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Industrial Development Bonds: A Proposal for Reform

Municipalities in recent years have increasingly used tax-exempt industrial development bonds to finance the construction of facilities for private enterprise. In addition, cities have increasingly financed less traditional types of industrial development bond projects. This widespread issuance of tax-exempt bonds has had a significant impact on federal revenues. Government sources estimate that nearly $1 billion in federal revenues will be lost in 1981. Because tax exemption confers a public subsidy on the beneficiary of the bonds, these financing practices have recently attracted widespread public attention.

1. The annual volume of industrial development bond sales reached $100 million for the first time in 1960. CONGRESSIONAL BUDGET OFFICE, PRELIMINARY DRAFT OF SMALL ISSUE INDUSTRIAL DEVELOPMENT BONDS 8 (October 1980) [hereinafter cited as PRELIMINARY DRAFT]. Between 1960 and 1968, when the Revenue Adjustment Act changed the federal tax structure for industrial development bonds, the annual volume of sales rose from $100 million to $1.8 billion. Id. at 10. Estimates indicate that by 1979, sales of small issue industrial development bonds alone had reached $7 billion. Id. at 16.

2. Industrial development bonds were originally used as a means to stimulate manufacturing investment. PRELIMINARY DRAFT, supra note 1, at 23. Now many states permit the use of industrial development bonds for both industrial and commercial projects. Id. As a result of this expansion, a greater variety of activities have been eligible for industrial development bond financing. A preliminary Congressional Budget Office (CBO) study listed several of these "less traditional" uses of industrial development bonds:

1. Commercial Real Estate Development. . . . shopping centers, . . . corporate headquarters . . . new branch bank offices . . . office building and equipment purchases, including art work and stereo- phonic sound.
2. Retail Stores. . . . department stores, drugstores, supermarkets, grocery stores, restaurants, ice cream parlors, fast food chains and automobile dealerships.
3. Recreational Facilities. . . . including movie theaters, country clubs, skating rinks, bowling alleys, tennis and racquetball clubs, health clubs and golf courses.
4. Tourist facilities. . . . hotels, motels, beach resorts, ski lodges.
5. Health Facilities. . . . proprietary (for-profit) hospitals and nursing homes.

Id. at 23-24.

3. See PRELIMINARY DRAFT, supra note 1, at 58.

Minnesota municipalities have mirrored the trend toward greater use of tax-exempt industrial development bonds and have widened the scope of projects eligible for such financing. In 1979, however, the Minnesota legislature, "concerned about the recent uncontrolled proliferation of projects" being financed by these tax-exempt bonds, amended the Minnesota Municipal Industrial Development Act (the Act). The amend-

This issue has also attracted the attention of the Oversight Subcommittee of the United States House of Representatives Ways and Means Committee, which announced that it will schedule hearings on industrial development bonds in the 1981 session of Congress. Florida Democrat Sam Gibbons, Chair of the Oversight Subcommittee, stated, "I am concerned about the growth in the use of [industrial development bonds] and the shift in emphasis from factories to fast foods. The most alarming thing is that the government doesn't know how much it is losing as a result of the bond boom." Controversy, supra, at 70. At the request of this committee, an extensive study of industrial development bonds has been undertaken by the Congressional Budget Office. See Preliminary Draft, supra note 1.

5. In Minnesota, where a total of $673 million of industrial development bonds were issued in 1979, projects that received such financing included supper clubs, shopping centers, bowling alleys, bank branches, dentist offices, and raquetball clubs. See generally Minnesota Dep't of Econ. Dev., Municipal Revenue Bonds Annual Report: 1979 (on file with the Minnesota Law Review). In 1976, a total of $115 million of industrial development bonds were issued in Minnesota. Id. at 13.

6. Ridgewood Dev. Co. v. State, 294 N.W.2d 288, 290 (Minn. 1980). In Ridgewood, a company sought to finance its development of residential real estate property with approximately $30 million of municipal industrial development revenue bonds. Id. In 1978, two similar projects secured bond financing for approximately $45 million and $8.6 million each. See Minnesota Dep't of Econ. Dev., Municipal Revenue Bonds Annual Report: 1977-1978 at 7-8 (on file with the Minnesota Law Review) [hereinafter cited as Annual Report]. The average amount of municipal revenue bonds issued to industrial and commercial projects during 1978 was, however, only approximately $1.6 million per project. Id. at 9. This differential between the average amount of bonds issued for projects and the disproportionately large amount of bonding secured by residential projects contributed to the legislature's specific concern with residential real estate development projects receiving industrial development bonding.

7. When a municipality issues municipal industrial development bonds, the municipality typically acquires property and constructs a building to be leased or conveyed under a revenue agreement to private interests. See 15 E. McQuillan, Municipal Corporations § 43.32a (3d ed. 1970). The Minnesota Municipal Industrial Development Act provides that the revenue agreement "may be in the form of a lease, mortgage, direct or installment sale contract, loan agreement, take or pay or similar agreement." Minn. Stat. § 474.02(7) (1980). One of the principal features of these revenue bonds is that the interest paid on the bonds is tax-exempt. See Minn. Stat. § 474.12 (1980).

ment accomplished two purposes: first, it excluded certain types of projects from receiving industrial development bonds, and second, it prescribed a mandatory procedure that a municipality must follow when it contemplates issuing industrial development bonds. Problems with the use of industrial development bonds still remain, however, because the legislature failed to address effectively the use of ad-hoc municipal decision making that is responsible for many of the present abuses in tax-exempt industrial development financing. Moreover, the problems created by the lack of formal decision making procedures are exacerbated by the vague requirement that industrial development bonds serve a public purpose, and by restrained judicial review of municipal expenditures under the public purpose requirement.

This Note will examine the solutions available to control the rapidly increasing abuses of industrial development bonds. First, it will demonstrate the inappropriateness of using legislative standards to limit the substantive discretion extended to municipalities under the Minnesota Municipal Industrial Development Act. It will then show the inadequacy of deferential judicial review to determine whether an expenditure of public funds is legally permissible. Finally, this Note will suggest a proposal for legislative reform that would resolve many of the problems remaining after the Minnesota legislature's recent amendment of the Act. Under this proposal municipalities

9. Specifically, the term "project" was redefined to exclude "any property to be sold or to be affixed to or consumed in the production of property for sale, and . . . any housing facility to be rented or used as a permanent residence." Act of June 1, 1979, ch. 306, § 11, 1979 MINN. LAWS 797 (codified at MINN. STAT. § 474.02 (1d) (1980). At the same time that the legislature prohibited housing facilities from being financed with industrial development revenue bonds under Chapter 474, the legislature enacted Chapter 462C, which authorizes cities to "develop and administer programs of making or purchasing mortgage loans to finance the acquisition of single family housing by low and moderate income persons." Act of June 1, 1979, ch. 306, § 1, 1979 MINN. LAWS 797 (codified at MINN. STAT. § 462C.01 (1980)). To finance these programs, the legislature authorized the issuance and sale of revenue bonds. MINN. STAT. § 462C.07 (1980). The purpose of this change was to remove the financing of housing from the Industrial Development Act, where the legislature felt that the broad discretion of the Act was being abused by the financing of housing projects that did not serve a public purpose, yet to permit the financing of housing projects when they complied with the stricter public purpose constraints incorporated into the new legislation. Telephone Interview with Minnesota State Representative William Schreiber (Jan. 21, 1981).

