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Home Sweet Home? What Massachusetts Can Tell Us about the Prospects for the Illinois Affordable Housing Planning and Appeal Act

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HOME SWEET HOME?: WHAT MASSACHUSETTS CAN TELL US ABOUT THE PROSPECTS FOR THE ILLINOIS AFFORDABLE HOUSING PLANNING AND APPEAL ACT

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INTRODUCTION

In August 2004, forty-nine communities in Illinois received notice that they would each be required to prepare a plan to create additional affordable housing units in their community.[1] These plans were the first step in implementing the Illinois Affordable Housing Planning and Appeal Act (the "Illinois Act"),[2] a relatively new Illinois law designed to "encourage counties and municipalities to incorporate affordable housing within their housing stock sufficient to meet the needs of their county or community."[3] However, even at this early stage in its implementation, this statute is generating debate regarding both its legal effect and its practicality as a remedial measure.[4] These questions and others will likely continue to emerge as the Illinois Housing Development Authority ("IHDA") and State Housing Appeals Board ("SHAB") move forward with enforcement.

Some of these questions may be answered, however, by referring to lessons learned far from the suburbs of Chicago. In Massachusetts, statutes substantially similar to the Illinois Act have been in effect since 1969.[5] As such, courts in that state have had over three decades to consider the reach and effect of those laws, and scholars and practitioners have had ample opportunity to analyze their effectiveness in creating more affordable hous-

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1. Courtney Flynn & Susan Kuczka, *49 Towns Must Add Affordable Housing*, CHI. TRIB., Aug. 12, 2004, § 2 (Chicago ed.), at 1.

2. 310 ILL. COMP. STAT. ANN. 67/1–67/50 (West Supp. 2005).

3. *Id.* § 67/10.

4. *See* Flynn & Kuczka, *supra* note 1 (discussing applicability of the Act to home rule communities and quoting officials who doubt the law can be implemented in their communities effectively).

5. MASS. GEN. LAWS ANN. ch. 40B, §§ 20–23 (West 2004).

ing.[6] By referring to the Massachusetts experience, the parties affected by the Illinois Act can begin to predict the future of that legislation.

This Note will examine both the Illinois Act and its Massachusetts counterpart and will discuss how the lessons learned in Massachusetts, both inside and outside of the courtroom, can shed some light upon the future of the Illinois Act and suggest ways to enhance its effectiveness.[7] This analysis reveals that while direct legal challenges likely will be unsuccessful in striking down the Illinois Act in its entirety, the Illinois Act's inherent weaknesses and the practical challenges that it faces likely will limit its effectiveness as currently written. Part I will briefly sketch the issue of affordable housing and exclusionary zoning in the United States. Part II will lay out the legal framework of the Illinois Act and compare it to that in place in Massachusetts, noting both the similarities and the differences between them. Part III will address some of the legal challenges brought against the Massachusetts law, assess the likelihood of similar challenges in Illinois, and predict the likely outcome of such challenges. Part IV will discuss the various practical and implementation difficulties that arguably have muted the effectiveness of the Massachusetts law and will attempt to determine if those same difficulties will affect the Illinois Act. Finally, Part V will provide some recommendations for making the Illinois Act more effective.

I. THE AFFORDABLE HOUSING DILEMMA

The United States lacks sufficient affordable housing units to satisfy the needs of its citizens. In 1999, almost 28 million American households reported spending more than thirty percent of their income on housing, which is the threshold of "affordability" established by the federal government.[8] According to the Joint Center for Housing Studies of Harvard University, of the over 21 million American households within the lowest

6. *See, e.g.*, Sharon Perlman Krefetz, *The Impact and Evolution of the Massachusetts Comprehensive Permit and Zoning Appeals Act: Thirty Years of Experience with a State Legislative Effort to Overcome Exclusionary Zoning*, 22 W. NEW ENG. L. REV. 381, 388–89 (2001).

7. While Massachusetts has the oldest of the statewide appeal statutes, and thus provides the most extensive grounds for comparison at present, several other states in the northeastern U.S. have enacted similar statutes. For a description of these states' efforts, see generally Sam Stonefield, *Affordable Housing in Suburbia: The Importance but Limited Power and Effectiveness of the State Override Tool*, 22 W. NEW ENG. L. REV. 323 (2001) (discussing state override laws in Connecticut, Massachusetts, New Jersey, and Rhode Island).

8. MILLENNIAL HOUS. COMM'N, MEETING OUR NATION'S HOUSING CHALLENGES 2 (2002), http://www.mhc.gov/MHCReport.pdf.

income quintile in 2003, over 15 million fell within this affordability gap.[9] In 1999, shortages in affordable rental units forced 1.7 million low-income American households into "severely inadequate housing, placing their health and safety at risk."[10] In its 2002 report, the bipartisan Millennial Housing Commission suggested that the situation was not improving for Americans in need of affordable housing, noting that the number of units considered affordable to low- and moderate-income renters fell by over nine percent between 1985 and 1999.[11] The Commission also concluded that federal measures had proven inadequate, standing alone, to ease the growing affordable housing shortage.[12]

Federal housing programs have changed significantly since their birth in the 1930's.[13] Today, several federal programs grant assistance to providers of affordable housing.[14] The HOME program provides block grants to state and local governments for use in expanding the stock of affordable units.[15] Private developers can receive tax incentives from the federal government through the Low Income Housing Tax Credit ("LIHTC") program.[16] This program provides a ten-year tax incentive to developers who agree to maintain the development as affordable housing for at least thirty years.[17] In addition, the federal government maintains mortgage insurance programs that insure loans by private lenders for the construction or substantial rehabilitation of multifamily dwellings.[18]

However, these programs have not been successful in closing the affordability gap. Some of the difficulty may arise from insufficient funding: expenditures on federal housing assistance have accounted for an ever-diminishing proportion of total tax expenditures over much of the last quar-

9. JOINT CTR. FOR HOUS. STUDIES OF HARVARD UNIV., THE STATE OF THE NATION'S HOUSING 2005 39 tbl.A-11 (2005), http://www.jchs.harvard.edu/publications/markets/son2005/son2005.pdf. The report also points out that even these sobering figures fail to account for households who live in overcrowded or "structurally inadequate" housing falling within the technical definition of affordability. *Id.* at 3.

10. MILLENNIAL HOUS. COMM'N, *supra* note 8, at 2.

11. *Id.*

12. *Id.*

13. *Id.* at 22–24.

14. *Id.* at 24.

15. *Id.*

16. *Id.*

17. *Id.* at 118. The developer must either (1) maintain twenty percent of the units as "affordable" (gross rents not exceeding thirty percent of monthly income) to tenants earning less than fifty percent of the area median income, or (2) maintain forty percent of the units as affordable to tenants earning less than sixty percent of the area median income. *Id.*

18. *Id.* at 107, 115. These programs are not explicitly limited by tenant income in the same way as the LIHTC program.

ter-century.[19] Further still, many federal Department of Housing and Urban Development ("HUD") mortgages are reaching maturity, meaning that a significant proportion of units that are currently affordable may no longer be affordable in ten years' time.[20]

As serious as these federal problems are, obstacles erected at the local level often pose an even more formidable threat to affordable housing construction. One municipal policy in particular, a group of zoning practices collectively referred to as "exclusionary zoning," often raises substantial obstacles to such construction.[21] Exclusionary zoning refers to municipal zoning restrictions that operate to exclude low-income families by raising the price of the general housing stock and decreasing the development of affordable housing.[22] These restrictions may prescribe minimum lot size, setback, and floor space requirements.[23] They may instead establish a pattern of underzoning for traditionally affordable types of housing, such as multi-family dwellings and mobile homes, or of overzoning for non-residential uses.[24]

One of the most well-known cases involving exclusionary zoning, *Southern Burlington County NAACP v. Township of Mount Laurel*, provides numerous examples of exclusionary zoning in practice.[25] The municipal practices in that case included lot size and floor space requirements[26] and development limitations on apartment units with multiple bedrooms.[27] In one planned development, the township demanded that the developer agree to pay educational expenses for children attending the township's schools if "more than .3 school children per multi-family unit" in the development attended school there.[28] In another instance, the township "approved" a proposed subsidized development, but required the development to adhere to the existing ordinances.[29] This meant that the development would have to consist of "single-family detached dwellings on 20,000 square foot lots," which effectively "killed realistic housing for

19. *Id.* at 24 fig.9.

20. U.S. GEN. ACCOUNTING OFFICE, GAO-04-20, MULTIFAMILY HOUSING: MORE ACCESSIBLE HUD DATA COULD HELP EFFORTS TO PRESERVE HOUSING FOR LOW-INCOME TENANTS 3–5 (2004).

21. Henry A. Span, *How the Courts Should Fight Exclusionary Zoning*, 32 SETON HALL L. REV. 1, 8–9 (2001).

22. *Id.*

23. *Id.*

24. *Id.*

25. 336 A.2d 713 (N.J. 1975).

26. *Id.* at 719–20.

27. *Id.* at 721.

28. *Id.* at 721–22.

29. *Id.* at 722.

this group of low and moderate income families."[30] While this is by no means an exhaustive list of exclusionary zoning techniques, it is sufficient to illustrate why federal assistance has not always succeeded in increasing construction of affordable housing.

Recognizing that the affordability gap is often a local problem, some states have enacted legislation to address the problem at the local level. The solutions available to legislators are varied.[31] However, both Massachusetts and Illinois have chosen a similar path, empowering a statewide appeals board to review and override local zoning decisions that stand in the way of affordable housing development under certain conditions.[32]

II. STATEWIDE APPEAL ACTS: MASSACHUSETTS AND ILLINOIS

A. Massachusetts: Comprehensive Permit and Zoning Appeals Act

The Massachusetts Comprehensive Permit and Zoning Appeals Act (the "Massachusetts Act")[33] provides that a "public agency or limited dividend or nonprofit organization proposing to build low or moderate income housing may submit to the board of [zoning] appeals . . . a single application to build such housing in lieu of separate applications to the applicable local boards."[34] This provision streamlines the application process for affordable housing developers by granting the local board of zoning appeals the "same power to issue permits or approvals as any local board or official who would otherwise act with respect to such application."[35] Thus, where a developer might normally have to seek separate permits from numerous local boards such as planning boards, historical commissions, or sewer districts, the Massachusetts Act empowers the zoning board of appeals to issue a single permit in their place.[36] The local zoning board of appeals

30. *Id.*

31. *See, e.g.*, Barbara Ehrlich Kautz, *In Defense of Inclusionary Zoning: Successfully Creating Affordable Housing*, 36 U.S.F. L. REV. 971, 972–74, 979–82 (2002) (describing inclusionary zoning ordinances that require a certain proportion of all new development to be affordable, one alternative to the method created under the Illinois Act).

