

“A Statement About Who Deserves to Live Here”: The Fair Housing Act Implications of Housing New York

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New York City faces the twin problems of housing segregation and a shortage of affordable housing. In response, Mayor Bill de Blasio developed Housing New York, a plan to create or preserve 300,000 affordable units across a variety of income bands. As part of this plan, the City instituted inclusionary zoning policies and modified density caps in certain neighborhoods while targeting units for households in a range of income brackets citywide. Yet many residents and community advocates have long argued that homes developed under the plan are unaffordable to working-class, disproportionately affecting Black and Latino New Yorkers.

This Note takes a first pass at analyzing the plan’s compliance with the Fair Housing Act of 1968 through the lens of the plan’s income affordability targets and its household targets (the latter being deciphered through the aforementioned changes to city policy on density and the number of bedrooms targeted in new housing units). It examines key neighborhood demographics for communities targeted for inclusionary zoning and argues that the plan’s income affordability targets and its household targets, taken together with the City’s existing community preference policy, likely have a disparate impact on Black and Latino New Yorkers by disproportionately denying members of these communities housing and by perpetuating segregation within and between neighborhoods. This Note then propose a non-comprehensive set of

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The quotation in the title was relayed to City Limits by housing activist Susanna Blankley. See Abigail Savitch-Lew, *Other Naves and de Blasio Team Draw Lessons from East New York Rezoning Struggle*, CITY LIMITS (Apr. 19, 2016), <https://citylimits.org/2016/04/19/other-naves-and-de-blasio-team-draw-lessons-from-east-new-york-rezoning-struggle/> [https://perma.cc/3AF6-RBSQ].

remedies that would fall within jurisprudential constraints on Fair Housing Act cases.

I. INTRODUCTION

The fiftieth anniversary of the passage of the Fair Housing Act of 1968 (FHA or “the Act”) invites an examination into the state of housing segregation in one of our nation’s largest cities, New York City (the City). Even now, a single racial or ethnic bloc dominates the population of over half of the City’s community districts,¹ even though no one racial group makes up more than one-third of the City’s overall population.² The problem has not improved in recent decades: the dissimilarity index, which is the standard measurement for assessing racial differences across Census tracts, has remained flat for Black-white and Latino-white segregation between the 1980 and 2010 Censuses.³

Hand-in-hand with persistent housing segregation in the City is New York’s affordability crisis, the manifestations of which are legion. The share of the City’s rent-burdened households, defined as households that spend over 30% of their incomes on rent,⁴ has grown from 40.7% to 51.7% in the period between 2000 and 2014.⁵ Over 250,000 families are on the waiting list for New York

1. New York City recognizes fifty-nine official community districts, which encompass culturally similar and geographically proximate neighborhoods. See *Community District Profiles*, N.Y.C. PLANNING, <https://communityprofiles.planning.nyc.gov/> [https://perma.cc/P7WZ-9E92] (last visited Nov. 11, 2017).

2. Mireya Navarro, *Segregation Issue Complicates de Blasio’s Housing Push*, N.Y. TIMES (Apr. 24, 2016), <https://www.nytimes.com/2016/04/15/nyregion/segregation-new-york-city-and-de-blasio-affordable-housing.html> [https://perma.cc/MVE9-TRE3].

3. Ingrid Gould Ellen, Opinion, *Building Justice: New York City’s Separate and Unequal Neighborhoods*, CITY LIMITS (Aug. 22, 2016), <https://citylimits.org/2016/08/22/building-justice-new-york-citys-separate-and-unequal-neighborhoods/> [https://perma.cc/LQA3-E5F3].

4. See, e.g., MARY SCHWARTZ & ELLEN WILSON, U.S. CENSUS BUREAU, WHO CAN AFFORD TO LIVE IN A HOME? A LOOK AT DATA FROM THE 2006 AMERICAN COMMUNITY SURVEY 1–2 (2008), <https://www.census.gov/housing/census/publications/who-can-afford.pdf> [https://perma.cc/D88F-4J7E] (surveying the history of the federal government’s definition of rent-burdened households).

5. FURMAN CTR. FOR REAL ESTATE & PUB. POLICY, STATE OF NEW YORK CITY’S HOUSING AND NEIGHBORHOODS IN 2015, 14 (2016), http://furmancenter.org/files/sotc/NYUFurmanCenter_SOCin2015_9JUNE2016.pdf [https://perma.cc/R6ZE-77ED] [hereinafter STATE OF NEW YORK CITY’S HOUSING AND NEIGHBORHOODS IN 2015] (analyzing data derived from the 2000 U.S. Census and the 2010–2014 American Community Survey); see also N.Y. UNCONSOL. LAW §§ 26-501–26-520, 26–530 (McKinney 2017) (New York State’s statutes governing rent stabilization and rent increases in New York City); Emergency Tenant Protection Act of 1974, N.Y. UNCONSOL. LAW §§ 8621–8634 (McKinney 2017) (New York state’s general rent stabilization law).

City public housing, and just under 150,000 families are on the waiting list for Housing Choice Vouchers in New York City,⁶ the latter of which has been closed to new applicants since 2009.⁷ On the supply side, the City’s Department of Finance estimates it lost 50,000 rent-stabilized units between 2004 and 2014.⁸ Overall, asking rents have increased by an average of 3.9% per year between 2010 and 2017, greatly outpacing the 1.2% average annual growth of the consumer price index (CPI) of the New York metropolitan area in the same period.⁹

These trends have hit the poorest New Yorkers hardest. According to a commercial market analysis, asking rents in the bottom quintile of the market have increased at a 4.9% average annual rate since 2010, compared to 3% in the top quintile of the market.¹⁰ At the same time, wages have grown slowly or even fallen in some fast-growing low-skilled or unskilled sectors.¹¹ Within the housing market and policy landscape in New York City, gentrification has placed new stress upon low-income New Yorkers.

First coined in 1964,¹² gentrification broadly refers to the displacement of low-income communities at the expense of upwardly

6. N.Y.C. HOUS. AUTH., NYCHA 2017 FACT SHEET 3 (2017), <https://www1.nyc.gov/assets/nycha/downloads/pdf/factsheet.pdf> [<https://perma.cc/W4Q7-XK8U>]. This fact sheet notes that there is little overlap between the waiting lists, with only about 15,000 applicants on both lists. Housing Choice Vouchers are commonly referred to as Section 8 vouchers.

7. *Information for Section 8 Applicants*, N.Y.C. HOUS. AUTH., <http://www1.nyc.gov/site/nycha/section-8/applicants.page> [<https://perma.cc/N8WE-YCHU>] (last visited Jan. 10, 2018).

8. See, e.g., *Interactive Map Shows NYC’s Disappearing Rent-Stabilized Apartments*, GOTHAMIST (July 15, 2015, 7:30 PM), http://gothamist.com/2015/07/15/rent_stabilized_map_nyc.php [<https://perma.cc/Y5S5-GENA>] (noting that New York City lost 50,000 rent stabilized units between 2004 and 2014). To learn more about how apartments exit regulation, see *Deregulation*, N.Y.C. RENT GUIDELINES BD., <https://www1.nyc.gov/site/rentguidelinesboard/resources/deregulation.page> [<https://perma.cc/A8CB-N9YT>] (last visited Dec. 26, 2018).

