

The Builder's Remedy: Key Considerations for Enforcing Pro-Housing Policies

Executive Summary

Housing shortages across the United States have created a crushing cost burden for many Americans. In response, most state governments have begun requiring or encouraging local governments to allow more housing construction. States are using a variety of tools to do so, including mandating that localities meet state-imposed housing targets, offering financial incentives, and preempting local zoning. However, some localities resist these reforms, and states need effective enforcement mechanisms in response to this local pushback. One of the most powerful and controversial of these tools is the builder's remedy.

The builder's remedy is a set of policies that allows developers to bypass some local land use procedures and regulations for certain projects—typically those containing affordable housing—when a municipality fails to meet state-mandated housing targets. These policies incentivize municipalities to meet the state's requirements in order to avoid the builder's remedy process. They also generate more housing by allowing developers that have applied for local permits to seek review of unfavorable local decisions by a court or state administrative body when the locality has missed its target. Each state has a different procedure for how developers can access the builder's remedy. Sometimes the builder's remedy results from litigation and is shaped by the state courts, such as the *Mount Laurel* doctrine that New Jersey's highest court crafted to address unconstitutional exclusionary zoning, but most often, states have imposed the builder's remedy via legislation.

This brief looks at the eight states that have implemented a builder's remedy—California, Connecticut, Illinois, Massachusetts, New Hampshire, New Jersey, Rhode Island and Washington—for lessons learned that might help other states craft effective enforcement for their pro-housing legislation.

Core components of the policy

A builder's remedy generally consists of three structural elements:

- **Safe Harbor Requirements:** Criteria that a municipality must meet to be exempt from the remedy (such as the percentage of its housing stock that is subsidized through a government program or otherwise qualifies as “affordable”).
- **Project Eligibility:** Requirements the development must meet to qualify for the remedy, usually involving a particular share of units affordable to households with specific levels of income.
- **Review Procedures:** Processes to determine whether the prior two conditions are met, as well as local procedures for considering a builder's remedy project permit application and for reviewing whether a developer should be granted relief from adverse local land use decisions.

Learning from the states: various approaches

States that implemented a builder's remedy made critical trade-offs in the design of their programs. Their different approaches provide valuable lessons to other states considering a builder's remedy:

- **Setting Targets:** Targets for the percentage of local housing stock that must be affordable in each municipality to avoid the builder's remedy offer clarity and predictability. Bespoke "fair share" models that target specific numbers of homes that a locality must permit provide for more nuance but risk further litigation and delay from disputes over these numbers.
- **Balancing Affordability and Planning Interests:** States setting the affordability requirements for projects eligible for the builder's remedy must be cautious to ensure that projects remain financially viable. Similarly, states must carefully consider how to balance any potential harms a development may impose against the public's need for affordable housing. No state exempts projects eligible for a builder's remedy from essential health, safety, and environmental standards, but a state likely will be unable to achieve its pro-housing goals if it does not allow some projects to proceed even though they do not comply with all of the local government's regulations.
- **Streamlining the Permitting Process:** A "one-stop" or comprehensive permit process as the first step of the builder's remedy can significantly reduce the time and risk of development.
- **Determining Whether the Remedy is Warranted:** Using the courts to determine whether the remedy is available and justified can give the process more consistency and independence and draw on the judiciary's experience with land use conflicts. Using administrative bodies instead of the courts can provide more flexibility to appoint decision-makers with more specialized expertise on land use and local governments.

Effectiveness and alternatives

Evidence suggests that builder's remedy policies are correlated with **greater production of affordable housing** than the locality previously experienced and, in some cases, greater production than has occurred in jurisdictions with other enforcement mechanisms for their land use reforms. Though there are a limited number of studies on the impacts of a builder's remedy, the data available show that the remedy is associated with more localities complying with state housing mandates to avoid the builder's remedy by reaching the 'safe harbor.' It also shows that projects have been permitted as a result of builder's remedy challenges (or threats of challenges) to localities that have not attained safe harbor in states like Massachusetts and New Jersey, with more affordable housing being developed as a result.

States have adopted a variety of tools to secure compliance with their land use reforms, including "carrots," like financial incentives, and "sticks," like preemption of specific zoning rules. Incentives often are insufficient to overcome local resistance to the state's targets, while sticks are not consistently deployed and often get mired in litigation if used. The builder's remedy is both a potential incentive for compliance and an enforcement tool against non-compliant localities that, if well-crafted, can help encourage more housing production while respecting local governments' control over how to comply with targets.

Conclusion

The builder's remedy has proven to be one of the more effective enforcement tools to ensure local compliance with state land use reforms. It gives the locality control over how it will comply with the state's mandates but enlists developers to help ensure that the locality does indeed comply. It has been shown to increase the housing stock and result in the development of more mixed income housing than other approaches. To be successful, however, states must carefully tailor affordability requirements to ensure that projects remain financially feasible for developers and must balance affordability goals against other concerns development might pose. Designing the remedy to provide certainty and minimize the time the remedy takes will help ensure its effectiveness.

Introduction

States across the nation are trying to address the shortage of affordable housing by demanding that their local governments take steps to make it easier to build more housing and a wider variety of housing types, as documented in the Furman Center’s [Land Use Reform Tracker](#). Some states create methodologies for determining state-wide housing needs (including housing affordable to lower-income households) that are then distributed at the regional and local level. Those states assign local governments a target and require localities to plan and zone to meet the target. States also have preempted local governments’ regulation of specific kinds of development by telling localities what they must allow or by requiring localities to change their procedures to streamline the development approval process. Regardless of which measures they take, states confronted with stonewalling or defiance from their local governments need ways to enforce their mandates. States have used a variety of tools to ensure compliance, including, but not limited to, providing priority for state funds to cooperative localities, withholding state funds from localities that don’t meet the requirements¹, and giving their attorneys general the power to sue localities.²

Eight states—California, Connecticut, Illinois, Massachusetts, New Hampshire, New Jersey, Rhode Island, and Washington—give developers the right to seek permission for their projects through special administrative processes or to use special processes to challenge a local government’s rejection or conditioning of their project if the jurisdiction is not achieving its housing supply targets.³ That enforcement mechanism—the builder’s remedy policy—is the subject of this policy brief.

1. See e.g. OR. REV. STAT. § 197.335 (4) (2025).

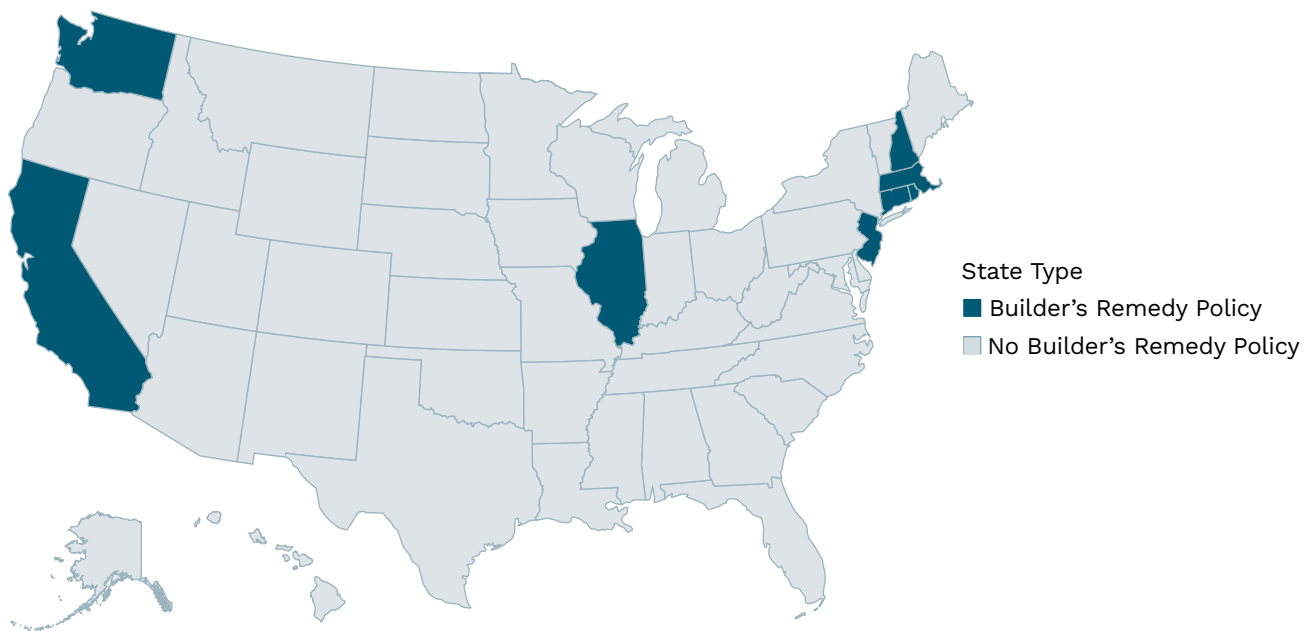
2. See e.g. CAL. GOV’T CODE § 65585(K) (WEST 2026).

3. Of course, when a court finds a zoning ordinance or other land use regulation or their application to deny a particular development permit to be unconstitutional or otherwise against the law, a court may order the grant of a permit as part of its remedy. See, e.g., *Surrick v. Zoning Hearing Bd.*, 382 A.2d 105, 109–10 (Pa. 1977). But those instances differ from a builder’s remedy because they require a finding of unconstitutionality or other violation of the property owner’s rights, rather than a finding that the locality has not met a particular target for housing production. In addition, those remedies are focused on the wrongdoing of the municipality and generally do not review the merits of the proposed development.

A builder's remedy⁴ generally has three major components:

1. a “safe harbor” in which the builder's remedy is not available, which a locality typically can achieve by having a plan to allow more housing and meeting a target for the share or number of homes in the jurisdiction that must be affordable to low- and moderate-income households.⁵ In some states, the locality can achieve safe harbor by adopting pro-housing land use regulatory reforms, along with specific plans about how it will meet the safe harbor target;
2. a set of requirements that a housing development project must meet to be eligible for the builder's remedy; and
3. a set of procedures to determine whether the builder's remedy should be granted (that is, to determine whether the municipality is in safe harbor, whether the project is eligible for the remedy, and whether the project should be permitted).

Figure 1: States with a Builder's Remedy



4. “The builder's remedy” refers to processes by which a court or administrative body grants (or orders the locality to grant) necessary permits to a developer-plaintiff. But as this list makes clear, that remedy requires other policies to be in place: the target or other criteria that the local government must meet to avoid a builder's remedy, the criteria the developer must meet to invoke a builder's remedy, and the process and body for determining those issues and for reviewing the decision to deny the developer a permit. To be concise, we refer to the entire set of policies necessary to allow a court to order the municipality to issue a building permit as the builder's remedy.

5. Not every state that has a process for setting targets to meet affordable housing needs at the regional and local level employs a builder's remedy. Nine states (California, Connecticut, Illinois, Massachusetts, New Jersey, Oregon, Rhode Island, Vermont and Washington) now use processes that assign targets to regional, county or local governments, or require them to set specific supply targets. CAL. GOV'T CODE § 65584(b)(1)–(2) (West 2026); CONN. GEN. STAT. § 8-30g(k) (Supp. 2026); 310 ILL. COMP. STAT. ANN. 67/20 (West 2026); MASS. GEN. LAWS ch. 40B, §§ 20 para. 4, 23 (2026); N.J. REV. STAT. §§ 52:27D-304.1(f)(1)(a), -304.2, -304.3 (West 2025); OR. REV. STAT. § 184.453(2)–(4) (2025); 45 R.I. GEN. LAWS § 45-22.2-6(b)(6) (2026); VT. STAT. ANN. tit. 24, § 4348(a) (2026); WASH. REV. CODE § 36-70A-115(1) (2025). Of those states, Oregon and Vermont do not use a builder's remedy to enforce the targets. Meanwhile, New Hampshire, which does have a builder's remedy, requires every locality to provide “reasonable and realistic opportunities” for workforce housing but does not allocate a quantitative target. N.H. REV. STAT. ANN. § 674:59(l) (2025).

States have taken different approaches to each of these three components. In this policy brief, we first describe the variations among the eight states (California, Connecticut, Illinois, Massachusetts, New Hampshire, New Jersey, Rhode Island, and Washington) that have adopted some form of a builder's remedy. We explore what can be learned from the different design choices the various states have made. We review empirical research to compare the costs and benefits of the builder's remedy against other alternative strategies states have implemented to enforce supply-side reforms. We conclude with the key concerns that states considering a builder's remedy should address.

Differences in States' Design of Builder's Remedy Policies

There are important distinctions in the design choices that states have made in crafting the three core elements of their builder's remedy policies. Those differences provide important lessons about how the builder's remedy can be shaped to best increase overall and affordable housing supply.

Safe Harbor Requirement

A local government's compliance with the state's safe harbor requirements will prevent a developer from being able to invoke the builder's remedy. Safe harbor requirements ask localities to achieve an outcome and/or take an action. With slight variations, states have taken two broad approaches to outcome-based safe harbors. Some states require that all localities (or those of a certain size) must have a consistent percentage share of their total housing stock that is affordable housing.⁶ Connecticut, Illinois, Massachusetts, and Rhode Island all provide safe harbor to those municipalities in which ten percent of the housing stock⁷ is affordable. On the other hand, California, New Jersey, and Washington impose location-specific "fair share" requirements, which specify the number of homes that each locality must possess to meet the regional need for housing.

6. Each of these states defines "affordable" somewhat differently, but generally "affordable" projects are those receiving federal, state or local project- or tenant-based subsidies for low- and moderate-income housing or those that are deed restricted as part of inclusionary housing or other regulatory programs. See *infra* Figure 3.

7. See CONN. GEN. STAT. § 8-30g(k) (Supp. 2026); 310 ILL. COMP. STAT. 67/15 (West 2026); MASS. GEN. LAWS ch. 40B, § 20 (2026) (note that a municipality also can attain safe harbor if affordable housing occupies sites constituting 1.5% of the total land area zoned for residential, commercial, or industrial use in the municipality).