32. *See* 310 ILL. COMP. STAT. ANN. 67/30 (West Supp. 2005); MASS. GEN. LAWS ANN. ch. 40B, § 22 (West 2004) (permitting developers to appeal from a denial or conditional approval of their building applications).

33. *See* Krefetz, *supra* note 6, at 381–82 (noting that Chapter 40B of Massachusetts General Laws is commonly known as the "Comprehensive Permit and Zoning Appeals Act").

34. Ch. 40B, § 21.

35. *Id.*

36. MASS. DEP'T OF HOUS. & CMTY. DEV., OVERVIEW OF THE MASSACHUSETTS COMPREHENSIVE PERMIT LAW (2003), http://www.mass.gov/dhcd/ToolKit/ch40Bg1.htm.

may, after a public hearing, grant the requested "comprehensive permit" by a majority vote and may attach conditions or other requirements to the permit if it so chooses.[37] If the board votes to issue the permit, aggrieved parties can appeal that decision to the courts.[38]

However, if the board either denies the developer's application or grants it "with such conditions and requirements as to make the building or operation of [low or moderate income] housing uneconomic," the applicant can appeal the board's decision to the Housing Appeals Committee ("HAC"), a body in the state's Department of Housing and Community Development.[39] If the local board denies the developer's application outright, the HAC review assesses only whether the decision of the local board of appeals was "reasonable and consistent with local needs."[40] If the board instead conditionally grants the application, the HAC determines whether the conditions and requirements imposed "make the construction or operation of [the proposed] housing uneconomic and whether they are consistent with local needs."[41] In either case, however, the controlling factor is whether the board's decision was "consistent with local needs"; the Committee cannot vacate, modify, or remove board decisions or conditions that are consistent with local needs, even if the board decisions make the proposed development uneconomic.[42]

Therefore, the definition of "consistent with local needs" is one of the most important aspects of the statute. The statutory definition begins by stating that "requirements and regulations shall be considered consistent with local needs if they are reasonable in view of the regional need for low and moderate income housing . . . and if such requirements and regulations are applied as equally as possible to both subsidized and unsubsidized housing."[43] While this definition is somewhat vague, the statute provides a more explicit limitation upon the HAC's authority on review. Specifically, if the city or town denying or conditionally granting the permit already has low- or moderate-income housing "in excess of ten per cent of the housing units reported in the latest federal decennial census of the city or town, or on sites comprising one and one half per cent or more of the total land area zoned for residential, commercial or industrial use," then the local board's

37. Ch. 40B, § 21.
38. *Id.*
39. *Id.* § 22.
40. *Id.* § 23.
41. *Id.*
42. *Id.*
43. *Id.* § 20.

decisions are, by definition, consistent with local needs.[44] In this analysis, housing units qualify as low- or moderate-income housing if they are subsidized by the state or federal government.[45] In addition, a decision to deny or conditionally grant the application is consistent with local needs if the proposed development would result in new construction covering over three-tenths of one percent of all zoned land or ten acres, whichever is larger, within one year.[46] Thus, the statute provides a "safe harbor" from Committee intervention for communities that fall within one of these statutory categories.

B. Illinois: Affordable Housing Planning and Appeal Act

The Illinois Act begins by defining those local governments that are exempt from its requirements, a determination that, although more complicated in its formulation, is comparable in function to the Massachusetts Act's safe harbor.[47] First, any municipality with a population of less than 1,000 is exempt from the operation of the Illinois Act.[48] Next, "any local government in which at least 10% of its total year-round housing units are affordable" is also exempt.[49] Under the statute, a housing unit is affordable if the cost of residing in that unit totals no more than thirty percent of the gross annual household income for a household of the size that could occupy the unit,[50] computed with reference to the area's median household income.[51] The IHDA must make this determination on an annual basis and publish a list of exempt and non-exempt local governments.[52]

44. *Id.*

45. *Id.*

46. *Id.*

47. *See* 310 ILL. COMP. STAT. ANN. 67/20 (West Supp. 2005) (describing methods for determining exempt local governments).

48. *Id.* § 67/15.

49. *Id.* It is interesting to note that the Illinois Act uses the same ten percent figure as the Massachusetts Act, though that figure is never explained as having any independent significance.

50. *Id.* In computing the thirty percent threshold, the statute distinguishes between sale and rental units. A sale unit is affordable if the sum of "mortgage, amortization, taxes, insurance, and condominium or association fees, if any" is less than thirty percent of the household's gross income. *Id.* A rental unit is affordable if the sum of rent and utilities is less than thirty percent of the household's gross income. *Id.*

51. *Id.* § 67/20(b). The statute uses the median income figure for the county or primary metropolitan statistical area ("PMSA") in which the local government is located. In making its calculations, the IHDA totals the number of (a) sale units that are affordable to households with a gross income of less than eighty percent of the local median, and (b) rental units that are affordable to households with a gross income of less than sixty percent of the local median, dividing the sum of such units by the total number of local year-round housing units to derive the percentage of affordable units. *Id.*

52. *Id.* § 67/20(c).

Non-exempt governments must adopt an affordable housing plan and submit it to the IHDA; the first group of plans must have been approved by the local authority before April 1, 2005.[53] The affordable housing plan must include the following: (1) a statement of the number of affordable units needed to exempt the local government from the Illinois Act, (2) an identification of the most suitable property for developing affordable housing units, (3) incentives that the local government may provide to attract affordable housing, and (4) an affordable housing goal selected from the three available under the statute.[54] The three approved goals are the following: (1) affordable housing constitutes at least fifteen percent of new development or redevelopment within the local government, (2) the number of affordable housing units increases by at least three percentage points, or (3) affordable housing units constitute at least ten percent of total year-round housing units.[55]

When the statute becomes fully effective,[56] an affordable housing developer can seek review by the State Housing Appeals Board ("SHAB") if the developer's application to the local authority is "either denied or approved with conditions that in his or her judgment render the provision of affordable housing infeasible."[57] When a qualifying developer files an appeal with the SHAB, the SHAB will conduct a de novo review to determine whether the local government placed an "undue burden" on the development because it contained affordable housing.[58] In this proceeding, the developer bears the burden of demonstrating that the application was unfairly denied or that unreasonable conditions were placed upon the proposed affordable housing development.[59]

While the initial ten percent threshold exempts some local governments, the Illinois Act contains a second set of safe harbor provisions that

53. *Id.* § 67/25.

54. *Id.* § 67/25(b).

55. *Id.* § 67/25(b)(iv).

56. *See id.* § 67/30. Section 30, which governs appeals to the State Housing Appeals Board, becomes effective in two stages. Beginning in January 2006, affordable housing developers whose applications are denied or granted with conditions that would render provision of affordable housing infeasible may submit information to the Board, unless the local government is exempt from the Illinois Act. The Board will provide this information in an annual report. Then, beginning in January 2009, the Board will have the enforcement powers discussed below.

57. *Id.* § 67/30(b). To qualify as an affordable housing developer, the developer's proposed development must be either subsidized by the federal or state government or subject to restrictions that keep at least twenty percent of the units affordable for fifteen years (for sale units) or thirty years (for rental units). *Id.* § 67/15.

58. *Id.* § 67/30(c).

59. *Id.*

further limit the SHAB's authority.[60] First, the SHAB must dismiss the developer's appeal if the local government has adopted, submitted, and implemented its required affordable housing plan and has satisfied its chosen affordable housing goal.[61] Also, the SHAB must dismiss the appeal if the local government's reason for denying the application was a "non-appealable local government requirement,"[62] defined as "all essential requirements that protect the public health and safety, including any local building, electrical, fire, or plumbing code requirements or those requirements that are critical to the protection or preservation of the environment."[63]

If none of the safe harbor provisions apply, and the SHAB finds in favor of the developer, then the SHAB "may affirm, reverse, or modify the conditions of, or add conditions to, a decision made by the approving authority."[64] The SHAB decision "constitutes an order directed to the approving authority and is binding on the local government."[65] The decision is subject to judicial review, however, with the state appellate courts having exclusive jurisdiction over challenges to SHAB decisions.[66]

III. LEGAL QUESTIONS

In the years since its adoption, litigants have challenged the Massachusetts Act on several grounds, but Massachusetts courts have not invalidated the law.[67] Likewise, challenges to the Illinois Act are likely forthcoming. While these challenges are also unlikely to result in the wholesale demise of the Illinois Act, an analysis of the likely challenges reveals that the Illinois Act is vulnerable to partial invalidation and that it likely requires additional clarification to be effective.

60. Under the Illinois Act, the IHDA determines exempt municipalities on an annual basis using the ten percent standard. *Id.* § 67/20. The additional goal-based exemptions shield qualifying communities after the developer appeals to the SHAB, *id.* § 67/30(d), but do not technically render the municipality "exempt" from the Illinois Act. *See id.* § 67/15 (defining "exempt local government" as "any local government in which at least 10% of its total year-round housing units are affordable . . . or any municipality under 1,000 population," without reference to any of the other, goal-based exemptions).

61. *Id.* § 67/30(d). The Illinois Act does not expressly establish any penalties for failing to submit an affordable housing plan. *Id.* § 67/25. However, failing to submit a plan would prevent the failing municipality from taking advantage of this statutory safe harbor provision.

62. *Id.* § 67/30(e).

63. *Id.* § 67/15.

64. *Id.* § 67/30(f).

65. *Id.*

66. *Id.* § 67/30(g).

67. *See, e.g.*, Bd. of Appeals v. Hous. Appeals Comm., 294 N.E.2d 393, 424 (Mass. 1973).