9. STREETEASY, *THE WIDENING GAP: RENTS AND WAGES IN NEW YORK CITY 1–2* (2017), <https://wp.zillowstatic.com/streeteasy/2/2017-StreetEasy-Rent-Affordability-Report-467583.pdf> [<https://perma.cc/YA3L-RT8J>].

10. *Id.*

11. *Id.* Retail employees’ wages stagnated, and workers in personal care and service, food preparation and service, and transportation and moving saw their earnings growth lag behind the averages. Wages for health care support workers, which ranked among the fastest-growing employment sectors in New York City between 2010 and 2017, actually fell by 1.1%, even as overall wages in New York City grew by 1.8% over the same period. *Id.* at 3 tbl.1.

12. See Willy Staley, *When Gentrification Isn’t About Housing*, N.Y. TIMES (Jan. 23, 2018), <https://www.nytimes.com/2018/01/23/magazine/when-gentrification-isnt-about->

mobile residents, with the displaced residents typically being people of color and the incoming residents largely being white.¹³ In New York City, New York University's Furman Center for Real Estate and Urban Policy identifies an area as the subject of gentrification if its average household income was in the bottom forty percent of the city's neighborhoods in 1990, but subsequently saw a greater rent increase than did the median neighborhood on a percentage basis.¹⁴ The City's gentrified neighborhoods experienced faster average annual rent increases between 1990 and 2014; added the greatest percentage of housing units between 2000 and 2010; saw the fastest-growing shares of young, educated, and nonfamily households in the city between 2000 and 2010; and witnessed a declining share of Black and Latino residents between 2000 and 2010 compared to low-income and non-gentrifying neighborhoods and high-income neighborhoods.¹⁵

The gentrification crisis thus begs the question: what must cities consider when creating affordable housing? Cities' affordable housing development programs — and, indeed, all of their housing policies — must nevertheless comply with the FHA.¹⁶ The

housing.html [https://perma.cc/35N4-5M2E] (attributing the origin of the term to British sociologist Ruth Glass, who used it in an essay about postwar London).

13. MAUREEN KENNEDY & PAUL LEONARD, BROOKINGS INST., DEALING WITH NEIGHBORHOOD CHANGE: A PRIMER ON GENTRIFICATION AND POLICY CHANGES 2, 5 (Apr. 2001), <https://www.brookings.edu/research/dealing-with-neighborhood-change-a-primer-on-gentrification-and-policy-choices/> [https://perma.cc/9PUE-2VPY].

14. STATE OF NEW YORK CITY'S HOUSING AND NEIGHBORHOODS IN 2015, *supra* note 5, at 5. For this calculation, the Furman Center uses sub-borough areas (SBAs), U.S. Census designations (also known as Public Use Microdata Areas, or PUMAs, more generally) similar to New York City's community districts, in lieu of community districts.

15. *Id.* at 5–12.

16. *See generally infra* Part II.C.2. In fact, the FHA created a duty that the U.S. Department of Housing and Urban Development (HUD) affirmatively further fair housing — that is, to go beyond mere non-discrimination and to take steps to develop open, integrated, residential housing patterns. 42 U.S.C. § 3608(d) (2012). In 2015, HUD issued a rule clarifying and enforcing the mandate, citing both the FHA and Congress's repeated re-affirmation of the duty in subsequent acts, which has since extended to requiring recipients of HUD program funds to affirmatively further fair housing. *See* Affirmatively Furthering Fair Housing, 80 Fed. Reg. 42,272, 42,274 (July 16, 2015) (codified at 24 C.F.R. pts. 5, 91, 92, 570, 574, 576, & 903) [hereinafter AFFH]. Given the uncertainty surrounding the Trump administration's enforcement of the rule (*see* Rachel Dovey, *HUD May be Trying to Kill Obama-Era Fair Housing Rule*, NEXT CITY (Jan. 8, 2018), <https://nextcity.org/daily/entry/hud-may-be-trying-to-quietly-kill-obama-era-fair-housing-rule> [https://perma.cc/WP7Q-V5ND]), this Note does not discuss AFFH further. However, the City's statutory requirement both to not discriminate and to affirmatively further fair housing as a recipient of HUD funds is unchanged. Furthermore, in July 2018, New York City enacted legislation requiring the City to “provide for the creation and preservation of affordable housing in the city in a manner that affirmatively furthers fair housing.” Local Law 2018/133, N.Y.C. Council (N.Y. 2018), <https://legistar.council.nyc.gov/>

Act prohibits governments from excluding members of a protected class (*inter alia*, race) on the basis of their membership in that class from zoning and land use decisions that prevent them from living in a given community.¹⁷ Specifically, the Act prohibits decisions that are motivated by animus toward the class or that have a discriminatory effect on members of that class.¹⁸ A policy may have a discriminatory effect if it either has an adverse effect on members of the protected class or if it perpetuates segregation in the community in question.¹⁹ In order for an FHA challenge to be successful, it must identify a policy or practice; a “one-time decision” may not necessarily constitute a policy.²⁰

New York City mayors have traditionally employed a breadth of tools in response to the affordable housing crisis.²¹ It was in this context that, in May 2014,²² Mayor Bill de Blasio announced Housing New York (the “Plan”), a ten-year, \$41.4 billion plan to build or preserve 200,000 affordable units between 2014 and 2024.²³ In addition to employing an array of incentives and subsidies to entice landlords into preserving affordable housing, the original plan and its subsequent revisions also aim to rezone cer-

LegislationDetail.aspx?ID=3344796&GUID=8E629C24-E879-415C-A513-1A244CCE0B3D [https://perma.cc/P2WQ-97H3].

17. See generally ROBERT G. SCHWEMM, HOUSING DISCRIMINATION LAW & LITIGATION § 10:6 (2018). This Note will explore this subject at greater length in the ensuing sections.

18. See generally Texas Dep’t. of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc., 135 S. Ct. 2507 (2015).

19. See, e.g., Huntington Branch, N.A.A.C.P. v. Town of Huntington, 844 F.2d 926, 934–35 (2d Cir. 1988) [hereinafter *Huntington II*], superseded by regulation on other grounds, 24 C.F.R. § 100.500.

20. *Inclusive Communities*, 135 S. Ct. at 2523.

21. See, e.g., John Petro, *A Closer Look at Ed Koch’s Affordable Housing Legacy*, NEXT CITY (Feb. 7, 2013), <https://nextcity.org/daily/entry/a-closer-look-at-ed-kochs-affordable-housing-legacy> [https://perma.cc/3AT4-Q6MC] (describing Mayor Ed Koch’s efforts to build 180,000 units of affordable housing); see also Cindy Rodriguez, *As Bloomberg Built Affordable Housing, City Became Less Affordable*, WNYC (July 9, 2013), <https://www.wnyc.org/story/304422-new-york-remade-city-more-desirable-ever-also-too-expensive-many/> [https://perma.cc/8A48-DYA3] (surveying the methods and impact of Mayor Michael Bloomberg’s plan, the core of which was to build or preserve 165,000 units of affordable housing).

