June 23, 2025

Christina McClernon
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Re: Proposed Amendments to "State Housing Appeals Board" regulations, 47 I.A.C. § 395.001, *et al*.

Dear Ms. McClernon,

The undersigned organizations write to share feedback and concerns with the recently proposed amended regulations for the State Housing Appeals Board. We are a broad coalition of organizations committed to fair and affordable housing statewide, with a collective interest in the success of the Affordable Housing Planning and Appeals Act (AHPAA). We believe AHPAA is a critical tool for ensuring a more equitable distribution of our state's scarce housing resources and we want to see the law succeed as originally intended. Members of this coalition advocated for the creation of an Illinois builder's remedy back in 2003—efforts that culminated in the passage of AHPAA—and have been involved with multiple efforts to improve the law in the 22+ years since its creation. We continue to dedicate resources to AHPAA's success and see the current rulemaking process as an opportunity to clarify several ambiguities in the law for the benefit of the State Housing Appeals Board (SHAB) and parties involved in a potential appeal.

We have been eagerly awaiting these draft regulations since IHDA's Board approved them on January 19, 2024,[1] and were disappointed that it took nearly 17 months for the changes to become public. Nevertheless, we ask that IHDA work quickly and diligently with JCAR to incorporate our feedback below, which is organized by section for ease of review. If a proposed change (or lack of change) is not commented on, we are neutral on that change (or non-change).

I. Generally

To start, we note that IHDA has chosen to retain the existing title ("State Housing Appeals Board") for the amended regulations, rather than something that would make these regulations' relationship to AHPAA clearer, such as titling Part 395 "the Affordable Housing Planning and Appeal Act." This decision may be reflective of an internal belief at IHDA that the Authority's rulemaking authority is limited to the portions of AHPAA that deal with the Act's appeals process. We say this because shortly before these draft rules were approved

[1] Ill. Hous. Dev. Auth., January 19, 2024 – Board Meeting Minutes, https://www.ihda.org/wp-content/uploads/2024/02/2024-02-IHDA-024-Minutes-Approved.pdf.

by IHDA's board, we were told "The only rulemaking that [IHDA] will need to do with reference to SB1476 impacts the State Housing Appeals Board process. **The other portions of the AHPAA (the NELGs determination, the creation and collection of plans, etc.) are not governed by rules.**"[2]

We believe this is a fundamental misunderstanding of IHDA's rulemaking authority for AHPAA. When AHPAA was first signed into law, its rulemaking authority was contained within Section 50(c) of the Act. And in its original form, the rest of Section 50 was titled "State Housing Appeals Board" and otherwise focused on the composition of the SHAB and the terms of its members. While the law's original language gave IHDA permission to create regulations "necessary and appropriate to . . . provide direction to local governments and affordable housing developers," this language's location within the section about the SHAB could conceivably be construed as limiting IHDA's rulemaking authority to providing direction to local governments and affordable housing developers in conjunction with the appeals process.[3]

However, an early amendment to AHPAA, Public Act 94-0303, which went into effect on July 21, 2005, moved IHDA's rulemaking authority from Section 50 to *its own section* of the Act (Section 60) entitled "Rulemaking Authority."[4] The decision to transfer IHDA's rulemaking authority under AHPAA to its own section is a clear signal that legislators intended for the creation of rules for any part of the law that would "provide direction to local governments and affordable housing developers."[5] In other words, IHDA has broad authority to create regulations governing all of AHPAA, including but not limited to:

- the determination of NELGs;
- the creation of, minimum requirements for, and evaluation of affordable housing plans;
- the timelines and directions for submission of the new mid-term reports under 310 ILCS § 67/25(b); and
- clarification regarding when the Authority will use its relatively new power to refer NELGs to the Office of the Illinois Attorney General.[6]

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[2] E-mail from Managing Director, Strategic Planning and Reporting, Ill. Hous. Dev. Auth., to Impact for Equity (January 2, 2024) (on file with Impact for Equity) (emphasis added).