In discussing these challenges, it is important to bear in mind that exclusionary zoning and opposition to affordable housing legislation need not arise from motives that are classist or racist. While it would be naïve to suppose that these motivations are absent, there are many reasons for local opposition to statutes like the Illinois Act. Exclusionary zoning can advance valuable community goals, many of which are echoed in the explanations given by opponents of the Illinois Act.[68] Some local officials and residents who oppose the Illinois Act rely upon purely legal arguments, claiming that the statute is inapplicable to their communities[69] or that it represents an improper usurpation of municipal autonomy.[70] Others simply doubt that the statute is workable, claiming that their communities are "built out" or that developers are unlikely to build affordable housing there because of high land prices.[71] Opponents commonly make economic arguments as well, emphasizing the possible adverse effects of affordable housing development on property values and the tax base in their communities.[72] Finally, some opponents argue that affordable housing developments will inevitably clash with existing development and thereby compromise the character of the community.[73]

A. Applicability to Home Rule Communities

One potential legal challenge to the Illinois Act that is already a topic of discussion among local officials and analysts is a claim that its provisions do not apply to home rule communities.[74] In Illinois, municipalities with populations of greater than 25,000, as well as other municipalities that so elect, are designated home rule units.[75] "[A] home rule unit may exercise any power and perform any function pertaining to its government and affairs," except as limited by the Illinois constitution or preempting stat-

68. *See* Span, *supra* note 21, at 9–15 (discussing the positive aspects of exclusionary zoning and suggesting that it advances many of the same goals that zoning was originally created to address).

69. Flynn & Kuczka, *supra* note 1.

70. Trine Tsouderos, *North Shore Dwellers Target Housing Law*, CHI. TRIB., Aug. 2, 2004, § 2 (Chicagoland ed.), at 1. *See also* Span, *supra* note 21, at 12–13 (noting that for many communities, "self-determination" in zoning matters "is a valuable end in itself").

71. Flynn & Kuczka, *supra* note 1.

72. Tsouderos, *supra* note 70. *See also* Span, *supra* note 21, at 10, 12–13 (noting community concerns regarding decreases in property values and discussing taxation and service provision problems that may arise when communities become less economically homogeneous).

73. Tsouderos, *supra* note 70. *See also* Span, *supra* note 21, at 11 (discussing community concerns regarding "the character of the town as a whole").

74. Ronald S. Cope, *The Affordable Housing Planning and Appeal Act: The New Illinois Affirmative Action Housing Program*, ILL. MUN. REV., June 2004, at 13, 15 (part 1).

75. ILL. CONST. art. VII, § 6(a).

utes.[76] This home rule authority encompasses the ubiquitous police power—"the power to regulate for the protection of the public health, safety, morals and welfare"[77]—which, in turn, includes the power to enact zoning restrictions.[78]

Massachusetts also has a home rule provision in its state constitution,[79] and Massachusetts courts have also held that this provision provides municipalities with a "broad grant of powers to adopt ordinances or by-laws for the protection of the public health, safety, and general welfare."[80] Likewise, this power includes the authority to enact zoning restrictions.[81] Thus, the relationship between the Massachusetts Act and the home rule power is instructive in assessing whether and how the Illinois Act will affect home rule communities in Illinois.

1. Massachusetts Law

Massachusetts courts have addressed the impact of the state's home rule provision on the operation of its housing appeals law. In *Board of Appeals of Hanover v. Housing Appeals Committee in the Department of Community Affairs* ("*Hanover*"), the Supreme Judicial Court of Massachusetts answered numerous questions regarding the Massachusetts Act, including its applicability to home rule communities.[82] In deciding whether the law applied to such communities, the court first considered whether the Act vested the power to override local zoning regulations in the HAC.[83] Second, the court determined whether a power to override local zoning regulations could be exercised consistently with the constitutional grant of home rule authority to municipalities.[84]

In response to the first question, the *Hanover* court held that the Massachusetts legislature intended to grant the power to override local zoning regulations to the HAC.[85] The court reached this conclusion by considering the extensive legislative history of the Massachusetts Act.[86] Noting that the

76. *Id.*
77. *Id.*
78. Thompson v. Cook County Zoning Bd. of Appeals, 421 N.E.2d 285, 292 (Ill. App. Ct. 1981); *see also* Scadron v. City of Des Plaines, 606 N.E.2d 1154, 1163–64 (Ill. 1992) (discussing "a home rule unit's concurrent power to regulate signs" by zoning restrictions).
79. MASS. CONST. amend. art. II.
80. Bd. of Appeals v. Hous. Appeals Comm., 294 N.E.2d 393, 409 (Mass. 1973).
81. *Id.*
82. *Id.* at 401.
83. *Id.*
84. *Id.*
85. *Id.* at 406–07.
86. *Id.* at 402–06.

reports consulted by the legislature prior to enactment, as well as contemporaneous descriptions of the bill by the legislators themselves, pertained to a need to overcome exclusionary zoning practices, the court concluded that the legislature intended to provide relief from those practices through the Massachusetts Act.[87] Then the court held that the interpretation of the statute must include the power to override local zoning ordinances to give effect to the legislature's intent, even though the statute never expressly used the word "zoning" in describing the override power.[88]

The court then considered the second question, holding that the Massachusetts legislature could confer the authority to override zoning regulations without offending the constitutional grant of home rule authority to local governments.[89] This required the court to answer two related questions. First, the court had to determine whether the state home rule amendment protected the zoning power in the first instance.[90] Second, if the home rule amendment did protect the zoning power, the court had to investigate whether the legislature had acted in accordance with the state constitution in limiting that power.[91]

The Massachusetts home rule amendment provides that a municipality has the power to "exercise any power or function which the general court [the state legislature] has power to confer upon it" through local ordinances and by-laws.[92] Though broad, this power is not unlimited. First, a municipality cannot "enact private or civil law governing civil relationships except as an incident to an exercise of an independent municipal power."[93] Thus, to the extent that zoning ordinances govern civil relationships, they are permissible under the Massachusetts home rule amendment only if they do so as a mere incident to an independent municipal power.[94]

In a case prior to *Hanover*, the Supreme Judicial Court of Massachusetts interpreted the phrase "independent municipal power" to refer to "the various component powers making up the broad police power."[95] Pursuant to this interpretation, the *Hanover* court held that any effect that a town's zoning regulations might have on civil relationships was merely "incidental to the exercise of the town's independent police powers to control its land

87. *Id.* at 406.
88. *Id.* at 407.
89. *Id.* at 410.
90. *Id.* at 409.
91. *Id.*
92. MASS. CONST. amend. art. II, § 6.
93. *Id.* § 7.
94. *Id.*
95. Marshal House, Inc. v. Rent Review & Grievance Bd., 260 N.E.2d 200, 206–07 (Mass. 1970).

usages in an orderly, efficient, and safe manner to promote the public welfare."[96] Thus, the Massachusetts home rule amendment protected the local zoning power.[97]

However, this finding did not end the inquiry, as the court next had to determine if the Massachusetts Act limited the home rule power to zone. A home rule unit cannot legally exercise its home rule power in a manner "inconsistent with the constitution or laws enacted by the general court in conformity with powers reserved to the general court."[98] Therefore, the court had to determine whether the legislature had enacted the Massachusetts Act, which limits the zoning power reserved to municipalities under the home rule amendment, in accordance with the legislature's own reserved powers. The legislature acts in accordance with the powers reserved to it under the Massachusetts home rule amendment if it acts through "general laws which apply alike to all cities, or to all towns, or to all cities and towns, or to a class of not fewer than two."[99] Because the Massachusetts Act is a general law that applied to multiple municipalities, the *Hanover* court found that the legislature had acted in conformity with the home rule amendment in enacting that law.[100] The court went on to conclude that exclusionary municipal zoning practices would frustrate the purpose of the Massachusetts Act, and were therefore inconsistent with that law.[101] As a result, exclusionary zoning practices were no longer afforded home rule protection after the enactment of the Massachusetts Act.[102]

2. Illinois Law

If Illinois courts must determine whether the Illinois Act applies to home rule municipalities, they will likely begin with the same two questions as the *Hanover* court. First, they must determine whether the legislature intended for the Illinois Act to confer the authority to override local zoning regulations, which are a part of the local home rule authority.[103] This question marks the logical starting point for a judicial analysis of the Illinois Act because if the courts answer this question negatively, they need not consider the compatibility of the Illinois Act with the home rule author-

96. Bd. of Appeals v. Hous. Appeals Comm., 294 N.E.2d at 409.
97. *Id.*
98. MASS. CONST. amend. art. II, § 6.
99. *Id.* § 8.
100. Bd. of Appeals v. Hous. Appeals Comm., 294 N.E.2d at 409.
101. *Id.* at 409–10.
102. *Id.* at 410.
103. Thompson v. Cook County Zoning Bd. of Appeals, 421 N.E.2d 285, 292 (Ill. App. Ct. 1981).

ity. If, however, state courts conclude that the Illinois Act does attempt to confer such authority, they must then determine whether that grant is legally effective, the second issue that the *Hanover* court addressed.

Like the Massachusetts Act, the text of the Illinois Act does not expressly state that it confers to the SHAB the power to override local zoning ordinances. In the section entitled "Purpose," the legislature states that frustrated affordable housing developers "may seek relief from local ordinances and regulations that may inhibit the construction of affordable housing," but it does not explicitly use the term "zoning."[104] Later, in the section establishing the housing appeals process, the Illinois Act creates a remedy for affordable housing developers whose building applications are "denied or approved with conditions that in [the developers'] judgment render the provision of affordable housing infeasible."[105] To determine whether the application was "unfairly denied or unreasonable conditions have been placed upon [its] tentative approval," the SHAB shall "consider any action taken by the unit of local government in regards to granting waivers or variances" that impact "the economic viability of the development."[106] Again, there is no express mention of "zoning."