22. See Jarrett Murphy, *Breaking Down De Blasio’s Expanded Housing Plan*, CITY LIMITS (Oct. 26, 2017), <https://citylimits.org/2017/10/26/breaking-down-de-blasios-expanded-housing-plan/> [https://perma.cc/HL2H-94ZS].

23. BILL DE BLASIO, N.Y.C., HOUSING NEW YORK: A FIVE-BOROUGH, TEN-YEAR PLAN 5, 99 (2014), http://www.nyc.gov/html/housing/assets/downloads/pdf/housing_plan.pdf [https://perma.cc/AQ4B-TDLP] [hereinafter HOUSING NEW YORK I]; Mireya Navarro & Michael Grynbaum, *De Blasio Sets a 10-Year Plan for Housing, Putting the Focus on Affordability*, N.Y. TIMES (May 5, 2014), <https://www.nytimes.com/2014/05/06/nyregion/de-blasio-affordable-housing-plan.html> [https://perma.cc/HNU4-QCSD].

tain city neighborhoods and implement mandatory inclusionary housing (MIH) to ensure a floor for affordable housing development in those neighborhoods.²⁴ These neighborhoods are largely low-income communities of color, some of which are presently gentrifying.²⁵

Despite its ambition,²⁶ available data suggests that the Plan fails to comply with the FHA because it disproportionately denies housing to Black and Latino New Yorkers and perpetuates segregation in two ways. First, the Plan's income targets for affordability disproportionately deny access to housing produced under the Plan to Black and Latino households. Second, the targets for the number of bedrooms in apartments produced under the Plan breed exclusion due to differences in household size and composition that manifest along racial and ethnic lines; these differences will be described as the "Household Differential" for the sake of clarity. The City's longstanding community preference policy — which grants a preference for city-subsidized affordable units to residents of the community district where the newly available affordable housing is located²⁷ — compounds the perpetuation of segregation, particularly in gentrifying neighborhoods. Commenting on the affordability targets in the context of one neighborhood's re-zoning, Susanna Blankley, a longtime housing activist in New York City, said: "It's going to cost more dollars to get more deeper [*sic*] levels of affordability, but that's a statement about who deserves to live here."²⁸

This Note uses aggregated data to take a first pass at assessing Housing New York's compliance with the FHA and addresses how the Act can be a tool to improve the Plan's affordability. Part II provides the history of the Housing New York plan, introduces the City's community preference policy in affordable

24. See generally *infra* Part II.A.

25. See generally *infra* Part II.

26. The plan aims to produce more units than either the Koch or the Bloomberg plans. See *supra* note 21.

27. Andrea McArdle, *Challenges to Achieving New York City's Affordable Housing Goals: Reconciling Mandatory Inclusionary Housing, Community Preference Requirements, and Fair Housing Laws*, FORDHAM URB. L.J. CITY SQUARE (May 26, 2016), <http://urbanlawjournal.com/challenges-to-achieving-new-york-citys-affordable-housing-goals-reconciling-mandatory-inclusionary-housing-community-preference-requirements-and-fair-housing-laws/> [https://perma.cc/AQ83-8Q8T].

28. Abigail Savitch-Lew, *Other Naves and de Blasio Team Draw Lessons from East New York Rezoning Struggle*, CITY LIMITS (Apr. 19, 2016), <https://citylimits.org/2016/04/19/other-naves-and-de-blasio-team-draw-lessons-from-east-new-york-rezoning-struggle/> [https://perma.cc/3AF6-RBSQ].

housing lotteries, and surveys the establishment of disparate impact liability under the FHA. Part III first explains how the Plan’s income and household targets disproportionately deny Black and Latino residents, including family households with children, eligibility for units produced under Housing New York, thereby also perpetuating segregated living patterns, before surveying how the City’s longstanding community preference policy further compounds these effects, particularly in gentrifying neighborhoods. Part IV completes the disparate impact analysis: it first establishes causation between the policy and the perpetuation of segregation, then anticipates and rebuts potential justifications for the Plan’s current design. Lastly, this Note proposes a non-comprehensive set of changes to Housing New York to improve the Plan’s compliance with the FHA without exceeding the shrinking menu of legal remedies available in FHA cases. Appendix B contains a glossary of land use and statistical terms that may be useful for evaluating this analysis.

II. THE PAST AND PRESENT OF HOUSING NEW YORK, THE COMMUNITY PREFERENCE POLICY, AND THE DISPARATE IMPACT STANDARD

Both the Housing New York plan and FHA jurisprudence have evolved rapidly in recent years. Part II.A examines the past and present of Housing New York, while Part II.B describes New York City’s community preference policy, which gives preference to neighborhood residents on half of the units made available through housing lotteries. Part II.C then takes a different tack, surveying the establishment of disparate impact liability under the FHA.

A. HOUSING NEW YORK: THE PLAN ITSELF

This Subpart outlines the development of the Housing New York policy from its inception through early 2018. It first summarizes the original Housing New York policy, then specifies the effects of the City’s MIH and Zoning for Quality and Affordability (ZQA) policies, and finally outlines the city’s recent modifications to the Plan and its ambitions for employing MIH and ZQA. This survey of the Plan’s details will lay the groundwork for the FHA analysis undertaken in Parts III and IV.

1. *The Original Plan*

In 2014, Mayor Bill de Blasio announced the first iteration of Housing New York, his administration's package of policies, programs, and proposals to respond to New York City's affordable housing crisis.²⁹ The ten-year, \$41.4 billion plan (including \$8.2 billion in public funding) sought to build or preserve 200,000 affordable units between 2014 and 2024.³⁰ The City would preserve sixty percent of those planned units, with an array of new and expanded programs and incentives to encourage building owners and landlords to maintain the affordability of their units.³¹ New housing would constitute the remaining forty percent of the units, which the City would create by identifying and developing unused and underused public and private sites; employing a multitude of subsidies to develop new mixed-income programs;³² and committing to a MIH program for developers as part of certain "rezonings that add substantial capacity for new housing in transitioning neighborhoods."³³ Taken together, the City aimed for 8% of the created or preserved housing to be set aside for extremely low-income residents; 12% for very low-income resi-

29. See Murphy, *supra* note 22.

30. HOUSING NEW YORK I, *supra* note 23, at 99 (2014); Navarro & Grynbaum, *supra* note 23.

31. HOUSING NEW YORK I, *supra* note 23, at 8–9.

32. The plan uses Area Median Income, or AMI, as its baseline for determining residents' income bands. HUD calculates AMI as the combined median income for a given household size. All levels of government use AMI to determine the subsidies for which developers, building owners, and residents qualify. Notably, HUD includes not only the incomes of residents in New York City but also those of neighboring suburban Westchester, Rockland, and Putnam Counties. *New York HUD Metro FMR Area FY 2017 Income Limits Summary*, U.S. DEPT. OF HOUS. & URB. DEV., <https://www.huduser.gov/portal/datasets/il/il2017/>