Figure 2: State Safe Harbor Requirements (for local governments to avoid the builder’s remedy)

State	Safe Harbor Requirement
California⁸	The locality must have timely adopted and updated a housing element in its comprehensive plan that complies with state law; <i>and</i> Must have met its share of the regional housing need allocation for the income category targeted by the proposed housing project
Connecticut⁹	10% of local housing stock must be affordable; <i>or</i> The locality must have been granted a temporary moratorium on the builder’s remedy for certain projects by earning a specified number of “housing unit equivalency points”
Illinois¹⁰	The locality must be “exempt,” which means that: • 10% of its total year-round occupied housing stock is affordable; <i>or</i> • It has a population of <1000 <i>Or</i> a non-exempt municipality must have timely submitted an affordable housing plan to the state, implemented its plan, <i>and</i> met the affordability goal it was required to establish in the plan
Massachusetts¹¹	The locality has achieved at least one of the “statutory minima”: • 10% of local housing stock is affordable; <i>or</i> • Affordable housing occupies 1.5% of the locality’s total land area; <i>or</i> • Including the proposed project, construction of affordable housing would begin in the calendar year on sites totaling >0.3% of the locality’s land area or 10 acres (whichever is larger); <i>Or</i> the municipality has made recent progress toward achieving the statutory minima (creating eligible units ≥ 2% of the municipality’s housing stock in the 12 months prior to the project’s application); <i>Or</i> the state has certified the municipality’s compliance with its approved Housing Production Plan (granting a one- year temporary safe harbor if the municipality has increased its eligible units by 0.5% of the local goal for the calendar year or for two years if the municipality has increased its eligible units by 1.0% of its total housing stock in the calendar year)

8. CAL. GOV’T CODE § 65589.5(4)(d)(1) (West 2026).

9. CONN. GEN. STAT. § 8-30g(k), (l) (Supp. 2026). “Affordable” means 10% of housing stock is in either: 1) assisted housing, 2) mortgage financed by Connecticut Housing Finance Authority, 3) deed-restricted and affordable at 80% of AMI, 4) deed-restricted in a mobile manufactured home park, 5) or mobile homes in resident-owned mobile home park. *Id.* § 8-30g(k).

10. 310 ILL. COMP. STAT. 67/30(d) (West 2026); ILL. HOUS. DEV. AUTH., AFFORDABLE HOUSING PLANNING AND APPEAL ACT (AHPAA): 2023 NON-EXEMPT GOVERNMENT HANDBOOK (2023). “Affordable” is defined as owner-occupied homes affordable to those making <80% AMI or rental units affordable to those making <60% AMI. 310 ILL. COMP. STAT. 67/20(b)(i)–(ii) (West 2026). Non-exempt municipalities are required to adopt one or more of three specific goals: 15% of all new development or redevelopment would be affordable; the overall percentage of affordable housing would increase by ≥5 percentage points; or ≥10% affordable housing within the jurisdiction. *Id.* 67/25(b)(vi).

11. MASS. GEN. LAWS ch. 40B, § 20 para. 2 (West 2025); 760 MASS. CODE REGS. 56.03(1)(b), (4), (5) (LexisNexis 2020). Massachusetts defines “low and moderate income housing” (i.e., affordable housing) broadly as any housing constructed with funds dedicated to low and moderate income housing.

State	Safe Harbor Requirement
New Hampshire¹²	The locality must provide “reasonable and realistic opportunity” for workforce housing
New Jersey¹³	The locality must timely adopt a “Fair Share” target using a specified methodology and process, and a Housing Element and Fair Share Plan showing how it will meet that target
Rhode Island¹⁴	The locality has met the goal of 10% of the housing stock being low- and moderate-income housing; or The locality has promulgated land use regulations that implement a compliant comprehensive plan that includes a housing element that provides for ≥10% of the housing stock to meet that goal and the local review board finds that the locality has made significant progress towards meeting that goal
Washington¹⁵	The State’s Department of Commerce must certify that the housing element of the locality’s plan (as well as regulations that implement the housing element) is compliant with state law

12. See N.H. REV. STAT. ANN. § 674:58–:59 (2026); see also *Britton v. Chester*, 595 A.2d 492, 496–497 (N.H. 1991) (authorizing trial courts to award the builder’s remedy when local ordinances make development of affordable housing infeasible as long as the “proposed development provid[es] a realistic opportunity for the construction of low- and moderate-income housing and [is] consistent with sound zoning concepts and environmental concerns.”). “Workforce housing” is defined as housing affordable to a 4-person household making 100% AMI or rental housing affordable to a 3-person household making 60% AMI. N.H. REV. STAT. ANN. § 674:58(IV) (2026). Developments cannot exclude children from more than 20% of units or have fewer than two bedrooms in 50% of units to qualify as workforce housing. *Id.*

13. N.J. REV. STAT. § 52:27D-304.1 (2025).

14. 45 R.I. GEN. LAWS §§ 45-53-3(5), 4(a), 45-53-4(f)(3)(iii)(E)(I) (2026 as amended by H.B. 8004, 2025-2026 Gen. Assemb., Jan. Sess. (R.I. 2026) (enacted)). Rhode Island defines “affordable housing” as housing where all payments are ≤30% of the income earned by someone making <120% AMI for owner-occupied homes or making ≤80% AMI for rentals. *Id.* § 45-53-3(9); 42 R.I. GEN. LAWS § 42-128-8.1(d)(1) (2026).

15. WASH. REV. CODE §§ 36.70A.030(13), 36.70A.835(4) (2026).

The most prominent example of individually tailored requirements is New Jersey’s Mount Laurel doctrine, which interpreted the state’s constitution to require all municipalities to create “a realistic opportunity for producing a fair share of the regional present and prospective need for low- and moderate-income housing.”¹⁶ The body assigning the shares has varied over the years,¹⁷ but since 2024, each municipality must determine its “present and prospective obligations” according to legislatively mandated formulas.¹⁸ Each municipality is also required to adopt a Housing Element and Fair Share Plan (HEFSP), outlining how it plans to meet its obligations.¹⁹ If the municipality satisfies both requirements, it is in safe harbor.²⁰

California’s builder’s remedy uses a process known as the Regional Housing Needs Allocation (RHNA) through which the California Department of Housing and Community Development (HCD) assigns each of the state’s regional Councils of Government (COG) the number of homes affordable to households at various income levels that will be needed in the region.²¹ Each COG then distributes the region’s need among its local governments.²² Additionally, each municipality is required to produce a “comprehensive, long-term general plan” for its physical development.²³ The plan must include a ‘housing element’ outlining the strategies the municipality will use to accommodate enough development to meet its housing need allocation (such as rezoning particular areas of the locality to allow denser development).²⁴ If the locality adopted a plan that complies with the law, updated that plan as required, has been deemed in substantial compliance by HCD,²⁵ and is meeting its allocation of need for the households with incomes that would

16. *In re Adoption of N.J.A.C. 5:96 & 5:97 (Mount Laurel IV)*, 110 A.3d 31, 48 (N.J. 2015); see also *S. Burlington Cnty. NAACP v. Mount Laurel Twp. (Mount Laurel I)*, 336 A.2d 713, 724 (N.J. 1975), *cert. denied*, 423 U.S. 808 (1975); *S. Burlington Cnty. NAACP v. Mount Laurel Twp. (Mount Laurel II)*, 456 A.2d 390, 420 (N.J. 1983).

17. The determination of each municipality’s fair share was made in the years immediately following the *Mount Laurel* decision by specialized courts, then by an administrative agency called the Council on Affordable Housing (COAH). The process was then stalled by COAH’s delays and inability to adopt a methodology the courts would approve, so the trial courts were responsible for the determination between 2015 and 2024. For the history of the procedures and methodology of calculating a municipality’s fair share, see *Mount Laurel IV*, *supra* note 16, at 1–5, and FAIR SHARE HOUS. CTR., DEVELOPING EFFECTIVE FAIR HOUSING PLANS FOR THE FOURTH ROUND 5–6 (DEC. 2024), <https://www.fairsharehousing.org/wp-content/uploads/2024/12/Developing-Effective-Housing-Plans-In-The-Fourth-Found.pdf>.

18. N.J. REV. STAT. §§ 52:27D-304.1(3)(F)(1)(A) (2025). The New Jersey Department of Community Affairs also is required to estimate each locality’s fair share using the mandated formulas and published its estimates in October 2024. See Affordable Housing Obligations for 2025–2035 (Fourth Round) Methodology and Background (New Jersey Department of Community Affairs: October 2024), https://www.nj.gov/dca/dlps/pdf/FourthRoundCalculation_Methodology.pdf.

19. N.J. REV. STAT. §§ 52:27D-310, –311 (2025).

20. N.J. REV. STAT. § 52:27D-304.1(3)(B) (2025).

21. CAL. GOV’T CODE § 65584 (West 2026). HCD is required to consult with regional planning bodies and the Department of Finance in determining regional needs. *Id.* Each region’s Council of Governments must then divide the regional need among the region’s local governments, after consultation with HCD about the methodology to be used. *Id.* at (B)(2). For a good overview of the process, see Jeff Clare, Note, *Because Housing Is What? Fundamental. California’s RHNA System as a Tool for Equitable Housing Growth*, 46 ECOL. L.Q. 373, 384–386 (2019).

22. CAL. GOV’T CODE §§ 65584 (B)(2), 65584.04, 65584.05 (West 2026).

23. CAL. GOV’T CODE § 65300 (West 2026).

24. See CAL. GOV’T CODE § 65583 (West 2026) (“The housing element shall consist of an identification and analysis of existing and projected housing needs and a statement of goals, policies, quantified objectives, financial resources, and scheduled programs for the preservation, improvement, and development of housing. The housing element shall identify adequate sites for housing, including rental housing, factory-built housing, mobile homes, and emergency shelters, and shall make adequate provision for the existing and projected needs of all economic segments of the community...”).

25. See *Housing Elements: Compliance § 1*, CAL. DEP’T OF HOUS. & CMTY. DEV., <https://www.hcd.ca.gov/housing-element/compliance>; CAL. GOV’T CODE § 65585(b)(1)(A), (d) (West 2026).

be served by the proposed development, it will be in safe harbor from a builder's remedy challenge.²⁶ Washington modeled its planning requirements and builder's remedy after California's but allows a local government to be in safe harbor if the state's Department of Commerce has certified that the locality's housing element and regulations to implement that element are compliant with state law. While the housing element must "plan for and accommodate" the locality's estimated needs, safe harbor does not explicitly depend upon meeting a particular number or share of affordable units.²⁷

In contrast to the quantitative approaches of those states, New Hampshire uses a qualitative criterion: a municipality will be in safe harbor if it has provided "a reasonable and realistic opportunity for the development of workforce housing."²⁸ Some states with percentage-based targets also provide alternative, qualitative pathways to safe harbor. Rhode Island, for example, provides safe harbor when a municipality shows "significant progress" towards the required housing supply goal, even if it falls short of meeting that goal.²⁹

How tailored to each locality should the targets be?

Whether the safe harbor from a builder's remedy should be based on bespoke fair share requirements or targets that are generalized across localities involves a number of policy decisions. The main advantage of a generally applicable quantitative target is that it gives local governments a clear and predictable path to qualify for the safe harbor. This helps to avoid the "bureaucratic wrangling and litigation" that have plagued the allocations in California and New Jersey.³⁰ In states with clear, uniform targets, local officials are keenly focused on whether their municipality has met the target and can take that information into account in their discretionary decisions about whether to approve a particular proposal.³¹

26. See CAL. GOV'T CODE § 65589.5 (4)(d)(1) (West 2026); Memorandum from Megan Kirkeby, Deputy Dir. Div. of Hous. Pol'y Dev., to Plan. Dirs. & Interested Parties, Housing Accountability Act Technical Assistance Advisory (Government Code Section 65589.5), attach. at 4, 14 (Sep. 15, 2023), <https://www.hcd.ca.gov/community-development/housing-element/housing-element-memos/docs/hcd-memo-on-haa-final-sept2020.pdf>

27. H.B. 1220, 67th Leg., 2021 Reg. Sess. (Wash. 2021) (enacted).

28. N.H. REV. STAT. ANN. § 674:59 (Westlaw through 2026 Reg. Legis. Sess.); see also *Britton v. Chester*, 595 A.2d 492, 496–497 (N.H. 1991).

29. 45 R.I. Gen. Laws § 45-53-4(f)(3)(iii)(E)(i) (2026 as amended by H.B. 8004, 2025–2026 Gen. Assemb., Jan. Sess. (R.I. 2026) (enacted)), https://webserver.rilegislature.gov/Statutes/TITLE45/45-53/45-53-4_45-53-4.htm

30. Christopher S. Elmendorf, Nicholas J. Marantz & Paavo Monkkonen, A Review of California's Process for Determining, and Accommodating, Regional Housing Needs 3 (Cal. State Auditor, Background Paper, Jan. 4, 2022), <https://law.ucdavis.edu/sites/g/files/dgvnsk10866/files/inline-files/RHNA-Audit-Background-Paper-2021.01.04.pdf> [<https://perma.cc/DY5Y-DT53>] (describing the "fundamental problems" in California's RHNA process); Nicholas J. Marantz & Huixin Zheng, State Affordable Housing Appeals Systems and Access to Opportunity: Evidence from the Northeastern United States, 30 Hous. Pol'y Debate 370, 388 (2020), <https://doi.org/10.1080/10511482.2020.1712612>; Allan Mallach, The Mount Laurel Doctrine and the Uncertainties of Social Policy in the Time of Retrenchment, 63 Rutgers L. Rev. 849, 864 (2011).

31. Edward G. Goetz & Yi Wang, Overriding Exclusion: Compliance with Subsidized Housing Incentives in the Massachusetts 40B Program, 30 HOUS. POL'Y DEBATE 457, 471–472 (2020), <https://doi.org/10.1080/10511482.2020.1726984>. Local officials in New Hampshire, on the other hand, complain that fuzzier qualitative fair share targets create uncertainty and ambiguity. MARK J. FOUGERE & KAREN WHITE, N.H. HOUS., NEW HAMPSHIRE'S WORKFORCE HOUSING LAW: A 10-YEAR RETROSPECTIVE ON THE LAW'S IMPACT ON ZONING AND CREATING WORKFORCE HOUSING 53 (N.H. Hous., 2021), <http://web.archive.org/web/20211223014831/https://www.nhhfa.org/wp-content/uploads/2021/12/Workforce-Housing-Law-Report-12.2021.pdf>

A potential downside of a generally applicable target, however, is that it may ignore legitimate differences between municipalities relevant to where housing should be built.³² Such differences might include the amount of available land a municipality has to develop new housing, that land's proximity to transit and amenities, the area's labor market, or the capacity of local infrastructure. A uniform percentage-based target accounts for some local variation because the affordable housing target depends upon a municipality's existing size and housing stock (although the target may disincentive growth in smaller municipalities by requiring fewer units than would be economically feasible to finance).