10. See MINN. STAT. § 474.01(7b) (1980).

11. See notes 85-86 infra and accompanying text.

12. See notes 45-50 infra and accompanying text.

13. See notes 52-54 infra and accompanying text.
would be required to institute local procedures for evaluating industrial development bond projects.\(^\text{14}\) The objective of this reform is to reduce arbitrary industrial development bond approvals by promoting procedural consistency in local decision making and also by facilitating effective judicial review of those determinations.

I. STATE LEGISLATIVE STANDARDS: AN INAPPROPRIATE SOLUTION

One method to control the expenditures made by municipalities is for the legislature to adopt substantive standards that would limit by statute the types of projects eligible for industrial development bond financing.\(^\text{15}\) For example, a legislature might determine that rental housing as a class is not eligible for industrial development bonds,\(^\text{16}\) or that hotels and motels as a class are eligible for such bonds.\(^\text{17}\) A number of states have adopted this approach.\(^\text{18}\)

Although the legislative standards approach has some advantages, such as producing predictable results, being easy to administer, and reducing the number of projects financed with bonds,\(^\text{19}\) there are several reasons why this approach is undesirable. First, the legislative standards approach is inconsistent with the purpose of the Minnesota Municipal Industrial Development Act, which expresses a legislative preference for local

\(^{14}\) This recommendation has its source in Bruff, *Judicial Review in Local Government Law: A Reappraisal*, 60 Minn. L. Rev. 669 (1976). Bruff urges courts to force local governments to conform their decision-making process to a system similar to that embodied in the Administrative Procedure Act, 5 U.S.C. §§ 551-559, 701-706 (1976). Bruff, *supra*, at 695-98. This Note applies Bruff's proposal, with some modifications, to the specific municipal decision making involved in industrial development bonding. Bruff's proposal may also be suitable for application in other areas of municipal decision making.

\(^{15}\) Legislative standards are "defined simply as the substantive resolution of important policy issues by legislation." Bruff, *supra* note 14, at 680; see Moragne v. States Marine Lines, Inc., 398 U.S. 375, 392 (1970); cf. Gottschalk v. Benson, 409 U.S. 63, 73 (1972) (patent standards require congressional determination, for that is the only way to resolve conflicting views); Friend v. Northern Trust Co., 314 Ill. App. 596, 603, 42 N.E.2d 330, 334 (1942) (question of what shall constitute grounds for divorce is one of public policy and is for legislature to decide).

\(^{16}\) See note 7 *supra*.

\(^{17}\) See Minn. Stat. § 474.02 (1b) (1980).


\(^{19}\) The advantages associated with the legislative standards approach stem from its ability to provide a single, substantive, statutory standard that must be complied with by all local governments throughout a state.
action. The Act declares that "[i]t is the policy of the state to facilitate and encourage action by local government units to prevent the economic deterioration of such areas." By encouraging local action through this provision of the Act, the legislature recognized that local conditions vary and that city hall might provide a better vantage point than the state legislature for identifying and curing these local conditions. The legislative standards mechanism is incompatible with local action because it attempts to force industrial development bond expenditures into a predetermined set of legislatively sanctioned projects. Because this system restricts the ability of municipalities to rectify troublesome local conditions, it frustrates the Act's purpose of encouraging local government action.

In addition, the legislative standards method is contrary to the concept of home rule, a doctrine under which a state constitution grants a city the authority to draft and adopt a charter for its own government. Although recent developments, particularly in land use planning, have restrained municipalities' exercise of home rule powers in some contexts, the principles

20. See Minn. Stat. § 474.01(2) (1980).
21. Id.

Since cities have a better vantage point, they are "vested with broad discretion in determining whether particular projects serve a public purpose." R.E. Short Co. v. City of Minneapolis, 269 N.W.2d 331, 338 (Minn. 1978).
23. Bruff, supra note 14, at 681. Bruff notes that the "confining effect of legislative standards is increased by the operation of Dillon's rule, which enjoins strict construction of statutory delegations of power to cities." Id. at 681 n.63; see notes 42-44 infra and accompanying text.
24. Minn. Stat. § 474.01(2) (1980); see text accompanying note 21 supra.

Even if legislative standards were more generalized, such as to prescribe that X jobs must accompany each million dollars of bonding, the same arguments as those pertaining to specific legislative standards would be applicable. Moreover, for generalized standards to be workable, they would have to encompass all of the various types of projects possible under industrial development bonding. Once such general standards were imposed, it would be mandatory that applications fulfilling those requirements be granted industrial development bonding. Thus, local governments would be stripped of all decision-making discretion.

25. The Minnesota Constitution provides that "[a]ny local government unit when authorized by law may adopt a home rule charter for its government." Minn. Const. art. 12, § 4; accord, Cal. Const. art. 11, § 8; Mich. Const. art. 7, § 22; N.Y. Const. art. 9, § 2; Wis. Const. art. 11, § 3.
26. In land use planning there has been a trend toward state or regional control as contrasted with local control. See, e.g., Rose, Conflict Between Re-
of home rule remain valid, especially within the context of industrial development bonding. Although home rule advocates have advanced different rationales for the doctrine over the years, recent proponents have urged the adoption of home rule as a method to increase local government's power to solve the problems of urbanization, a goal similar to that articulated in the Minnesota Municipal Industrial Development Act. Legislative standards for industrial development bonds, however, contradict the local control concept of home rule by requiring a municipality to undertake only those projects authorized by the legislature.

Finally, a system favoring legislative standards would inevitably inhibit municipal approval of creative industrial development bond projects. Municipal studies might indicate, for example, that economic deterioration caused by transportationalism and Home Rule: The Ambivalence of Recent Planning Law Decisions, 31 Rutgers L. Rev. 1, 8, 18, 20-21 (1978); Schnidman, The Courts Enter the Zoning Game: Will Local Governments Win or Lose?, 43 Geo. Wash. L. Rev. 590, 606 (1975).

Minnesota has recently implemented a broad range of legislation allowing state administrative agencies to preempt and supervise local land use regulation. See, e.g., Minn. Stat. §§ 4.10-36 (1980) (State Planning Agency); id. §§ 462.381-398 (regional development commissions); see Note, State Intervention into Local Land Use Regulation—A Proposal for Reform of Minnesota Legislation, 63 Minn. L. Rev. 1259, 1259 (1979) (proposing that the American Law Institute's Model Land Development Code "be used as a guide to the formation of legislation that would eliminate interagency conflict" caused by recent legislation attempting "to ensure that local land use decisions reflect state and regional interests").

27. See, e.g., Gotherman, Municipal Home Rule in Ohio, 8 Capital U.L. Rev. 243, 262 (1978) (suggesting that home rule in Ohio is "a viable legal and political doctrine"); Howard, Home Rule in Georgia: An Analysis of State and Local Power, 9 Ga. L. Rev. 757, 757-58, 773-78 (1975) (interpreting a recently adopted constitutional amendment as giving "local governments a degree of self-government far exceeding that previously granted to them under home rule"); Comment, A New Approach to Home Rule in Illinois—County of Cook v. John Sexton Contractors Co., 29 De Paul L. Rev. 603, 612-15 (1980) (suggesting that a recent decision by the Illinois Supreme Court indicates that the court "has overcome its reluctance to construe the powers of a home rule unit broadly in accordance with the spirit of the Illinois Constitution").