2017summary.odn?states=%24states%24&data=2017&inputname=METRO35620MM5600*New+York%2C+NY+HUD+Metro+FMR+Area&stname=%24stname%24&statefp=99&year=2017&selection_type=hmfa [https://perma.cc/C2QX-TZMK] (last visited Jan. 11, 2018). Housing New York, using these HUD guidelines, defines extremely low-income residents as making less than 30% of AMI, very low-income residents as making 51–80% of AMI, moderate-income residents as making 81–120% of AMI, and middle-income residents of 121–165% of AMI. HOUSING NEW YORK I, *supra* note 23, at 6; BILL DE BLASIO, N.Y.C., HOUSING NEW YORK 2.0 11 (2017), <http://www1.nyc.gov/assets/hpd/downloads/pdf/about/hny-2.pdf> [https://perma.cc/CX3K-HUEV] [hereinafter HOUSING NEW YORK 2.0].

33. HOUSING NEW YORK I, *supra* note 23, at 9–10, 30–31. Thus, it is important to understand MIH for what it is: one key component of the Plan. See *Mandatory Inclusionary Housing*, N.Y.C. PLANNING, <https://www1.nyc.gov/site/planning/plans/mih/mandatory-inclusionary-housing.page> [https://perma.cc/WRW9-D73D] (last visited Jan. 13, 2018) (“[MIH] represents the floor, not the ceiling, of affordability that would ultimately be achieved in new development”). This floor is why this analysis nevertheless also examines Housing New York's overall income targets.

dents;³⁴ 58% percent for low-income residents; 11% for moderate-income residents; and 11% for middle-income residents.³⁵

In addition, the Plan posits that there is a mismatch between the City’s household composition and the units available to households on the market. It notes that there are 1.9 million one- and two-person households in New York City, but only 1.25 million studios and one-bedroom apartments.³⁶ The Plan observes that families with children are often priced out of multi-bedroom apartments by individuals who are unable to rent studios or one-bedroom apartments and instead live in those multi-bedroom apartments together as roommates. To address this issue, the Plan outlines an objective to build more studios and one-bedroom apartments, asserting that the City “need[s] not only more housing, but also a mix of new housing types that reflects the diversity of New Yorkers’ needs.”³⁷

2. *Mandatory Inclusionary Housing and Zoning for Quality and Affordability*

In March 2016, the City Council passed both MIH and ZQA.³⁸ The ZQA made increased housing density in the City easier in some respects, yet harder in others. In relevant part, it allows developers to build taller buildings than would otherwise be permitted for structures that contain affordable senior housing or long-term care facilities, or that provide affordable housing through MIH or its voluntary counterpart.³⁹ However, ZQA precludes developers from adding square footage to any kind of residential unit save affordable senior housing, instead permitting

34. Housing New York defines extremely low-income residents as making 0–30% of AMI and very low-income residents as making 31–50% of AMI. HOUSING NEW YORK I, *supra* note 23, at 6, and HOUSING NEW YORK 2.0, *supra* note 32, at 11. For income bands for the remaining groups, *see supra* note 32.

35. *See* HOUSING NEW YORK I, *supra* note 23, at 11.

36. *Id.* at 24.

37. *Id.*

38. Erin Durkin, *De Blasio’s Affordable Housing Plans Both Clear City Council with Ease, Despite Spirited Protests from Community Groups*, N.Y. DAILY NEWS (Mar. 22, 2016), <http://www.nydailynews.com/news/politics/de-blasio-affordable-housing-plans-clear-city-council-article-1.2573791> [<https://perma.cc/3RPT-WFPN>].

39. *Zoning for Quality and Affordability*, N.Y.C. COUNCIL, <https://council.nyc.gov/land-use/plans/mih-zqa/zqa/> [<https://perma.cc/J9VH-7AF5>] (last visited Jan. 10, 2018) [hereinafter *City Council ZQA Overview*].

developers to pursue architectural diversity.⁴⁰ Similarly, even though the Plan lowers the density factor (i.e., allows for greater density) for the City's denser residential districts,⁴¹ the City Council doubled down on contextual zoning imposing exacting conditions for developers who seek to build long-term care facilities and affordable senior housing in low- and medium-density residential districts.⁴² Even as the City relaxed parking requirements for MIH housing and affordable senior housing built within a Transit Zone — defined as the area within half a mile of a subway stop — it restricted a small increase in building height permitted for buildings with ground floor commercial or community facilities to buildings outside the Manhattan Core (south of West 110th Street and south of East 96th Street).⁴³

Consequentially, the City did allow developments with ten units or more to receive more expansive floor-to-area (FAR) ratio bonuses tied to the share of floor area set aside for residents in low- and middle-income bands. MIH provided the City Council with two default options and two additional options for granting FAR bonuses for future re-zonings under the program. Table 1, below, summarizes these options.

40. *Id.* (ZQA “[c]hange[s] rules that lead to flat, dull apartment buildings, to accommodate and encourage façade articulation, courtyards, and other elements that provide visual variety and make the pedestrian experience more interesting”).

41. *See* N.Y.C. PLANNING, HOUSING NEW YORK: ZONING FOR QUALITY AND AFFORDABILITY OVERVIEW 12 (June 2016), <https://www1.nyc.gov/assets/planning/download/pdf/plans-studies/zqa/adoption-overview.pdf?r=1> [<https://perma.cc/X66R-9HE6>] [hereinafter CITY PLANNING COMMISSION ZQA OVERVIEW].

42. *City Council ZQA Overview*, *supra* note 39.

43. *Id.*

TABLE 1: REQUIREMENTS FOR FAR BONUSES UNDER MIH⁴⁴

		Affordable Housing Set-aside	AMI	Maximum Annual Income (family of three) ⁴⁵
Default Housing Options	Option 1	25% <i>with 10% required at</i>	60% (on average) 40%	\$51,500 \$34,400
	Option 2	30%	80% (on average)	\$68,700
Additional Options	Deep Affordability Option ⁴⁶	20%	40%	\$34,400
	Workforce Development Option ⁴⁷	30% <i>with 5% required at</i> <i>with 5% required at</i>	115% (on average) 70% 90%	\$98,800 \$60,100 \$77,300

In addition, the resolution required a greater share of floors in the units in question to have at least one affordable unit and increased the share of required affordable floor area for developers choosing to build the affordable units offsite.⁴⁸

3. *Housing New York 2.0 and the City’s Growing Ambitions*

Since the passage of MIH and ZQA, the City has revised Housing New York three times. In February 2017, Mayor de Blasio announced that the Fiscal Year 2018 city budget would include another \$1.9 billion to preserve or construct 10,000 affordable housing units for extremely and very low-income families,⁴⁹ half of which would be set aside for seniors and another 500 of which would be set aside for U.S. military veterans.⁵⁰ In May 2017, the

44. N.Y.C. COUNCIL, MIH AND ZQA COUNCIL MODIFICATIONS 31, 35–37 (May 2016), <http://council.nyc.gov/land-use/wp-content/uploads/sites/53/2016/05/MIH-ZQA-Council-Modifications-1.pdf> [<https://perma.cc/34JN-U3T7>] [hereinafter COUNCIL MODIFICATIONS].

