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*Alternative 2 – Application for Affordable Housing Development; Affordable Housing Appeals*¹³⁴

4-208.1 Findings

The legislature hereby finds and declares that:

- (1) there exists an acute shortage of affordable, accessible, safe, and sanitary housing for low- and moderate-income households in the state;
- (2) it is imperative that action be taken immediately to assure the availability of such housing; and
- (3) it is necessary for all local governments in the state to assist in the provision of such housing opportunities to assure the health, safety, and welfare of all citizens of the state.

4-208.2 Purpose

It is the purpose of this Act to provide expeditious relief from local ordinances or regulations that inhibit the construction of affordable housing needed to serve low- and moderate-income households in this state. The provisions of this Act shall be liberally construed to accomplish this purpose.¹³⁵

4-208.3 Definitions

As used in this Act:

- (1) “**Affordable Housing**” means housing that has a sales price or rental amount that is within the means of a household that may occupy moderate-, low-, or very low-income housing, as defined by paragraphs (9), (10), and (12), below. In the case of dwelling units for sale, housing that is affordable means housing in which mortgage, amortization, taxes, insurance, and condominium or association fees, if any, constitute no more than [28] percent of such gross annual household income for a household of the size which may occupy the unit in question. In the case of dwelling units for rent, housing that is affordable means housing for which the rent and utilities constitute no more than [30] percent of such gross annual household income for a household of the size which may occupy the unit in question.

¹³⁴This model statute was drafted by Peter A. Buchsbaum, a partner in the law firm of Greenbaum, Rowe, Smith, Ravin, and Davis in Woodbridge, New Jersey, along with additional drafting and material by Stuart Meck, FAICP, Principal Investigator, and Michelle J. Zimet, AICP, Attorney and Senior Research Fellow, for the Growing SmartSM project.

¹³⁵The text of this model is drawn from Conn. Gen. Stat. Ann. §8-30g; Mass. Gen. Laws Title 40B §§20 to 23; and Gen. Laws of R.I. §§43-53-1 to 53-8. These statutes, based on the original 1969 Massachusetts Affordable Housing Appeals Act, St. 1969, c. 774, resemble each other.

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- ◆ Note that, for purposes of this model, the term “affordable housing” applies only to very-low-, low-, and moderate-income housing and does not apply to middle-income housing.
 - (2) “**Affordable Housing Developer**” means a nonprofit entity, limited equity cooperative, public agency, or private individual firm, corporation, or other entity seeking to build an affordable housing development.
- ◆ The inclusion of private developers, as well as nonprofit and governmental organizations, in this definition, is necessary to encourage a widespread participation in the development of affordable housing.
 - (3) “**Affordable Housing Development**” means any housing that is subsidized by the federal or state government, or any housing in which at least [20] percent of the dwelling units are subject to covenants or restrictions which require that such dwelling units be sold or rented at prices which preserve them as affordable housing for a period of at least [15] years.¹³⁶
- ◆ The 20 percent standard for what constitutes lower income housing development has been used in New Jersey, particularly the *Mount Laurel II* case.¹³⁷
 - (4) “**Approving Authority**” means the Planning Commission, Zoning Board of [Appeal or Adjustment], Governing Body, or other local government body designated pursuant to law to review and approve an affordable housing development.
 - (5) “**Development**” means any building, construction, renovation, mining, extraction, dredging, filling, excavation, or drilling activity or operation; any material change in the use or appearance of any structure or in the land itself; the division of land into parcels; any change in the intensity or use of land, such as an increase in the number of dwelling units in a structure or a change to a commercial or industrial use from a less intensive use; any activity which alters a shore, beach, seacoast, river, stream, lake, pond, canal, marsh, dune area, woodlands, wetland, endangered species habitat, aquifer or other resource area, including coastal construction or other activity.
 - (6) “**Exempt Local Government**” means:
 - (a) any local government in which at least [10] percent of its housing units, at the time an application is made pursuant to this Act, have been subsidized by the federal or state government, or by a private entity, and in which occupancy is restricted or intended for low- and moderate-income households;

¹³⁶For an excellent example of a deed restriction based on years of successful experience in New Jersey, see 5 N.J.A.C., Ch.93, App. I, which contains the deed restriction for low- and moderate-income housing required by the State Council on Affordable Housing.

¹³⁷*Mt. Laurel II*, 456 A.2d 390 at n.37.