28. See, e.g., Comment, supra note 27, at 604 and n.6 (stating that the 1970 Illinois constitutional convention's primary purpose for adopting home rule was to help local governments solve urban problems); see notes 20-22 supra and accompanying text.

29. See text accompanying notes 16-17 supra.

tional difficulties could be remedied only by multi-use projects that combined industrial and residential uses.\textsuperscript{31} The amendment to the Minnesota Municipal Industrial Development Act, however, would prohibit such a project.\textsuperscript{32} Thus, substantive legislative standards might prevent a municipality from selecting the best solution for a local problem.\textsuperscript{33}

An analysis of the legislative standards approach demonstrates the importance of giving local governments the discretion to respond to distinctive local conditions. Past practice illustrates, however, that nothing is more subject to abuse than discretionary decision making.\textsuperscript{34} A system of judicial review may curb this abuse by permitting the essential element of discretion in local government decision making, while providing the necessary control over such discretion.

II. TRADITIONAL JUDICIAL REVIEW: AN INADEQUATE SOLUTION

Judicial review of industrial development bonding occurs primarily when a municipality sanctions such bond financing for a project.\textsuperscript{35} As a result, deferential judicial review does not greatly decrease the risk of authorizing projects that have been arbitrarily or capriciously approved by a municipality. In addition, the modern trend of courts to construe liberally\textsuperscript{36} the requirement that such projects serve a "public purpose" allows more projects to qualify for tax-exempt financing than have qualified in the past.\textsuperscript{37}

When reviewing industrial development bonding decisions, courts apply three distinct doctrines: the delegation doctrine, Dillon's rule, and the public purpose doctrine. Under the dele-\textsuperscript{37}
gation doctrine, courts examine the delegating statute for constitutional validity.\(^3\) Modern delegation doctrine recognizes the necessity for legislatures to delegate power to municipalities;\(^3\) the only requirement is that the delegating legislation contain standards to guide the exercise of power by cities.\(^4\) Because of the effect of Dillon's rule, however, these standards have not prevented cities from exercising power arbitrarily.

Many courts apply Dillon's rule to determine "whether the local exercise of power is within the terms of the delegating statute."\(^4\) This rule requires strict construction of statutory delegations, and denial of a municipality's power to act if any doubt exists concerning its validity.\(^4\)

Responding to overly

\(^{38}\) See, e.g., In re Garrison Diversion Conservancy Dist., 144 N.W.2d 82, 91-93 (N.D. 1966); City of Milwaukee v. Sewerage Comm'n, 268 Wis. 342, 349-51, 67 N.W.2d 624, 628-29 (1954).

\(^{39}\) In its traditional form, the delegation doctrine held "that power vested in the constitution in the legislature may not be delegated." Bruff, supra note 14, at 678; see, e.g., People ex rel. Chicago Dryer Co. v. City of Chicago, 413 Ill. 315, 320, 109 N.E.2d 201, 204 (1952). See generally 2 E. McQuillan, Municipal Corporations §§ 4.08-.09 (3d ed. 1979).

The policies underlying this traditional view of the doctrine were two-fold: "first, protection against arbitrariness through the prevention of undue concentration of power in one branch of government; second, functional efficiency through the allocation of tasks to the branches of government best suited to exercise them." Bruff, supra note 14, at 678 (footnote omitted); see, e.g., Opinion of the Justices, 110 N.H. 359, 362-63, 266 A.2d 823, 825-26 (1970); David v. Vesta Co., 45 N.J. 301, 321-25, 212 A.2d 345, 355-58 (1965).

\(^{40}\) See Members of the Jamestown School Comm. v. Schmidt, 405 A.2d 16, 23-24 (R.I. 1979); Polygon Corp. v. City of Seattle, 90 Wash. 2d 59, 66, 578 P.2d 1309, 313 (1978). See generally 1 K. Davis, Administrative Law Treatise §§ 2.01-.15 (1958 & Supp. 1970); L. Jaffe, Judicial Control of Administrative Action 32-34, 73-85 (abbr. ed. 1965). These standards may be so specific as to cause rigidity, or so broad as to be only "platitudinous requirements that the delegate advance the public... health, safety, and welfare." Bruff, supra note 14, at 682. Dillon's rule has the effect, however, of producing broad standards as opposed to specific standards. See notes 54-55 infra and accompanying text.

\(^{41}\) Bruff, supra note 14, at 669; see, e.g., City of Phoenix v. Arizona Sash, Door & Glass Co., 80 Ariz. 100, 102-03, 293 P.2d 438, 439 (1956); City of Osceola v. Whistle, 241 Ark. 604, 605-06, 410 S.W.2d 393, 394 (1966); Father Basil's Lodge, Inc. v. City of Chicago, 393 Ill. 246, 250-53, 65 N.E.2d 805, 810-12 (1946).

\(^{42}\) Dillon's rule is as follows:

It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the accomplishment of the declared objects and purposes of the corporation—not simply convenient, but indispensable. Any fair, reasonable, substantial doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied.

1 I. Dillon, Commentaries on the Law of Municipal Corporations § 237 (5th ed. 1911) (emphasis in original). This rule favoring state sovereignty received its most famous expression by Judge John F. Dillon in City of Clinton v. Cedar
technical applications of the rule by courts,\textsuperscript{43} legislatures have delegated broad powers to cities without meaningful guidelines for implementation.\textsuperscript{44} Thus, the effect of Dillon's rule has been to expand local power rather than to confine it.

Finally, the satisfaction of state and federal public purpose provisions\textsuperscript{45} requires that funds be expended only for public purposes.\textsuperscript{46} This requirement is not, however, susceptible to


\textsuperscript{44} Dillon's rule, which was widely adopted by courts in the early twentieth century as a rule of statutory construction, later functioned like a rule of constitutional interpretation in the context of home rule powers. See id.; Michael & Norton, Home Rule in Illinois: A Functional Analysis, 1978 U. ILL. L.F. 559, 559-63 (Dillon's rule remains applicable to some delegations of power under the Illinois constitution); Note, Dillon Rule—A Limit on Local Government Powers, 41 Mo. L. Rev. 546, 547-48, 558-68 (1976) (noting that Dillon's rule, with minor alterations, has been adopted in almost every state, and remains applicable despite widespread criticism by contemporary observers that the rule is "an archaic and unrealistic limit on city powers"). See generally Serbine, Municipal Powers, in 24 MINN. STAT. ANN. 73, 78-79 (1958); J. Sutherland, Statutes and Statutory Construction § 64.02 (4th ed. C. Sands 1974).


