

101 Arch Street
Suite 101
Boston, MA 02110
T 617.224.0600
F 617.224.0601

1325 G Street NW
Suite 770
Washington, DC 20005
T 202.926.3400
F 202.926.3401



Memorandum

TO: Kristina Brown, Program Officer, United Way of Rhode Island
CC: Representative June Speakman, Chair, Special House Commission to Study the Low and Moderate Income Housing Act
FROM: Claudia Wack
DATE: January 5, 2023
SUBJECT: Recommended Legislative Changes to the Low and Moderate Income Housing Act

As part of my pro bono research for United Way, concerning how to increase housing production in Rhode Island, I reviewed potential means to improve the state's Low and Moderate Income Housing Act. This memorandum summarizes my recommendations for key changes to the law based on the work of the Special House Commission chaired by Representative Speakman, as well as best practices from other jurisdictions. Separately attached are a redline of the current statute and a document demonstrating how the Act would read as amended.

Please note that any of the contents can be revised based on feedback from United Way or the Commission.

Overview of Proposed Changes to § 45-53

1. Offer by-right zoning incentives for low and moderate income housing.

- Scale the incentives based on the number of deed-restricted units in a development and the units' level of affordability

2. Address procedural pain points.

- Eliminate comprehensive permit application requirements that are more onerous than what is required for other developments (other than materials related to eligibility/compliance) and limit requests for supplementary materials.
- Simplify the application review process to correspond with the recommendations of the Land Use Commission.
- Clarify that inaction on an application will always eventually lead to its default approval.
- Implement stricter standing requirements for any party seeking to challenge a comprehensive permit approval.
- Freeze the record on appeal and eliminate counterproductive remand procedures.
- Redesign the state housing appeals board to be comprised of individual administrative hearing officers.
 - *Note: Appeals could also proceed directly to superior court, as in Connecticut. It would be valuable to hear feedback from the Commission on this point. The current proposal resembles the systems of Massachusetts and New Hampshire. New Hampshire's housing appeals board adjudicates residential land use matters beyond just those related to affordable housing, an approach that could help to justify the cost of maintaining full-time hearing officers.*

3. Make the comprehensive permit a more effective “builder’s remedy.”

- Narrow and concretize the grounds on which a comprehensive permit may be denied.
- Adopt a stronger evidentiary standard for local review board decisions and shift the legal burden of proof to municipalities to justify a denial.

4. Increase accountability for bad-faith behavior.

- Allow the superior court to require an appeals bond from a party challenging a comprehensive permit approval.
- Temporarily remove comprehensive permitting authority from a municipality that repeatedly or egregiously violates state law.

Table of Proposed Revisions

Note: the subsections below reference the as-amended version of the statute, not the redline.

Section	Subsection	Explanation of Proposed Change
§ 45-53-3 Definitions	(1)	Revise the definition of “affordable housing plan” for clarity. The changes are not substantive.
	(4)	Remove the definition of “consistent with local needs” in favor of a better-defined standard and to eliminate special treatment for certain cities and towns.
	(5)	Revise the definition of “infeasible” to encompass more applicants and a broader range of scenarios beyond literal financial loss.
	(9)	Revise the definition of “low- or moderate- income housing” to cross-reference § 42-128-8.1(d), which defines what is considered affordable for very low, low, or moderate income households.
	(10)	Revise the vague definition of “meeting local housing needs” to incorporate concrete year-over-year progress metrics.
	(12)	Add a new definition for “objective,” to describe the criteria that a municipality may apply to a comprehensive permit application.
	(13)	Add a new definition for “specific and substantial adverse impact,” to describe one of the limited grounds on which a comprehensive permit application may be denied.
§ 45-53-3.1 Formula to include multi-family rental apartment units as low and moderate income housing		Remove Section 3.1 in favor of alternate incentives for very low income housing (see the new Section 16) and to avoid confusing affordable housing metrics through the inclusion of market-rate units.

<p>§ 45-53-4</p> <p>Procedure for approval of construction of low or moderate income housing</p>	<p>(a)</p>	<ul style="list-style-type: none"> • Allow developments that qualify for zoning incentives under Section 16 to utilize the comprehensive permit application procedure. • Eliminate application requirements that are more onerous than what is required for other developments (except materials that relate to proof of eligibility or compliance). • Limit requests for supplementary application materials. • Revise the application review and approval process to capture the recommendations of the Land Use Commission. <i>(Note: the draft language will likely need to be updated further to ensure that citations and terminology remain aligned with any other land use legislation adopted in 2023.)</i> <ul style="list-style-type: none"> ○ Consolidate any public hearings early in the application process. ○ Once the local review board has approved a master plan, conduct subsequent review stages administratively. ○ Allow by-right proposals (i.e., those that do not require any discretionary relief) to be approved administratively • Clarify that inaction at any stage eventually leads to an application’s default approval.
	<p>(b)</p>	<ul style="list-style-type: none"> • Strengthen the evidentiary standard for local review board decisions. <ul style="list-style-type: none"> ○ “Clear and convincing evidence” rather than “legally competent evidence.” • Narrow and concretize the grounds on which an application may be denied. <ul style="list-style-type: none"> ○ A municipality has already met its 10% goal. ○ A municipality is meeting concrete year-over-year progress metrics. ○ Deed-restricted units are not integrated within the development (where applicable). ○ The development is proposed for land subject to a conservation restriction or zoned for agriculture, open