[3] IHDA "may adopt such other rules and regulations as it deems necessary and appropriate to carry out the Board's responsibilities under this Act and to provide direction to local governments and affordable housing developers." The Affordable Housing Planning and Appeal Act, Pub. Act 93-0595, 2003 Ill. Laws 4234.

[4] Pub. Act 94-0303, 2005 Ill. Laws 2750. This amendment also made it clear that rulemaking was *not optional*, changing the "may" in the original act to "shall."

[5] *Id*.

[6] We do acknowledge that the 2023 Non-Exempt Local Government Handbook contains timelines for submission of "Local Government Housing Plan Implementation Reports" (the four-year reports from 67/25(b)) on "a rolling basis." ILL. HOUS. DEV. AUTH. OFF. OF HOUS. COORDINATION SERVS., AFFORDABLE HOUSING PLANNING AND APPEAL ACT: 2023 NON-EXEMPT LOCAL GOVERNMENT HANDBOOK 13 (March 6, 2025). Separately, the Handbook states that IHDA will decide whether to refer a community the Attorney General for non-compliance "on a case-by-case basis" and that "it is unlikely that the Authority would report Non-Exempt Local Governments making good faith efforts to comply." *Id.* at 26. While this is a good start, we believe

While IHDA acknowledged its broad authority to create rules during the initial round of rulemaking in 2012,[7] the resulting regulations were unfortunately limited to addressing ambiguities around the SHAB and AHPAA's appeal process. We urge IHDA to recognize and utilize the full breadth of its rulemaking authority as provided under the law to "encourage counties and municipalities to incorporate affordable housing within their housing stock sufficient to meet the needs of their county or community."[8] IHDA can signal its understanding of this broad authority by renaming this Part "the Affordable Housing Planning and Appeal Act" and beginning the rulemaking process for parts of the law that currently lack regulations.

II. Section 395.103 Definitions

We are concerned that the proposed regulations do not include an updated definition for "local government" to reflect the changes made by Public Act 102-0175,[9] which went into effect in 2021. Public Act 102-0175, in part, amended AHPAA to include an explicit preemption of Home Rule in Section 70:

> Unless otherwise provided under this Act or otherwise in accordance with State law, a unit of local government, **including a home rule unit**, or any non-home rule county within the unincorporated territory of the county, may not regulate the activities described in this Act in a manner more restrictive than the regulation of those activities by the State under this Act. **This Section is a limitation under subsection (i) of Section 6 of Article VII of the Illinois Constitution on the concurrent exercise by home rule units of powers and functions exercised by the State.[10]**

No rulemaking occurred following the 2021 amendments to AHPAA, so the current process presents the first opportunity for IHDA to clarify those changes. Without this clarification, municipalities and other stakeholders will lack critical information about the limitations on home rule authority. More specifically, we are aware of at least one home rule NELG that questioned whether they needed to comply with the law as recently as May 2024.[11] And we are concerned other communities may be operating under the same misguided belief.

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rulemaking should (a) codify timelines and (b) clarify what constitutes a "good faith effort" so that municipalities are on notice as to how to comply with the law.

[7] *See generally,* ILL. HOUS. DEV. AUTH., STATE HOUSING APPEALS BOARD – 47 ILL. ADM. CODE 395 – RESPONSE TO PUBLIC COMMENTS 7-8 (Dec. 17, 2012) (on file with Impact for Equity) [hereinafter "IHDA 2012 RESPONSE TO PUBLIC COMMENTS"] ("To the extent that the Authority took liberties to address ambiguous and/or silent portions of the Act, the resulting rules are not unreasonable, arbitrary or capricious.").

[8] 310 ILCS § 67/10.

[9] COVID-19 Affordable Housing Grant Program Act, Pub. Act 102-0175, 2021 Ill. Laws 5419.

[10] 310 ILCS § 67/70.