\textsuperscript{46} See Bruff, supra note 14, at 687. Delegations to cities often include "general welfare" clauses which grant a general power to legislate without specific statutory authority. See, e.g., 1 C. Antieau, supra note 43, § 5.07 ("The difficulty in making specific enumeration of all such powers as may be properly delegated to municipal corporations renders it necessary to confer such power in general terms.") (footnote omitted). Compare 6 E. McQuillan, supra note 7, §§ 24.43-44 ("[C]ourts uniformly regard [general welfare clauses] as ample authority for a reasonable exercise . . . of a broad and varied municipal activity to protect the health, morals, peace and good order of the community, [and] to promote its welfare in trade, commerce, industry, and manufacture.") (footnote omitted) with Minn. Stat. § 474.01(2) (1977) ("The welfare of the state requires the active promotion . . . and development of economically sound industry . . . through governmental action for the purpose of preventing, so far as possible, the emergence of blighted and marginal lands and areas of chronic unemployment.").

\textsuperscript{47} For the evolution of the public purpose doctrine in federal constitutional law, see generally Carmichael v. Southern Coal & Coke Co., 301 U.S. 495 (1937) (upholding the Alabama State Unemployment Compensation Act as an exercise of the taxing power of the state to effect a public purpose); Milheim v. Moffat Tunnel Improvement Dist., 262 U.S. 710 (1923) (upholding the public purpose claim for bonds sold to finance the cost of a tunnel); Green v. Frazier, 253 U.S. 233 (1920) (upholding the public purpose claim for legislation creating a state industrial commission to operate several business enterprises); Jones v.
precise definition, and the tests fashioned by the courts to decide whether a municipal expenditure serves a public purpose reflect this imprecision. These vague standards invest considerable discretion in municipalities to determine the propriety of expenditures, without prescribing effective guidelines to direct municipal decision makers.

To determine whether an expenditure of public funds, such as municipal bonding, is for a public purpose, courts have used various indicia. The extent of the judicial deference afforded one factor, the expression of approval by the municipal legislative body, illustrates the extensive discretion that courts permit municipalities to exercise. The lack of logic underlying such deference is evident: "an express desire to spend municip-

City of Portland, 245 U.S. 217 (1917) (upholding the public purpose claim for the establishment of a municipal coal and fuel yard which would sell fuel at cost).

The public purpose requirement of federal law has been incorporated into the Minnesota Constitution. See MINN. CONST. art. 10, § 1; accord, ILL. CONST. art. 8, § 1(a); People ex rel. City of Urbana v. Paley, 68 Ill. 2d 62, 69, 368 N.E.2d 915, 916 (1977); IOWA CONST. art. 3, § 31; Frost v. State, 172 N.W.2d 575, 579 (Iowa 1969).

47. See, e.g., City of Pipestone v. Madsen, 287 Minn. 357, 364, 178 N.W.2d 594, 599 (1970); Visina v. Freeman, 252 Minn. 177, 184, 89 N.W.2d 635, 643 (1958); 15 E. McQuillan, supra note 7, § 39.19.

As a guideline, some courts have construed public purpose to mean "such an activity as will serve as a benefit to the community as a body and which, at the same time is directly related to the functions of government." R.E. Short Co. v. City of Minneapolis, 269 N.W.2d 331, 337 (Minn. 1978) (quoting Visina v. Freeman, 252 Minn. 177, 184, 89 N.W.2d 635, 643 (1958)). Accord, State ex rel. McClure v. Hagerman, 155 Ohio St. 320, 325, 98 N.E.2d 835, 838 (1951) (municipalities may spend public money for purposes conducive to the "public health, safety, morals, general welfare, security, prosperity, and contentment of all the inhabitants or residents").

48. See notes 50-54 infra and accompanying text.


50. One commentator suggests that courts use six principal factors to determine the propriety of municipal bonding: "Prior characterization, legislative or voter approval, general economic benefit, competition with private enterprise, number of beneficiaries, and necessity because of infeasibility of private performance." Note, supra note 37, at 227. The commentator rightly concludes that most of these factors are not helpful in determining whether an expenditure is a public purpose. See id. at 232-40.

51. See Note, supra note 37, at 234. It is important to recognize that a revenue bond, such as those issued under the Minnesota Municipal Industrial Development Act, does not require approval by a general referendum. See MINN. STAT. § 474.04 (1980).

52. See, e.g., R.E. Short Co. v. City of Minneapolis, 269 N.W.2d 331, 337 (Minn. 1978) (courts "pay great deference to the initial legislative determination that a particular project serves a public purpose"). See also Opinion to the
pal funds in a particular way [evidenced by a resolution of a city council] by no means assures that the use is public.”

Judicial deference in these circumstances is reasonable only if it is assumed that municipal decision making is performed in a rational and nonarbitrary fashion. This assumption is unfounded, however, because rationality and nonarbitrariness are themselves the subject of the judicial inquiry.

All three doctrines applied in judicial review—the delegation doctrine, Dillon’s rule, and the public purpose doctrine—impede courts from preventing arbitrary municipal authorization of industrial development bonds. For judicial review of industrial development bonds issues to be effective, there must be constraints, not necessarily on substantive determinations, but on local decision-making procedures. Because local governments, desiring to maintain their decision making independence, would not be likely to comply voluntarily with requirements that are imposed against only a few towns, judicially imposed procedural requirements would not be likely to succeed. A system of legislative reform, on the other hand, could effectively constrain municipal decision making and yet allow municipalities the opportunity to respond to local conditions.

III. LEGISLATIVE REFORM OF INDUSTRIAL DEVELOPMENT BOND FINANCING

The procedural reforms enacted in the amendment to the Minnesota Municipal Industrial Development Act substantially enhance previous procedures by requiring a notice-and-comment public hearing. The previous procedures only re-

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53. Note, supra note 37, at 234.

54. Municipal expenditures have been overruled when “the primary object of the proposed use] is to promote some private end,” City of Pipestone v. Madsen, 287 Minn. 357, 365, 178 N.W.2d 594, 599 (1970) (quoting Burns v. Essling, 156 Minn. 171, 174, 194 N.W. 404, 405 (1923)), or when it is “clearly apparent that the municipality's determination] is without reasonable foundation,” City of Tulsa v. Williamson, 276 P.2d 203, 214 (Okla. 1954), or is “manifestly arbitrary and incorrect.” State ex rel. McClure v. Hagerman, 155 Ohio St. 320, 325, 98 N.E.2d 835, 838 (1951) (quoting 37 AM. JUR. MUNICIPAL CORPORATIONS § 120, at 735 (1941)).

55. See, e.g., R. Babcock, THE ZONING GAME (1966). Babcock posits that “[j]udicial surveillance of local [zoning] procedure under our present enabling legislation is ineffectual. A reversal or remand by the courts because of sloppy procedure before the board of appeals of Broadview has not, in my experience, the slightest impact on the practices of neighboring Westchester.” Id. at 156.