The clarity and simplicity of generally applicable percentage-based targets therefore may outweigh the theoretical planning issues that might arise from not creating individual targets for each municipality, especially if the municipality has leeway to deny projects based on serious planning concerns such as health, safety and environmental harm. It is possible, however, for the builder's remedy statute to specify slightly different targets for various types of municipalities (or to exempt certain kinds of localities from the builder's remedy) without sacrificing the advantage of having clear and general targets.³³ Because demand for new housing may be low in certain localities, or the availability of government subsidies may be limited or targeted to a subset of municipalities to meet other goals, making this type of differentiation may be appropriate, but doing so requires careful attention to avoid introducing uncertainty.

What metric should the safe harbor target be based on?

After determining whether safe harbor requirements should be uniform or variable, a state must determine how to define the targets. There are at least two important choices to make: whether the target should be production of housing in general or affordable housing in particular, and whether the relevant metric should be stock or growth.

The first choice will depend on the overall goal of the policy. If the goal is increasing overall housing supply regardless of the new housing's affordability to lower-income households, the safe harbor provision could simply be based on growth in a locality's supply of housing. This may be an effective approach, even if the policymakers' primary concern is affordability for low-income households, because there is significant evidence that new market-rate housing can help slow the growth in rent increases overall,

32. See Jonathan Witten, *Adult Supervision Required: The Commonwealth of Massachusetts's Reckless Adventures with Affordable Housing and the Anti-Snob Zoning Act*, 35 B.C. ENV'T AFF. L. REV. 217, 222 n.25 (2008) (criticizing chapter 40B as a "one-size-fits-all statute" that "makes no distinction among the state's unique geologic or topographic regions or among the state's cities, suburbs, or relatively rural towns").

33. Until 2026, Rhode Island had a variable target for cities with high proportions and absolute numbers of rental units which nonetheless provided clear, percentage-based targets. 45 R.I. GEN. LAWS § 45-53-3(5)(i) (2025), *repealed by*, H.B. 5801, 2024-2025 Gen. Assemb., Reg. Sess. sec. 2, § 45-53-3(5) (R.I. 2025) (enacted).

especially at a regional or citywide scale.³⁴ However, if the goal is to secure more units that are immediately affordable to lower-income households (and will remain so), a target based on general supply growth may be insufficient. Where local politics tend to oppose affordable housing, municipalities could reach safe harbor just by allowing growth in the market-rate stock.

A policy that requires a percentage of the municipality's housing stock to be affordable, while overcoming those problems, poses several concerns. Such a policy may make municipalities more wary of allowing the development of market-rate housing, because doing so increases the number of affordable homes that will be needed to satisfy the safe harbor.³⁵ The percentage affordable approach also poses a risk that once municipalities reach the target, they will no longer have an incentive to grow their overall housing supply because that would trigger the need for more affordable housing.³⁶ Such a policy also allows (and may even incentivize) localities to reach their percentage target by applying affordability restrictions to existing units in their housing stock (or broadening the definition of which existing homes are affordable), thus limiting the impact of standard percentage targets to spur new construction. However, individual fair share targets can address this concern, as they are largely based on the number of new affordable units built in each locality.³⁷

The second issue is whether the metric should focus on the absolute size of the stock (it must be a particular number or specified share of the existing stock), or on growth of the stock (it must grow by a particular percentage). A state could grant safe harbor for municipalities that make it possible for their stock of all housing, or all affordable housing, to grow by a certain percentage within a given period. A downside of that model, however, is that municipalities with minimal existing housing or little to no affordable housing in their stock, could meet the safe harbor threshold with very small increases. To address that issue, the policy would have to mandate the greater of a minimum growth share or a particular number of new homes or new affordable homes (perhaps graduated by the size of the jurisdiction).

34. Vicki Been, Ingrid Gould Ellen & Katherine O'Regan, *Supply Skepticism Revisited*, 35 HOUS. POL'Y DEBATE 96, 106 (2025), <https://doi.org/10.1080/10511482.2024.2418044>.

35. See Christopher S. Elmendorf, *Beyond the Double Veto: Housing Plans as Preemptive Intergovernmental Compacts*, 71 HASTINGS L.J. 79, 99 (2019). Elmendorf notes that models like 40B that define the target required for safe harbor as percentage of total housing stock (as opposed to the number of new homes permitted) could expose jurisdictions that approve new market rate units to builder's remedy lawsuits because those new units would reduce the affordable share of their housing stock.

36. Goetz and Wang found a plateau effect on subsidizing housing production once a municipality met the 10% threshold required by 40B in Massachusetts. Goetz & Wang, *supra* note 31, at 472-73 ("The fact that program compliance is measured as a ratio of subsidized to total housing also has implications for local governments. Safe harbor from unwanted subsidized housing proposals is achieved not by building a given number of subsidized units, but by achieving and maintaining a 10% ratio of subsidized housing to total housing stock. Thus, expiring use restrictions and conversions of subsidized housing to market rate will negatively affect a municipality's compliance (by reducing the numerator of the ratio). Similarly, community growth and the production of new, nonsubsidized housing units will also have implications for compliance by increasing the denominator and forcing local governments to build subsidized housing to keep up, if not to make progress.").

37. States have designed hybrid policies that primarily count new construction while still incentivizing the preservation of existing units in some cases. See, e.g., N.J. REV. STAT. § 52:27D-31(k)(7) (2026) (awarding a "bonus point" of credit for the preservation of affordable housing, specifying bonus points can make up no more than 25% of a municipality's need obligation); Cal. Gov't Code § 65583.1(c) (2026) (permitting one quarter of affordable construction quotas to be met by preservation of existing affordable housing).

Similar to this approach was the proposed New York State Housing Compact, which would have imposed rate of growth targets on housing in general but counted units that were affordable twice in the calculation.³⁸ While as yet unproven, the proposed Housing Compact model may be a promising way to encourage affordable housing development without determining an individual plan for each municipality or disincentivizing growth of market-rate supply.

Should the safe harbor depend upon the municipality adopting particular policies, instead of reaching the production goal?

New York’s proposed Housing Compact would have granted safe harbor to municipalities that took certain “preferred actions” intended to increase housing supply, such as loosening restrictions on accessory dwelling units (ADUs), removing various exclusionary zoning measures, or adopting “smart growth” and adaptive reuse rezoning.³⁹ Although various states allow temporary safe harbor status for making progress toward an affordable housing goal,⁴⁰ and several states include a requirement of an affordable housing plan as part of the safe harbor, no state currently allows safe harbor status just for making policy changes.⁴¹

The “preferred action” option has the advantage of allowing flexibility. Municipalities can choose whether to accommodate more housing, for example, by allowing ADUs rather than increasing the density allowed on particular parcels. The “preferred action” option also creates an alternative pathway to compliance in markets where there are financial or other constraints to growing the housing supply. If the alternative options are well-crafted to spur housing production, providing the alternative may be an effective way to expand housing supply while minimizing state preemption of local planning authority. To the extent that the goal of the builder’s remedy policy is to increase the supply of affordable units, though, allowing alternative options that increase housing supply but do not produce affordable units will undercut that goal. Further, because the evidence about which particular policies result in greater housing (or affordable

38. See Assemb. B. 3006, 2023-2024 Leg., Reg. Sess. pt. F, § 1003(3)(a)–(b), (c)(i) (N.Y. 2023) (as introduced Feb. 1, 2023).

39. See *Id.* § 1003(4); Policy Information Deck, N.Y. Governor, The New York Housing Compact 27–30 (Mar. 2023), https://www.governor.ny.gov/sites/default/files/2023-03/NY_Housing_Compact_info_deck_March_2023.pdf.

40. For example, Massachusetts grants temporary safe harbor for municipalities that have adopted a state-approved Housing Production Plan and have received a Certification of Municipal Compliance. The certification protects the municipality for one year and requires that the municipality “has increased its number of [subsidized low or moderate income] units in an amount equal to or greater than its 0.50% production goal for that calendar year.” 760 MASS. CODE REGS. 56.03(4)(e)–(f) (2017). Connecticut similarly grants a temporary moratorium to municipalities that have earned “housing unit-equivalent” points. Conn. Gen. Stat. § 8–30g(l)(6) (2026); Conn. Agencies Regs. § 8–30g–6 (2015).

41. Washington grants safe harbor to a local government that has a housing element to their comprehensive plan (and implementing regulations) that address the state’s goal that localities “plan for and accommodate” housing needs and have been certified as compliant. Thus, a locality cannot only choose policies to implement but must also address the state’s assessment of needs, report on housing production, and report on progress towards meeting those needs. See S.B. 5148, 69th Leg. 2025 Reg. Sess. (Wash. 2025) (enacted); Wash. Rev. Code §§ 36.70A.070; 36.70A.610 (2025).

housing) production is limited, the adoption of “preferred” policies may not actually increase housing production. The strategy also could become mired in controversy over whether the policy a municipality adopts is so riddled with exceptions or loopholes that it should not be counted as a “preferred” policy.

Project Requirements

States with builder’s remedy policies allow developers to use the builder’s remedy only for certain development projects. States generally limit eligibility along two dimensions: affordability restrictions, and how risks the development might pose to health and safety should be balanced against the need for affordable housing.

Virtually all the states with builder’s remedies require that the development project contain some proportion of units that are affordable to low- or moderate-income households. The definition of low -or moderate-income is tied to the U.S. Department of Housing and Urban Development’s standards. The requirements vary significantly from state to state regarding what qualifies as affordable, what share of units must be affordable, how long the affordability restrictions must remain in force, and the income levels for which the units must be affordable. Most states define affordable housing as developments that are drawing subsidies from government programs (which generally have their own requirements).

Figure 3: Requirements for a Builder’s Remedy Development Project, by State

State	Affordability Requirement
California ⁴²	• The project must be a Housing Development Project that provides housing for very low-, low-, or moderate-income households, meaning that either: • 100% of the housing in the project must be sold or rented to households with incomes ≤120% of the area median income (AMI); • Or in a mixed income development: • 7% of the housing must be sold or rented to households with income ≤30% AMI; - or • 10% of the housing must be sold or rented to households with income ≤50% AMI; - or • 13% of the housing must be sold or rented to households with income ≤80% AMI, • But not more than 20% of the housing may be required to be affordable • Or the proposed development must be an emergency shelter • Affordable units must be deed-restricted for 55 yrs (rental) or 45 years (owner-occupied) Affordable is defined as deed-restricted to restrict rentals or sales to households with particular levels of income
Connecticut ⁴³	• 15% of units must be affordable to households with incomes of ≤80% AMI; <i>and</i> • Another 15% must be affordable to households with incomes of ≤60% AMI Affordable is defined as housing receiving financial assistance under any governmental program for the construction or substantial rehabilitation of low- and moderate-income housing, or housing occupied by persons receiving rental assistance; and housing in a development for which 30% of the dwelling units will be deed-restricted for at least 40 years to be sold or rented at or below prices affordable to households with incomes ≤80% AMI
Illinois ⁴⁴	• 20% of units in a rental project must be affordable for households with incomes ≤60% AMI • 20% of units in a homeownership project must be affordable for households with incomes of ≤80% AMI • Units must be affordable for ≥ 30 years (rental) and ≥ 15 years (ownership) Affordable housing is that which is subsidized by the federal or state government or subject to restrictions that make ≥20% of the units affordable to low-income households

42. A builder’s remedy project is a “housing development project” (defined by CAL. GOV’T CODE § 65589.5(h)(2) (West 2025)) that provides housing for very low, low-, or moderate-income households (defined by *id.* § 65589.5(h)(3) and CAL. HEALTH & SAFETY CODE §§ 50079.5(a), 50093, 50105(a), 50106 (West 2025)) and meets various density and other requirements. CAL. GOV’T CODE § 65589.5(h)(11) (West 2026). Projects meeting that definition trigger the builder’s remedy. *Id.* § 65589.5(d).

43. CONN. GEN. STAT. §§ 8-30g(1), (3), (6) (Supp. 2026).

44. 310 ILL. COMP. STAT. 67/15 (LEXIS through P.A. 103-1065 of the 2024 Regular Session of the 103rd General Assembly); ILL. HOUS. DEV. AUTH., AFFORDABLE HOUSING AND APPEAL ACT (AHPPA): 2023 NON-EXEMPT LOCAL GOVERNMENT HANDBOOK 2, 18 (2023), https://joiningforces.connect2home.org/uploads/8/3/8/4/83841474/2023_ahpaa_handbook.pdf [<https://perma.cc/Z29B-9K3T>].

State

Affordability Requirement

Massachusetts⁴⁵

- 25% of the units must be affordable to households with incomes of ≤80% AMI; or
- 20% of the units must be affordable to households with incomes of ≤50% AMI
- Affordability on new units must be deed restricted for at least 30 years, but longer periods may be required by subsidizing agencies and localities

Affordable means housing subsidized by the federal or state government under any program to assist the construction of low- or moderate-income housing built or operated by any public agency, nonprofit, or limited dividend organization; or housing that is restricted to households with particular incomes

New Hampshire⁴⁶

- Project must include an unspecified amount of workforce housing, which is defined as rental housing affordable to households with incomes of 60% AMI (for 3-person households) or homeownership housing affordable to households with incomes of 100% AMI (for 4-person households)
- Developments that exclude minor children from ≥20% of the units, are age-restricted for older residents, or in which ≥50% of the units have fewer than 2 bedrooms cannot count as workforce housing
- The state does not require that affordability be maintained for any particular period of time

New Jersey⁴⁷

- Generally, ≥20% of the housing in the project is affordable
- ≤50% of those units must be affordable to households making between 50% and 80% AMI; *and*
- ≥50% must be affordable to households making ≤50% AMI; *and*
 - ≥13% of those units must be set aside for households making ≤30% AMI, with half of those for families
- Units must be affordable for 40 years (rental) and 30 years (for-sale housing)⁴⁸

Affordable means rents and prices are affordable to households of specified incomes under long-term deed restrictions or regulatory agreements

Rhode Island⁴⁹

- ≥25% of the units must be affordable to households with incomes of ≤120% AMI
- Units must be affordable for 99 years or a period of ≥30 years agreed to by the applicant and locality or prescribed by the government subsidy program

Affordable means units for which the rent, heat, and utilities or the principal, interest, insurance, and taxes are ≤30% of the gross income of households with incomes of 120% AMI (for homeowners) or 80% (for renters); or those that receive government subsidy to assist the construction or rehabilitation of affordable housing

45. MASS GEN. LAWS ch. 40B, §§ 20-23 (West 2025); 760 MASS. CODE REGS. 56.02 ¶ 23, 56.04(1) (2020) (definitions of “Income Eligible Household” and “Low or Moderate Income Housing”); MASS. DEP’T OF HOUS. & CMTY. DEV., GUIDELINES: G.L. C.40B COMPREHENSIVE PERMIT PROJECTS (Dec. 2014), <https://www.mass.gov/doc/guidelines-gl-c40b-comprehensive-permit-projects-and-subsidized-housing-inventory/download> [<https://perma.cc/MPE6-N9AK>].