[11] E-mail from Peter M. Friedman, Elrod Friedman LLP to Erik Turner, et al., Ill. Hous. Dev. Auth. (May 14, 2024) (on file with Impact for Equity) ("The Village [of Winnetka] also received the . . . letter regarding the new home rule provision of the Act. The Village continues to evaluate the nature and scope of the applicability of Section 70 to the Village, but does not believe the issue is as definitive as stated in the letter.").

We assume the lack of change to the definition of "local government" to reflect home rule preemption was an oversight, but the unamended language threatens to muddy rather than clarify the current text of the law for municipalities and other observers. This is especially concerning because it is not the only time IHDA has published guidance around AHPAA that does not reflect the changes made in 2021. The FAQ in IHDA's initial publication of the 2023 Non-Exempt Local Government (NELG) Handbook (released alongside the new list of NELGs in December 2023) did not mention the 2021 changes to the law. Instead, the handbook merely "encourage[d]" home rule communities to follow AHPAA as previous versions of the handbook had done.[12] However, after several months of both informal and formal outreach to IHDA from Housing Action Illinois, Impact for Equity, and others, IHDA released an updated handbook on April 16, 2024 to make it clear that "home rule units are not categorically exempt from AHPAA."[13] Contemporaneously, IHDA also conducted direct outreach to NELGs with home rule authority to alert them to the change to the law.[14]

Because we believe uncertainty around AHPAA's applicability to home rule communities has undermined the law's effectiveness since its passage in 2003,[15] we see the current round of rulemaking as an opportunity to definitively address the issue once and for all. We urge IHDA to define "local government" in the way the Authority originally proposed defining the term in 2012: "A county or a municipality, **including home rule units and counties and municipalities other than home rule units**, as described in Article VII of the Constitution of the State of Illinois."[16] By making this change to the Act's regulations—rather than relying on text buried in the FAQs of a Handbook—IHDA will make it plain that all eligible communities are subject to the law, and non-exempt local governments both (a) must follow AHPAA's planning requirements; and (b) are subject to appeal under Section 30 of the Act.

III. Section 395.203 Meetings of the Members

The proposed changes to the section concerning regular meetings of members of the SHAB (subsection (b)) are concerning. The rules currently direct the SHAB to meet "at least annually, with the specific date for the annual meeting to be set no later than January 1 of each calendar year. . ." with an option to cancel if there's no business to address. This

[12] ILL. HOUS. DEV. AUTH. OFF. OF HOUS. COORDINATION SERVS., AFFORDABLE HOUSING PLANNING AND APPEAL ACT: 2023 NON-EXEMPT LOCAL GOVERNMENT HANDBOOK 26 (2023).
[13] ILL. HOUS. DEV. AUTH. OFF. OF HOUS. COORDINATION SERVS., AFFORDABLE HOUSING PLANNING AND APPEAL ACT: 2023 NON-EXEMPT LOCAL GOVERNMENT HANDBOOK 26 (April 16, 2024).
[14] *See e.g.,* Letter from Kristin Faust, Executive Director, Ill. Hous. Dev. Auth. to Greg Lungmus, Village President, Village of Northfield (April 17, 2024) (on file with Impact for Equity); Letter from Kristin Faust, Executive Director, Ill. Hous. Dev. Auth. to Chris Rintz, Village President, Village of Winnetka (April 17, 2024) (on file with Impact for Equity).
[15] *Cf.* Letter from Larry Frang, Executive Director, Illinois Municipal League to Kristi S. Poskus, Deputy General Counsel, Ill. Hous. Dev. Auth. 1-3 (Oct. 30, 2012) (on file with Impact for Equity) *with* IHDA 2012 RESPONSE TO PUBLIC COMMENTS 1-6.
[16] 36 Ill. Reg. 14050, 14056 (Sept. 13, 2012).

ensures SHAB members are aware that they may be called upon to act at least once during the year and to put the selected date on their calendar. The proposed changes state that regular meetings will only happen as necessary and for specific purposes but provide no means for calling such a meeting.