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- (b) any local government whose median household income is, according to most recent census data, less than 80 percent of the median household income of the county or primary metropolitan statistical area as last defined and delineated by the U.S. Bureau of the Census in which the local government is located; or
 - (c) any local government whose percentage of substandard dwelling units in its total housing stock, as determined by the most recently available census data, is more than 1.2 times (120 percent) the percentage of such dwellings in the housing stock for the county or primary metropolitan statistical area in which the local government is located.
- ◆ This definition of “exempt” local governments, found in various forms in the New England statutes, recognizes that certain communities may have already met their burden of providing low- or moderate-income housing. See, for example, Conn. Gen. Stat. Ann. §8-30g(f). The county is suggested as a primary standard of comparison, but metropolitan areas may be substituted in place of a county. Use of an entire state would in most cases be impractical since entire regions of the state may have less than the statewide median income and use of the state as the base would thus exempt them from the applicability of the statute.
- (7) “**Household**” means the person or persons occupying a dwelling unit.
 - (8) “**Local Government**” means the [county, city, village, town, township, borough, *or* other political subdivision] which has the primary authority to review development plans.
 - (9) “**Low-Income Housing**” means housing that is affordable, according to the federal Department of Housing and Urban Development, for either home ownership or rental, and that is occupied, reserved, or marketed for occupancy by households with a gross household income that does not exceed 50 percent of the median gross household income for households of the same size within the county or primary metropolitan statistical area in which the housing is located. For purposes of this Act, the term “low-income housing” shall include “very low-income housing.”
 - (10) “**Moderate-Income¹³⁸ Housing**” means housing that is affordable, according to the federal Department of Housing and Urban Development, for either home ownership or rental, and that is occupied, reserved, or marketed for occupancy by households with a gross household income that is greater than 50 percent but does not exceed 80 percent of the median gross household income for households of the same size within the county or primary metropolitan statistical area in which the housing is located.

¹³⁸In some states where there a greater stratification of income and housing, a fourth category may be included entitled “middle-income” that would be defined as households with a gross household income that is greater than 80 percent but does not exceed 95 to 120 percent of the median gross household income for households of the same size within the county or metropolitan area in which the housing is located. See, e.g., 24 CFR §91.5 (Definition s– “Middle-income family”).

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- (11) “**Unnecessary Cost Generating Requirements**” mean those development standards that may be eliminated or reduced that are not essential to protect the public health, safety, or welfare or that are not critical to the protection or preservation of the environment, and that may otherwise make a project economically infeasible. An unnecessary cost generating requirement may include, but shall not be limited to, excessive standards or requirements for: minimum lot size, building size, building setbacks, spacing between buildings, impervious surfaces, open space, landscaping, buffering, reforestation, road width, pavements, parking, sidewalks, paved paths, culverts and stormwater drainage, and oversized water and sewer lines to accommodate future development without reimbursement.
- (12) “**Very Low-Income Housing**” means housing that is affordable, according to the federal Department of Housing and Urban Development, for either home ownership or rental, and that is occupied, reserved, or marketed for occupancy by households with a gross household income equal to 30 percent or less of the median gross household income for households of the same size within the county or primary metropolitan statistical area in which the housing is located.

4-208.4 Local Government Action on Affordable Housing Applications

- (1) An affordable housing developer may file an application for an affordable housing development in any nonexempt local government with the Approving Authority, in accordance with a checklist of items required for a complete application previously established by [ordinance *or* rule of *the* Department of Housing and Community Development *or other state agency authorized by statute*].
- (2) The Approving Authority shall review the application in accordance with the standards set forth in Section [4-208.5(1)] below, and shall have the power to issue a comprehensive permit which shall include all local government approvals or licenses, other than a building permit, necessary for the authorization of the affordable housing development. The Approving Authority shall hold at least [1], but no more than [3], public hearings on the proposal within [60] days of receipt of the application and shall render a decision within [40] days after the conclusion of the public hearing(s).
- (3) Failure of the Approving Authority to act within this time frame shall mean that the Authority is deemed to have approved the application, unless the time frame is extended by a voluntary agreement with the applicant.

