Their study concluded that “encouraging filtering by subsidizing high-quality new construction is a comparatively inefficient way to aid lower-income households.” *Id.* at 320.

178. The Rothenberg study stated that one of the main sources of its skepticism about the benefits of filtering was that the “repercussions [of new housing construction] dampen progressively the further in quality one moves from the submarket bearing the initial impact.” ROTHENBERG ET AL., *supra* note 25, at 320. The higher-density multifamily housing that this Note proposes would be likely to fall into a middle-quality submarket, and therefore would be much more likely to have an impact on the supply of low-income housing than the high-end construction that is typically assumed in discussions of filtering theory. *See id.* at 519 (noting that the study’s critique that the construction of high-end housing has little effect on the bottom two quintiles of the housing market “would not apply to construction originating in middle-quality submarkets”).

179. This proposal to allow higher-density development of multifamily housing units in towns that lack them would not implicate the problems with high-density development that Professors Schill and Wachter and others have identified in dense public housing projects. *E.g.*, Schill & Wachter, *supra* note 37, at 1289-95. The proposal in this Note would probably not decrease housing unit prices enough to affect the state’s poorest residents. Its main benefit would be to provide housing for moderate-income families in suburban towns where it was not previously available. Therefore, it would not create a concentration of extreme poverty of the kind that Schill and Wachter criticize. Instead, it would be likely to foster socioeconomic and racial integration at the level of the municipality. *See* Boudreaux, *supra* note 25, at 556-63 (arguing that because racial minority status is highly correlated with apartment living, permitting the construction of high-density multifamily apartments in the suburbs would promote racial integration).

1. *Exemption and Moratorium*

First, it is necessary to eliminate the moratorium that the 2000 amendments introduce. It has the virtue of recognizing the significance of new market-rate units, but it does more harm than good by prioritizing the production of government-funded and deed-restricted units above all other forms of construction. The system that exempts towns in which more than ten percent of the housing stock qualifies as “affordable” should be preserved because it exempts municipalities that already have significant amounts of public housing, multifamily housing, and low-cost rental housing, thereby promoting the fair distribution of such housing and decreasing the tendency for it to become concentrated in a few urban areas.

2. *Proposals a Developer May Appeal: The Prima Facie Case*

In order to take advantage of the potential economies created by denser multifamily housing and to decrease the problems associated with price restrictions, the statute should be amended to allow developers to appeal denials of proposals for multifamily housing developments above a certain density. The legislature could set a particular density per acre above which developers could bring appeals. Connecticut could adopt a single minimum density measure or, alternatively, the state could establish a sliding scale of densities that would trigger the appeals process that varied based on the size of the municipality. In addition to meeting the minimum density required to trigger the procedure, developers would also have to submit a plan indicating that they proposed to build the housing as multifamily housing with, for example, at least four units per building.

3. *A Municipality’s Motion To Dismiss*

If the developer met all of the technical requirements to appeal the decision, the municipality would have a chance to have the appeal dismissed if it could demonstrate that (1) the municipality contained a significant amount of multifamily housing (at least five percent of its housing stock); and (2) at least ten percent of its housing stock (including market-rate units) met the price limits for affordability for people making eighty percent of the state or regional median income (whichever is lower) as defined in the statute. This would be a preliminary determination made before a court got to the merits of the appeal. This would address the concerns expressed by municipal officials that they are not getting credit for their market-rate units that meet the state’s affordability requirements.¹⁸⁰

180. See *supra* Subsection III.A.1.

This inquiry could add significant costs to the procedure, because it would require the court to examine evidence outside of the record compiled by the local land use authority. It would, however, be an optional defense that the municipality could raise at its discretion. Therefore, because of the stringent standard, many towns would presumably choose not to raise the issue, since they would bear the risk of nonpersuasion.

4. *Weighing the Merits: Technical Feasibility, Reasonable Changes*

If the court's inquiry were to proceed beyond the stage of the motion to dismiss, then the current determination of whether a municipality's articulated "substantial public interests" "clearly outweigh the need for affordable housing"¹⁸¹ should be replaced with a determination of whether the project is technically feasible at reasonable cost. The feasibility standard could be measured by estimating the engineering, materials, and labor costs that it would take to make the project sound. For example, if a zoning board said that the proposed development would create a sewage disposal problem, then the court would estimate the cost of improving the town's sewage disposal system to the point at which it could handle the development. If a development was technically feasible at reasonable implementation costs, then the town would be required to approve the development.