As written, this makes regular meetings largely indistinguishable from special meetings (addressed separately in subsection (d)). Given that the Governor will need to appoint seven new members to the SHAB before the window to submit appeals reopens on January 1, 2026, scheduling regular meetings will ensure these members have a chance to meet one another and learn their responsibilities as Board members before appeals are filed. Even if there are no appeals, a single meeting would provide a time for them to review state regulations that govern their behavior, decide on administrative matters for future meetings, or work through scheduling or logistics that may impact those meetings. As a result, we ask that IHDA keep most of this section's existing language and require a minimum of one regular meeting of the SHAB per year.

IV. Section 395.305 Initial Pleadings by Appellants

The regulations around initial pleadings remain largely unchanged from past versions aside from changes to capitalization and updating dates in accordance with the 2023 amendments to the underlying statute. One statement that remains unchanged in Section 305 makes it clear that appellants cannot file an appeal with the SHAB until "after the final action or decision of an approving authority to deny an application for an affordable housing development." Unfortunately, as in past versions of the regulations, "final action or decision" lacks a definition, and this phrase is not referenced in the text of AHPAA itself. As a result, both potential appellants and NELGs are left to guess what actions by an NELG are appealable, and the ambiguity may deter potential appellants from filing meritorious cases.

We are especially concerned about a situation where a municipality may repeatedly delay a final decision approving or denying an affordable housing proposal to run out the clock on a developer's patience and financing stack—a situation that affordable housing developers in Illinois know all too well.[17] This is not a novel concern—both Impact for Equity (as BPI Chicago) and Housing Action Illinois submitted comments to this effect in 2012.[18] In response to those comments, IHDA pointed to Section 395.314(a)(7) as proof that the "rules already incorporate the concepts of delays of a decision by an Approving

[17] For example, Zion Woods, a 25-unit affordable development in Deerfield that was first proposed as 48 units in 2013 but not approved until 2018 with additional hurdles delaying the groundbreaking until 2024. Eric DeGrechie, *Affordable Housing Development Breaks Ground in Deerfield*, PATCH, Apr. 29, 2024, https://patch.com/illinois/deerfield/affordable-housing-development-breaks-ground-deerfield.

[18] Letter from Adam Gross, Director, Affordable Housing Program, BPI Chicago to Kristi S. Poskus, Deputy General Counsel, Ill. Hous. Dev. Auth. (Oct. 23, 2012) (on file with Impact for Equity); Letter from Bob Palmer, Policy Director, Housing Action Illinois to Kristi S. Poskus, Deputy General Counsel, Ill. Hous. Dev. Auth. (Oct. 26, 2012) (on file with Impact for Equity).

Authority."[19] However, Section 395.314 addresses an appellant's burden of proof once they've already filed an appeal. Section 395.305 is intended to give appellants clarity on what an initial pleading should include and, critically, *when it needs to be filed* ("within 45 days after the final action or decision of an Approving Authority"). Without greater clarity about what constitutes a final action or decision, it remains unclear when the clock begins running on the 45 days, which may further dissuade appellants from filing an appeal. Consequently, we propose IHDA make it clear what constitutes a "final action or decision" by adding language to Section 395.305 (or, alternatively as a definition under Section 395.103) that states:

> A final action or decision of an Approving Authority denying an application for an affordable housing development may include, but is not limited to:
>
> 1. Voting to formally deny a proposal;
> 2. Denying land use approvals or entitlements necessary for the issuing of a building permit;
> 3. Refusing to take final legislative or administrative action;
> 4. Determining an application incomplete which complies with all criteria as specified by local land use codes; or
> 5. Rendering a proposal financially infeasible by imposing conditions or fees which are not required by local land use codes and/or extensive delay which causes a source of funding to expire.

Collectively, these definitions should capture the many ways that a project can be disapproved whether or not a local government formally denies the project. If formal denial is limited to a vote by a city council or planning commission, the extreme authority local officials hold over the many expensive, time consuming, arcane aspects of land use will result in the denial of projects in ways that will prevent appellants from being heard by the SHAB, and consequently, undermine AHPAA's goal to create more affordable housing.