46. N.H. REV. STAT. ANN. §§ 674:58(IV) (2026).

47. Note that there is no statutory mandate about the share or depth of affordability for builder’s remedy projects, but case law and practice have typically adopted the norms listed in the table. See *also* N.J. STAT. ANN. §§ 52:27D-321(f), -329.1 (West 2025); Uniform Housing Affordability Controls at New Jersey Administrative Code 5:80-26.1 et seq. (2025).

48. N.J. STAT. ANN. § 52:27D-321(f) (West 2025).

49. 42 R.I. GEN. LAWS § 42-128-8.1(d)(1) (2026); 45 R.I. GEN. LAWS §§ 45-53-3(9), 45-53-4(a) (2026).

Washington⁵⁰

- ≥20% of the housing must be affordable to households with incomes of ≤60% (for renters) or ≤80% AMI (for homeowners); or
- ≥50% must be workforce housing affordable to households with incomes of ≤80% (for renters), or ≤100% AMI (for homeowners); or
- 100% of the housing must be moderate-income housing affordable to households with incomes of ≤120% AMI
- Affordability must be restricted by deed or covenant for ≥ 25 years

Affordable means units for which the rent and utilities other than telephone are ≤30% of the gross income of households with incomes of ≤60% (for renters) or ≤80% AMI (for homeowners)

No state completely exempts builder's remedy-eligible projects from the local planning process: all states contain some concessions to environmental or health, safety, and other traditional land use planning concerns. If a project poses such a serious threat to one of these interests that the need for affordable housing might not outweigh the threat, the builder's remedy may not be awarded even if the project meets affordability requirements and the municipality is not in safe harbor.⁵¹ However, in determining whether to award a builder's remedy, courts generally do not grant municipalities the deference typically accorded to local government land use decisions because the purpose of the builder's remedy policy is to strike a balance between the need for housing and these other concerns.⁵² These requirements prevent developers from using the builder's remedy to push through projects that would create significant harm, but they are defined narrowly to prevent local governments from using planning concerns indiscriminately to thwart the building of affordable housing.

50. WASH. REV. CODE § 36.70A.030(5), (30) (2026) (defining affordable housing and moderate-income households); WASH. REV. CODE § 36.70A.835(11)(b) (2026) (defining workforce housing and mandating the share of housing that must be affordable, workforce, or moderate income housing and the term of affordability).

51. See Memorandum from Megan Kirkeby, *supra* note 26, attach. at 4, 20 (California); CONN. GEN. STAT. § 8-30g(g)(1) (Supp. 2026); 310 ILL. COMP. STAT. 67/30(e), 67/15 (West 2026) (Illinois); MASS. GEN. LAWS ch. 40B, §§ 20, 23 (West 2025) (Massachusetts); Britton v. Chester, 595 A.2d 492, 497-98 (N.H. 1991) (New Hampshire); *Mount Laurel II*, 456 A.2d 390, 452 (N.J. 1983) (New Jersey); 45 R.I. GEN. LAWS § 45-53-3(5), -4(f)(3)(iii)(E)(I), -5.1(g) (2026 as amended by H.B. 8004, 2025-2026 Gen. Assemb., Jan. Sess. (R.I. 2026) (enacted)) (Rhode Island).

52. See, e.g., *Ayers v. Town of Stoughton Zoning Bd. of App.*, 13 L.C.R. 271, 273 (Mass. Land Ct. 2005) (“[For Chapter 40B cases,] whether the regional need for more affordable housing is greater than shortcomings in traditional planning with respect to a particular project is determined by a balancing test of those factors. However, the balancing test is weighted in favor of alleviating shortages of low and moderate income housing.”); Terry Tondro, *Connecticut’s Affordable Housing Appeals Statute: After Ten Years of Hope, Why Only Middling Results?*, 23 W. NEW ENG. L. REV. 115, 119–123 (2001) (discussing how Connecticut’s builder’s remedy provision shifts the burden of proof from the applicant to the municipality, and providing examples of planning interests courts found not dispositive in builder’s remedy suits that would have been compelling in other contexts).

Project requirement considerations

The eligibility requirements for which projects may be granted a builder's remedy must be carefully tailored. The burdens they impose have the potential to affect the economic feasibility of the development projects, which weakens the builder's remedy as a tool for achieving the primary goal of encouraging more housing supply.

Should affordable units be required, and if so, how stringent should the requirement be?

Most states award the remedy only to development projects that contain a specified share of affordable housing. Whether this is the optimal way to design the policy depends on the goal being pursued.⁵³ If the builder's remedy policy is intended to address high housing costs driven by shortages throughout the market, the requirement that a project include affordable units may be counter-productive in some local markets because having to provide affordable units decreases the incentive for developers to take advantage of the builder's remedy.⁵⁴ However, to the extent that the policy is intended to serve other goals, such as making communities more racially or economically diverse, the requirement to include affordable units in a project taking advantage of a builder's remedy is likely essential. Nevertheless, the amount and level of affordability required needs to account for the housing market realities across the state. In high-cost markets, or where government subsidies are stretched thin, a stringent affordability requirement may make development financially infeasible.

Requiring projects that want to use the builder's remedy to include affordable housing is essentially a form of inclusionary housing. As the experience with other forms of inclusionary housing has shown, the determination of what the project's affordability requirements should be (in terms of percentage of units, income levels targeted, and length of affordability) would ideally consider all the various factors that shape the financial feasibility of developing new housing. Inclusionary programs typically provide some incentive (such as a density bonus) for developers to set aside a share of affordable units in a project. The value of those incentives has to at least make up for the extra costs the affordable units will add to the project (after other government subsidies the developer might be able to access to help pay for the affordable units).

53. See Steven J. Eagle, "Affordable Housing" As Metaphor, 44 *FORDHAM URB. L.J.* 301, 304–05 (2017) (discussing varied types of affordable housing goals, including "developing an ample supply of housing in price ranges that attract and retain residents conducive to the growth and economic prosperity of cities"; "ensuring that neighborhood housing remains available for existing residents, while preserving their cultural and other non-pecuniary values"; and "the provision of adequate housing in high-cost cities for low- and moderate-income persons and the overlapping concern for 'fair housing' for families of all races and backgrounds")

54. See, e.g., Emily Hamilton, *Inclusionary Zoning and Housing Market Outcomes*, 23 *CITYSCAPE* 161, 189 (2021) (finding some evidence that inclusionary zoning increases market-rate house prices; no evidence that it reduces new housing supply; and finding that most programs offering increased development rights to developers that choose to provide below-market-rate housing units have been unsuccessful in producing affordable units); Robert C. Ellickson, *The Irony of "Inclusionary" Zoning*, 54 *S. CAL. L. REV.* 1167, 1188–89, 1189 figs. 1 & 2 (1981) (arguing that inclusionary zoning functions as a tax on new residential development that reduces overall housing supply and raises market-rate prices).

The calculation of how much affordability requirements can add to the costs of a project without making the project unprofitable is a difficult one. The builder's remedy may save the developer considerable time and allow the project to avoid costly requirements that localities might otherwise try to impose. It could alternatively result in foregone income from market rate units and time and money spent complying with requirements involved in subsidy and other affordability programs. Furthermore, unlike the density bonuses typically involved in inclusionary zoning, the builder's remedy involves risk: although many builder's remedy challenges succeed, some do not. The litigation is costly and may affect a developer's reputation and relationships with local officials and communities.

A number of builder's remedy programs have been criticized as falling short because of the costs the affordability restrictions impose. Connecticut's requirement that at least 15% of the units be reserved for households earning no more than 60% of AMI and another 15% for households earning no more than 80% of AMI for at least 40 years is considered by many to be unworkable.⁵⁵ The California legislature recently reduced the percentage of affordable units required for the builder's remedy (though that reduction may have been counter-balanced with new limits on the density of builder's remedy projects).⁵⁶ State and local governments considering builder's remedy policies may find guidance in the requirements imposed by government subsidy programs. The effects on a project's return from any requirements in excess of what those programs mandate should be carefully considered. While many constituencies will call for more stringent affordability requirements, asking for too much may mean that the builder's remedy fails to provide either an incentive to localities to comply with pro-housing policies or an additional enforcement stick the state can use to ensure its policies are implemented fairly and effectively.

55. Marantz & Zheng, *supra* note 30, at 373; Tondro, *supra* note 52, at 161–162; Robert D. Carroll, *Connecticut Retrenches: A Proposal to Save the Affordable Housing Appeals Procedure*, 110 YALE L.J. 1247, 1248 (2001). There are no public data that can pinpoint precisely how often the builder's remedy has been invoked in Connecticut. A 2013 report estimated that since 1992, 27 cases resulted in 1,400 new units. Julia Singer Bansal, *Housing Units Built under the Affordable Housing Appeals Procedure*, CONN. GEN. ASSEMB.: OFF. OF LEGIS. RSCH (Feb. 13, 2013), <https://www.cga.ct.gov/2013/rpt/2013-R-0143.htm>. Third party testimony before the 2017 General Assembly Housing Committee cautiously estimated that 12,000 units were built because of the builder's remedy. *Public Hearing of Feb. 16, 2017, Before the J. Comm. on Hous. Comm.*, 2017 Leg., Reg. Sess. 133 (Conn. 2017) (statement of Tim Hollister, Land Use Att'y).

56. Assemb. B. 1893, 2023–2024 Leg., Reg. Sess. (Cal. 2024) (signed Sept. 19, 2024, eff. Jan. 1, 2025) (amending CAL. GOV'T CODE § 65589.5). AB 1893 reduced the affordability threshold for mixed-income builder's remedy projects from 20% of affordable units to as few as 7–13% of units for low-income households depending on the income level targeted while introducing new minimum and maximum density limits on such projects.

Should there be a limited dividend requirement placed on for-profit developers using the builder's remedy?

Massachusetts imposes a requirement that limits the profit a for-profit developer can earn on a builder's remedy project. Profits above that amount must be returned to the municipality.⁵⁷ Rhode Island originally imposed a similar limited dividend requirement on its builder's remedy but eliminated those limits in 2002.⁵⁸ No other state imposes a limited dividend requirement.

Because it shifts some of the profit earned on the builder's remedy project from developers to municipalities, a limited dividend requirement may make the policy more palatable to local governments.⁵⁹ The obvious downside of the limited dividend requirement is that capping the profit a developer may earn on a project may disincentivize the developer from using the builder's remedy. While Massachusetts has seen substantial use of the builder's remedy despite the limited dividend requirement, even more development might have been achieved absent the limited dividend requirement. Additionally, the requirement necessitates significant administrative review and oversight,⁶⁰ and some critics claim that it is subject to "pervasive abuse" by developers.⁶¹

In evaluating whether to include a limited dividend requirement as part of its builder's remedy, therefore, a state should consider the following factors: the extent to which it would disincentivize use of the builder's remedy by developers; the potential administrative and enforcement costs of the requirement; and the difficulty of integrating the limits with other government subsidy programs that make different assumptions about the economics of the project.

What kinds of planning issues should disqualify an otherwise eligible builder's remedy project?

Every state with a builder's remedy requires projects to address reasonable environmental and health and safety concerns. If a project violates one of these interests, the builder's remedy may not be awarded, even if the project meets affordability requirements and the municipality is not in safe harbor.

57. See MASS. GEN. LAWS CH. 40B, § 21; Ellen Callahan, Note, *Will an Increase in Profits Increase Affordable Housing? Examining the Limited Dividend Requirement of Chapter 40B of the Massachusetts General Laws*, 50 SUFFOLK U. L. REV. 649, 654–55 (2017).

58. Callahan, *supra* note 57, at 662.

59. Additionally, in Massachusetts (where public subsidy is a requirement for builder's remedy projects), the limited dividend requirement was a key component in the Supreme Judicial Court's decision to hold the policy constitutional under the public purpose doctrine because it ensured that the primary benefit of the policy went to the public. *Id.* at 663.

60. See MASS. DEP'T OF HOUS. & CMTY. DEV., *supra* note 45, AT IV-8 TO -9.

61. See Letter from Gregory W. Sullivan, Mass. Inspector Gen., to Aaron Gornstein, Undersec'y, Dep't of Hous. & Cmty. Dev., app. at 1 (July 31, 2012), <http://www.mass.gov/ig/publications/reports-and-recommendations/chapter-40b-publications/oversight-of-chapter-40b-affordable-housing-rentals-july-2012.pdf> [<http://perma.cc/JDF2-8WWL>] (addressing concerns of developer abuse under 40B).

Of course, the builder's remedy policy should not allow developments to proceed at unlimited cost to other planning interests: affordable housing, while a vital public interest, is not the only such interest. Any builder's remedy policy accordingly should include backstops that protect these other planning interests. The questions for a state crafting a builder's remedy are: (1) which planning interests should be protected; and (2) how decision makers should weigh those interests against the value of the affordable housing provided by the project.