56. See notes 8-10 supra and accompanying text.
quired a municipality considering financing a project with industrial development bonds to submit a detailed application to the Commissioner of Securities. The Act now requires, in addition to these procedures, that before submitting the application to the Commissioner the municipality "conduct a public hearing on the proposal to undertake and finance the project." The Act specifies that notice be published of the time and place of the hearing, the place and times for inspection of a draft copy of the proposed application to the Commissioner of

57. In order to receive approval from the Commissioner of Securities the municipality must submit the following information:

1. Name of firm
2. Nature and description of the firm's business
3. Scope of the project to be financed
4. Proposed term of the revenue agreement
5. Estimated dollar cost of project and allocation of bond proceeds
6. Estimated number of new jobs to be created
7. A resolution of the municipality giving preliminary approval to the project
8. A letter of intent to purchase the bond issue from an underwriter or an analysis of a fiscal consultant as to the feasibility of the project from a financial standpoint
9. A comprehensive statement indicating how the project satisfies the public purposes and policies of the Minnesota Industrial Development Act
10. A preliminary opinion of bond counsel as to the legality of the issue


Although these requirements appear to be quite stringent, the following excerpt from an application to the Commissioner of Securities to receive industrial development bonding for a restaurant demonstrates that the "comprehensive statement" of "public purposes and policies" submitted to the Commissioner is little more than a restatement of the public policies outlined in the Minnesota Industrial Development Act.

Representatives of the company estimate that, as a result of the acquisition and construction of the Project, the Company will employ approximately one hundred (100) persons in the City and the surrounding area, in addition to those currently employed by the company. The City Council is concerned about the level of unemployment in the City and the surrounding area and the resulting movement of persons to other areas where jobs are more plentiful, and believes that the existence of the Project in the City would help alleviate those problems.

Representatives of the Company estimate that the acquisition and construction of the Project will result in an additional annual payroll of approximately $225,000, based on wage rates currently in effect. The City Council believes that a substantial percentage of that additional payroll will be spent on housing, food and other goods and services in the City and surrounding area, thus benefitting the local economy.


58. MINN. STAT. § 474.01 (7b) (1980).
Securities, and a statement of the "general nature" of the project. At the hearing, the municipality must give "all parties who appear . . . an opportunity to express their views with respect to the proposal." Following completion of the public hearing, the municipality must adopt "a resolution determining whether or not to proceed with the project."

All of these procedural reforms significantly increase the openness of the decision-making process. More people have an opportunity to participate in such proceedings; thus, more interests can be represented. Although these procedures diminish the likelihood that municipalities will make arbitrary decisions concerning industrial bond financing, additional benefits can be derived from requiring a record of such proceedings.

A. A Model for Reform

The components of the legislative reform recommended for industrial development bonding are a requirement that municipalities adopt local procedures for the decision-making process, a requirement that all bond application proceedings be performed on the record, and a legislative statement encouraging municipalities to adopt local standards to assist in the decision-making process.

1. Parameters of the Model

The primary goal of industrial development bond reform should be to "provide a framework for principled decision-making . . . [thereby] enhancing the integrity of the [decision-making] process." To achieve this goal, a legislatively mandated

59. Id.
60. Id.
61. Id.
62. Four bills have recently been introduced in the Minnesota legislature to further amend industrial development bonding law. Two of the bills propose repeal of Minnesota Statutes § 474.02, subdivisions 1a & 1b (1980). Minn. H.F. No. 22, 72 Legis., 1981 Sess. § 1; Minn. S.F. No. 73, 72 Legis., 1981 Sess. § 1. These bills would prohibit the use of industrial development bonds for commercial, as distinguished from industrial, purposes. The other two bills impose additional reporting requirements on municipalities, and require adoption of municipal "operating guidelines." Minn. H.F. No. 268, 72 Legis., 1981 Sess. §§ 3, 4; Minn. S.F. No. 205, 72 Legis., 1981 Sess. §§ 3, 4. These guidelines are statements of "the authorized uses for municipal industrial revenue bonds within that municipality." Minn. H.F. No. 268, 72 Legis., 1981 Sess. § 3; Minn. S.F. No. 205, 72 Legis., 1981 Sess. § 3.
requirement that municipalities adopt local procedures for the issuance of industrial development bonds is essential. Such procedures, by contributing to the fairness and openness of industrial development bond financing determinations, can help eliminate arbitrary exercises of discretionary power by municipalities. Principles of procedural fairness require that an applicant for industrial development bonds know and have an opportunity to respond to the information considered by the municipality, as well as an explanation for the conclusions reached. In addition, principles of openness require public

64. See, e.g., K. DAVIS, ADMINISTRATIVE LAW TEXT § 4.03 (3d ed. 1972). Another area of municipal decision making that exhibits problems similar to those of industrial development bonding is zoning. Babcock, noting that most zoning altercations "are settled by crude tribal adaptations of medieval trial by fire" or are "concluded by confused and ad hoc injunctions of bewildered courts," R. BABCOCK, supra note 55, at 154, suggests that "[o]nly the legislature can prescribe adequate rules for local administrative procedure and record-keeping." Id. at 156.

65. See, e.g., Papachristou v. City of Jacksonville, 405 U.S. 156, 170 (1971) (an ordinance which provided "no standards governing the exercise of the discretion granted by the ordinance . . . permits and encourages an arbitrary and discriminatory enforcement of the law"); Environmental Defense Fund, Inc., v. Ruckelshaus, 439 F.2d 584, 596 (D.C. Cir. 1971) ("To protect [fundamental personal interests] from administrative arbitrariness . . . [c]ourts should require administrative officers to articulate the standards and principles that govern their discretionary decisions in as much detail as possible."); Holmes v. New York City Hous. Auth., 398 F.2d 262, 265 (2d Cir. 1968) ("It hardly need be said that the existence of an absolute and uncontrolled discretion in an agency of government vested with the administration of a vast program, such as public housing, would be an intolerable invitation to abuse. . . . For this reason alone due process requires that selections among applicants be made in accordance with 'ascertainable standards.'"). See also K. DAVIS, DISCRETIONARY JUSTICE 98-99 (1969); Garner, The Informal Actions of the Federal Government, 26 AM. U.L. REV. 799, 802 (1977).

66. See, e.g., Morgan v. United States, 304 U.S. 1, 18 (1938) ("The right to a hearing [—a fair and open hearing—] embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them."); North Ala. Express, Inc. v. United States, 585 F.2d 783, 786 (5th Cir. 1979) ("[D]ue process requires that interested parties be given a reasonable opportunity to know the claims of adverse parties and an opportunity to meet them."). See generally K. DAVIS, supra note 64, at § 4.07.

67. See, e.g., Environmental Defense Fund, Inc. v. Ruckelshaus, 439 F.2d 584, 598 (D.C. Cir. 1971) ("Discretionary decisions should more often be supported with findings of facts and reasoned opinions." (footnote omitted)); Gerard v. Schrader, 531 P.2d 872, 879 (Wyo. 1975) ("It is insufficient for an administrative agency to state only an ultimate fact or conclusion, but each ultimate fact or conclusion must be thoroughly explained in order for a court to determine upon what basis each ultimate fact or conclusion was reached."); cert. denied, 423 U.S. 904 (1975). See also Sofaer, Judicial Control of Informal Discretionary Adjudication and Enforcement, 72 COLUM. L. REV. 1293, 1310 (1972); Verkuil, A Study of Informal Adjudication Procedures, 43 U. CHI. L. REV. 737, 790 (1976).
hearings on an industrial development bond application, especially in light of the requirement that projects serve a public purpose.