4-208.5 Basis for Approving Authority Determination

- (1) The Approving Authority shall grant approval of an affordable housing development unless facts produced in the record at the public hearing or otherwise of record demonstrate that the development as proposed:
 - (a) would have significant adverse effects on the environment; or

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- (b) would significantly conflict with planning goals and policies specified in the local government's comprehensive plan, provided they are not designed to, or do not have the effect of, rendering infeasible the development of affordable housing while permitting other forms of housing.
- (2) The Approving Authority may condition the approval of the affordable housing development on compliance with local government development standards, contained in an ordinance or regulation, which are necessary for the protection of the health and safety of residents of the proposed development or of the residents of the local government, or which promote better site and building design in relation to the area surrounding the proposed development, provided that any such ordinances or regulations must be equally applicable to both affordable housing development and other development, and provided that such conditions do not render the affordable housing development infeasible. The Approving Authority shall waive such local government development standards where their application would render the provision of affordable housing infeasible, unless such waiver would cause the affordable housing development to have significant adverse effects on the environment.
- (3) For purposes of this Act, a requirement, condition, ordinance, or regulation shall be considered to render an affordable housing development proposed by an affordable housing developer that is a nonprofit entity, limited equity cooperative, or public agency infeasible when it renders the development unable to proceed in accordance with program requirements of any public program for the production of affordable housing in view of the amount of subsidy realistically available. For an affordable housing development proposed by an affordable housing developer that is a private for-profit individual firm, corporation, or other entity, the imposition of unnecessary cost generating requirements, either alone or in combination with other requirements, shall be considered to render an affordable housing development infeasible when it reduces the likely return on the development to a point where a reasonably prudent developer would not proceed.¹³⁹

4-208.6 Appeal to [State Housing Appeals Board *or* Court]

- (1) An affordable housing developer whose application is either denied or approved with conditions that in his or her judgment render the provision of affordable housing infeasible,

¹³⁹ For an existing statutory definition of “infeasible,” see R.I. Gen. Laws §45-53.4(c), which provides:

“Infeasible” means any condition brought about by any single factor or combination of factors, as a result of limitations imposed on the development by conditions attached to the zoning approval, to the extent that it makes it impossible for a public agency, nonprofit organization, or limited equity housing cooperative to proceed in building or operating low or moderate income housing without financial loss, within the limitations set by the subsidizing agency of government, on the size or character of the development, on the amount or nature of the subsidy, or on the tenants, rentals, and income permissible, and without substantially changing the rent levels and unit sizes proposed by the public agency, nonprofit organization, or limited equity housing cooperative.

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may, within [30 or 45] days of such decision appeal to the [State Housing Appeals Board or other state trial court] challenging that decision. The [Board or Court] shall render a decision on such application within [120] days of the appeal being filed. In its determination of any such appeal, the [Board or Court] shall conduct a *de novo* review of the matter.

- ◆ The New England statutes are either silent on the burden of proof before the appeals board, or place the burden of proof on the local government.¹⁴⁰ Given the nature of the interests involved – municipal discretion vs. housing affordability – it is advisable to allow the appeal authority to conduct its own independent *de novo* review of the facts. Whether the applicant or the local government has the ultimate burden of proof is a question of policy for each state to determine as it balances the weight of affordable housing needs against local government planning discretion. Optional language on burden of proof is provided in paragraph (2) below.

- (2) In rendering its decision, the [Board or Court] shall consider the facts and whether the Approving Authority correctly applied the standards set forth in Section [4-208.5] above.

[add optional additional burden of proof language for (2)]

[In any proceeding before the [Board or Court], the Approving Authority shall bear the burden of demonstrating that it correctly applied the standards set forth in Section [4-208.5] above in denying or conditionally approving the application for an affordable housing development.]

- (3) The [Board or Court] may affirm, reverse, or modify the conditions of, or add conditions to, a decision made by the Approving Authority. The decision of the [Board or Court] shall constitute an order directed to the Approving Authority, and shall be binding on the local government which shall forthwith issue any and all necessary permits and approvals consistent with the determination of the [Board or Court].
- (4) The [*appellate court of competent jurisdiction*] shall have the exclusive jurisdiction to review decisions of the [Board or Court].

[4-208.7 Enforcement]

[The order of the Board may be enforced by the Board or by the applicant on an action brought in the [*trial court*].]

- ◆ Where a housing appeals board rather than a court is selected, it must be given the authority to enforce its orders.

4-208.8 Nonresidential Development as Part of an Affordable Housing Development

¹⁴⁰See Conn. Gen. Stat. Ann. §8-30g(c).