On the first question, specifically enumerating and defining the planning interests that may overcome the need for affordable housing, and avoiding broad "catch-all" terms such as "health, safety, and welfare," will help provide clarity and certainty to the developer, the local government, and the reviewing body. By specifying the issues that should and should not be considered, the legislature can encourage consistent application of the builder's remedy and avoid time-consuming and costly litigation over its scope. States will need to decide whether builder's remedy projects should have to comply with a wide variety of environmental and public safety concerns, from whether projects should have to go through environmental review procedures to whether there are any circumstances in which they may be excused from regulations regarding risks of flooding, earthquakes, wildfires, or other disasters. It may be helpful for the state to set guidelines about the local regulations, such as California's requirement that the standards be "objective" (discussed further in the next section), and to make clear that the permitting decision should consider whether means of resolving the issue other than outright denial of the permit could be appropriate.⁶²

In addition to clarifying how localities should balance housing needs against legitimate public health and safety concerns, states may want to consider substantive limits on the kinds of projects that can qualify for the builder's remedy. Several states, for example, have provisions aimed at preventing unusually large proposed projects.⁶³ California defines both the maximum and minimum density of projects that can use the builder's remedy.⁶⁴

On the second question, regardless of how well-drafted the statute is, because planning interests are so varied, the administrative body or court reviewing builder's remedy applications will likely end up making the critical determinations regarding countervailing planning interests. Therefore, policymakers

62. See, e.g., Assemb. B. 1893, 2023–2024 Leg., Reg. Sess. (Cal. 2024) (signed Sep. 19, 2024, eff. Jan. 1, 2025) (amending CAL. GOV'T CODE § 65589.5).

63. See, e.g., Sen. B. 158, 2025–26 Leg., Reg. Sess. (Cal. 2025) (signed Oct. 11, 2025) (amending Cal. Pub. Res. Code § 21080.66) (reducing maximum eligible site size for builder's remedy projects to 4 acres); 760 MASS. CODE REGS. 56.03(1)(d), (6) (listing maximum sizes of projects by size of municipality, ranging from the larger of 300 units or 2% of the locality's total units in a community with >7,500 year-round housing units to 6% of the locality's total units in a community with 2,500 housing units).

64. *Id.*

should carefully consider and specify which party will bear the burden of demonstrating the project’s (non)impact on such interests and the standard applied in weighing any impact against the public’s interest in the availability and affordability of housing.⁶⁵

Adjudication Procedure

If (1) the municipality in which the project is proposed is not in safe harbor, and (2) a project meets requirements about affordability, and (3) there are no health, safety, environmental or other specified planning concerns that outweigh the need for affordable housing, then the developer is generally entitled to a builder’s remedy in states that have adopted it. In some circumstances, the remedy may allow the development to proceed even if it violates local zoning or other regulations. The third critical component of a builder’s remedy policy is the procedure for determining whether the conditions for invoking the builder’s remedy are met and the standards the reviewing body must apply in determining whether the project can proceed.

Figure 4: Builder’s Remedy Procedures by State

State	Procedure, Reviewing Body, and Standards of Proof
California ⁶⁶	Only some builder’s remedy projects will qualify for a “streamlined ministerial permit” process; others must use the locality’s normal permitting processes A locality that is not in safe harbor can only deny or condition a builder’s remedy project if it proves, by a preponderance of evidence, a specific health/safety impact that can’t be mitigated without making the project unaffordable (or a few other narrow exceptions) The locality can only require a builder’s remedy project to meet objective, quantifiable, written standards that would have applied had it been proposed on a site with a general plan designation and zoning classification that allow the density and unit type proposed, and only then if such standards don’t make the project infeasible The locality’s decision can be appealed through state courts, where the locality will bear the burden of proof by a preponderance of the evidence The court can order the locality to act pursuant to the court’s decision or can order the necessary permits itself if the locality has acted in bad faith Successful plaintiffs will be awarded attorneys’ fees barring unusual circumstances

65. Tondro, *supra* note 52, at 119 (“The force of the special section 8-30g procedure lies in its shifting of the burden of proof from the applicant to the planning and zoning commission.”); Bob Neel, Note, *Combating Exclusion & Achieving Affordable Housing: The Case for Broad Adoption of Housing Appeals Statutes*, 99 WASH. U. L. REV. 1397, 1408–09 (2022) (discussing Connecticut Supreme Court case that undermined 8-30g’s shift of the burden of proof, and subsequent amendment to the statute restoring the shift).

66. CAL. GOV. CODE § 65913.4 (West 2026) provides a “streamlined ministerial permit” process that will be available for some builder’s remedy projects. Cal. Gov. Code § 65589.5(d)(2) (West 2026) (the adverse effect must be significant, quantifiable, direct and unavoidable, based on objective, identified written public health or safety standards, policies, or conditions as they existed on the date the application was deemed complete); see also § 65589.5(f)(6) (while a locality can impose certain standards, it may not render the project infeasible, nor can it require the developer to seek a plan amendment, rezoning or other legislative approval); § 65589.5(i) (burden of proof in judicial proceedings); § 65589.5(k)(ii) (regarding the court’s remedial powers).

Connecticut⁶⁷

Applicants first follow the locality's normal procedures

The locality's decisions may be appealed to the state courts and are assigned to judges specifically designated to hear such appeals

The municipality bears the burden of proving by sufficient evidence in the record that “the decision is necessary to protect substantial public interests in health, safety or other matters which the commission may legally consider; such public interests clearly outweigh the need for affordable housing; and such public interests cannot be protected by reasonable changes” to the development

If the court finds in favor of the challenger, it can wholly or partly revise, modify, remand or reverse the decision

No provision for legal fees for successful challenges

Illinois⁶⁸

Applicants follow locality's normal procedures,

The developer, someone eligible to apply to live in the development, or a local housing organization can appeal denials or overly restrictive conditions to the State Housing Appeals Board (SHAB)

- But “essential requirements that protect the public health and safety” or “preservation of the environment” are not appealable

Governor must appoint 7 members to the SHAB, but the SHAB has not always been fully staffed, at times lacking a quorum

Appellant bears the burden of proving the application was unfairly denied or unreasonably conditioned

SHAB may affirm, reverse, or modify the conditions of, or add conditions to, the locality's decision

SHAB decisions may be appealed to the state appellate court, which can overturn only if “clearly erroneous”

67. Ct. Gen. Law. 8-30g §§ (f) –(i) (2024). A municipality also can prevail by proving that the proposed project would be located in an area zoned for industrial use that does not permit residential uses and that the proposed project is not assisted housing.

68. 310 Ill. Comp. Stat. 67/15, 30(b)(5)–(g) (2026) (requiring that the members of the Board be a retired judge as chair, a member from a zoning board of appeals and one from a planning board, local and county officials, an affordable housing developer, and an affordable housing advocate); Natalie Moore, *With No Oversight, Illinois Cities Flout State Law That Encourages Affordable Housing*, WBEZ Chi. (Jan. 21, 2021, at 7:00 EDT), <https://www.wbez.org/race-class-communities/2021/01/21/with-no-oversight-illinois-cities-flout-state-law-that-encourages-affordable-housing>. There are currently 7 members sitting on the board, although it still seems that their docket is not being utilized. *Housing Appeals Board: Board and Commission Details*, GOVERNOR'S OFF. OF EXEC. APPOINTMENTS, <https://govappointments.illinois.gov/boardsandcommissions/details/?id=cf14cb5e-2007-ee11-8f6d-001dd8068008> (last visited July 23, 2026); see also *infra* note 91 (pointing to the continued non-use of the Illinois State Housing Appeals Board).

Massachusetts⁶⁹

A builder's remedy developer files one application with the municipal board of appeals, which can issue a comprehensive permit covering all necessary approvals

The applicant can appeal to the Housing Appeals Committee (HAC) if the application is denied or overly restricted

The applicant must first make a *prima facie* case to the HAC that the project complies with federal/state standards and other generalized standards as to local concerns; the burden then shifts to the municipal board to show that there is a valid health, safety, environmental, design, open space, or other local concern that supports such denial, and that such local concern outweighs the housing need

The HAC may only decide whether a denial was unreasonable and not consistent with local needs, or whether any conditions imposed upon an approval make the construction or operation of the housing uneconomic and not consistent with local needs; if so, the HAC must direct the board to issue a comprehensive permit or approval or to remove any conditions as necessary to make the project economic; if the decisions or conditions are consistent with local needs the HAC must let them stand

HAC decisions are appealable to superior court; the courts may assess costs against an appellant only for bad faith or malice

New Hampshire⁷⁰

The applicant must follow the normal permitting process but include a written statement of intent to qualify as workforce housing.

Denials may be appealed to superior court or the Housing Appeals Board (HAB), an administrative body made up of one lawyer and either a professional engineer or land surveyor appointed by the governor and executive council

The developer must specify why the denial or conditions were unreasonable; the HAB may overturn the locality only for "errors of law or if the board is persuaded by the balance of probabilities, on the evidence before it, that said decision is unreasonable"

HAB decisions are appealable to the state supreme court

69. Mass. Gen. Laws ch. 40B, §§ 21, 22 (2025); see also 760 Mass. Code Regs. § 56.07(2)(a)(2) (applicant must show that "its proposal complies with federal or state statutes or regulations, or with generally recognized standards as to matters of health, safety, the environment, design, open space, or other matters of Local Concern." Local Concern is "the need to protect the health or safety of the occupants of a proposed Project or of the residents of the municipality, to protect the natural environment, to promote better site and building design in relation to the surroundings and municipal and regional planning, or to preserve Open Spaces"). See also Mass. Gen. Laws G.L. c. 23B, § 5A. (2025) (composition of the HAC); Mass. Gen. Law ch. 40A § 17 (2025) (rights of 3rd party challengers).

70. N.H. Rev. STAT. ANN. § 679:5(III) (allowing builder's remedy appeals in either the HAB or state court); see also *id.* § 674:61(I) (providing for appeals of workforce housing decisions to superior court); *id.* § 679:5(III) (providing for appeals of workforce housing decisions to the Housing Appeals Board); *id.* § 679:1-679:3 (appointments to the board); *id.* § 679:9 (standard of review).

New Jersey⁷¹

Issues about whether a municipality is in safe harbor are resolved before the Affordable Housing Dispute Resolution Program (“Program”) and according to strict deadlines. If the Program cannot resolve the dispute, it is submitted to a county-level housing court judge, and may be appealed through the courts. Even if the locality meets the requirements for safe harbor and receives a “certificate of compliance” with its obligations, a developer or other interested party can challenge the locality’s compliance with the certification in the courts. The municipality is entitled to a presumption of validity, but if the Court determines that the locality is “determined to be constitutionally noncompliant” or acting in bad faith; failing to meet deadlines; or not actually allowing affordable housing to be developed as it committed to do in its fair share plan and housing element, then the Court can strip the locality of its safe harbor status.

If a municipality is not in safe harbor, a developer whose qualifying project is denied may bring a builder’s remedy suit in Superior Court, Law Division, where it will be assigned to the *Mt. Laurel county* housing court judge. The court often appoints a special master or hearing examiner to evaluate site suitability, final site plan issues, and compliance with other permits (e.g., DEP approvals), then make recommendations to the judge.

The court can order the municipality to rezone the site and approve the project (potentially with modifications) usually with a percentage of units reserved as affordable. The litigation is governed by the framework established by the long line of cases *Mt. Laurel* spawned.

Rhode Island⁷²

A developer can apply for a comprehensive permit

Denials or conditioned approvals may be appealed to state superior court, which must give the appeal priority and hear it as soon as possible

The court must decide whether the decision was arbitrary and capricious or clearly erroneous in light of seven specific considerations, including the need for affordable housing and matters of environmental protection and health and safety

Washington⁷³

Applicants first follow the locality’s normal permitting procedures

If the permit is denied or conditioned in ways that make the project infeasible, the applicant must pursue any administrative appeals the locality provides, before seeking judicial review through the state’s Land Use Petition Act

71. N.J. STAT. ANN. § 52:27D-304.1(b) –(f) (West 2025) (safe harbor); see also *Administrative Office of the Courts, Affordable Housing Dispute Resolution Program Implementation of L. 2024, c. 2* (Dec. 2024); *Mount Laurel II*, 456 A.2d at 453 (appointment of a special master and remedies); *Toll Bros. v. Twp. of W. Windsor*, 803 A.2d 53, 76–81 (N.J. 2002) (framework for builder’s remedy litigation).

72. RI Gen L § 45-53-51. (2025) (specific criteria are: Consistency of the decision with the approved affordable housing plan; extent to which the community meets or plans to meet housing needs including the 10% goal for low- and moderate-income housing; environmental protection; the state’s need for low- and moderate-income housing; the health and safety of the occupants of the proposed housing or the locality’s residents; the need for better site and building design or to preserve open space; and whether the reasons for denial, local zoning or land use ordinances, requirements and regulations are applied as equally as possible to both subsidized and unsubsidized housing).

73. See WASH. REV. CODE § 36.70C (2026) (judicial review process); S.B. 5148, 69th Leg. 2025 Reg. Sess. (Wash. 2025) (enacted) (mandating approval of builder’s remedy projects unless municipality finds specified conditions).

Application and initial review

In all states with a builder's remedy the developer at some point can appeal or challenge the denial of a local permit in state courts. As Figure 4 describes, in some states—Connecticut, Illinois, New Hampshire, New Jersey, and Washington—the process begins with the same permit applications that other proposed projects that are not as-of-right would have to file. The application for a builder's remedy project, however, may need to indicate that the project is eligible for the remedy and include details about the proposed affordable units.⁷⁴

Some states provide a separate, streamlined application process for a builder's remedy project. In Massachusetts and Rhode Island, for example, the developer may submit a single application for a “comprehensive permit” to one local body, rather than applying for separate approvals from various bodies (such as water or sewer districts, fire departments, and building inspectors),⁷⁵ as is the norm for development proposals. That single local body then notifies other agencies that would normally weigh in on such an application, and these other entities have an opportunity to make recommendations but have no authority to separately approve or deny the application. The statutes also prescribe timelines for the review of comprehensive permit applications.⁷⁶ California provides a similar streamlined ministerial permit that only some builder's remedy projects will qualify for (and not all developers will accept the conditions it imposes).⁷⁷

Appeals procedure and body

Once the local government approves (with or without conditions) or denies the permit application, aggrieved parties (whether the developer, a neighbor, or some other party with standing under the state's general rules) have an opportunity to appeal the decision. Some states have created state-level administrative bodies specifically tasked with hearing builder's remedy appeals. In New Hampshire, developers must elect whether to appeal to either an administrative body that is designated for “questions of housing and housing development” or the state courts.⁷⁸ Rhode Island recently abolished its administrative

74. See CONN. GEN. STAT. § 8-30g(b)(1) (2024) (requiring an affordability plan with specific details); N.H. REV. STAT. ANN. § 674:60(1) (2025) (requiring a statement of intent).