V. § 395.308 Reply to the Initial Pleading by Approving Authority

As with Section 305, the proposed changes to Section 308 are minimal: primarily changes to capitalization and adjustments to bring the regulations in line with the 2023 legislative amendments. While these provisions are necessary, we believe the current rulemaking process creates a unique opportunity to make additional changes to this section to make the SHAB function more efficiently. More specifically, we believe IHDA should further amend §395.308(b) as follows:

> (b) The reply to the initial pleading shall include the following:
> . . .

[19] IHDA 2012 RESPONSE TO PUBLIC COMMENTS 13 (citing to Section 395.314(a)(vii) which was recodified as Section 395.314(a)(7) during past rulemaking).

4) a statement clarifying which local, state, or federal law, if any, the Local Government relied upon as a basis for denying, or applying conditions to, the application that is the subject of the appeal.

While 308(b)(1) generally asks for the justification for a denial and "Non-Appealable Local Government Requirements," those requirements only cover certain criteria for health and safety. We do not believe that IHDA's intention is to suggest that these health and safety provisions are the only requirements which could govern a land use decision. Thus, adding a requirement to clearly link a decision to deny or apply conditions to a proposed affordable development to the law—whether that's the local zoning code or state or federal law—would make the appeals process more efficient and transparent.

While municipalities are entitled to govern their jurisdictions via legislation and through exercise of discretion, both actions are subject to constitutional and statutory limitations. Given that the SHAB's job on appeal is, in part, to determine whether denials stem from a justification in the law, or the exercise of that discretion, they need to be on notice of why the decision was made. In legal proceedings, local discretion typically receives deference, provided that the discretion is exercised in furtherance of a legitimate government interest. As a result, we believe that municipalities should, at a minimum, be able to articulate what that interest is and how a proposed development is deficient with respect to it.

Without this requirement, the SHAB cannot assess municipalities' reasoning or the legitimacy of their decisions, which will make evaluating appeals incredibly difficult. We ask that IHDA amend Section 308 as suggested above as part of the current round of rulemaking.

VI. § 395.313 Evidence

Section 313 is also largely unchanged from the existing regulations. Nevertheless, the current rulemaking process affords IHDA the opportunity to build on the existing regulations to include additional categories of evidence that the SHAB can consider as it makes decisions. In particular, we ask that the following language be added to § 395.313(g):

g) Types of Evidence: The Board shall hear evidence only as to matters actually in dispute. Factual areas in which evidence may be heard if it is relevant to issues in dispute include, but are not limited to, the following:

1) Health

. . .

G) Potential measures that could improve local sewage, water drainage, and/or fire protection, and measures by the Local Government to make such improvements or prevent such improvements from being made.

The existing types of evidence focused on health, safety, and the environment speak to the adequacy of *existing* infrastructure as a limitation on housing construction, but the state of infrastructure within municipalities is always in flux. It can age or it can be improved. It may be inadequate if left unchanged—or made sufficient with new improvements. If local governments can deny proposals for inadequate infrastructure, they may be disincentivized to proactively improve that infrastructure for new housing or consider ways to increase the capacity for a specific project with identifiable needs.

It is conceivable that a municipality would refuse funding or projects to improve local infrastructure as a proactive justification to deny future housing proposals. And they could repeatedly make those refusals and then eventually place all responsibility for improvements on new projects, making proposals financially infeasible by tasking developers with deferred city maintenance.

In other words, the current rule is purely backward-looking, analyzing the state of health and safety at the time that an application was made. However, housing and its needs are fundamentally forward-looking, based on analyzing how a community's existing infrastructure may be insufficient, but could be improved. Practically and philosophically, SHAB members should understand what potential a properly developed municipality *could* hold when making decisions. Consequently, parties should be allowed to present evidence about potential ways to improve the local infrastructure as part of the appeal process to ensure a fair and equitable outcome.