45. The author calculated the maximum annual income for income bands greater than 80% of AMI by relying on HUD’s Fair Market Rent income limit guidelines. See *New York HUD Metro FMR Area FY 2017 Income Limits Summary*, *supra* note 32.

46. The Deep Affordability Option does not include subsidies without a greater affordability set-aside.

47. The Workforce Development Option is not eligible for any subsidies and is not available for re-zonings within in the Manhattan Core. No units are permitted to go to households earning more than 135% AMI (\$104,895 a year for a family of three). Source: *Mandatory Inclusionary Housing*, *supra* note 33.

48. COUNCIL MODIFICATIONS, *supra* note 44, at 43.

49. See *infra* tbl.3.

50. Press Release, Office of the Mayor, State of the City: Mayor de Blasio Rolls Out New Affordable Housing Initiatives for Seniors, Veterans and Families Most in Need (Feb. 10, 2017), <https://www1.nyc.gov/office-of-the-mayor/news/075-17/state-the-city-mayor-de>

New York City Department of Housing Preservation and Development (HPD) announced an alteration to the target composition of the new and preserved housing: now, 10.5% of the created or preserved housing would be allocated for extremely low-income residents; 14.5% for very low-income residents; 55.5% for low-income residents; 10% for moderate-income residents; and 9.5% for middle-income residents.⁵¹ These targets were more generous at the lowest income bands than those set out previously.⁵² Lastly, in October 2017, Mayor de Blasio announced that the City was going to meet the 200,000-unit marker two years ahead of schedule and would instead seek to build or preserve 300,000 affordable units by 2026.⁵³ The ratio of 60% preserved housing to 40% new housing would apply to the expanded plan.⁵⁴

In November 2017, the Mayor released a holistically updated version of Housing New York: Housing New York 2.0, incorporating all of the previously noted changes while introducing further additions and a more detailed summary of the Plan's impact, both projected and to date.⁵⁵ While Housing New York initially targeted a split of 60% to 40% between housing preservation and new affordable housing construction, the most recent available data indicate that 68% of progress through March 2019 has come from preservations of existing units at the time of the update and 32% from new construction.⁵⁶ In addition, the Plan had created or preserved 15% of its units for extremely low-income households; 17% for very low-income households; 48.5% for low-income households; 6.5% for moderate-income residents; and 13% for middle-income residents.⁵⁷ Table 2 compares income targets

blasio-rolls-out-new-affordable-housing-initiatives-seniors- [https://perma.cc/65W8-XWLH].

51. Press Release, N.Y.C. Dep't. of Hous. Pres. & Dev., HPD Announces New Targets for Housing New York Plan to Achieve Deeper Affordability (May 11, 2017), <https://www1.nyc.gov/site/hpd/about/press-releases/2017/05/05-11-17.page>

[https://perma.cc/XAM8-9WT9]; see also HOUSING NEW YORK 2.0, *supra* note 32, at 11.

52. Compare *id.* and accompanying text, with note 35 and accompanying text *supra*.

53. Press Release, N.Y.C. Dep't. of Hous. Pres. & Dev., Mayor de Blasio to Complete Affordable Housing Plan 2 Years Ahead of Schedule, Accelerate Pace and Expand Goals (Oct. 24, 2017), <https://www1.nyc.gov/office-of-the-mayor/news/682-17/mayor-de-blasio-complete-affordable-housing-plan-2-years-ahead-schedule-accelerate-pace-and#/0> [https://perma.cc/8WVS-R3XU].

54. Murphy, *Breaking Down De Blasio's Expanded Housing Plan*, *supra* note 22.

55. See generally HOUSING NEW YORK 2.0, *supra* note 32.

56. N.Y.C. RENT GUIDELINES BD., 2019 HOUSING SUPPLY REPORT 8 (May 16, 2019), <https://www1.nyc.gov/assets/rentguidelinesboard/pdf/hsr19.pdf> [https://perma.cc/JBD5-BVZ9] [hereinafter 2019 HOUSING SUPPLY REPORT].

57. See generally HOUSING NEW YORK 2.0, *supra* note 32, at 11.

across the Housing New York iterations with housing produced through March 2019. Lastly, as compared to the first iteration of Housing New York, the updated plan places greater emphasis on anti-displacement strategies⁵⁸ and preserving and expanding homeownership,⁵⁹ as well as a variety of other proposals in collaboration with the state and federal governments.⁶⁰

TABLE 2: HOUSING NEW YORK INCOME TARGETS FOR CREATED AND PRESERVED HOUSING

	Housing New York I	Housing New York 2.0	Housing New York Actual Through March 2019 ⁶¹
Extremely Low Income (0–30% AMI)	8%	10.5%	16.6%
Very Low Income (31–50% AMI)	12%	14.5%	24.4%
Low Income (51–80% AMI)	58%	55.5%	42.9%
Moderate Income (81–120% AMI)	11%	10%	5.9%
Middle Income (121–165% AMI)	11%	9.5%	10.2%

Between 2017 and 2018, the City also added new neighborhoods to its wish list for MIH re-zonings, with an eye toward adding even more. Despite community resistance, Mayor de Blasio indicated an appetite for future re-zonings.⁶²

58. *Id.* at 12, 22, 24 (touting the enactment of the tenant’s right to counsel and the Certificate of No Harassment requirement for landlords seeking to renovate their buildings while also, *inter alia*, creating the Neighborhood Pillars program to help community-based organizations acquire and rehabilitate rent-stabilized buildings; developing neighborhood-specific anti-displacement strategies; and launching a program to reinvest in sustainable Mitchell-Llama housing).

59. *Id.* at 16, 21 (announcing programs to enhance community land trusts, help low-income homeowners stay in their homes, and aid households earning between 80% to 130% of AMI in buying their first home).

60. *See generally id.* at 29–31.

61. 2019 HOUSING SUPPLY REPORT, *supra* note 56, at 8.

62. Mayor de Blasio said in 2017: “We know there will be a number of re-zonings. . . . We’re not going to lack for places to go. . . . I’m saying, if one’s not working you just switch up and move to the next.” Murphy, *supra* note 22 (quoting Mayor de Blasio’s response to a question asking whether the expanded affordable housing target meant that the city would seek to re-zone additional neighborhoods).