75. See 760 Mass. Code Regs. § 56.02 (LexisNexis 2025) (defining the “Local Boards” whose review processes are consolidated in the comprehensive permit process); 45 R.I. GEN. LAWS § 45-53-4(a) (LexisNexis 2025) (“Any applicant proposing to build low- or moderate-income housing may submit to the local review board a single application for a comprehensive permit to build that housing in lieu of separate applications to the applicable local boards”).

76. See MASS. ANN. LAWS ch. 40B, § 21 (LEXIS through Chapter 407 of the 2024 Legislative Session of the 193rd General Court) (Massachusetts); 45 R.I. GEN. LAWS ANN. § 45-53-4(f)(3)(iii)(C) (West through Chapter 100 of the 2026 Reg. Sess. of the R.I. Leg.) (Rhode Island).

77. CAL. GOV. CODE § 65913.4 (2025).

78. See N.H. REV. STAT. ANN. § 679:5 (LEXIS through Chapter 381 of the 2024 Regular Session).

body and now sends these appeals to the state's trial courts.⁷⁹ Illinois passed legislation establishing a State Housing Appeals Board in 2003, but it has been plagued by insufficient staffing and has not yet heard any cases.⁸⁰

In other states, including New Jersey, California, Connecticut, and now Rhode Island, trial courts hear the appeals and litigation from an aggrieved party seeking the builder's remedy, often under rules or timelines that vary from other appeals, and sometimes with judges especially assigned to hear the cases and develop expertise about them. Connecticut and Rhode Island require the court to expedite builder's remedy cases to the extent practicable, privileging them over other cases.

The reviewing body must determine whether the municipality is in safe harbor and, if not, whether the project is eligible for the builder's remedy. In some states, however, the decision about whether the municipality is in safe harbor is made by the state's department of housing or similar agency. States with percentage-based safe harbor requirements may publish lists of which municipalities are in safe harbor. California's Department of Housing and Community Development, for example, determines whether municipalities are RHNA compliant.⁸¹ In New Jersey, challenges to the requirements for immunity from exclusionary housing litigation (the builder's remedy) are reviewed by New Jersey's Affordable Housing Dispute Resolution Program.⁸² In Washington, the state's Department of Commerce selects local governments to review, and if its review finds the locality's housing element (or regulations implementing the element) to be non-compliant, it must then give the locality at least 120 days to correct any identified deficiencies. If it then finds that the actions the locality takes do not correct the deficiencies (and the locality is therefore subject to the builder's remedy), the locality can appeal to a growth management appeals board.⁸³

States take different approaches to the allocation of the burden of proof upon appeal. In Connecticut, for example, the municipality bears the burden of proving that its denial of the builder's remedy project was supported by sufficient evidence in the record. In Massachusetts, the developer must first establish a *prima facie* case "that its proposal complies with federal or state statutes or regulations, or with

79. 45 R.I. GEN. LAWS § 45-53-5 (LEXIS through Chapter 457 of the 2024 Session, including all edits made by the Rhode Island Director of Law Revision) (repealed pursuant to its own terms Jan. 1, 2024); *id.* § 45-53-5.1.

80. See 310 ILL. COMP. STAT. 67/30(b), (c) (2025); Natalie Moore, *With No Oversight, Illinois Cities Flout State Law That Encourages Affordable Housing*, WBEZ Chi. (Jan. 21, 2021, 6:00 AM), <https://www.wbez.org/stories/with-no-oversight-illinois-cities-flout-state-law-that-encourages-affordable-housing/7d298f69-113e-4541-9132-9af59d6b3667> [<https://perma.cc/2SNT-UV52>].

81. Local governments may have an opportunity to challenge the agency determination of compliance. See, e.g., *Martinez v. City of Clovis*, 90 Cal. App. 5th 193, 243 (Cal. Ct. App., 5th Dist., 2023) (reviewing a challenge to an HCD determination and noting that "courts generally will not depart from the HCD's determination unless 'it is clearly erroneous or unauthorized.'"); see also CONN. AGENCIES REGS. § 8-30g-2(a), (h) (LexisNexis 2025).

82. N.J. STAT. ANN. § 52:27D-304.1(b) -1(f) (1) to (b)(2) (West 2025) (safe harbor process).

83. WASH. REV. CODE §§ 36.70A.30, 36.70A.835(9)(b)-(10) (2026).

generally recognized standards as to traditional planning concerns,” at which point the burden shifts to the municipality to demonstrate that the project poses some harm or threat to a planning interest that outweighs the local need for affordable housing.⁸⁴

Procedural considerations

Should there be a comprehensive permit process at the local level for builder’s remedy projects?

This approach, as taken by Massachusetts and Rhode Island, has significant advantages.⁸⁵ By replacing individual procedures before the many agencies (and departments within those agencies) that sequentially review a permit application, the comprehensive permit reduces the time and risk of the permitting process.⁸⁶ That, in turn, may provide sufficient cost savings to incentivize developers to include affordable housing in the project.⁸⁷

The comprehensive permit system may cut down on the amount of litigation surrounding a qualified builder’s remedy project. In builder’s remedy jurisdictions that don’t use a comprehensive permit system, a successful challenge to a local agency’s denial may result in a court order that requires the developer to go back to other agencies that also need to approve the permit, only to be rejected again, which then requires the developer to go back to court.⁸⁸ A comprehensive permit provision ensures that when a court or administrative body reviews the local decision, all of the relevant planning considerations are already in the record. In Massachusetts, a comprehensive permit process may be used even once a municipality has achieved safe harbor protection.⁸⁹ A final important feature of the comprehensive permit system is that it may streamline the local permitting of affordable housing projects that would otherwise require a lengthy rezoning but are desirable to the locality given the remaining need for affordable housing, even after the safe harbor is reached.

One potential downside of a comprehensive permit system is that it imposes some administrative cost on the local governments, which must adopt a new process to review the comprehensive permit applications. While those costs are unlikely to outweigh the comprehensive permitting system’s significant streamlining benefits, states should consider the tradeoffs.

84. See CONN. GEN. STAT. § 8-30g(g) (requiring an affordability plan with specific details); 760 MASS. CODE REGS. § 56.07(2)(a)(2).

85. See Section I.3.A, *supra*; MASS. GEN. LAWS ch. 40B, § 21 (2026); 45 R.I. GEN. LAWS § 45-53-4 (2026).

86. For evidence that comprehensive permit processes result in more housing production, see Brian Kleckner, *Similar Laws, Different Outcomes: Affordable Housing Production in Massachusetts and Connecticut* 20-26 (2022) (masters thesis, Trinity College), <https://www.jstor.org/stable/community.34031519>.

87. See Neel, *supra* note 66, at 1418 (“By consolidating expensive, laborious permitting requirements, the [comprehensive permitting] system incentivizes the incorporation of low-cost housing and reduces barriers to development.”).

88. See, e.g., *Great Bridge Props., LLC v. Town of Ossipee*, No. 04-E-110, 2005 N.H. Super. LEXIS 3, at *29–31 (N.H. Super. Ct. Feb. 7, 2005).

89. See *Boothroyd v. Zoning Bd. of Appeals*, 449 Mass. 333, 340–41 (2007).

Who should hear appeals of local government decisions on eligible projects: an administrative board, a court, or both?

As noted earlier, the states have adopted a variety of approaches in designating the body to hear builder's remedy matters and how the body does so. New Jersey and Rhode Island have changed their approaches, presumably out of dissatisfaction with the results.⁹⁰ The history of inaction by the State Housing Appeals Board (SHAB) in Illinois and the now defunct New Jersey Council on Affordable Housing (COAH) illustrates some of the risks of the administrative model, where enforcement may stall due to administrative delays, shifts in political will, and a lack of staffing and capacity.⁹¹ However, administrative boards can be beneficial because the forum is specially dedicated to one type of case, the process may be speedier, and the decisions may be both substantively better (due to the experience and expertise of the adjudicators) and more uniform (because only one state administrative body, rather than many trial courts, is involved).⁹²

It is important, however, to keep in mind that decisions of administrative bodies can be appealed through a state's court system. If litigants seek those appeals, the administrative route may be no quicker in practice than litigating the issue in the trial courts would have been.⁹³ The fact that parties aggrieved by comprehensive permit approval (e.g., abutters) appeal to superior court, whereas parties aggrieved by a denial (developers) appeal to the administrative body, undercuts the doctrinal consistency benefit. Both of these issues were noted as motivations for Rhode Island when it eliminated its State Housing Appeals Board in favor of appeals directly to superior court.⁹⁴

90. See *Mount Laurel II*, 92 N.J. 158, 216–217 (1983) (establishing specially appointed judges to handle Mount Laurel cases); *Hills Dev. Co. v. Twp. of Bernards* (Mount Laurel III), 103 N.J. 1 (1986) (upholding the Fair Housing Act and COAH as an administrative alternative to court supervision); *Mount Laurel IV*, 221 N.J. 1 (2015) (declaring COAH “moribund” and returning enforcement responsibility to the courts); see also 45 R.I. GEN. LAWS § 45-53-7(c) (2026) (providing a sunset for the Housing Appeals Board in 2024); S.B. 1050, 2023-2024 Gen. Assemb., Reg. Sess. sec. 1, § 45-53-5(a) (R.I. 2023) (enacted) (repealed pursuant to its own terms Jan. 1, 2024) (extending appeals to the Board until the end of 2023). In Rhode Island, parties aggrieved by an approval of a comprehensive permit may appeal directly to court. See 45 R.I. GEN. LAWS § 45-53-5.1 (2026).

91. Alex Nitkin, *A Proposed Law Would Push Wealthy Suburbs to Build More Affordable Housing. Mayors Are Pushing Back*, ILL. ANSWERS PROJECT (MAY 27, 2026), <https://illinoisanswers.org/2026/05/27/proposed-illinois-law-push-wealthy-suburbs-build-more-affordable-housing/> (“Non-compliant towns are subject to an appeal system...No one has ever used it.”); see also SUNI KARTHA, MARTIN COZZOLA & AARON HARRIS, IMPACT FOR EQUALITY, BUILDING AN AFFORDABLE ILLINOIS: MANY HIGH-COST SUBURBS CONTINUE TO VIOLATE STATE AFFORDABLE HOUSING LAW 3 tbl. 1 (2025), <https://impactforequity.org/report/many-high-cost-suburbs-continue-to-violate-state-affordable-housing-law/> (highlighting the low compliance rate among non-exempt communities, suggesting localities do not view oversight by the SHAB as very threatening). For issues on the COAH in New Jersey, see Alan Mallach, *The Mount Laurel Doctrine and the Uncertainties of Social Policy in a Time of Retrenchment*, 63 Rutgers L. Rev. 849 (2011).

92. *Speaker Shekarchi 14-Bill Package to Address Rhode Island Housing Crisis*, R.I. NEWS TODAY (MAR. 3, 2023), <https://rinewstoday.com/speaker-shekarchi-presents-14-bill-package-to-address-rhode-island-housing-crisis/> [<https://perma.cc/EH69-JN8X>] (“Abutters currently appeal approvals directly to Superior Court, under a different standard, while applicant appeals go to SHAB; this amendment allows for a more streamlined appeal process under the same standards for all parties.”); UPRISE RI, *RI’s Bold Plan to Tackle Housing Crisis: 14 Bills Unveiled*, at 14:03–14:43 (YouTube, Mar. 3, 2023), <https://www.youtube.com/watch?v=UoEdjzmkw4&t=819s> [<https://perma.cc/J8KM-8M8K>] (“Because of the nature of SHAB, and the big board that it is, and the requirements to fulfill...it takes a long time, and a long process, and then you go to superior court...90% of SHAB cases end up in superior court anyway.” (remarks of K. Joseph Shekarchi, R.I. House Speaker)). But see *About the SHAB*, R.I. HOUS. APPEALS BD., <https://housingappealsboardri.com/> (suggesting a lower rate than 90%).

93. See LYNN FISHER, RAPPAPORT INST., REVIEWING CHAPTER 40B: WHAT GETS PROPOSED, WHAT GETS APPROVED, WHAT GETS APPEALED, AND WHAT GETS BUILT? 8 (Nov. 2008), www.hks.harvard.edu/sites/default/files/centers/rappaport/files/40B_final.pdf (highlighting risk to developers of delaying projects through appeals).

94. *Speaker Shekarchi 14-Bill Package*; *supra* note 92; UPRISE RI, *supra* note 92.

The details of the procedural structure likely are more important than the binary choice of administrative body or court.⁹⁵ If the courts are solely responsible, a separate docket (as in the new Rhode Island system)⁹⁶ and specialized trial judges (as in New Jersey)⁹⁷ may help secure the benefits of efficiency and the quality and consistency of judicial decisions. If an administrative body handles the decisions, appeals can go directly to the appellate court rather than to a trial court, and states can mandate priority for those appeals.⁹⁸ Regulations governing the administrative bodies can borrow from the procedures of trial courts as appropriate to avoid having to reinvent the wheel, as Massachusetts has done.⁹⁹ Further, it is essential that whatever body is tasked with handling builder's remedy matters be sufficiently staffed to do so, as the disappointing history of Illinois's long-inactive appeals board confirms.¹⁰⁰

Should there be any procedural safeguards on settlements between the municipality and the developer?

Settlements of builder's remedy suits in states with fair share safe harbor requirements raise the concern that municipalities and developers may reach agreements that undercut the state's goal of encouraging the production of affordable units. Therefore, states with this type of fair share requirement should adopt procedural safeguards to prevent settlements that do not contain affordable housing. New Jersey's "fairness hearing" approach, where a Superior Court judge evaluates whether a municipality is fulfilling their obligation under the Mount Laurel doctrine, appears to have been fairly successful in this regard.¹⁰¹ Similarly, New Jersey's Fair Share Housing Center, a non-profit advocacy organization representing the interests of low-income households, has played a leading role in proceedings before the Affordable Housing Dispute Resolution program, providing an independent check on settlements between developers and localities, and helping to secure affordable housing settlement agreements with more than 340 municipalities throughout the state.¹⁰² A state adopting a builder's remedy with a fair share requirement should consider a similar arrangement, which may require the state to provide funding for such actors as part of the builder's remedy statute.

95. The allocation of the burden of proof, and standards of proof, also are important details in any builder's remedy program. We address those in a separate policy brief, *Delays, Discretion, and Denials: State Legislative Reforms to Local Land Use Processes* (forthcoming).