This system would have the benefit of removing the issue of the amount of a community's need for affordable housing, thereby also removing the confusion over whether need should be defined locally or more broadly. Under this proposal, if a community did not meet the exemption from the Act and was unable to meet the standard for a motion to dismiss, then the community would presumptively need to contribute to the state's stock of moderate-income housing by allowing the production of high-density multifamily housing.

In addition, similar to the standard under the current Appeals Procedure, if the zoning board had plan-specific objections that could be cured through reasonable changes, then the board would be under an obligation to approve the development subject to those changes. The reasonableness of the plan-specific changes would be judged according to the likely cost increases they would impose on the development project.

C. *Merits and Drawbacks*

The primary merit of this system is that it would increase the production of medium- and high-density multifamily housing in those

181. CONN. GEN. STAT. § 8-30g(g) (2001).

communities that lacked it, resulting in a likely decrease in average housing prices in those communities. At the very least, it would provide a greater variety of types of housing in Connecticut's exclusionary municipalities. It would provide a concrete way of enforcing the instruction in the state's zoning enabling act that municipal zoning "regulations *shall* . . . encourage the development of housing opportunities, including opportunities for multifamily dwellings, . . . for all residents of the municipality."¹⁸²

This proposal would not require that the land in any specific municipality be developed at high densities. It would simply remove towns' restrictions that preclude the possibility of constructing housing at high densities. Thus, one would expect developers to bring these appeals only when the value in the land would increase when it is rezoned to allow denser uses.

In addition to a potential decrease in housing prices, there are other potential benefits to denser development that have been documented in the literature on sprawl. This denser development could help to combat the environmental and infrastructural problems associated with low-density sprawl development.¹⁸³

The primary drawback to this proposal is a political one. The proposal would face fierce opposition from the municipalities to which it would apply. These are the same municipalities that drove the passage of the 2000 amendments. The opposition would be muted somewhat by towns' ability to get credit for their low-priced market-rate units under this proposal. That alone, however, would probably not create sufficient support for such an initiative.

The problem with any legislative solution to exclusionary zoning is that the more effective a solution promises to be, the more opposition it will receive from exclusionary suburban towns. Some have cited this as a modern-day example of the danger of majoritarian "faction" in small democratic units that Madison warned of in *The Federalist No. 10*.¹⁸⁴ This is not to say that there are no good reasons to vest land use controls in local authorities. For example, Professor Carol Rose suggests that the reason why we assign decisions regarding land use and education to local units is because "we are not willing to make [these] decisions . . . through coalition

182. *Id.* § 8-2(a) (emphasis added).

183. *E.g.*, William W. Buzbee, *Urban Sprawl, Federalism, and the Problem of Institutional Complexity*, 68 *FORDHAM L. REV.* 57, 69-75 (1999); Timothy J. Dowling, *Reflections on Urban Sprawl, Smart Growth, and the Fifth Amendment*, 148 *U. PA. L. REV.* 873, 876-78 (2000).

184. *E.g.*, Stephen David Galowitz, *Interstate Metro-Regional Responses to Exclusionary Zoning*, 27 *REAL PROP. PROB. & TR. J.* 49, 71 (1992); Carol M. Rose, *New Models for Local Land Use Decisions*, 79 *NW. U. L. REV.* 1155, 1157 (1985). Promoting the idea of a national government, Madison argued that majorities are likely to trample the rights of minority groups in small governmental units: "[T]here is nothing to check the inducements to sacrifice the weaker party or an obnoxious individual." *THE FEDERALIST NO. 10*, at 49 (James Madison) (Clinton Rossiter ed., 1999).

building, but rather we want particularized consideration of individual proposals by people whose judgment we trust and whom we can influence through consultation.”¹⁸⁵ This desire for local control may be particularly strong in Connecticut, where there is a strong perception of the historical power of municipal home rule.¹⁸⁶ Whatever the merits of local control of land use decisions or the desire of municipalities to exercise that control, Connecticut and several other states have chosen to reclaim some of that control and return it to the state. Effectively combating exclusionary zoning seems to require a willingness to do so.