Though the term "zoning" is never used, these provisions nonetheless make it relatively clear that the legislature intended to confer the power to override zoning ordinances to the SHAB under the Illinois Act. The Act seeks to provide developers relief from restrictive "ordinances and regulations"[107] by empowering the SHAB to "affirm, reverse, or modify the conditions of, or add conditions to, a decision made by the [local] approving authority."[108] It is difficult to conceive of local ordinances and regulations, other than zoning ordinances, that would significantly impede construction of affordable housing. Further, the only express limit to the SHAB's override authority, as it pertains to local regulations, prohibits override of local decisions based upon "non-appealable local government requirement[s]."[109] These non-appealable requirements include "all essential requirements that protect the public health and safety, including any local building, electrical, fire or plumbing code requirements or those requirements that are critical to the protection or preservation of the environ-

104. 310 ILL. COMP. STAT. ANN. 67/10 (West Supp. 2005).
105. *Id.* § 67/30(b).
106. *Id.* § 67/30(c).
107. *Id.* § 67/10.
108. *Id.* § 67/30(f).
109. *Id.* § 67/30(e).

ment."[110] It is telling that general zoning regulations are not specifically enumerated within this exempted class.[111] Finally, requiring the SHAB to consider any waivers or variances granted by the approving authority suggests that those underlying regulations being waived or varied, presumably zoning ordinances, are precisely the types of "ordinances and regulations" that the Illinois Act seeks to address. In sum, the text of the Act, though it does not refer to the power to override zoning regulations explicitly, likely attempts to confer that authority to the SHAB in its general grant of power to override local decisions.

However, Illinois courts will not infer legislative intent to limit home rule powers; the legislature cannot limit home rule powers without explicitly stating its intent to do so in the statute.[112] As noted above, Illinois recognizes zoning as a home rule power.[113] Thus, without an explicit legislative statement that the Illinois Act limits the zoning power of home rule communities, courts will not imply a legislative intent to do so. In addition, legislative acts that seek to limit home rule powers are subject to constitutional limitations. Under the Illinois constitution, the legislature may deny or limit most home rule powers not exercised by the State[114] "by a law approved by the vote of three-fifths of the members elected to each house."[115] Because the Illinois Act did not pass either chamber of the legislature by a three-fifths margin, it likely cannot limit or deny a home rule power like zoning.[116]

Even though the Illinois Act likely does not place a blanket limitation upon home rule zoning authority, it is still possible for a municipality to

110. *Id.* § 67/15.

111. This exclusion may implicate the familiar rule of statutory construction that items excluded from an enumerated list within a statute are not subject to that statute's provisions. *See, e.g.*, Burke v. 12 Rothschild's Liquor Mart, Inc., 593 N.E.2d 522, 527 (Ill. 1992). Even so, the ambiguities within the definition of "non-appealable local government requirements" leave open the possibility of a broad judicial reading that would encompass most zoning ordinances, as well as municipal attempts to cloak exclusionary zoning practices within the protected classification. *See infra* Part IV.

112. *See* Scadron v. City of Des Plaines, 606 N.E.2d 1154, 1164–65 (Ill. 1992) (holding that statute must specifically refer to home rule communities in order to limit home rule powers).

113. *See* Thompson v. Cook County Zoning Bd. of Appeals, 421 N.E.2d 285, 292 (Ill. App. Ct. 1981) (noting that zoning is a home rule power).

114. The legislature may deny or limit any home rule power other than the powers to make local improvements by special assessment and to levy or impose additional taxes within their boundaries. ILL. CONST. art. VII, § 6(l). In addition, the legislature may not provide for exclusive state exercise of the power to tax. *Id.* § 6(h).

115. *Id.* § 6(g).

116. The version of Illinois Act enacted by the Illinois General Assembly passed the Senate by a thirty-one to twenty-five vote with three not voting and the House by a sixty-one to fifty-two vote with three present votes and two absent. H.B. 0625 Vote History, 93d Gen. Assem., Reg. Sess. (Ill. 2003), http://www.ilga.gov/legislation/votehistory/93/senate/09300HB0625_05212003_001000T.pdf (Senate), http://www.ilga.gov/legislation/votehistory/93/house/09300HB0625_05292003_048000C.pdf (House).

overreach its home rule authority in particular cases. The home rule power extends to those matters "pertaining to [local] government and affairs,"[117] and though this authority is broad, Illinois courts have articulated limits to its reach. Under the "statewide concern" doctrine, a home rule unit may use its power to regulate problems that are local in nature, but not those which are statewide or national concerns.[118]

Where a home rule municipality claims that it is exempt from a state law, the court will examine three factors to determine whether the statewide concern limitation applies: (1) the extent to which the municipal conduct has an effect outside of the municipality, (2) the traditional allocation of authority between the state and local government on the subject, and (3) the relative interests of the state and local governments in regulating the subject.[119] These factors favor municipal primacy in zoning decisions in most cases, but Illinois courts have not always deferred to local applications of zoning ordinances and other land use regulations. For example, courts have granted relief from local ordinances requiring special use permits for a state prison facility,[120] a regional bus garage and maintenance facility,[121] and a sewage treatment plant.[122] These cases illustrate that home rule zoning authority may be curtailed when it unduly hinders uses that benefit government units beyond the home rule municipality.

Even so, drawing a parallel between these cases (which pertain to traditional service functions that have an extraterritorial impact) and privately-developed affordable housing (which does not so obviously display either characteristic) will likely prove difficult. In many ways, zoning housing development is quintessentially local in character. Courts will likely resist extending the statewide concern doctrine to something as pedestrian as housing development, fearing such extension would effectively remove any meaningful limiting principle from the doctrine and render home rule authority largely illusory.[123]

On the other hand, supporters of the Illinois Act will likely point to the wealth of academic literature surrounding the extraterritorial impact of high

117. ILL. CONST. art. VII, § 6(a).

118. People *ex rel.* Bernardi v. City of Highland Park, 520 N.E.2d 316, 321 (Ill. 1988).

119. *Id.*

120. City of Joliet v. Snyder, 741 N.E.2d 1051, 1055 (Ill. App. Ct. 2000).

121. City of Evanston v. Reg'l Transp. Auth., 559 N.E.2d 899, 905 (Ill. App. Ct. 1990).

122. Metro. Sanitary Dist. v. City of Des Plaines, 347 N.E.2d 716, 719 (Ill. 1976).

123. For a critical perspective on the "statewide concern" doctrine, including its detrimental effect on the home rule power, see Arthur C. Thorpe & Janet N. Petsche, *Will the "Statewide Concern" Limitation Destroy Home Rule?*, 80 ILL. B.J. 182 (1992).

housing costs as support for application of the statewide concern rule.[124] The "spatial mismatch" hypothesis posits that there is a mismatch between job opportunities, which have shifted in large numbers from central cities to suburbs, and non-resident workers (largely conceived of as the urban poor) who would take the jobs but who cannot because of various structural barriers.[125] Some of these barriers, such as lengthy commutes and limited mass transit between central cities and suburbs, could be alleviated if the urban workforce relocated to their suburban jobsites. However, the lack of affordable housing in these communities limits the ability of workers to relocate.[126] The theory suggests that this unenviable calculus that faces the urban workforce is responsible, at least in part, for central city unemployment and poverty.[127]

When couched in these terms, exclusionary zoning has significant effects outside of the home rule municipality by maintaining a system of non-resident, commuter workers in suburban areas and by contributing to the poverty of the urban poor.[128] The relative state interest in regulating against exclusionary zoning appears greater when cast in these terms, particularly if the link between spatial mismatch and urban poverty is clearly established because this link would draw state expenditures on aid to the urban poor into the statewide concern analysis. In addition, the fact that affordable housing developments may benefit from state or federal subsidies[129] suggests that affordable housing may rise to the level of a statewide or national concern. In light of the relative willingness of Illinois courts to scrutinize municipal zoning ordinances, the Illinois Act may ultimately

124. *See, e.g.*, John F. Kain, *Housing Segregation, Negro Employment, and Metropolitan Decentralization*, 82 Q.J. ECON. 175 (1968) (discussing relationship between racially segregated housing, outmigration of jobs from the central city, and urban poverty).

125. John Foster-Bey, *Bridging Communities: Making the Link Between Regional Economies & Local Community Development*, STAN. L & POL'Y REV., Summer 1997, at 25, 31.

126. *Id.*

127. *Id.*; Kain, *supra* note 124, at 196–97.

128. It is notable that all of the non-exempt communities under the Illinois Act lie either in Cook County, where the City of Chicago is located, or in the five abutting collar counties. *See* Press Release, Ill. Hous. Dev. Auth., Illinois Housing Development Authority Releases List of 49 Communities That Must Comply with Affordable Housing Planning and Appeal Act (Aug. 12, 2004), http://www.ihda.org/admin//Upload/Files//8e3d4770-6932-4503-a3ad-665a0c32edcb.pdf (listing non-exempt communities, all of which are situated in Cook, DuPage, Kane, Lake, McHenry, or Will Counties); *see also* U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, COUNTY AND CITY DATA BOOK: 2000, app. C-22 (13th ed. 2001) (mapping locations of the pertinent counties).

129. *See* 310 ILL. COMP. STAT. ANN. 67/15 (West Supp. 2005) (defining "affordable housing development" to include "any housing that is subsidized by the federal or State government").

apply to home rule municipalities in particular cases, notwithstanding its failure to expressly preempt home rule authority.[130]

Regardless of whether or not this argument proves successful, the legislature should specifically articulate its intent to grant the SHAB power to override home rule zoning ordinances in a statute passed by a three-fifths majority of both houses. As the Illinois Act now stands, it likely does not apply to limit the zoning powers of home rule communities, and therefore provides the SHAB with no meaningful authority over those communities.[131] Even so, the fact that the enforcement provisions of the Act do not apply to home rule communities does not render the statute entirely ineffective. As currently enacted, the Illinois Act applies in its entirety to non-home rule communities of over 1,000 inhabitants.[132]

B. Right to Review

As the SHAB begins to enforce the Illinois Act, questions are likely to arise regarding the right to seek judicial review of SHAB decisions and the relationship of this right to pre-existing rights under the traditional zoning appeals system. In the traditional system, a developer seeking a variation applies to the local authority,[133] which must hold a public hearing with statutory notice on the requested variation.[134] If it is the local zoning board of appeals that renders the final decision, judicial review is available under the provisions of the Illinois Administrative Review Act.[135] This right to

130. *See* 1 NORMAN WILLIAMS, JR. & JOHN M. TAYLOR, AMERICAN LAND PLANNING LAW: LAND USE & THE POLICE POWER § 7.16 (2003 rev. ed.) (describing Illinois courts as showing "hostility towards zoning," as compared to other states).