A procedural device that is indispensible to the success of industrial development bond reform is the requirement of a record. One commentator has noted that "[t]he cloak for arbitrary decision-making is the absence of any command . . . to make a record. If little or nothing is put on the record by the municipal agency, the less chance of reversal." A record can thus insulate the decision-making process from determinations based upon extrinsic factors by exposing their involvement to the reviewing court. This requirement also facilitates effective judicial review of municipal determinations by providing a reviewing court with the precise facts, findings, and reasons upon which the municipality's decision rests. The reviewing court can thereby better understand what it is reviewing, and avoid speculation. The insistence on a record, therefore, serves as a vital link to improving the system of judicial review that has traditionally been the primary check on discretionary municipal decision making.

68. See, e.g., Bagby v. School Dist. No. 1, Denver, 186 Colo. 428, 434, 528 P.2d 1299, 1302 (1974) (Colorado statute prohibiting "making final policy decisions or taking formal action in other than a public meeting . . . [is] designed precisely to prevent the abuse of 'secret' or 'star chamber sessions' of public bodies."); Drew v. Insurance Comm'r & Treasurer, 330 So. 2d 794, 796 (Fla. App. 1976) ("An administrative proceeding should provide a citizen with a fair, open, and impartial hearing." (footnote omitted)); Adams v. Marshall, 212 Kan. 595, 601, 512 P.2d 365, 371 (1973) ("[P]roceedings of a judicial nature held behind closed doors and shielded from public scrutiny have long been repugnant to our system of justice."). See generally K. Davis, supra note 64, § 4.06.

69. No equivalent to a formal record requirement for municipal procedure exists presently in Minnesota. The only requirement that is remotely similar requires only that a clerk maintain "a minute book, noting therein all proceedings of the council." Minn. Stat. § 412.151 (1980). These minutes are inadequate to serve as a record for judicial review, however, because exactness comparable with judicial records is not mandated. See, e.g., Hokanson v. High School Dist. No. Eight, 121 Ariz. 264, 268, 589 P.2d 907, 911 (Ct. App. 1979); Walters v. Validation of $3,750,000.00 School Bonds, 364 So. 2d 274, 276 (Miss. 1978); Houman v. Mayor of Pompton Lakes, 155 N.J. Super. 129, 172, 382 A.2d 413, 455-36 (1977); Op. Att'y Gen. 470c (Minn. Feb. 18, 1959). Because of this deficiency in the record of municipal proceedings, it is necessary to incorporate the administrative law procedure requiring a rulemaking record. See note 95 infra and accompanying text.

70. R. Babcock, supra note 55, at 159.

71. See, e.g., id.

72. See, e.g., R.E. Short Co. v. City of Minneapolis, 269 N.W.2d 331, 340 (Minn. 1978).

73. See, e.g., Sofaer, supra note 67, at 1310 (1972); Verkuil, supra note 67, at 790-91. See generally K. Davis, supra note 64, § 16.07.

74. See notes 38-45 supra and accompanying text.
In addition, the legislature should permit municipalities to adopt local standards for industrial development bond determinations. Local standards have the advantage of being more flexible than the legislative standards approach because local conditions or preferences that may affect public purpose findings can be incorporated into the standards. Properly formulated standards could serve as a municipality's individualized declaration of goals to be achieved with industrial development bond projects. Prospective bond financing applicants could thus have advance knowledge of a municipality's specific requirements for industrial development bonding approval. More importantly, capricious municipal approval of projects that do not conform to these standards would more readily be exposed to the reviewing court.

Imposition of this reform model may increase the cost of industrial development bonds, or adversely affect the marketability of such bonds. In addition, municipalities may still find

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75. These local standards would be most appropriate in cities that use industrial development bonding frequently. See Annual Report, supra note 6 (listing amount and location of bond issues in Minnesota during the June 1977 through December 1978 period). Although these standards do not necessarily have to reflect quantitative or class-based choices, see text accompanying notes 16-17 supra, they should be limiting criteria.

76. See text accompanying note 22 supra.

77. See text accompanying notes 36-37 supra.

78. These standards could be effective only when concepts of "public purpose" incorporated in the Minnesota Industrial Development Act are particularized to reflect specific local conditions. See text accompanying note 21 supra.

79. See, e.g., Bruff, supra note 14, at 692.

80. If, for instance, local standards sought to promote compatibility between bond projects and the surrounding environment, and yet a nuisance-like activity was approved for a residential area, a reviewing court would have reason to question the judgment of the municipality.

81. One of the costs inherent in the proposed reform is incurred in producing a record of the proceedings. Such costs, however, could be paid out of the proceeds of the bonds as reasonable incidental expenses to the issuance of the bonds. See, e.g., Bell v. Board of Educ., 343 S.W.2d 804, 808 (Ky. 1961); First Sewerage Dist. v. City Council, 215 La. 428, 444, 40 So. 2d 808, 814 (1949); Mayor & Bd. of Alderman v. Engle, 211 Miss. 380, 395-96, 51 So. 2d 564, 570 (1951).

The effective judicial activity that could result from the proposed system of reform may also be seen as affecting the marketability of industrial development bonds. In a discussion on the effect litigation has on the marketability of municipal bonds, one source notes that:

A municipal bond underwriter . . . wants assurance that he is buying bonds which are valid binding obligations of the issuer. Any challenge of the validity of the bonds, even though it be without apparent merit, raises a possibility that the bonds may be invalidated and may impair or ruin the marketability of the bonds.
it difficult not to approve bond financing applications without more direct federal or state limitations on bond issuance. These speculative costs and problems are, however, outweighed by the benefits that reform can achieve by improving the structure of industrial development bonding at both the municipal and judicial levels.

2. Impetus for the Model

Many of the recommendations for industrial development bond reform correspond to mechanisms implemented to cure the problems of administrative agencies. This similarity of cures is inevitable since the problems of municipal decision making in industrial development bonding resemble the problems that existed in administrative agencies prior to the adoption of the Administrative Procedure Act (APA). The problems of pre-APA administrative agencies included "the combination of judicial with executive or legislative functions . . . [and] the lack of effective independent review or judicial control of administrative decisions." Lack of clear structural

SANSE SUTIS, NO-LITIGATION CERTIFICATES 4, 5 (1958). Thus, it is contended that the "less risk" that accompanies a bond, the more attractive the bond is to potential purchasers. See id. Strict adherents to this philosophy may suggest that from the standpoint of prospective bond purchasers, a legislative standards approach presents more predictability than judicial review as a means to constrain expenditures for industrial development bonding. This suggestion, however, is an inadequate short-term solution because its rigid approach to eliminating abuses of industrial development bonding will effectively eliminate the ability of local government units to respond to unique local conditions. See notes 20-24 supra and accompanying text. Although effective judicial review may cause some uncertainty at first, this effect will be minimized as municipalities conform their decision making to considerations appropriate to public purpose concepts. See, e.g., notes 95 & 105 infra. This solution, therefore, can improve municipal decision making while still allowing municipalities to exercise discretion within reasonable limits.