B. A PRIMER ON THE COMMUNITY PREFERENCE POLICY

Central to New York City's affordable housing regime is its community preference policy. Under the policy, eligible residents of a community district enjoy a significant preference in City housing lotteries for affordable housing developments produced or preserved in the district, regardless of the amount of time they have lived in the district.⁶³ Naturally, this policy severely disadvantages residents of other community districts in housing lotteries. More problematically, the preference triggers fair housing concerns because a single racial or ethnic bloc dominates the population of over half of the city's community districts, even though no racial or ethnic group constitutes more than a third of the city's population.⁶⁴ Three Black New Yorkers, who have unsuccessfully entered housing lotteries in majority-white community districts where they do not live, began litigating the policy in federal court in 2015.⁶⁵ The plaintiffs are suing the City for allegedly violating the Fair Housing Act (both under disparate impact and discriminatory intent theories) and the New York City Human Rights Law.⁶⁶ The court denied the City's motion to dismiss their complaint, but the litigation remains in discovery as of April 2019.⁶⁷ Part III.C will examine how the policy further perpetuates segregation in violation of the Act and renders Housing New York's less affordable.

C. THE ESTABLISHMENT OF DISPARATE IMPACT LIABILITY

This Subpart traces the establishment of disparate impact liability under the FHA, first introducing the statute, then tracking the evolution of the disparate impact theory of liability both surrounding and subsequent to the Supreme Court's 2015 decision in *Texas Department of Housing & Community Affairs v. Inclusive Communities Project*.⁶⁸

63. McArdle, *supra* note 27.

64. Navarro, *supra* note 2.

65. First Amended Complaint at ¶¶ 7–10, 13–16, 172–82, Noel v. City of New York, No. 1:15-cv-05236, 2015 WL 10853937 (S.D.N.Y. Sept. 1, 2015), ECF No. 13.

66. *Id.* at ¶¶ 183–90.

67. Noel v. City of New York, No. 1:15-cv-05236, 2016 WL 6208564 at *8 (S.D.N.Y. Oct. 24, 2016).

68. Texas Dep't. of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc., 135 S. Ct. 2507 (2015).

1. *The Fair Housing Act of 1968*

The cornerstone of federal fair housing law is the Fair Housing Act of 1968.⁶⁹ Signed into law only a week after the assassination of the Rev. Dr. Martin Luther King, Jr.,⁷⁰ the Act makes it the stated “policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States.”⁷¹ Senator Walter Mondale, the bill’s chief sponsor, stated that the bill’s objective was to advance “truly integrated and balanced living patterns.”⁷² This objective is one “that Congress considered to be of the highest priority.”⁷³ The Act, inter alia, makes it unlawful to “refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.”⁷⁴

2. *The Enduring Applicability of Disparate Impact Liability to Affordable Housing Development Policies*

The availability of the disparate impact standard under Section 3604(a), including for challenges to affordable housing development policies, is well-established, even if jurisprudential developments have placed certain express limits on its use. Indeed, the establishment of disparate impact liability under the Fair Housing Act — which was ultimately ratified by the Supreme Court in *Inclusive Communities* — has been slow, and this development was not always guaranteed.⁷⁵

69. 42 U.S.C. §§ 3601–19, 3631 (2012).

70. The Fair Housing Act passed so shortly after Dr. King’s in part to honor his legacy. See DeNeen L. Brown, *The Fair Housing Act Was Languishing in Congress. Then Martin Luther King Jr. Was Killed*, WASH. POST (Apr. 11, 2018), https://www.washingtonpost.com/news/retropolis/wp/2018/04/11/the-fair-housing-act-was-languishing-in-congress-then-martin-luther-king-jr-was-killed/?utm_term=.123b6469092e [<https://perma.cc/66YR-2E6X>].

71. 42 U.S.C. § 3601 (2012).

72. 114 Cong. Rec. 3422 (1968).

73. *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 211 (1972).

74. 42 U.S.C. § 3604(a) (2012).

75. The U.S. Supreme Court had repeatedly sidestepped the issue of addressing whether plaintiffs could use a disparate impact standard under the Fair Housing Act. See *Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights (Arlington Heights II)*, 429 U.S. 252, 271 (1977), *cert. denied*, 434 U.S. 1025 (1978) (refusing to consider either “ultimate effect” of defendant village’s refusal to rezone or any plaintiff claims under the Fair Housing Act); see also *Town of Huntington v. Huntington Branch, N.A.A.C.P.*, 488 U.S. 15

Nevertheless, in 2013 — well after all circuit courts developed a disparate impact standard that did not require intent⁷⁶ — the United States Department of Housing and Urban Development (HUD) issued a rule that, *inter alia*, affirmed the availability of disparate impact liability.⁷⁷ For the most part, the rule codified the Second Circuit’s standard as articulated decades earlier in *Huntington Branch N.A.A.C.P. v. Town of Huntington (Huntington II)*.⁷⁸ Plaintiffs first need to show a *prima facie* case by demonstrating that the challenged practice “actually or predictably results in a disparate impact on a group of persons or creates, increases, reinforces, or perpetuates segregated housing patterns” because of membership in a protected class.⁷⁹ Subsequently, “the respondent or defendant has the burden of proving that the challenged practice is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests of the respondent or defendant.”⁸⁰ Lastly, provided the defendant met their burden, the plaintiff then has the burden of “proving that the substantial, legitimate, nondiscriminatory interests supporting the challenged practice could be served by another practice that has a less discriminatory effect.”⁸¹

(1988), *aff’d*. 844 F.2d 926 (2d Cir. 1988) (withholding comment on applicability of the disparate impact standard to FHA cases given that the appellant conceded its appropriateness, while also refraining from endorsing the Second Circuit’s use of the analysis).

76. All circuit courts, including the Second Circuit, developed disparate impact standards for Fair Housing Act claims that did not include any intent requirement by 1988. *Texas Dep’t. of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2519 (2015) (collecting cases).

77. HUD Disparate Impact Rule, 24 C.F.R. § 100.500 (2018).

78. Compare *id.* with *Huntington Branch, N.A.A.C.P. v. Town of Huntington (Huntington II)*, 844 F.2d 926 (2d Cir. 1988).

79. 24 C.F.R. § 100.500(a) (2018). Cf. *Huntington II*, 844 F.2d at 934 (2d Cir. 1988) (quoting *United States v. City of Black Jack*, 508 F.2d 1179, 1184–85 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975)).

80. 24 C.F.R. § 100.500(c)(2) (2018). Cf. *Huntington II*, 844 F.2d at 939.

81. 24 C.F.R. § 100.500(c)(3) (2018). This burden being placed on the plaintiff was a shift from the *Huntington II* standard. See *Implementation of the Fair Housing Act’s Disparate Impact Standard*, 78 Fed. Reg. 11460, 11462–63 (Feb. 15, 2013) (to be codified 24 C.F.R. pt. 100); cf. *Huntington II*, 844 F.2d at 939. Notably, the *Huntington II* court, writing in the context of plaintiffs who sought to develop affordable housing, noted that the balance of the considerations should tilt further toward the plaintiffs if they were seeking merely to enjoin a “municipal defendant from interfering with its plans rather than attempting to compel the defendant itself to build housing.” *Id.* at 940 (noting agreement with *Arlington Heights II*). Courts have not meaningfully addressed this distinction since then.