131. Those provisions of the Illinois Act that do not purport to curtail local authority are not subject to the state constitutional limits noted above, and therefore they can likely be applied to home rule communities. Thus, the SHAB may still maintain and disseminate information regarding denied development applications in home rule communities. *See* 310 ILL. COMP. STAT. ANN. 67/30(a) (West Supp. 2005). Likewise, the IHDA can include home rule communities within its annual list of non-exempt communities (because home rule communities are not exempt within the meaning of the statute, *see id.* § 67/15) and can request an affordable housing plan from those communities (though it would serve no purpose if the SHAB has no authority to override the local authority). *Id.* § 67/25. Whether this type of enforcement is a responsible investment of state resources is open to debate.

132. *See id.* § 67/15 (providing that municipalities of under 1,000 population are exempt from the Act).

133. The "local authority" in charge of zoning variations and special uses may be either the local zoning board of appeals or the corporate authorities of the municipality, depending on the local ordinance and size of the municipality. 65 ILL. COMP. STAT. ANN. 5/11-13-4, -5 (West 2005).

134. For municipalities, see *id.* § 5/11-13-6. For townships, see 60 ILL. COMP. STAT. ANN. 1/110-35 (West 1996). For counties, see 55 ILL. COMP. STAT. ANN. 5/5-12009 (West 2005) (with some exceptions to the hearing requirements listed therein). The hearing is held before the local zoning board of appeals.

135. 65 ILL. COMP. STAT. ANN. 5/11-13-13 (municipalities); 60 ILL. COMP. STAT. ANN. 1/110-50 (townships); 55 ILL. COMP. STAT. ANN. 5/5-12012 (counties).

review is "limited to parties of record to the proceeding before the administrative agency whose rights, privileges, or duties are affected by the decision,"[136] which may include neighbors of the affected property.[137] On review, the court will not disturb the local board's decision, to the extent that it is based on findings of fact,[138] unless that decision is "contrary to the manifest weight of the evidence."[139] If the reviewing court reverses the local board, the board lacks standing to appeal the decision upward,[140] but if the court instead affirms the local board, the parties aggrieved by the decision may appeal further.[141] Where, instead of the zoning board, the municipal governing authority renders the final decision itself, aggrieved parties can challenge that decision through an action for declaratory or injunctive relief.[142] Though the aggrieved parties will receive a de novo hearing in such cases, they have the burden of showing by clear and convincing evidence that the ordinance in question[143] "is arbitrary and unreasonable and bears no substantial relation to the public health, safety or welfare" as applied to their case.[144] Thus, under the current system, whether the requested variation or special use is granted or denied, the aggrieved parties may seek judicial review, though their evidentiary threshold in seeking to overturn the local authority's decision is daunting.

136. Winston v. Zoning Bd. of Appeals, 95 N.E.2d 864, 868 (Ill. 1950).

137. *See* 65 ILL. COMP. STAT. ANN. 5/11-13-7. This provision, which governs notice in municipalities of over 500,000 residents, provides that a neighboring owner (within 250 feet of the property at issue) who appeared and objected at the board's hearing and demonstrated that its property would be "substantially affected" by the outcome may seek review of the board's decision under the Administrative Review Law. *See also* Podmajersky v. Zoning Bd. of Appeals, 476 N.E.2d 1176, 1178 (Ill. App. Ct. 1985) (recognizing right to administrative review of abutting landowner). It is beyond the scope of this discussion to enumerate all circumstances and locales that give abutting landowners or other aggrieved parties a right to review—it is only important to note that some landowners do have such a right.

138. *See* Scadron v. Zoning Bd. of Appeals, 637 N.E.2d 710, 712–13 (Ill. App. Ct. 1994) (applying deferential factual review standard to local board's decision not to grant a special use). However, if the local board's decision rests upon a question of law, such as construction of the zoning ordinance, the court will review de novo. Chicago Title & Trust Co. v. Vill. of Inverness, 735 N.E.2d 686, 688–89 (Ill. App. Ct. 2000).

139. *Scadron*, 637 N.E.2d at 713.

140. Speck v. Zoning Bd. of Appeals, 433 N.E.2d 685, 687–88 (Ill. 1982).

141. *See Scadron*, 637 N.E.2d at 713 (deciding appeal by applicant from lower court's affirming of local board).

142. *See* Kleidon v. City of Hickory Hills, 458 N.E.2d 931, 935–36 (Ill. App. Ct. 1983) (discussing action for declaratory and injunctive relief brought by abutters aggrieved by a variation granted by the city council).

143. In such cases, there will always be an ordinance at issue. If a developer is challenging the municipality's decision, the developer will be challenging the application of the zoning ordinance. If, on the other hand, an aggrieved landowner is challenging the municipality's decision to grant a variation, the ordinance at issue will be the variation itself. *See* 65 ILL. COMP. STAT. ANN. 5/11-13-5 (West 2005) ("If the power to determine and approve variations is reserved to the corporate authorities, it shall be exercised only by the adoption of ordinances.").

144. *Kleidon*, 458 N.E.2d at 940.

Under the new statewide appeals system created by the Illinois Act, if the local authority denies or conditionally approves a variation request, a qualifying developer may appeal that decision to the SHAB rather than directly to the courts.[145] Before the SHAB, the developer has the burden of showing that the application was "unfairly denied" or that "unreasonable conditions have been placed upon [its] tentative approval."[146] Review by the SHAB is de novo, without regard to whether the decision below was issued by a local board or by a municipal governing authority.[147] Once the SHAB has rendered its decision, the state appellate courts have exclusive jurisdiction over any further appeals.[148]

Two obvious questions arise from this appeals structure. First, which parties to the local board's proceedings, other than the developer,[149] have standing to appear before the SHAB or are entitled to notice of its proceedings? Second, who has standing to appeal from SHAB decisions, and what is the standard of review in the appellate courts on such appeal? Once again, the analysis of these questions by Massachusetts courts is instructive in predicting how Illinois courts might answer them.

1. Standing Issues

The Massachusetts Act is unambiguous on standing issues. If the local board approves a developer's comprehensive permit application, parties "aggrieved by the issuance" of that permit, including abutting landowners, are entitled to judicial review under the same conditions as other zoning decisions.[150] If the local board instead denies the application, then the applicant has the right to appeal to the HAC.[151] In the HAC proceedings, too, aggrieved parties such as abutters may intervene unless their interests are "substantially similar" to those of a party already involved in the proceedings and the would-be intervenors fail to show that their interests will not be diligently represented by the parties already before the HAC.[152] Finally, judicial review of HAC decisions is governed by chapter thirty A of the

145. 310 ILL. COMP. STAT. ANN. 67/30(b) (West Supp. 2005).

146. *Id.* § 67/30(c).

147. *Id.*

148. *Id.* § 67/30(g).

149. *See id.* § 67/30(f) (defining the SHAB's decision as "an order directed to the approving authority"). This suggests that the approving authority has a direct stake in the outcome of the proceedings and might properly be a named party in such proceedings.

150. *See* MASS. GEN. LAWS ANN. ch. 40B, § 21 (West 2004) (defining the right to appeal by cross-reference to chapter 40A, which governs ordinary zoning appeals).

151. *Id.* § 22.

152. 760 MASS. CODE REGS. 30.04(2) (2005), *available at* http://www.mass.gov/dhcd/regulations/760030.htm (last visited Dec. 20, 2005).

General Laws of Massachusetts,[153] which also extends to all parties "aggrieved" by the final decision.[154] Thus, at all levels in the process, it is clear that aggrieved parties, such as abutters, have a right to present their interests to the deciding body.

The language of the Illinois Act does not specify these matters as clearly as its Massachusetts counterpart. However, Illinois law provides that if a statute does not set out procedures for administrative proceedings, the administrative proceedings will be "governed by established rules of procedure applicable generally to administrative tribunals."[155] Thus, while future regulations will define the nature of SHAB review,[156] courts could rely on existing administrative structures to define the applicable procedures, if necessary.

Specifically, questions regarding notice and hearings could be answered by reference to the Illinois Administrative Procedure Act.[157] The Administrative Procedure Act requires a hearing and notice to all parties in contested cases,[158] defining "party" as "each person or agency named or admitted as a party or properly seeking and entitled as of right to be admitted as a party."[159] Under this definition, the developer and the approving authority would likely be the named parties in a proceeding before the SHAB, and are therefore entitled to notice of its proceedings. What is unclear, however, is whether abutters or others aggrieved by the proposed variation fall within this definition, because the Illinois Act does not state whether such individuals are "entitled as of right" to intervene before the SHAB.[160]

One answer would be to allow abutters to participate as parties before the SHAB to the same extent as they could before the local authority. This solution recognizes that the SHAB decision effectively replaces the local board decision, and thus treats it similarly to that decision. Under this approach, the question of notice can be answered with reference to the Administrative Procedure Act, which would require notice to all parties who

153. MASS. GEN. LAWS ANN. ch. 40B, § 22 (West 2004).

154. MASS. GEN. LAWS ANN. ch. 30A, § 14 (West 2001).

155. Flick v. Gately, 65 N.E.2d 137, 139 (Ill. App. Ct. 1946).

156. Under the Illinois Administrative Procedure Act, agencies must adopt procedures for hearings on contested cases. 5 ILL. COMP. STAT. ANN. 100/10-5 (West 2005).

157. *Id.* § 100/10-25.

158. *Id.*

159. *See id.* § 100/1-55.

160. *See* 310 ILL. COMP. STAT. ANN. 67/30 (West Supp. 2005) (making no mention of proper parties before the SHAB or right to intervene).

are entitled to participate in the SHAB proceeding.[161] One potential definition for eligible abutters already lies within the municipal code, which uses a 250-foot radius for local hearings in large municipalities.[162] Allowing these parties to intervene before the SHAB would be similar to the Massachusetts approach.[163]

A second answer would be to exclude these other interested parties from the SHAB process, or to limit their participation to situations where the parties before the SHAB will not adequately represent their interests. However, this approach would likely cut off abutters from any further right to appeal the SHAB's decision.[164] This could result in a situation where abutters "succeed" before the local board through denial of a variation request, only to have that success reversed by a proceeding before the SHAB in which they could not participate and from which they cannot appeal. While it is not completely certain that this would run afoul of the abutters' rights, Illinois courts have recently shown some willingness to expand the procedural rights afforded to such parties in administrative proceedings.[165] At a minimum, it seems unlikely that a court, when asked to review the validity of the Illinois Act in its present form, would presume the absence of procedures or protections necessary to render the Act constitutional.[166] Thus, a challenge to the Illinois Act on these grounds should not succeed, at least at present.