82. See, e.g., Bergan, Industry's Bondage Fetish, THE WASHINGTON MONTHLY, Jan. 1981, at 23 (suggesting that "[t]here is no reason to expect businesses to curb their appetites for [industrial development bonds] . . . [n]or are states and cities likely to slow the pace of [industrial development bond] growth"); Controversy, supra note 4, at 72 (suggesting that the federal government has an interest in regulating industrial development bonds, whereas cities use the bonds for "competitive reasons"); Greene, supra note 4, at 69 (suggesting that the states "might be better off" if the federal government restricted industrial development bonds).


84. Report of the Special Comm. on Administrative Law, 61 A.B.A. REP. 720, 724 (1936). The American Bar Association (ABA) found especially disturbing the "tendency to avoid making any [statutory] provision whatsoever for judicial review, and, so far as possible, to avoid the possibility of such review." Report of the Special Comm. on Administrative Law, 59 A.B.A. REP. 539, 547 (1934). At Congressional hearings for proposed administrative procedure
separations of power,\textsuperscript{85} as well as inadequate judicial review of decision making,\textsuperscript{86} also characterize the process involved in industrial development bonding. These similarities suggest that the APA can serve as a useful guideline to implementing industrial development bond reforms.\textsuperscript{87}

acts, members of the ABA argued that strict judicial review was necessary to control the agencies. \textit{See generally Administrative Procedure: Hearings on S. 674, S. 675, & S. 918 Before a Subcomm. of the Senate Comm. on the Judiciary, 77th Cong., 1st Sess. (pt. 3) 925-30 (1941) (testimony of Jacob Lashly); \textit{id.} at 939-42 (testimony of Thomas B. Gay); \textit{id.} at 957-79 (testimony of O. McGuire) [hereinafter cited as \textit{Hearings}].

The critique and recommendations of the ABA were disputed, in part, by the Attorney General’s Committee on Administrative Procedure. The Committee recommended against enlarging the factual inquiry of the courts generally, for “[d]issatisfaction with existing standards as to the scope of judicial review derives largely from dissatisfaction with the fact-finding procedures . . . employed by the administrative bodies.” \textit{S. Doc. No. 8, 77th Cong., 1st Sess. 92 (1941)} [hereinafter cited as \textit{S. Doc. No. 8}]. Changes in administrative fact-finding procedures were recommended that would “inspire confidence and . . . obviate the reasons for change in the scope of judicial review.” \textit{id.} at 92. \textit{See also Hearings, supra} (pt. 2) at 943-52 (testimony of Harry Shulman).

35. The requirement of separation of powers is generally held inapplicable to municipalities. \textit{See, e.g.,} County of Mariposa v. Merced Irrigation Dist., 32 Cal. 2d 467, 476-77, 196 P.2d 920, 926 (1949); Flanigan v. Preferred Dev. Corp., 226 Ga. 267, 268, 174 S.E.2d 425, 426 (1970); Pressman v. D'Alesandro, 193 Md. 672, 679, 69 A.2d 453, 454 (1949). Municipal governing bodies are often small and unicameral, see 1 C. \textit{Anteau, supra} note 43, § 4.00; and are authorized to perform both legislative and executive functions. \textit{See} Shanley v. Jankura, 144 Conn. 694, 703, 137 A.2d 536, 541 (1957); Mara v. Township of Parsippany-Troy Hills, 24 N.J. 113, 119, 130 A.2d 828, 830 (1957); Myers v. Schiering, 27 Ohio St. 2d 11, 13, 271 N.E.2d 864, 865 (1971); Bruff, \textit{supra} note 14, at 673, 693.

36. \textit{See} notes 35-55 \textit{supra} and accompanying text.

37. The Attorney General’s Committee on Administrative Procedure observed that:

\begin{quote}
Running through the criticisms of administrative procedure is the desire to prevent either one of two major objectives from being furthered by the sacrifice of the other. It is well recognized that the purpose of Congress in creating or utilizing an administrative agency is to further some public interest or policy which it has embodied in law . . . . But everyone also recognizes that these public purposes are intended to be advanced with impartial justice to all private interests involved and with full recognition of the rights secured by law. Powers must be effectively exercised in the public interest, but they must not be arbitrarily exercised or exercised with partiality for some individuals and discrimination against others.
\end{quote}

\textit{S. Doc. No. 8, supra} note 84, at 2.

In examining the rulemaking process, the Committee noted the inadequacy of the hearing process. In some agencies hearings were not required for the issuance of regulations. \textit{See S. Doc. No. 10, 77th Cong., 1st Sess. (pt. 7) 65-67 (1941) (Bureau of Fisheries); \textit{id.} (pt. 9) at 64-65 (Internal Revenue Service). In others the hearing was held, but only after a decision had been reached. See \textit{id.} (pt. 2) at 7 (War Dept. Engineering Dept.). The Committee highlighted the need to “improve, without rigidifying, the rule-making process by emphasizing the importance of outside participation prior to the issuance of rules.” \textit{S. Doc. No. 8, supra} note 84, at 6.

In framing its recommendations, the Committee observed that because ad-
When a municipality enacts the measures contained in the proposed legislative reform, principles of fairness and openness should prevail. These principles could best be effectuated by employing an informal rulemaking model similar to that in the APA. Under this system, a municipality would be required to publish notice of the proposed rulemaking, as well as provide interested parties with the right to participate in the rulemaking process. Once a rule is promulgated, it must include a concise general statement of its basis and purpose, which will serve as a statement of reasons that will help a reviewing court judge the rationality of the rule and determine whether the rule conforms to statutory authority.

Although the informal rulemaking model presents the least

ministerial agencies investigate and make discretionary choices within an area of specialization, S. Doc. No. 8, supra note 84, at 101-02, and because members bring background knowledge and expertise to bear on performance of their tasks, id. at 19, yet need to learn the viewpoints of those affected in order properly to make the choices, id. at 101, the procedures followed should be “systematically and specifically” directed toward eliciting facts, id. at 102, especially from those directly and financially affected by the decisions. Id. To the extent that members of a municipal government have expert knowledge of local conditions, see note 29 supra and accompanying text, and have discretion to decide whether approval of industrial development bonding is desirable for the community and in furtherance of the purposes of the Industrial Development Act, see Minn. Stat. § 474.03 (1980), the rulemaking guidelines of the APA may be adapted to the procedures of bonding decisions. Municipal governments, of course, differ from administrative agencies in that the former are representative bodies. This distinction does not vitiate the importance of improving the fact-finding procedure. At most it suggests that the fact-finding procedures adopted by a municipality may more readily be patterned after a legislative model. See S. Doc. No. 8, supra note 84, at 101-02.

88. To some extent, municipal procedures are required by statute to be open. See Minn. Stat. § 471.705 (1980). See also Wickham, Let the Sun Shine In! Open-Meeting Legislation Can Be Our Key to Closed Doors in State and Local Government, 68 NW. U.L. Rev. 480, 480 n.2 (1973) (various state statutes). Therefore, to avoid an overlap between existing municipal procedures and proposed administrative procedures, the legislature could incorporate the administrative procedures into the municipal procedures when the municipal procedures are deficient.


90. See 5 U.S.C. § 553(b) (1976). Under the APA, notice must include a statement of the time, place, and nature of the proceedings, a reference to the legal authority under which the rule is proposed, and the terms of the proposed rule.