In 2015, the Supreme Court upheld the availability of a disparate impact standard in *Inclusive Communities*⁸² while casting doubt on its reach. The Court cited HUD’s burden-shifting framework favorably⁸³ and accentuated the rule’s skepticism of challenges to the mere siting of affordable housing.⁸⁴ The Court also established that “racial imbalance . . . does not, without more, establish a prima facie case of disparate impact.”⁸⁵ Although the Supreme Court did not expressly decide the rule’s constitutionality,⁸⁶ the Second Circuit in *Mhany Management, Inc. v. County of Nassau* interpreted the *Inclusive Communities* decision as effectively adopting the HUD rule’s burden-shifting framework.⁸⁷

Indeed, the *Huntington*, *Inclusive Communities*, and *Mhany* cases are just three examples of how the FHA extends to affordable housing development.⁸⁸ The Second Circuit’s decision in *Tsombanidis v. West Haven Fire Dep’t*,⁸⁹ which came down after

82. See *Texas Dep’t. of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2518 (2015).

83. *Id.* at 2515 (mentioning that HUD justifies its burden-shifting framework as analogous to Title VII’s test and acknowledging HUD’s disparate impact rule does not dictate the siting of affordable housing).

84. *Id.* at 2523 (“[T]he FHA . . . does not put housing authorities and private developers in a double bind of liability. . . . As HUD itself recognized in its recent rulemaking, disparate-impact liability ‘does not mandate that affordable housing be located in neighborhoods with any particular characteristic’” (quoting Implementation of the Fair Housing Act’s Discriminatory Effect Standard, 78 Fed. Reg. 11476 (Feb. 11, 2013))).

85. *Inclusive Communities*, 135 S. Ct. at 2523 (citation omitted).

86. In June 2018, HUD issued an advanced notice of proposed rulemaking, suggesting that the existing HUD Disparate Impact Rule needed modification in light of *Inclusive Communities*. See Reconsideration of HUD’s Implementation of the Fair Housing Act’s Disparate Impact Standard, 83 Fed. Reg. 28560, 28560 (proposed Jun. 20, 2018) (to be codified at 24 C.F.R. pt. 100).

87. *Mhany Mgmt., Inc. v. Cty. of Nassau*, 819 F.3d 581, 619 (2d Cir. 2016) (“The Supreme Court implicitly adopted HUD’s approach” (citing *Inclusive Communities*, 135 S. Ct. at 2518)). Fourteen years after the initial complaint, the parties entered into a landmark settlement agreement in March 2019. See Settlement Agreement, *Mhany Mgmt., Inc. v. Cty. of Nassau*, No. 2:05-cv-02301 (E.D.N.Y. Mar. 15, 2019).

88. The *Inclusive Communities* Court itself noted that suits challenging “zoning laws and other housing restrictions that function unfairly to exclude minorities from certain neighborhoods without any sufficient justification . . . reside at the heartland of disparate-impact liability.” *Texas Dep’t. of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2521–22 (2015).

89. *Tsombanidis v. West Haven Fire Dep’t*, 352 F.3d 565 (2d Cir. 2003), superseded by regulation, 24 C.F.R. § 100.500 (2013); see also *Mhany Mgmt.*, 819 F.3d at 619 (recognizing *Tsombanidis* as superseded by the HUD rule). Although this case was decided well before *Inclusive Communities*, its analysis still holds. The *Tsombanidis* court takes pains to state that “a plaintiff has not met its burden if it merely raises an inference of disparate impact,” and it similarly stipulates that the plaintiff “must show a causal connection between the facially neutral policy and the alleged discriminatory effect” to make a prima

Huntington but before *Inclusive Communities* and *Mhany*, clarified the proper role of statistical evidence in demonstrating the alleged disparate impact of a policy or practice. In reviewing select appellate decisions involving municipal policies and practices in the Second and Third Circuits, the *Tsombanidis* court favorably cited past decisions finding a prima facie case of disparate impact when the affected share of a population belonging to a protected class reliant on a particular kind of housing exceeds that group's share of the general population.⁹⁰ The *Mhany* court retained this approach, favorably citing the portion of the lower court's opinion finding a prima facie showing of disparate impact because the local municipality's rejection of a particular zoning change "largely eliminated the potential for the type of housing that minorities were disproportionately likely to need — namely, affordable rental units."⁹¹

Thus, notwithstanding the disparate impact standard's uneven development, its availability is settled law, including for challenges to local affordable housing policies. Accordingly, it is appropriate to use the standard in assessing Housing New York. The next Part addresses Housing New York's disparate effects under the first step of the disparate impact test under *Inclusive Communities*, and Part IV takes on the remainder of the burden-shifting framework.

facie showing of disparate impact. *Id.* at 575. These concepts bear a strong resemblance to the "robust causality requirement" in *Inclusive Communities*. See 135 S. Ct. at 2523.

90. See *Tsombanidis*, 353 F.3d at 575–76 (noting that, in *Huntington*, Black and Latino residents bore the brunt of the town's affordable housing shortage and that affordable housing construction was limited to a 52% minority area while the town was 98% white, while also noting that, in *Rizzo*, Philadelphia's "urban renewal" policies turned a neighborhood that was previously 45% Black to 100% white). The Eighth Circuit in *Gallagher v. Magner*, 619 F.3d 823 (8th Cir. 2010), cert. dismissed, 565 U.S. 1187 (2012), helpfully restated the *Tsombanidis* analysis this way: "[P]laintiffs can establish disparate impact by showing statistics that (1) $x\%$ of all of a protected class in an area depend on a type of housing affected by the challenged policy or practice, (2) $y\%$ of all of the non-protected population depends on that type of housing, and, crucially, (3) x is significantly greater than y ." *Id.* at 835.

91. *Mhany Mgmt.*, 819 F.3d at 617.

III. HOUSING NEW YORK’S RACIALLY DISPARATE EFFECTS

The racially disparate effects of Housing New York become readily apparent upon examination. Through the end of 2018, the City has built or preserved about 122,000 affordable units under the Plan.⁹² Of that total, 1,300 of the units were produced under MIH, with another 7,800 applications in the pipeline.⁹³ Part III.A examines how the targeted allocation of housing by income band disproportionately denies Black and Latino New Yorkers access to housing produced under the Plan and perpetuates segregated living patterns. Part III.B evaluates how the City’s targets for housing units further add to these effects in light of the Household Differential. Part III.C surveys how the City’s longstanding community preference policy exacerbates those outcomes, particularly in gentrifying neighborhoods.