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- (1) An applicant for development of property that will be principally devoted to nonresidential uses in a nonresidential zoning district shall have the status of an affordable housing developer for the purposes of this Act where the applicant proposes that no less than 20 percent of the area of the development or 20 percent of the square footage of the development shall be devoted to affordable housing, except that the applicant shall bear the burden of proof of demonstrating that the purposes of a nonresidential zoning district will not be impaired by the construction of housing in that zoning district and that the health, safety, and welfare of the residents of the affordable housing will not be adversely affected by nonresidential uses either in existence or permitted in that zoning district.
- (2) For purposes of paragraph (1) above, the square footage of the residential portion of the development shall be measured by the interior floor area of dwelling units, excluding that portion which is unheated. Square footage of the nonresidential portion shall be calculated according to the gross leasable area.

4-208.9 Overconcentration Of Affordable Housing

In order to prevent the drastic alteration of a community's character through the exercise of the rights conferred upon affordable housing developers by this Act, the requirements to approve affordable housing developments by a local government as specified in this Act shall cease at such time as:

- (1) the local government fulfills the requirements to become an exempt local government, as defined in Section [4-208.3(6)]; or
 - (2) where the number of units of affordable housing approved and built pursuant to this Act exceeds [__,000] dwelling units over a period of [5] years.
- ◆ Jurisdictions where there is faster growth may experience a rush of affordable housing proposals. To prevent communities from becoming overwhelmed by the prospect that developers may charge out to buy or option land within one community where there is ample vacant land, and seek zoning changes, there should be some upper limit on the amount of housing that can be approved under the special procedures contained in this statute. For example, in New Jersey during the 1980s, some towns were faced with as many as 11 lawsuits by developers.¹⁴¹ In the Section above, this occurs when the local government meets the requirements for an “exempt local government” in Section 4-208.3(6) or when a statutorily established limit on the number of units of affordable housing over a certain period of time is met.

[4-208.10 Housing Appeals Board]

- [(1) Composition [*describe composition of housing appeals board and terms of members*].]

¹⁴¹See, e.g., *Field v. Franklin Twp.*, 204 N.J. Super. 445, 449 A.2d 251 (1985).

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- ◆ If a housing appeals board, rather than the courts, is selected to administer the statute, the state will have to determine its composition. There should be representation by local and, if appropriate, county interests, by private for-profit and nonprofit developers of affordable housing, by planning interests, and by the public at large. Provided that the interests are reasonably balanced, there is no single correct answer either to the size of the body or the precise breakdown of appointees.¹⁴² If a court is chosen, it should be the trial court of general jurisdiction in the state.

[(2) Within [3] months after the effective date of this Act, the Housing Appeals Board shall adopt rules and regulations governing practice before it. The Board may adopt [subject to approval of the Department of Housing and Community Development *or other state agency*] such other rules and regulations as it deems necessary and appropriate to carry out its responsibilities under this Act.]

- ◆ The bracketed language in paragraph (2) gives the policy-making arm of the governor some input into substantive regulations. It is expected that general state administrative procedures acts will provide the procedural framework, such as notices, public hearings, publication, etc. for rule making, so that rule-making procedures need not be spelled out in this statute.

¹⁴²R.I. Gen. Stat. §45-53-7 provides the following board makeup:

Housing Appeals Board – (a) There shall be within the state a housing appeals board consisting of nine (9) members:

Housing Appeals Board

Represent:

1 district court judge (chair)
1 local zoning board member
1 local planning board member
2 city and town council members
(plus an alternate) – representing
municipalities of various sizes
1 affordable housing developer
1 affordable housing advocate
1 director of statewide planning or designee
1 director of Rhode Island housing or designee

Appointed by:

Chief of district court
Speaker of the house
Majority leader of senate
Speaker of the house
Majority leader of senate
(Governor)
Governor
Governor
Self-appointed
Self-appointed

(b) All appointed [sic] shall be for two (2) year terms, provided, however, the initial terms of members appointed by the speaker of the house and majority leader shall be for a period of one year. A member shall receive no compensation for his or her services, but shall be reimbursed by the state for all reasonable expenses actually and necessarily incurred in the performance of his or her official duties. The board shall hear all petitions for review filed under §45-53-5, and shall conduct all hearings in accordance with the rules and regulations established by the chair. Rhode Island housing [sic] shall provide such space, and such clerical and other assistance, as the board may require.