96. See 45 R.I. GEN. LAWS § 45-53-5.1 (2026).

97. See *Mount Laurel II*, 456 A.2d 390, 439-40 (N.J. 1983).

98. Governor Hochul's proposed New York Housing Compact would have given developers two routes of appeal: one through a state administrative body (the Housing Review Board, with appeal to an administrative law judge, whose decision could be appealed to the state supreme court—a trial court); the other through the state courts. See N.Y. A.B. 3006, pt. F, § 2 (2023) (proposed text for §§ 1004(5), 1005, 1005(2)(f), and 1006 of new article 20 of the General Municipal Law). The Compact's provision of two routes raises the specter of forum shopping, undercutting the goal of consistent adjudication. Additionally, the fact that Housing Review Board decisions could be appealed to state trial courts, and then to appellate courts likely would lengthen the total time of litigation.

99. See 760 Mass. Code Regs. § 56.01 – 56.08.

100. Natalie Moore, *With No Oversight, Illinois Cities Flout State Law That Encourages Affordable Housing*, WBEZ CHI. (JAN. 21, 2021, 6:00 AM), <https://www.wbez.org/stories/with-no-oversight-illinois-cities-flout-state-law-that-encourages-affordable-housing/7d298f69-113e-4541-9132-9af59d6b3667> [<https://perma.cc/2SNT-UV52>].

101. See generally Peter Buchsbaum, *Affordable Housing and the Mount Laurel Doctrine: Lessons Learned*, 57 WILLAMETTE L. REV. 201 (2021).

102. *Affordable Housing*, FAIR SHARE HOUS. CTR., <https://www.fairsharehousing.org/our-work/tenant-screening-fairness-2/> [<https://perma.cc/L36U-49QT>].

What Do We Know About the Effectiveness of Builder's Remedies?

This section will explore what the evidence shows about whether a state's adoption of a builder's remedy is correlated with more housing production than states with no builder's remedy policy or with more housing production than they likely would have experienced absent the policy.

The effects builder's remedies have on the production of affordable housing

Assessing the causal impact of builder's remedy policies on housing affordability is challenging, both because of variations among the policies and because of the number of other variables that may account for different rates of housing production across states and market conditions.¹⁰³ Still, a number of scholars have studied the effects of builder's remedy policies, and they find that the policies are associated with greater production of affordable housing than the area would otherwise have experienced and than other land use reforms studied have produced.¹⁰⁴

Marantz and Zheng's 2020 study compares outcomes across the various states that have adopted a builder's remedy (which they call "State Affordable Housing Appeals Systems" or SAHAS), using New York state as a control group. They found that, holding all else equal, Low-Income Housing Tax Credit (LIHTC) projects are more likely to be located in Massachusetts, Connecticut, and Rhode Island [SAHAS states] than in New York [the non-SAHAS control state].¹⁰⁵ Cowan's 2006 study employs a difference-in-difference model to compare changes in the rate of production of affordable housing between two periods in four states.¹⁰⁶ Two of the states (Connecticut and Rhode Island) adopted their builder's remedy policies during the study period, while the other two, which served as control groups, either had such a policy for the entire period (Massachusetts) or did not have one for the entire period (New Hampshire).¹⁰⁷ Cowan finds that adoption of the policies (labeled "anti-snob zoning laws") had a positive impact on production of affordable housing in those states, accounting for over 2,000 affordable units built in

103. Jenny Schuetz, *How to Evaluate State Pro-Housing Policies: Mind the Empirical Pitfalls*, NISKANEN CTR. (Feb. 5, 2026), <https://www.niskanencenter.org/how-to-evaluate-state-pro-housing-policies-mind-the-empirical-pitfalls/>.

104. For a thorough review of the evidence, see Carolina K. Reid, Carol Galante and Ashley F. Weinstein-Carnes, Addressing California's Housing Shortage 25 J. AFFORDABLE HOUSING & COMMUN. DEV. L. 271, 250-55 (2017), <https://www.jstor.org/stable/10.2307/26408189>.

105. Marantz & Zheng, *supra* note 30, at 381 (proposing that examining the siting of Low-Income Housing Tax Credit projects can help assess claims around SAHAS efficacy because restrictive land use regulations can impede LIHTC development, and LIHTC can be used to preserve affordability of units, which is in the interest of municipalities who want to stay in safe harbor).

106. Spencer M. Cowan, *Anti-Snob Land Use Laws, Suburban Exclusion, and Housing Opportunity*, 28 J. URB. AFFS. 295, 301-04 (2006), <https://doi.org/10.1111/j.1469-9906.2006.00293.x>.

107. *Id.* at 301; see also STUART MECK, REBECCA RETZLAFF & JAMES SCHWAB, REGIONAL APPROACHES TO AFFORDABLE HOUSING 141-158 (Am. Plan. Ass'n Plan. Advisory Serv., Rep. No. 513/514, 2003), https://www.huduser.gov/publications/pdf/regional_app_aff_hsg.pdf.

Connecticut and Rhode Island during the study period that would not otherwise have been built.¹⁰⁸ A 2018 study from Marantz and Dillon also found that Connecticut’s builder’s remedy was associated with an increase in single-family housing permits relative to the New York control group and therefore argue that, at a minimum, the policy did not have a negative effect on market-rate development. The authors argue that these findings refute the “backfire hypothesis” that these policies cause municipalities to restrict all new residential development.¹⁰⁹

Several descriptive studies have examined housing production and affordability outcomes in various states and are instructive despite employing methodologies that cannot determine causality. Bratt and Vladeck’s 2014 study compares affordable housing outcomes in Massachusetts, Rhode Island, and New Jersey (which had a builder’s remedy during only part of the study period) and Montgomery County, Maryland (which has a mandatory inclusionary zoning policy, not a statewide builder’s remedy policy). They find that “Massachusetts had the best record of total affordable housing production as a percentage of the growth in the statewide...housing stock from the start of the program”.¹¹⁰ Rhode Island also outperformed both Montgomery County and New Jersey in the percentage of the jurisdictions’ growth that was income-restricted housing.¹¹¹ Their findings suggest that states that have a builder’s remedy experience more housing growth than states with other programs to encourage affordable housing.

Goetz and Wang found that the number of localities meeting the Massachusetts 40B program’s 10 percent safe harbor requirement went from 3 in 1997 to 65 in 2017 (18.5 percent of the cities covered by the law).¹¹² They concluded: “Although we cannot say what would have happened in the absence of Chapter 40B,...[our] findings suggest that the state law influenced local actions related to subsidized housing development over this time period.”¹¹³ A 2023 report from the New Jersey Fair Share Housing Center found that since the enforcement of fair share obligations was reinvigorated in 2015, “the rate of affordable housing production has nearly doubled, overall multifamily housing production has significantly increased, and neighborhoods where new homes have been built have become more integrated.”¹¹⁴ The report concludes that “while actual builder’s remedy suits are fairly rare, the motivation to avoid them spurs significant

108. Cowan, *supra* note 106, at 305. He also finds that the effect is strongest “in municipalities in which minorities and lower-income households are already more heavily represented.” *Id.* at 307.

109. Nicholas J. Marantz & Harya S. Dillon, *Do State Affordable Housing Appeals Systems Backfire? A Natural Experiment*, 28 HOUS. POL’Y DEBATE 267, 284 (2018), <https://doi.org/10.1080/10511482.2017.1362021>.

110. Rachel G. Bratt & Abigail Vladeck, *Addressing Restrictive Zoning for Affordable Housing: Experiences in Four States*, 24 HOUS. POL’Y DEBATE 594, 621–22 (2014), <https://doi.org/10.1080/10511482.2014.886279>.

111. *Id.*

112. Goetz & Wang, *supra* note 31, at 464.

113. *Id.* at 474–475.

114. VANITA KALRA, MARTINA MANICASTRI & TANUSHREE BANSAL, N.J. FAIR SHARE HOUS. CTR., *DISMANTLING EXCLUSIONARY ZONING: NEW JERSEY’S BLUEPRINT FOR OVERCOMING SEGREGATION 2* (Apr. 2023), https://www.fairsharehousing.org/wp-content/uploads/2025/06/Dismantling-Exclusionary-Zoning_New-Jerseys-Blueprint-for-Overcoming-Segregation.pdf.

agreements to create affordable homes.”¹¹⁵ Further evidence for this is found in a recent report from the Regional Plan Association on New Jersey’s production of affordable housing before and after its Mount Laurel doctrine was reinvigorated (2015-2025), which showed that New Jersey municipalities have made substantially more progress in expanding housing supply than similar municipalities in Long Island, New York, which are not subject to a builder’s remedy.¹¹⁶

Both causal and descriptive research accordingly suggest that builder’s remedy policies do increase the production of affordable housing relative to areas that do not have the policies. That said, the history of resistance to the builder’s remedy in states like Massachusetts¹¹⁷ and New Jersey,¹¹⁸ as well as early indications from the re-introduction of the builder’s remedy in California,¹¹⁹ suggest that the introduction of any builder’s remedy will be contested and will take time to be effective.

115. *Id.* at 13.

116. REG’L PLAN. ASS’N, MAPPING NEW JERSEY’S GROWTH PART II (Mar. 2026), <https://rpa.org/work/reports/mapping-new-jerseys-growth-part-2> (“In both periods, multifamily housing production in Long Island—where no fair-share system or builder’s remedy exists—remained exceptionally low, increasing only from 1.4 units per 1,000 residents in the first period to 1.7 units in the second. In contrast, even the lowest-performing category in New Jersey—Non-Compliant Municipalities—experienced a significant increase in production, rising from 6.9 units per 1,000 residents to 13.5 units per 1,000 residents during the same timeframe.”).

117. See Goetz & Wang, *supra* note 31, at 467–69, 468 tbls. 3 & 4, 469 tbl. 5; *MIT study finds 40B projects often delayed*, MIT NEWS (June 18, 2007), <https://news.mit.edu/2007/forty-b-0618> (reporting on research by Lynn Fischer and Henry Pollakowski that is no longer archived).

118. See, e.g., Paula A. Franzese, *Mount Laurel III: The New Jersey Supreme Court’s Judicious Retreat*, 18 SETON HALL L. REV. 30, 35 & nn.34–35 (1988); Stuart Meck, *Commentary, New Jersey’s Mount Laurel Doctrine and Its Implementation: Under Attack, but Safe* (for Now), 66 PLAN. & ENV’T L. 4, 7 (2014); DOUGLAS S. MASSEY ET AL., *CLIMBING MOUNT LAUREL* 44–51 (2013).

119. See, e.g., CONOR DOUGHERTY, *GOLDEN GATES* 96, 104 (2020); Jeff Collins, *Housing Developers Ahead in ‘Builder’s Remedy’ Battle*, ORANGE CNTY. REG., Apr. 21, 2024, at A9; Edvard Pettersson, *California Takes Five Cities to Court over Housing Plan Failures*, COURTHOUSE NEWS SERV. (July 16, 2026), <https://www.courthousenews.com/california-takes-five-cities-to-court-over-housing-plan-failures/>; *Legal Action*, CAL. DEP’T OF HOUS. & CMTY. DEV., <https://www.hcd.ca.gov/hau/legal> (last accessed Aug. 12, 2026) (listing builder’s remedy lawsuits filed by the Cal. Dep’t of Hous. & Cmty. Dev. against localities). Compare this recent litigation with the previous half-century, where opponents of developments regularly succeeded in delaying or shuttering building projects, often through California Environmental Quality Act suits. See Yoni Appelbaum, *Stuck* 217–18 (2025).

The Costs of a Builder's Remedy

The cost of implementing and enforcing the builder's remedy will depend upon its specific design and the state's existing institutions and characteristics. The best evidence is probably provided by Massachusetts. In its five decades of existence, the Massachusetts Housing Appeals Committee (HAC) created by 40B has issued over 200 rulings or decisions.¹²⁰ The evidence suggests that the project applicants are successful in the vast majority of these determinations.¹²¹ Those results likely make localities more willing to negotiate with developers to avoid the HAC process.¹²² Accordingly, the administrative costs of operating a builder's remedy (such as setting up and running a comprehensive permit process, the review process) are hard to estimate but likely decrease over time.

In addition to those administrative costs, localities have argued that the proposed developments may impose environmental impacts, traffic congestion, school overcrowding, infrastructure pressures, and other harms to quality of life.¹²³ The existing evidence does not support those claims,¹²⁴ and as noted earlier, every state with a builder's remedy recognizes the need to protect against such harms. The builder's remedy typically reverses the usual presumption that a local government's determination that these interests outweigh the need for affordable housing is correct. But the builder's remedy does not ignore those potential costs. Critically, neither the administrative costs nor the difficulties of balancing the harms a particular proposed development may cause against the costs of failing to build sufficient housing to meet a state's needs are unique to a builder's remedy—they exist for every tool that might be used to ensure progress towards a state's goal of building more housing.

120. *Housing Appeals Committee (HAC)*, COMMONWEALTH OF MASS., <https://www.mass.gov/info-details/housing-appeals-committee-hac>.

121. 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, 397-98 (2001), <https://digitalcommons.wne.edu/lawreview/vol22/iss2/5> (finding that, as of 2001, the local zoning board decision had been upheld in 18 cases and overruled in 94 cases).

122. *Id.* at 398.

123. Jonathan Douglas Witten, *The Cost of Developing Affordable Housing: At What Price?*, 30 B.C. ENVTL. AFF. L. REV. 509, 533-34 (2003); see also Tondro, *supra* note 52, at 121-22 (describing the proliferation of "health and safety" concerns that have defeated developer appeals).

124. See David J. Ritchay & Zoe R. Weinrobe, *Fear and Loathing in Massachusetts: Chapter 40B, Community Opposition, and Residential Property Value* 185-86 (June 2004) (M.C.P. thesis, Mass. Inst. of Tech.), <http://hdl.handle.net/1721.1/17709>; ALEXANDRA DEGENOVA, BRENDAN GOODWIN, SHANNON MORIARTY & JEREMY ROBITAILLE, *ON THE GROUND: 40B DEVELOPMENTS BEFORE AND AFTER*, AT V (2009).

Alternatives to the Builder's Remedy

Given both the positive track records of the builder's remedy and the concerns localities express about the remedy's costs, this section reviews what the evidence shows about alternative policies to secure municipal compliance with state mandates aimed at increasing the production of affordable housing.¹²⁵ State policymakers considering adopting a builder's remedy should be aware of these alternatives and evaluate whether one or more of them may be better suited to the particular context of their state.