One way to make the proposal for a multifamily housing appeals procedure more politically palatable is to attack the fiscal concerns underlying the towns’ exclusionary behavior.¹⁸⁷ Studies have suggested that a central concern of many exclusionary communities is with the fiscal effects that new development will have on their school system.¹⁸⁸ The state might be able to address this concern by compensating towns for the first several years’ worth of additional school district expenses incurred as a result of additional schoolchildren in new multifamily developments.¹⁸⁹

VII. CONCLUSION

The 2000 amendments to the Appeals Procedure move Connecticut away from the goal of meeting its needs for low- and moderate-income housing. By increasing the requirements for set-aside developments and failing to clarify the meaning of “need” in the statute after *Christian Activities Council*, the amendments promise to reduce the amount of housing units that private developers will construct under the Appeals Procedure.

Private for-profit developers have produced by far the most housing units under the Appeals Procedure. They have surpassed nonprofit and

185. Carol M. Rose, *Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy*, 71 CAL. L. REV. 837, 911 (1983).

186. Timothy S. Hollister, *The Myth and Reality of Home Rule Powers in Connecticut*, 59 CONN. B.J. 389, 389-97 (1985) (noting that there is a strong perception of the powers of municipal home rule in Connecticut, but that the state constitution actually devolves to municipalities powers that are much more limited than is widely believed).

187. See Robert P. Inman & Daniel L. Rubinfeld, *The Judicial Pursuit of Local Fiscal Equity*, 92 HARV. L. REV. 1662, 1658-89 (1979) (arguing that the forces that give rise to exclusionary zoning are largely fiscally motivated).

188. E.g., PAUL KANTOR, *THE DEPENDENT CITY REVISITED: THE POLITICAL ECONOMY OF URBAN DEVELOPMENT AND SOCIAL POLICY* 164-66 (1995).

189. Connecticut has also shown a greater willingness than many states to entertain suits for the equalization of school financing based on the state constitution’s guarantees of public education and equal protection. E.g., *Sheff v. O’Neill*, 678 A.2d 1267 (Conn. 1996); *Horton v. Meskill*, 376 A.2d 359 (Conn. 1977). To the degree that these suits are successful over the long term in regionalizing school financing, they could have the effect of dampening municipalities’ fiscal incentives to engage in exclusionary zoning.

public-sector developers in their production of both deed-restricted units and market-rate units. Notably, there is evidence that even the market-rate units that for-profit developers have built under the statute have often been less expensive than the housing that was previously available in the communities in which they are situated. This suggests that when developers are allowed to build multifamily housing units at reasonably high densities (as they frequently are in the context of set-aside developments), the result will often be cheaper housing. The amendments fail because they are likely to chill the activities of private developers substantially, reducing their production of both deed-restricted and market-rate units.

It is unlikely that nonprofits or public-sector developers will be able to make up this shortfall in the production of affordable housing units. Even if they were able to make up the difference by stepping up the production of deed-restricted units, these devices cannot provide a workable long-term solution to Connecticut's affordable housing needs. Municipalities have experienced significant problems with deed-restricted units during the last decade. These problems include: (1) that it is difficult for low- and moderate-income home buyers to get mortgage financing for deed-restricted units; (2) that it is difficult for state and local officials to monitor the price and income limits on deed-restricted units and their occupants; and (3) that deed restrictions may cause low- and moderate-income homeowners to lose equity in their homes due to interest rate fluctuations. The state's experiences suggest that inclusionary zoning devices that rely on deed restrictions are the wrong policy tools for Connecticut and other states experimenting with ways to increase the supply of low- and moderate-income housing.

A better alternative for Connecticut would be to amend the Appeals Procedure to allow developers to appeal proposals for multifamily market-rate housing developments above a certain density. This would be likely to reduce housing prices and would offer more housing options in the state's exclusionary towns without having to create deed-restricted units.