91. See 5 U.S.C. § 553(c) (1976). Although the APA indicates that interested parties have only the right to participate in the informal rulemaking process by submitting written data or argument, it would be preferable to require public hearings in addition to these procedures because of the public nature of the issue involved in industrial development bonds. See note 10 supra and accompanying text.


cumbersome procedure, the necessity of a record\textsuperscript{94} suggests that the informal rulemaking on-the-rulemaking-record model should be used by a municipality when it makes a determination on a request for industrial development bonding.\textsuperscript{95} The purpose of using this model is to maintain the simplicity, flexibility, and efficiency of notice-and-comment proceedings while also producing more manageable and focused records for judicial review.\textsuperscript{96}

B. Judicial Review Under the Model

The scope of review of actions under the APA provides a useful guideline for judicial review of locally adopted proce-

\textsuperscript{94} See notes 70-74 supra and accompanying text.

\textsuperscript{95} The informal rulemaking on-the-rulemaking-record model of administrative procedure is of relatively recent origin. One commentator reasons that this hybrid rulemaking model was a Congressional response to the inadequacies of the traditional model of rulemaking:

Notice-and-comment rulemaking has often been praised as providing a fair and efficient procedure. The basic theory underlying these procedures seems unquestionably sound . . . . There are problems with notice-and-comment rulemaking, however, that may be traced to a recurring problem of the administrative process: the apparent insensitivity of agencies to communications addressed to them. A person adversely affected in some serious way by a proposed rule may find little solace in the opportunity to submit a written comment. . . .

Congress becomes the battleground for these opposing views when a new statute granting rulemaking authority is being considered. To a surprising extent, Congress has been sympathetic to the fears expressed by persons who may be subject to regulation under a broad grant of rulemaking authority.


Although this new "on-the-rulemaking-record" requirement is to be distinguished from the formal trial-type procedures associated with the "on-the-record" requirement of § 553(c) of the APA, see 1 K. DAVIS, \textit{ADMINISTRATIVE LAW TREATISE} § 6:4 (2d ed. 1978), the "rulemaking record" requirement has also served to replace the "focused and defined record" of the adjudicatory process, which has been more or less displaced because of the current popularity of rulemaking. Pedersen, \textit{Formal Records and Informal Rulemaking}, 87 YALE L.J. 38, 61 (1975). The need for a record in informal rulemaking has been considered essential to "an alternative structure for administrative action which can provide a satisfactory framework both for agency decisions and for judicial review." \textit{Id.} at 88. See also Hamilton, \textit{supra}, at 1333; Verkuil, \textit{supra} note 67, at 248; Note, \textit{The Judicial Role in Defining Procedural Requirements for Agency Rulemaking}, 87 HARV. L. REV. 782, 804-05 (1974). Pedersen suggested that the "increased importance of informal rulemaking" dictated that: "The time has come to adopt procedures for rulemaking in which a formal record plays a central role. . . . The adoption of this change would make rulemaking a more efficient and less arbitrary method for government policymaking." Pedersen, \textit{supra}, at 88.

\textsuperscript{96} See Hamilton, \textit{supra} note 95, at 1313-14; Pedersen, \textit{supra} note 95, at 61; Verkuil, \textit{supra} note 67, at 187; Note, \textit{supra} note 95, at 785.
dures and standards for industrial development bonding, and for review of municipal determinations to grant or deny such financing. When a municipality enacts procedures and standards that are similar to those of the informal rulemaking model, the concomitant "arbitrary and capricious" standard of review should be applied. A municipality's performance of this "quasi-legislative" function results in a reviewing court being "limited to determining whether there was a rational basis for the [decision] and whether the [municipality conformed to] statutory authority." A higher standard of review—substantial evidence—should be required for specific municipal decisions concerning individual projects, however; these decisions must be made on the record, in a manner similar to the process used in administrative decisions made on-the-rulemaking-record. Judicial review in these circumstances focuses on the record, scrutinizing the municipality's reasoning "from matters in the record to ultimate factual conclusions." For a court to affirm a municipality's decision, it must conclude that the municipality "acted within the scope of its authority." The court must then determine that the municipality "could have reasonably believed in the factual premise" underlying its decision and that the decision "was based on a 'consideration of the relevant factors.' " Finally, the court must conclude that the municipality followed

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98. Verkuil, supra note 67, at 206. Although this mode of deferential review presents problems similar to those involved in traditional judicial review of municipal expenditures, see notes 38-54 supra and accompanying text, application of Dillon's rule to a carefully detailed directive from the legislature as to what standards and procedures are appropriate for industrial development bonding should confine municipal discretion within acceptable limits. See text accompanying note 42 supra.
99. The substantial evidence standard "has become synonymous with active judicial review and is frequently contrasted with the 'arbitrary and capricious' standard usually associated with 'soft' judicial review." Verkuil, supra note 67, at 214 (footnote omitted). A requirement of substantial evidence review in informal rulemaking does not, however, mean that the rules must be made on the record in accordance with the trial-type procedures of formal rulemaking. See United States v. Florida E. Coast Ry., 410 U.S. 224, 239-46 (1973); note 95 supra.
101. Gifford, supra note 100, at 73 n.47 (describing review of agency action).
102. Id. at 73 n.47 (quoting Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416-17 (1971)).
correct procedures in reaching its decision.\textsuperscript{103} Adherence to this review standard would promote effective judicial review by eliminating the fallacious deference that traditionally has accompanied rationality review of industrial development bond determinations.\textsuperscript{104} Moreover, this heightened standard of review would give municipalities an additional incentive to improve their decision-making processes.\textsuperscript{105}

IV. CONCLUSION

The increased use of unrestrained municipal power to issue industrial development bonds has caused the Minnesota legislature to redefine the limits of the exercise of that power. Through the substantive standards in the recent amendment to the Minnesota Municipal Industrial Development Act, the legislature has prohibited the use of industrial development bonding for certain types of projects. This legislative standards approach unnecessarily restricts municipal discretion, which is essential for the Act's success. Despite this problem, the amendment to the Act does significantly improve the procedural requirements for the issuance of industrial development bonds. Nevertheless, analysis of these recent procedural changes suggests that the legislation does not provide for effective judicial review and thus does not prevent arbitrary local government decision making.

Additional reforms are needed to resolve these remaining problems. The substance-limiting approach of the recent amendment to the Act should be replaced with a procedural approach that opens the decision-making process and reveals the basis of municipal decisions without unnecessarily restricting a local government's discretion. In addition, judicial review must be made more effective by requiring that industrial development bond determinations be made on a record. This requirement, in conjunction with additional procedural reforms, can enhance both municipal decision making and judicial review of those determinations.

\textsuperscript{103} See Gifford, \textit{supra} note 100, at 73 n.47.
\textsuperscript{104} See notes 51-54 \textit{supra} and accompanying text.
\textsuperscript{105} The imposition of a higher standard of review in informal rulemaking, by the requirement that a determination must be supported by substantial evidence in the record as a whole, was the means Congress used to make agencies more responsive to their constituencies. See note 95 \textit{supra}. The threat of heightened judicial scrutiny in industrial development bonding would presumably have the same effect on municipal procedures.