Incentives

Instead of (or in addition to) sticks, a state can offer carrots -- such as making more state funding available to local governments that liberalize their zoning regulations. Programs in Connecticut, Massachusetts, New Hampshire, New York, and Wisconsin are examples of these incentives.¹²⁶ This approach encourages local governments to roll back their exclusionary zoning regulations by increasing the opportunity cost that those regulations impose on their municipalities.

Incentives should pose fewer threats to a locality's traditional planning interests than a builder's remedy. If the net cost additional housing imposes on a locality (after accounting for the value of the jobs, taxes, and other benefits of the housing) outweighs the incentives the state offers, the local government will forgo those incentives. Incentives are also less likely to provoke litigation than a builder's remedy. Despite these potential benefits, policymakers may prefer a builder's remedy to the incentive approach. Local governments may overestimate the costs to their residents of increased development, in which case an incentive policy would still result in more restrictive zoning than is appropriate.

Most importantly, the long history of exclusionary zoning and ideological commitment to local control of land use suggests that incentives will not be enough to encourage the municipalities most opposed to affordable housing to change their ways. Goetz and Wang found that even in Massachusetts, with its combination of a builder's remedy and incentives, the communities producing the lowest number of subsidized affordable units per capita were the whitest and wealthiest communities.¹²⁷ Some housing

125. For example, Minnesota imposed a fair share requirement similar to New Jersey's and California's, but without a builder's remedy to enforce the requirement. The results were disappointing and the fair share requirements have been described as "irrelevant." Edward G. Goetz, Karen Chapple & Barbara Lukermann, *Enabling Exclusion: The Retreat from Regional Fair Share Housing in the Implementation of the Minnesota Land Use Planning Act*, 22 J. PLAN. EDUC. & RSCH. 213, 221 (2003).

126. See, e.g., CONN. GEN. STAT. §§ 8-13M TO -13X (establishing incentive housing zones and providing state payments to municipalities that adopt higher-density zoning for housing development); Mass. Gen. Laws ch. 29, § 2JJJJJ (2025) (establishing the Fair Housing Fund); N.H. REV. STAT. ANN. § 12-O:71 (2026) (establishing a housing champion designation and providing preferential access to state resources for municipalities that adopt pro-housing policies); Exec. Order No. 30, N.Y. COMP. CODES R. & REGS. tit. 9, § 9.30 (2026), https://www.governor.ny.gov/sites/default/files/2023-07/EO_30.pdf (making access to some funds contingent on receiving a Pro-Housing Community Program Certification); Wis. Stat. § 234.66(2), (4)(a)(5) (2025) (establishing a residential housing infrastructure revolving loan fund and conditioning funding on local zoning and land use reforms).

127. Goetz & Wang, *supra* note 31, at 467–69, 468 tbls. 3 & 4, 469 tbl. 5.

advocates and policymakers argue that localities resistant to state mandates will not be swayed by incentives alone,¹²⁸ implying that the localities most likely to take advantage of incentive programs are those already inclined to permit more housing.

Giving municipalities the first opportunity to reform

A second alternative (or addition) to a builder's remedy is for the state to require that municipalities revise their land use regulations to allow for a certain level of housing development or for certain housing types, but if a municipality does not do so within a specified time, the state will impose its own version of a "model" ordinance. The municipality thus can avoid imposition of the model ordinance by adopting a new, compliant zoning ordinance.¹²⁹ As with incentive programs, the main advantage of this approach is that the local government retains the authority to control its own planning destiny, within prescribed limits. It is therefore less likely to result in violations of the locality's traditional planning interests. The main downside of this approach is that it gives local governments the opportunity to drag their feet—adopting the minimum change they believe they could get away with, and if that ordinance is invalidated, amending the ordinance in a small way to again try to find the minimum change acceptable. Each revision may require litigation over whether the ordinance complies with the state law, which will mean many years can go by before the goal of the state's reform is actually realized.¹³⁰

128. See, e.g., Sam Mellins, *Albany to Suburbs: We'll Pay You to Build Housing. Suburbs to Albany: No Thanks*, N.Y. FOCUS (MAR. 23, 2023), <https://nysfocus.com/2023/03/23/new-york-budget-housing-incentive-suburbs/> ("‘In my village, we don't have the space for it,’ said Bonnie Parente, mayor of East Williston. ‘They can incent me all they want.’”).

129. See Wash. H.B. 1110, 68th Leg., Reg. Sess. § 4 (2023) (requiring cities to adopt state-compliant development regulations and, if they do not, providing that a state model ordinance and standards apply in their place).

130. California has struggled, for example, to force local governments to adopt ordinances that actually permit the construction of ADUs. SB 1534 (1982) allowed municipalities to avoid state ADU requirements if they created local ordinances. See CAL GOV'T CODE § 65852.2 (1982). Localities adopted extremely onerous requirements for ADUs, leading to fewer than 1,300 annual approvals statewide before 2016. See CAL ASSEMB. SELECT COMM. ON PERMITTING REFORM, FINAL REPORT, Cal. Legis., 2023–2024 Reg. Sess., at 8 (2025). When California required ADUs to be approved ministerially, not discretionarily, see CAL GOV'T CODE § 65852.2(a)(3) (2002), many municipalities simply imposed extreme standards. *Id.* at 9. In response, California passed SB 1069 (2016) and AB 2299 (2016) to impose minimum standards on ADU ordinances and limit the length of ministerial review. See DYLAN CASEY, CAL. RENTERS LEGAL ADVOC. & EDUC. FUND, A GUIDE TO ENDING SINGLE-FAMILY ZONING: LESSONS LEARNED FROM 39 YEARS OF ADU LEGISLATION 7 (May 2021), <https://calhdf.org/wp-content/uploads/2021/05/A-Guide-to-Ending-Single-Family-Zoning-CaRLA-May-2021.pdf>.

Preempting local zoning

Another alternative to the builder's remedy is state preemption of restrictive zoning policies. Preemption can take many forms; states delegate the power to zone to their local governments and may circumscribe that power as they see fit, within constitutional limits. Recently, some state governments have limited their local governments' ability to forbid certain kinds of developments, such as duplexes and accessory dwelling units (ADUs).¹³¹ Others have targeted specific areas for denser development, requiring, for example, that multi-family buildings be allowed as of right in certain areas near public transit.¹³²

An advantage of preemption is that it can establish bright line rules that allow for development of more housing by simplifying the review and approval process for localities across the state.¹³³ A builder's remedy, by contrast, involves some litigation-like process for evaluating the locality's concerns about the proposed project's impact on traditional planning interests and weighing the benefits of the new housing against concerns found to be valid. Preemption may go too far by stripping local governments of certain powers completely, resulting in a situation in which traditional planning interests such as traffic, sprawl, and environmental issues posed by a specific development proposal are not adequately considered at any level.¹³⁴

131. See, e.g., ME. STAT. tit. 30-A §§ 4364-A to -B (2026) (recently enacted Maine statutes requiring ADUs to be allowed in areas zoned for housing, and that duplexes be allowed in such areas for lots not containing an existing dwelling unit). For more information on California's multiple attempts to pass legislation to mandate localities to allow ADUs, see Nicholas J. Marantz, Christopher S. Elmendorf & Youjin B. Kim, *Where Will Accessory Dwelling Units Sprout Up When a State Lets Them Grow? Evidence from California*, 25 CITYSCAPE 107, 109 (2023), <https://www.huduser.gov/portal/periodicals/cityscape/vol25num2/ch5.pdf>. See also Data of California ADU Regulations 2017–2026, *Mapping State Land Use Reforms*, N.Y.U. FURMAN CTR. (Apr. 22, 2026), <https://www.furmancenter.org/land-use-reform-tracker/?term-lut-topic=accessory-dwelling-units-regulations%2Callow-adus-where-single-family-homes-are-permitted%2Climit-local-requirements-on-adu-occupants&term-state=california>.

132. See MASS. GEN. LAWS CH. 40A, § 3A (2021).

133. See John Infranca, *The New State Zoning: Land Use Preemption amid a Housing Crisis*, 60 B.C. L. REV. 823, 886 (2019) (arguing tailored state-level interventions can be more responsive to local interest by eliminating vagueness and protracted procedure); see also LYDIA LO, ANNIE ROSENOW & YONAH FREEMARK, URB. INST., *ADVANCING PRO-HOUSING LAND-USE POLICY AT THE STATE LEVEL* 5 tbl. 1, 6–7 (2025) (addressing common housing market failures—housing monopolies, tragedy of the commons and free riding—and suggesting state-level preemption solutions); Christopher B. Goodman, *Local Governments in the Age of Preemption* 4 (N. Ill. Univ., Working Paper, May 5, 2025) (recognizing how zoning, although facially local, has effects beyond a municipality's boundaries and therefore sometimes requires state-level intervention to correct inefficiencies in the allocation of housing). But see *Montanans Against Irresponsible Densification*, L.L.C. v. State, 2026 MT 53, 427 Mont. 100 (2026) (litigation as result of preemption law).

134. See Richard C. Shrager, *The Perils of Land Use Deregulation*, 170 U. PENN. L. REV. 125, 151–52 (2021) (expressing doubt that centralization will have the desired, pro-housing effect as state governments are often influenced by the same suburban or business interests as local governments); Isabella Reed, *Land Use Preemption in 2025*, NAT'L ASS'N OF CNTYS. (July 13, 2026), <https://www.naco.org/state-policy/land-use> (voicing the concerns of local organizations which believe they can offer more “effective and attentive” decision-making and “prioritize smart growth and avoid overwhelming local services”); Goodman, *supra* note 133, at 4 (warning that centralization can introduce its own inefficiencies). But see Amy Lee, Adam Millard-Ball & Michael Manvill, *State Preemption in Theory and Practice: The Case of Parking Requirements*, 62 Urb. Affs. Rev. 1165, 1186–87 (2026) (finding that state-wide preemption does not negate local tailoring of a policy's implementation); Infranca, *supra* note 133, at 886 (arguing tailored state-level interventions can be more responsive to local interest). In the end, the correct policy choice comes down to state-by-state conditions which eschew a one-size-fits-all solution. Jenny Schuetz, *How Can State Governments Influence Local Zoning to Support Healthier Housing Markets*, 25 CITYSCAPE 73, 91 (2023); see also Matthew de Boer, Note, *State Interventions in Local Zoning: Lessons from Housing Applied to Data Centers*, 94 FORDHAM L. REV. 1943, 1984 (2026) (presenting a sliding scale of preemption “weight” tailored to local conditions).

Local inclusionary housing programs

Finally, inclusionary housing policies are sometimes presented as an alternative to a builder's remedy.¹³⁵ Under such policies, local governments require that some portion of newly-constructed or rehabilitated housing be affordable to low-income households, sometimes in exchange for the relaxation of barriers such as density constraints. Assuming that the demand for housing is sufficiently strong that building it is profitable despite the cost of the affordable units, the policy may result in a greater number of affordable units than if no such requirement was in place. Further, because the local government retains control over its land use regulations, inclusionary housing policies allow local governments to consider planning concerns in adopting their inclusionary housing policies.¹³⁶

The research on whether inclusionary housing results in more affordable housing is quite mixed, and the market conditions of the locality at the time the policy is in effect are key. It is extremely difficult to design a policy that will work in all market conditions and cycles. Further, inclusionary housing requirements do not address the reluctance of local governments to allow housing development in their neighborhoods. If a municipality's land use regulations already impose so many regulatory barriers, risks, and costs that developers are not able to build, adding an inclusionary housing requirement will stymie the development of any new housing, including new mixed-income affordable housing. Thus, while inclusionary zoning policies might be a substitute for a builder's remedy in some contexts, neither a builder's remedy nor inclusionary zoning will result in new housing in municipalities where development is not financially feasible (either because demand is too low or the cost of building is too high).¹³⁷ A builder's remedy has the advantage, however, that it can allow development in the face of regulatory barriers, while inclusionary zoning does not necessarily reduce those barriers.

135. See Witten, *supra* note 32, at 254 (recommending that Massachusetts abandon its builder's remedy and instead adopt "comprehensive land-use planning legislation that enables cities and towns to impose, among other things, inclusionary zoning requirements and to collect impact fees").

136. *Id.* at 255 n.149 (arguing that inclusionary housing policies "produce affordable housing without destroying local plans, zoning regulations, neighborhoods").

137. See Goetz & Wang, *supra* note 31, at 474 (discussing the relatively sparse use of the 40B process in Western Massachusetts where demand is lower than in the areas surrounding Boston).

So, should states adopt a builder's remedy?

This review of the benefits and costs of the builder's remedy, as well as those of some of the alternative enforcement policies available, reveals that each of the policies has tradeoffs. Policymakers should carefully consider the policy goals as well as the legal and institutional landscape of their particular state in deciding which to adopt. The evidence suggests that a builder's remedy can indeed increase the stock of affordable units, and states with builder's remedies have secured more new affordable housing than states using other enforcement strategies.¹³⁸ While the builder's remedy has the potential to result in harms to traditional planning interests such as health, safety, the environment, and the fiscal capacity of local governments, there are checks on those concern, and there is little concrete evidence of whether such effects have arisen from builder's remedies in practice.¹³⁹ Further, there is no alternative to the builder's remedy that has been shown to achieve the same increases in affordable housing production without similar tradeoffs.

Conclusion

Builder's remedy policies have been controversial since they were pioneered in 1969 through Massachusetts's "Anti-Snob Zoning Act," but the evidence reviewed above demonstrates that builder's remedy policies hold promise as a means of addressing the housing affordability crises around the United States. The varied records in different states show that the way the policies are designed and implemented matters. Policymakers considering using a builder's remedy should pay particular attention to the different ways states have structured their builder's remedy policies and the evidence on how those differences correlate with the policies' performance. States should carefully consider the tradeoffs of a standardized numerical target for municipalities to reach safe harbor, how to craft the affordability requirements for builder's remedy projects, the benefits and costs of a comprehensive permit process, and the need for a procedural structure for implementing the builder's remedy that is adequately staffed with specialized experts and which minimizes duplicative litigation. Other considerations include the importance of specifying the local concerns that can be considered to determine a project's eligibility for the remedy and of deciding how to allocate the burden and standard of proof on those concerns.

138. See *supra* Section 4.

139. See *supra* Section 5.

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