		<p>space, or heavy industry as of the date the application was deemed complete.</p> <ul style="list-style-type: none"> ○ The development will have a specific and substantial adverse impact on public health or safety (as defined by the state – see § 45-53-3(13)) that there is no feasible method to satisfactorily mitigate or avoid.
	(c)	Shift the legal burden of proof to municipalities to justify an application denial.
	(d)	Relieve local review boards of affirmative findings requirements.
	(e)	<ul style="list-style-type: none"> • Implement stricter standing requirements for when an “aggrieved party” may challenge a comprehensive permit approval. <ul style="list-style-type: none"> ○ The party must have a substantial injury in fact and make a threshold showing of gross negligence, willful misconduct, or ultra vires action on the part of the local review board.
<p>§ 45-53-5</p> <p>Appeals to state housing appeals board — Judicial review</p>		<p><i>Note: Sections 5-7 reflect one potential vision for redesigning the state housing appeals board. The content can evolve based on the Commission’s feedback.</i></p>
	(a)	Revise the text to reflect that each comprehensive permit appeal will be reviewed and decided by one of the individual hearing officers of the redesigned state housing appeals board.
	(c)	Create a ninety-day timeline for hearing officer decisions and freeze the record on appeal from the local review board.
	(d)	Indicate that a hearing officer shall affirm or reverse the decision of a local review board in whole or in part (no remand).
	(g)	<ul style="list-style-type: none"> • Revise the parameters for superior court review in order to reduce procedural delay and increase substantive oversight. <ul style="list-style-type: none"> ○ Freeze the record on appeal from the state housing appeals board. ○ Eliminate remand procedure.

		<ul style="list-style-type: none"> ○ Allow the court to engage in less deferential review.
	(h)	Enable the superior court to require an appeals bond from a party challenging a comprehensive permit approval, to offset the financial costs of delay.
	(i)	<ul style="list-style-type: none"> • Enable the superior court to temporarily suspend the comprehensive permitting authority of a municipality that recurrently or egregiously violates state law. <ul style="list-style-type: none"> ○ New comprehensive permit applications would be directly reviewed by the redesigned state housing appeals board for the period of time designated by the court.
§ 45-53-6 Power of state housing appeals board.	(b)	<ul style="list-style-type: none"> • Revise the text to reflect the redesigned nature of the state housing appeals board. (E.g., that the chief hearing officer shall appoint a hearing officer to each matter brought before the board.) • Indicate that decisions of the redesigned appeals board constitute persuasive precedent and must be made publicly available.
	(c)	Describe the authority of the redesigned appeals board to directly review comprehensive permit applications in place of a municipality upon the direction of the superior court.
§ 45-53-7 Housing appeals board.		Revise Section 7 to reconstitute the state housing appeals board as a set of at least three full-time administrative hearing officers, one of whom shall be designated by the governor as chief hearing officer.
§ 45-53-8 Severability and interpretation		Add a sentence to direct state courts to interpret any ambiguity in the statute in favor of enabling the construction of additional units.
§ 45-53-11 Annual comprehensive permit report.	(c)	Revise the text on annual comprehensive permit reports to reflect that the redesigned state housing appeals board shall contribute to annual reporting where it has temporarily assumed comprehensive permitting authority from a municipality.

<p>§ 45-53-13</p> <p>Annual status reports on appeals.</p>		<p>Revise the text on annual status reports on appeals to reflect the redesign of the state housing appeals board.</p>
<p>§ 45-53-16</p> <p>Zoning incentives for low or moderate income housing.</p>		<ul style="list-style-type: none"> • Establish by-right zoning incentives for low or moderate income housing. <ul style="list-style-type: none"> ○ Offer a base set of incentives to all developments that include low or moderate income housing (e.g., flexibility around off-street parking and minimum lot sizes) ○ Offer a sliding-scale density bonus based on the number of deed-restricted units within a development and those units' level of affordability ○ Grant a two-story height bonus to any development comprised of 100% low or moderate income housing, with moderate-income housing no more than 20% of the total. <ul style="list-style-type: none"> ▪ Grant a three-story bonus if the development is located within a particular radius of a transit hub or high-frequency transit stop.
<p>§ 42-128-8.1</p> <p>Housing production and rehabilitation.</p>	(4)	<p>Add a definition of “low-income household ($\leq 80\%$ AMI) to be cross-referenced by § 45-53-3(9).</p>
	(8)	<p>Add a definition of “very low-income household” ($\leq 50\%$ AMI) to be cross-referenced by § 45-53-3(9).</p>