2. Standard of Review

Massachusetts courts have also considered the standard of review that the HAC should apply to the matters before it. The Massachusetts Act came under fire on equal protection grounds for allegedly applying differ-

161. 5 ILL. COMP. STAT. ANN. 100/1-55.

162. 65 ILL. COMP. STAT. ANN. 5/11-13-7 (West 2005) (requiring written notice to record owners of property within 250 feet of the proposed variation in municipalities of over 500,000 residents).

163. *See* 760 MASS. CODE REGS. 30.04(2) (2005), *available at* http://www.mass.gov/dhcd/regulations/760030.htm (last visited Dec. 20, 2005) (establishing rights of parties seeking to intervene before the HAC).

164. If appeals from the SHAB are ultimately governed by the Administrative Review Law, as seems likely, the class of appellants is limited to parties of record in the administrative proceeding being reviewed. Winston v. Zoning Bd. of Appeals, 95 N.E.2d 864, 868 (Ill. 1950). Thus, an attempt by the SHAB to grant a right of appeal to non-party abutters would likely prove unsuccessful.

165. *See* People *ex rel.* Klaeren v. Vill. of Lisle, 737 N.E.2d 1099, 1108–10 (Ill. App. Ct. 2000), *aff'd*, 781 N.E.2d 223 (Ill. 2002). This case dealt with the right of neighbors to cross-examine witnesses at a local land use hearing and found such a right in administrative proceedings. In affirming the Appeals Court, the Illinois Supreme Court found that due process protected this right of the interested neighbors. *Klaeren*, 781 N.E.2d at 234–36.

166. *Cf.* Flick v. Gately, 65 N.E.2d 137, 139 (Ill. App. Ct. 1946) (noting that "established rules of procedure" control administrative proceedings where standards are not provided).

ent standards of review depending upon whether the initial application was granted or denied.[167] A local board challenged the statute by claiming that the appeal to the HAC for denied permits was a limited review, while judicial review of granted permits was de novo under Massachusetts law.[168] However, the court did not address the underlying constitutional argument because it found that both HAC review of denied permits and judicial review of granted permits was de novo.[169] Thus, the purported equal protection violation was nonexistent.

Illinois courts cannot follow the lead of Massachusetts on this point because the Illinois Act specifies that the standards of review differ. It is clear that the SHAB's review of denied or conditionally approved applications is de novo,[170] while both direct judicial review of a local zoning board's decision[171] and direct judicial review of the corporate authority's decision are deferential to the decision below.[172] Thus, if the local authority denies a variation, a developer can proceed before the SHAB and obtain de novo review,[173] and the SHAB decision is then likely subject to deferential review on appeal.[174] On the other hand, if the local authority approves the variation in the first instance, the SHAB never becomes involved, and those aggrieved by the variation can either obtain limited judicial review under the Administrative Review Act, in the case of a local board decision,[175] or face long odds in a suit for declaratory or injunctive relief against the corporate authority.[176]

Litigants seeking to invalidate the Illinois Act on equal protection grounds might make two arguments based on this distinction. First, they might argue that developers are given unfair preference by the statewide appeal mechanism, which effectively provides them with a second chance at de novo review outside of the court system. Second, if potentially aggrieved parties cannot appeal the SHAB decision to the appellate court, they might argue that similarly situated parties are being treated unequally under the law based solely upon whether the local board denied the initial

167. Bd. of Appeals v. Hous. Appeals Comm., 294 N.E.2d 393, 416 (Mass. 1973).

168. *Id.*

169. *Id.*

170. 310 ILL. COMP. STAT. ANN. 67/30(b) (West Supp. 2005).

171. Scadron v. Zoning Bd. of Appeals, 637 N.E.2d 710, 712–13 (Ill. App. Ct. 1994).

172. Kleidon v. City of Hickory Hills, 458 N.E.2d 931, 940 (Ill. App. Ct. 1983).

173. § 67/30(b).

174. *Scadron*, 637 N.E.2d at 713 (setting out scope of review under the Administrative Review Act). This assumes that SHAB decisions are ultimately made subject to review under the Administrative Review Act, which is the manner in which local decisions are currently reviewed.

175. *Id.*

176. *Kleidon*, 458 N.E.2d at 940.

application (which could trigger the SHAB review process) or approved it (which would trigger the existing administrative review process).[177]

The first argument likely lacks merit. The mere fact that the statute treats developers differently from aggrieved parties does not necessarily render the statute a violation of equal protection.[178] The Illinois Supreme Court noted long ago that the legislature "may . . . give to a party belonging to one class two hearings before his rights are determined and to one belonging to a different class one hearing, only," if the classifications are "based on a rational difference."[179] Under the Illinois Act, which seeks to encourage and enable increased development of affordable housing, the legislature likely sought to provide some advantage to affordable housing developers in gaining approval for their proposals. Whether justified in terms of the general need for more affordable housing or in terms of a perceived local bias against affordable housing, a reviewing court could almost certainly find a rational basis for treating developers differently under the Illinois Act than other parties.[180]

The second argument has more merit because it suggests that similarly situated aggrieved parties, such as abutters, might be treated differently based solely upon the initial denial or grant of the developer's application. As a result, abutters who succeeded at the local level could effectively be afforded fewer opportunities to defend their rights than those who failed at the local level.[181] However, as was noted in the preceding section, it is unlikely that a court, if asked to evaluate the Illinois Act at the current stage in its development, would presume that abutters are barred from appealing SHAB decisions if that right to appeal is necessary to uphold the Act.[182]

177. This is a variant of the problem noted in the preceding section of this Note. An example can clarify how this application is also problematic: In case one, the local board grants a developer's requested variation. In this case, abutters (to the extent they have a right to appeal) could appeal upwards through the judicial system, pursuant to the Administrative Review Act. In case two, the local board denies the developer's requested variation. In this case, the developer can appeal to the SHAB, pursuant to the Illinois Act. If the SHAB goes on to reverse the local board and grant the variation, abutters would likely wish to appeal the SHAB decision to the courts. However, if the Illinois Act is interpreted to deny these abutters the right to appeal SHAB decisions, then they are without recourse. Thus, the abutters in case one are treated differently than the abutters in case two based solely upon whether the local board denies or approves the developer's variation request. In fact, their right to further appeal is extinguished in the case where they *succeed* at the local level and preserved in the case where they *fail*.

178. *See, e.g.*, Arvia v. Madigan, 809 N.E.2d 88, 99 (Ill. 2004) (noting that the government may draw categorical distinctions between people under certain circumstances).

179. Bagdonas v. Liberty Land & Inv. Co., 140 N.E. 49, 51 (Ill. 1923).

180. *See Arvia*, 809 N.E.2d at 99 (noting that court will uphold a non-"suspect" classification if it can "reasonably conceive of any set of facts to justify the statutory classification").

181. *See supra* note 177.

182. *Cf.* Flick v. Gately, 65 N.E.2d 137, 139 (Ill. App. Ct. 1946) (noting that "established rules of procedure" control administrative proceedings where standards are not provided).

Therefore, this equal protection challenge to the Illinois Act should also fail.

C. *Vagueness*

Another challenge that opponents could raise against the Illinois Act is that it is unconstitutionally vague, in violation of due process guarantees.[183] The challenger claiming vagueness would almost certainly direct its claim at the Act's provisions relating to the SHAB appeals process—particularly the criteria to be used on SHAB review. These provisions state that the SHAB determines on review whether a developer's application was "unfairly denied" or whether "unreasonable conditions [were] placed upon [its] tentative approval."[184] In making its determination, the SHAB "shall consider the facts and whether the developer was treated in a manner that places an undue burden on the development due to the fact that the development contains affordable housing."[185] It must also consider the local government's actions "in regards to granting waivers or variances" that would impact the "economic viability of the development."[186] Finally, the SHAB must dismiss an appeal if the reason for denial was a "non-appealable local government requirement,"[187] which encompasses "all essential requirements that protect the public health and safety."[188] If a due process challenge arose, Illinois courts would have to determine whether these provisions are unconstitutionally vague.

In the *Hanover* case, the Massachusetts court determined that the standards set out in the Massachusetts Act were not unconstitutionally vague.[189] The two challenged standards were, (1) "consistent with local needs," and (2) "uneconomic."[190] However, as the court noted, both of these terms were expressly defined within the statutory text.[191]

183. *See* Bd. of Appeals v. Hous. Appeals Comm., 294 N.E.2d 393, 412–14 (Mass. 1973) (addressing vagueness challenge to the Massachusetts Act).

184. 310 ILL. COMP. STAT. ANN. 67/30(c) (West Supp. 2005).

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.* § 67/15.

189. *See* Bd. of Appeals v. Hous. Appeals Comm., 294 N.E.2d 393, 412–14 (Mass. 1973). The actual vagueness challenge leveled against the Massachusetts Act in this case was that the statute set out no standards for the local board's decision to grant or deny requests for comprehensive permits. The challenger argued that the standards set out in the Massachusetts Act only applied to HAC review. In its opinion, the court first determined that the same standards set out for the HAC also applied to local boards. The court then went on to determine that those standards were sufficiently definite to survive a due process challenge.

190. *Id.*; MASS. GEN. LAWS ANN. ch. 40B, § 23 (West 2004). In *Board of Appeals v. Housing Appeals Committee*, the court held that the word "reasonable" in section 23, referring to denied applica-

Regarding the first standard, requirements and regulations are "consistent with local needs" under the Massachusetts Act if "they are reasonable in view of the regional need" for affordable housing and "applied as equally as possible to both subsidized and unsubsidized housing."[192] The reviewing body (the HAC or a reviewing court) assesses whether the regulations are reasonable with regard to the number of "low income persons" in the local area and the needs (1) to protect the "health or safety" of both the occupants of affordable housing and the other residents in the area, (2) "to promote better site and building design in relation to the surroundings," or (3) "to preserve open spaces."[193] In addition, regulations are consistent with local needs if the local government falls within one of the safe harbors previously noted in Part II A of this Note.[194]

With regard to the second standard, the Massachusetts Act defines a development as "uneconomic" if it is "impossible" for (1) a public agency or nonprofit organization to build or operate the proposed housing "without financial loss," or (2) a limited dividend organization to build or operate the housing "and still realize a reasonable return."[195] The court held that the statutory floor created by the safe harbor provisions, combined with the statutory definitions of their terms, set out a sufficiently definite balancing test to survive the due process challenge.[196]

The Illinois Act does not provide statutory definitions for "undue burden," "unfairly denied," or "unreasonable conditions,"[197] so Illinois courts cannot rely upon express statutory definitions to reject a due process challenge to those provisions. Instead, a court will examine the language and purpose of the statute to determine if the statute's terms are definite enough to guide those who are bound by it.[198] The purpose of the Illinois Act's statewide appeal provision is to provide a developer with an opportunity for review if it believes that the local board "unfairly" denied its proposal be-

tions ("reasonable and consistent with local needs"), was merely "surplus verbiage," and thus focused its analysis solely on the terms "consistent with local needs" and "uneconomic." 294 N.E.2d at 413 n.17.