VII. Section 395.314 Appellant's Burden of Proof

Again, the regulations around the appellant's burden of proof remain largely unchanged from past versions aside from changes to capitalization and updating the potential parties in accordance with the 2023 amendments to the underlying statute. While we believe the current language provides great guidance to potential appellants on how to meet their burden when arguing an appeal, we believe two minor changes would go a long way to providing additional clarity to appellants, NELGs, and the SHAB.

To start, we ask that the meaning of "geographic focus area" be clarified for the sake of establishing which housing organizations can file appeals. We are concerned that without clarification, the SHAB will spend considerable time determining whether an appellant has standing rather than addressing the substance of the underlying complaint. More specifically, we foresee the SHAB having to consider arguments that appellant housing organizations are ineligible to file appeals because they are not *based* in the municipality where a development has been proposed. Such a narrow interpretation of "geographic focus area" would, for example, likely prevent a Chicago-based nonprofit housing advocacy organization with individual members throughout the metropolitan area from filing complaints about developments proposed outside City limits.

We read the plain language of the statute as suggesting the opposite—the municipality merely needs to be within the region (County, Metropolitan Statistical Area, etc.) where the organization builds or manages housing units or—in the case of a nonprofit—does its advocacy. This broad interpretation was presumably the intention of the General Assembly, and adding clarification to that effect to the regulations will allow the SHAB to focus on evaluating appeals rather than getting bogged down determining standing. Thus, we request that IHDA include language in its regulations establishing that a housing organization's "geographic focus area" will be evaluated on a case-by-case basis, but it can include multiple municipalities or counties or even be statewide.

In addition, we ask that IHDA re-examine its explanation of how appellants can meet their burden of proof under 395.314(a). Prior to 2019, each factor under 395.314(a) and (b) had the word "or" appended to the end of it, which made it clear that an appellant only needed to satisfy one of the listed factors to meet their burden in either scenario. Through amendments made to the regulations in 2019, however, the word "or" was removed from the end of each factor except the last one under subsection (a), and no clarifying language was added to the "umbrella" paragraph of this subsection.[20] As a result, the current language could be read to imply appellants need to satisfy all seven factors under 395.314(a) to meet their burden of proof. While a lawyer may correctly read these subsections as requiring appellants to satisfy a single factor to meet their burden, a non-attorney appellant—whether a developer, eligible resident, or employee of a housing organization—may reasonably think they need to satisfy each factor. As a result, they may be dissuaded from filing a meritorious appeal.

To combat this potential misunderstanding, we ask that IHDA edit this section in one of two ways. The first option would be to return to the pre-2019 language, with the word "or" at the end of each factor under 395.314(a). Subsection (b) was not changed during the 2019 amendments and still contains the word "or" at the end of each factor, so returning subsection (a) to its original language would ensure these sections match. Alternatively, clarifying language could be added to subsection (a) umbrella paragraph. Subsection 395.313(g), which lists the factual areas for the SHAB to consider evidence during an appeal, states "Factual areas in which evidence may be heard . . . **include, but are not limited to, the following**," before listing more than 20 different areas.[21] Similarly, 395.314(a) and (b) could be rewritten to state "the appellant shall demonstrate <u>the approving authority's actions have satisfied one or more of the following conditions</u>."

[20] 43 Ill. Reg. 6712, 6733 (June 7, 2019).
[21] 47 IAC § 395.313(g) (Emphasis added).

VIII. Conclusion

Thank you for your time and attention to our comments. We look forward to reviewing your response and hope to see the regulations revised to strengthen and clarify this critically important law.

Sincerely,

Abundant Housing Illinois
Chicago Area Fair Housing Alliance (CAFHA)
Chicago Lawyers Committee for Civil Rights
Connections for the Homeless
CUrbanism Club
Housing Action Illinois
Housing Opportunities and Maintenance for the Elderly (H.O.M.E.)
HOPE Fair Housing Center
Illinois Housing Council
Impact for Equity
League of Women Voters of Illinois
Open Communities
Metropolitan Planning Council
NAMI Illinois
Rockford Area YIMBY
Supportive Housing Providers Association (SHPA)
YIMBY Law