191. *See* ch. 40B § 20.

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.*

196. Bd. of Appeals v. Hous. Appeals Comm., 294 N.E.2d 393, 412–14 (Mass. 1973).

197. *See* 310 ILL. COMP. STAT. ANN. 67/15 (West Supp. 2005) (setting out definitions for the Act, which do not include "unfairly denied" or "unreasonable conditions"). It is possible that administrators may define these terms in accompanying regulations in the future.

198. *E.g.*, Chastek v. Anderson, 416 N.E.2d 247, 249 (Ill. 1981).

cause the proposed development included affordable housing.[199] At the same time, the SHAB has no authority to override "essential requirements" protecting public health and safety or the environment.[200] Finally, the statute places the burden of showing an undue burden upon the developer who appeals to the SHAB.[201] Taken together, these provisions can be reasonably construed as an effort to provide relief from local zoning practices that discriminate against affordable housing without a sufficient public welfare justification. By exempting essential requirements, the legislature evidenced its intent to balance the public purpose underlying local zoning ordinances with the need to encourage development of affordable housing.[202] Thus, a developer could prevail by showing that concerns less important to the public welfare than the need for affordable housing motivated the board denial or conditional approval of the developer's application—burdens imposed on such grounds would be "undue" in light of the shortage of affordable housing.

Unlike the previous terms, the statute does provide a definition for "non-appealable local government requirements,"[203] defining them as "all essential requirements that protect the public health and safety, including any local building, electrical, fire, or plumbing code requirements or those requirements that are critical to the protection or preservation of the environment."[204] The reviewing body (the SHAB or the appellate courts) might interpret this language to encompass all exercises of the local police power, including all zoning regulations.[205] Conversely, the enumerated examples that follow could provide context for interpreting the meaning of the clause and limit the definition of these non-appealable requirements to something less than the full range of the police power.[206]

Under the limited reading, the reference to requirements such as fire, electrical, and building codes suggests that regulations essential to protect-

199. § 67/10.

200. *Id.* § 67/15.

201. *Id.* § 67/30(c).

202. *Id.* § 67/5 (finding that there is a shortage of quality affordable housing in Illinois and noting the need to provide such housing for the workforce and retirees).

203. *Id.* § 67/15.

204. *Id.*

205. *See* ILL. CONST. art. VII, § 6(a) (providing that home rule communities have the power to "regulate for the protection of the public health, safety, morals and welfare"); Thompson v. Cook County Zoning Bd. of Appeals, 421 N.E.2d 285, 292 (Ill. App. Ct. 1981) (noting that zoning is a home rule power).

206. *See, e.g.*, City of E. St. Louis v. E. St. Louis. Fin. Advisory Auth., 722 N.E.2d 1129, 1133–34 (Ill. 1999) (applying doctrine of *ejusdem generis* to derive the meaning of the phrase "all powers necessary" in a statute granting "all powers necessary . . . including, but not limited to" a list of enumerated powers).

ing building occupants or the general public from physical harm must be applied to all construction, affordable or not. More specifically, it suggests that substandard construction is simply unacceptable, even in pursuit of the statute's goals. However, it does not go so far as to embrace all exercises of the police power—instead, it considers how directly related those exercises are to protecting the public from harm. While the reference to requirements "critical to the protection or preservation of the environment" is not accompanied by enumerated examples, the use of the word "critical" denotes that these requirements must be vital to environmental protection purposes.[207] Thus, under the limited reading, relatively few applications of the zoning power would be non-appealable.

In contrast, the broader construction of this passage would make any legitimate use of the police power a non-appealable requirement, and would thus limit the SHAB's power to those cases where the underlying zoning practice exceeded the municipal police power. This reading would make the developer's case much more difficult by shifting the analysis from whether a particular requirement is "essential" to whether that requirement is a permissible use of the police power. This reading is a plausible interpretation of the passage, but it does not adhere as closely to general principles of statutory construction as the limited reading in three respects. First, it minimizes the effect of limiting language within the statute, such as the listing of safety codes or the use of words like "essential" and "critical." Second, this reading appears to contradict the legislative intent underlying the statute by allowing most zoning practices to elude SHAB review. Finally, such a reading would give the statute an almost empty meaning because developers can already directly challenge municipal ordinances that exceed the police power in Illinois courts without the assistance of the Illinois Act.[208]

Even though there is room to debate the meaning of these passages, Illinois courts are unlikely to invalidate the Act for indefiniteness, given the deferential standard applied to vagueness challenges.[209] Before the SHAB

207. *See* MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 275 (Frederick C. Mish et al. eds., 10th ed. 1997) (defining "critical" as "INDISPENSABLE, VITAL").

208. *See, e.g.*, Kleidon v. City of Hickory Hills, 458 N.E.2d 931, 935–36 (Ill. App. Ct. 1983) (allowing challenge to municipal ordinance which granted a zoning variation).

209. *See generally* Ardt v. Ill. Dep't of Prof'l Regulation, 607 N.E.2d 1226, 1234–35 (Ill. 1992) (finding a prohibition of "statements which contain false, fraudulent, deceptive or misleading material or guarantees of success, statements which play upon the vanity or fears of the public, or statements which promote or produce unfair competition" in dental advertisements sufficiently definite to survive challenge); Chastek v. Anderson, 416 N.E.2d 247, 249, 251 (Ill. 1981) (finding a provision that allowed revocation of dental licenses for "improper, unprofessional or dishonorable conduct" sufficiently definite to survive constitutional challenge).

hears its first appeal, the IHDA will likely draft regulations that more clearly define key provisions of the Illinois Act. If not, the SHAB members will decide which meaning they will give to the non-appealable requirements language when they begin hearing appeals, and the appellate courts will ultimately determine if that interpretation is legally sound. In sum, though the Illinois Act is not without some ambiguity, it provides enough detail that those charged with compliance can adapt their behavior to meet its requirements; therefore, Illinois courts are unlikely to invalidate the Act on vagueness grounds.[210]

IV. PRACTICAL CHALLENGES

Even though Illinois courts are unlikely to invalidate the Illinois Act in its entirety, this does not guarantee that it will be successful in prompting the development of affordable housing. Numerous practical challenges stand in the way of the statute's ultimate goals. Some of these challenges have already been fleshed out through the preceding discussion—most notably, the Act's failure to expressly preempt home rule authority. Over one-half of the population of Illinois resides in cities populous enough to qualify as home rule communities by default,[211] and smaller municipalities could elect to become home rule communities as well.[212] This places a significant proportion of the state's population beyond the reach of the statute, making its goals more difficult to achieve.

Another difficulty facing the statute follows necessarily from its selected method of operation. The Illinois Act, like the Massachusetts Act, is a "supply side" provision that relies upon forces in the housing market to provide needed affordable housing.[213] The assistance that a supply side statute like the Illinois Act provides to developers has been categorized as "indirect, non-directive, and non-financial."[214] This is evident from a review of the statutory mechanism. First, the statute is "indirect" because it does not make the state itself responsible for building affordable housing, but rather relies on private developers to meet the need. Next, the statute is almost entirely "non-directive" because it places no positive obligations

210. *See, e.g.*, *Chastek*, 416 N.E.2d at 249 (stating that a statute is not unconstitutionally vague "if the duty imposed by the statute is prescribed in terms definite enough to serve as a guide to those who must comply with it").

211. *See* U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, 2000 CENSUS POPULATION COMPARED TO 1990: ILLINOIS MUNICIPALITIES, http://illinoisgis.ito.state.il.us/census2000/censusData/2000/docs/munipop.pdf (last visited Jan. 1, 2006).

212. *See* ILL. CONST. art. VII, § 6(a).

213. Stonefield, *supra* note 7, at 333–35.

214. *Id.* at 344.

upon the local government beyond submitting an affordable housing plan;[215] all of the other provisions are reactive rather than proactive, triggered only if a qualifying developer seeks to build affordable housing and is either denied or conditionally granted that opportunity.[216] Finally, the statute is decidedly non-financial because it neither provides new state incentives for affordable housing development nor requires local governments to provide such incentives themselves, though local governments might choose to do so as part of their affordable housing plan.[217] While it is conceivable that a market-driven approach like the Illinois Act is the most efficient method for fostering appropriate development of affordable housing, it is apparent that more authoritative methods could be utilized to that end.[218]

Aside from the statute's inherent weaknesses, municipalities may also have procedures available to them to frustrate the goals set by the Illinois Act. For example, local governments might begin using their eminent domain powers to take property, ostensibly for public use, to thwart proposed developments. Massachusetts courts have held that a "good faith" taking for public use, carried out by the local government, can defeat a developer's pending application for a comprehensive permit.[219] However, the "good faith" requirement may be more theory than fact, as proving bad faith on the part of the local government would likely prove quite difficult.[220]

Another possible impediment to affordable housing development might come through historical preservation campaigns.[221] Unlike the Mas-

215. *See* 310 ILL. COMP. STAT. ANN. 67/25 (West Supp. 2005).

216. *Id.* § 67/30.

217. *See id.* § 67/25(b)(iii) (providing that affordable housing plan must include a statement of "incentives that local governments *may* provide for the purpose of attracting affordable housing to their jurisdiction" (emphasis added)). The language of this provision appears permissive only as regards municipal incentives.

218. *See* Stonefield, *supra* note 7, at 344–49 (describing Massachusetts Act as "inadequate" and suggesting that disputes between proponents and opponents of affordable housing legislation as well as among the proponents themselves led to adoption of relatively ineffective statutes like the Massachusetts Act).

219. Town of Chelmsford v. DiBiase, 345 N.E.2d 373, 374 (Mass. 1976). *But see* Pheasant Ridge Assocs. v. Town of Burlington, 506 N.E.2d 1152, 1156–58 (Mass. 1987) (holding that a taking initiated in "bad faith" for specific purpose of defeating developer's application was void).

220. *See Pheasant Ridge Assocs.*, 506 N.E.2d at 1156 (noting that proving bad faith is difficult). In this case, a number of irregularities attended the taking—perhaps the most striking was a statement made during a presentation by a local official that effectively admitted that the purpose of the taking was to defeat the developer's proposal. *Id.* at 1158 n.8.

221. *See* Dennis Hous. Corp. v. Zoning Bd. of Appeals, 785 N.E.2d 682, 688 (Mass. 2003) (holding that a local zoning board of appeals could, as part of a comprehensive permit, grant a certificate on behalf of a historic district committee).

sachusetts Act, which allows the local board to grant a developer a comprehensive permit in place of individual permits from subsidiary bodies,[222] the Illinois Act contains no such provision. Thus, if an Illinois developer must obtain a certificate of compliance from the state Historical Preservation Agency or some local equivalent before proceeding with its development,[223] the Illinois Act provides no "bypass" mechanism. In theory, then, historical preservation authorities fall beyond the purview of the SHAB and might be used to block the development of affordable housing. Although historical preservation laws are undoubtedly important, and should not be suspect in most cases, it is still more important that local governments do not misuse such laws to frustrate well-intentioned efforts to provide affordable housing.[224]

Finally, courts and the SHAB should be wary of the possibility that some local governments might attempt to aggressively redefine local codes and environmental regulations in a way that would exclude affordable housing, in the hope that these efforts would be shielded from SHAB oversight as "non-appealable local government requirements."[225] Such efforts should not be rewarded, though discovering and remedying them would likely be even more difficult than weeding out bad faith uses of eminent domain.[226]

In short, even though state courts are unlikely to strike down the Illinois Act, practical challenges may limit its effectiveness in fostering significant affordable housing production.

V. RECOMMENDATIONS

Despite these weaknesses, advocates of the Illinois Act should not be disheartened. The Massachusetts Act, though afflicted with many of the same shortcomings as the Illinois Act,[227] is probably best described as a

222. MASS. GEN. LAWS ANN. ch. 40B, § 21 (West 2004).

223. 20 ILL. COMP. STAT. ANN. 3410/8 (West 2001).

224. For an anecdote and reflections concerning the possible misuse of historical preservation laws, see Benjamin M. Reznik, *Preservation Versus Affordable Housing*, L.A. LAWYER 60 (Jan. 2001).

225. 310 ILL. COMP. STAT. ANN. 67/15 (West Supp. 2005).

226. A degree of caution is likely warranted when dealing with matters so important both to the well-being of the general public and to the autonomy of local governments. For additional information on the relationship between environmental protection and affordable housing, see generally Rusty Russell, *Equity in Eden: Can Environmental Protection and Affordable Housing Comfortably Cohabit in Suburbia?*, 30 B.C. ENVTL. AFF. L. REV. 437 (2003).

227. In fact, the Massachusetts Act still retains some "problems" that have been left out of the Illinois Act. For example, the Massachusetts Act's requirement of a subsidy within the statutory definition of "low or moderate income housing" has been criticized. *See* Kenneth Forton, *Expanding the Effectiveness of the Massachusetts Comprehensive Permit Law by Eliminating Its Subsidy Requirement*,

modest success.[228] Between 1969 and 1999, 18,000 units of affordable housing were built using comprehensive permits granted under the Massachusetts Act.[229] The number of communities without subsidized housing fell from 173 in 1972, which constituted approximately half of the state's municipalities, to only 55 in 1997.[230] Even so, relatively few communities have reached the statutory goal of ten percent, and the demand for affordable housing still exceeds its supply.[231]

If its supporters hope for the Illinois Act to have a comparable or superior effect in Illinois, some changes are necessary. Most glaringly, the Act's lack of express home rule preemption is a loophole that the legislature should close to ensure that the Act is not wholly ineffectual. Unfortunately, the political support necessary to mend this problem may be lacking in the state legislature.[232] Likewise, any attempt to enhance the Act's effectiveness by making its provisions more directive or by providing direct financial assistance to affordable housing developers would likely face stiff opposition. Even so, adding some provisions that are not entirely reliant upon market forces—for example, mandating that a set percentage of new construction be affordable housing in those communities with the fewest affordable units—could help to spur development that might otherwise never occur. If the market alone is left to dictate the operation of the Illinois Act, affordable housing may never make inroads into some communities because developers may never find such development economically viable.[233] The legislature could also make the Act's affordable housing goals more challenging to local governments, though this, too, would likely face opposition.[234]

In addition to possible changes to the language of the statute, administrators should clarify its many ambiguities in any forthcoming regulations to the Illinois Act. This would include specifying which parties have stand-

28 B.C. ENVTL. AFF. L. REV. 651, 677–80 (2001). Likewise, critics have suggested that "it is difficult to justify" the statutory restriction upon the types of builders who qualify for the statute's protection. Stonefield, *supra* note 7, at 336.

228. *See* Krefetz, *supra* note 6, at 392–95 (describing the effect of the Massachusetts Act in stimulating proposals for and construction of affordable housing in Massachusetts).

229. *Id.* at 392.

230. *Id.* at 393.

231. *Id.* at 394.

232. *See supra* note 116 and accompanying text.

233. Whether this constitutes evidence that there is no market for affordable housing in those communities or instead constitutes a market failure is, of course, open to debate.

234. For example, an amendment to the Illinois Act was proposed in the senate which would have modified the three percent increase goal to require a three percent increase "every 5 years." This portion of the amendment was not enacted. S.B. 2724, 93d Gen. Assemb., Reg. Sess. (Ill. 2004) (as introduced, Feb. 4, 2004), http://www.ilga.gov/legislation/93/SB/PDF/09300SB2724.pdf.

ing before the SHAB and clarifying the notice requirements for the SHAB proceedings. Such regulations might also add further detail to the criteria that the SHAB can consider in reaching its decision and to the precise definition of "non-appealable local government requirements." Regulations could also help to set parameters on the SHAB's power to reverse the local authority when doing so would result in affordable housing units in excess of either the community's local housing goal or the ten percent statutory threshold.[235] Finally, administrative regulations could specify whether, and to what extent, a developer who obtains a favorable ruling from the SHAB can modify his or her development plans afterwards without having to revisit the approval and appeals process.

The Code of Massachusetts Regulations includes a regulation that would be of particular interest to those wary of the Illinois Act.[236] This regulation provides that the local board's denial or conditional grant of a developer's application is consistent with local needs if that developer had sought a variance for the same property within the preceding year and if its initial proposal did not contain affordable housing.[237] A similar regulation in Illinois would serve a dual function. First, where the local board denied the former application, that denial would prove that animus towards affordable housing did not motivate the denial of the subsequent application. Second, regardless of whether the former application proceeded to denial or was withdrawn, the regulation would limit the opportunistic developer's ability to use affordable housing to force through an otherwise objectionable development. By including limiting regulations like this one, the IHDA might be able to win over some of the legislators needed to make further changes to the statute itself, while at the same time enhancing the overall effectiveness of the Act. With some of these changes, the Illinois Act might prove to be a valuable tool in creating housing opportunities for those caught in the affordability gap.

235. In Massachusetts, a court faced with this issue held that a permit could issue where the current amount of affordable housing was below the statutory threshold while the amount after construction would be above the statutory threshold. Zoning Bd. of Appeals v. Hous. Appeals Comm., 446 N.E.2d 748, 754–55 (Mass. App. Ct. 1983). Such a result is advisable in Illinois as well because reaching a numerically precise threshold through the Illinois Act process is unlikely. To the extent that a proposed development would result in affordable housing greatly exceeding the community's chosen goal, it is likely that the SHAB would question whether the local board's denial was actually unreasonable.

236. 760 MASS. CODE REGS. 31.07(1)(h) (2005), *available at* http://www.mass.gov/dhcd/regulations/760031.htm (last visited Dec. 12, 2005).

237. *Id.*

CONCLUSION

Statewide override statutes like the Illinois Act represent one approach to easing the serious affordability gap facing families in the United States. The Illinois Act pursues a market-driven solution to the affordable housing shortage by providing developers with relief from municipal ordinances and policies that inhibit the construction of affordable housing.[238] Because this approach requires some preemption of municipal authority, the Illinois Act is likely to create controversy as it moves into the enforcement stage, and that controversy will likely result in legal and practical challenges to the Act.

As these challenges arise, analysts and litigants can look to the history of similar statutes in other states to predict the fate of the Illinois Act. The history of the Massachusetts Act is particularly instructive because that law has been in effect for over three decades, during which it has been the subject of judicial and academic scrutiny. By studying the Massachusetts Act, interested parties can predict the kinds of challenges that litigants may raise to the Illinois Act as well as the likely resolution of such challenges in Illinois courts.

This side-by-side analysis reveals certain differences between Illinois and Massachusetts law that will likely hamstring the effectiveness of the Illinois Act to a greater degree than its Massachusetts counterpart. Most notably, the Illinois Act's apparent inapplicability to home rule communities is a substantial legal obstacle to its effectiveness. Furthermore, although Illinois courts are unlikely to invalidate the Illinois Act in its entirety, numerous practical challenges also stand in the way of its goal of increasing affordable housing production.

With some changes, the Illinois Act could prove to be an effective tool for promoting affordable housing construction. In particular, the Illinois Act must apply to home rule communities if it is to enlarge the affordable housing stock to any appreciable degree. Illinois lawmakers should look to the example set by the Massachusetts Act to increase the effectiveness of the Illinois Act, while at the same time incorporating provisions that will safeguard the municipal zoning authority from undue interference. If Illinois lawmakers incorporate these changes in the Illinois Act, then the affordability gap in Illinois may slowly begin to narrow for the state's needy families. Without these changes, however, the Illinois Act may prove to be little more than an empty promise.

238. 310 ILL. COMP. STAT. ANN. 67/10 (West Supp. 2005).