A. THE PLAN’S INCOME TARGETS DISPROPORTIONATELY DENY HOUSING TO BLACK AND LATINO NEW YORKERS

Whether looking at the Plan’s income targets on the whole or the income targets for MIH neighborhoods specifically, these targets disproportionately deny housing to Black and Latino New Yorkers and perpetuate segregated living patterns. As mentioned in Part II, the City sought “rezonings that add substantial capacity for new housing in transitioning neighborhoods.”⁹⁴ According to *City Limits*, the City has initiated or is expected to initiate re-zonings in the neighborhoods of Bushwick, Gowanus, Long Island City, Bay Street, Chinatown, and Southern Boulevard.⁹⁵ Re-zonings in East New York, East Harlem, Far Rocka-

92. Press Release, N.Y.C. Dep’t. of Hous. Pres. & Dev., De Blasio Administration Financed More Than 34,000 Affordable Homes in 2018 — A New Record (Jan. 16, 2019), <https://www1.nyc.gov/site/hpd/about/press-releases/2019/01/de-blasio-administration-financed-more-than-34000-affordable-homes-in-2018.page> [<https://perma.cc/LC7Z-TG2E>].

93. *Id.*

94. HOUSING NEW YORK I, *supra* note 23, at 31. Notably, the Plan does not define what constitutes a “transitioning” neighborhood.

95. *ZoneIn*, CITY LIMITS, <https://citylimits.org/series/zonein/> [<https://perma.cc/5MXN-LVDR>] (last visited Feb. 13, 2019); *see also* Abigail Savitch-Lew, *Where Mayor de Blasio’s Rezoning Proposals Stand*, CITY LIMITS (Jan. 5, 2017), <https://citylimits.org/2017/01/05/where-mayor-de-blasios-rezoning-proposals-stand/> [<https://perma.cc/69GV-Z256>]. This analysis will include Flushing in part to get a more complete perspective on the effects of Housing New York and in part because the City may opt to try re-zoning the neighborhood again at a later date. Abigail Savitch-Lew, *Flushing: The Case of a Rezoning Postponed*, CITY LIMITS (Nov. 10, 2017), <https://citylimits.org/2017/11/10/flushing-the-case-of-a->

way, Jerome Avenue, and Inwood already passed the City Council, and the re-zoning in Flushing failed for the time being.⁹⁶

Since the City has concentrated on affordable housing in the neighborhoods mentioned in Housing New York or where rezonings are already underway, the neighborhoods' demographics, income patterns, and household makeup, as well as data from the City as a whole, form the basis of the overall fair housing analysis.⁹⁷ This Note uses aggregated geographic data at the public use microdata area (PUMA) level (also known as Sub-Borough Areas or SBAs in New York City), since it is most analogous to community district (CD) units principally used by the Furman Center in its analysis.⁹⁸ Specifically, this Note examines the thirteen PUMAs that correspond with the aforementioned neighborhoods. In addition, discussion of the affordability thresholds will examine options available per the MIH standard⁹⁹ as well as the broader AMI-based targets set out in Housing New York 2.0.¹⁰⁰

rezoning-postponed/ [https://perma.cc/9MWW-2W5Y]. Certain land use changes must go through the Uniform Land Uses Review Procedure (ULURP). For a primer on ULURP, see *Step 5: Uniform Land Use Review Procedure (ULURP)*, N.Y.C. PLANNING, <https://www1.nyc.gov/site/planning/applicants/applicant-portal/step5-ulurp-process.page> [https://perma.cc/W3SB-NCYV] (last visited Mar. 3, 2019).

96. *ZoneIn, CITY LIMITS*, <https://citylimits.org/series/zonein/> [https://perma.cc/5MXN-LVDR] (last visited Feb. 13, 2018).

97. This is not, however, to suggest that the City is interested in building and preserving affordable housing only in these neighborhoods. See *Housing New York Map*, N.Y. CITY DEP'T OF HOUS. PRES. & DEV., <http://hpd.maps.arcgis.com/apps/webappviewer/index.html?id=192d198f84e04b8896e6b9cad8760f22> [https://perma.cc/H7P5-JL32] (last visited Mar. 21, 2019) (demonstrating that, under Housing New York, the City has constructed and preserved affordable housing units in community districts across the City). Using only aggregated data, the analysis cannot be as precise as it would be with microdata.

98. Although this metric is useful, it is limited in that these designations can be notably larger than the area being rezoned. Were this level of specificity available at the level of Neighborhood Tabulation Areas (NTAs), which encase more specific neighborhoods and form the constituent parts of PUMAs, the level of precision of this analysis would increase. Specifically, this analysis examines the PUMAs for Bronx CDs 3 and 6 (Morrisania and Crotona along with Belmont and East Tremont, the latter of which encompasses the Southern Boulevard study area), Bronx CD 4 (Highbridge/Concourse, which encompasses the southern part of the Jerome Avenue re-zoning), Bronx CD 5 (University Heights/Fordham, which encompasses the northern part of the Jerome Avenue re-zoning), Brooklyn CD 4 (Bushwick), Brooklyn CD 5 (East New York/Starrett City), Brooklyn CD 6 (Park Slope/Carroll Gardens, which contains Gowanus), Manhattan CD 3 (Chinatown/the Lower East Side), Manhattan CD 11 (East Harlem), Manhattan CD 12 (Washington Heights/Inwood), Queens CD 1 (Astoria and Long Island City), Queens CD 7 (Flushing/Whitestone), Queens CD 14 (Rockaway and Broad Channel), and Staten Island CD 1 (St. George/Stapleton, which contains the Bay Street study area).

99. See *supra* tbl.1.

100. See *supra* tbl.2. This portion of the analysis will compare the neighborhood profiles to the Housing New York 2.0 targets, not what it has achieved thus far. Given that

A significant majority of Black and Latino families in the selected neighborhoods will not be able to afford homes produced under Housing New York, even under the updated income targets. Since the average household in the selected PUMAs has between two and three people, Table 3, below, presents Housing New York’s income bands for a family of three in greater detail using HUD’s Fiscal Year 2017 Income Limit calculation. The average household size in New York City is 2.7 people per household,¹⁰¹ rendering the Housing New York income bands, which are premised on a three-person household, a useful baseline for comparing median household incomes across most of the selected PUMAs.¹⁰²

TABLE 3: HOUSING NEW YORK’S INCOME BANDS¹⁰³

Income Band	Percentage of AMI	Annual Income (for a family of two)	Annual Income (for a family of three)
Extremely Low Income	0–30%	≤\$22,900	≤\$25,770
Very Low Income	31–50%	\$22,901–\$38,200	\$25,771–\$42,590
Low Income	51–80%	\$38,201–\$61,050	\$42,591–\$68,720
Moderate Income	81–120%	\$61,051–\$91,600	\$68,721–\$103,080
Middle Income	121–165%	\$91,601–\$125,950	\$103,081–\$141,735

the City is short on its goals for building new units (*see* 2019 HOUSING SUPPLY REPORT, *supra* note 56, at 8 (noting that 32% of the program’s production has come via new construction and that the program’s target is 40%)), and that the City has preserved and created more affordable housing for extremely- and very-low income households than planned, *see supra* tbl.2, the City has leeway to meet its construction targets with less generous set-asides.

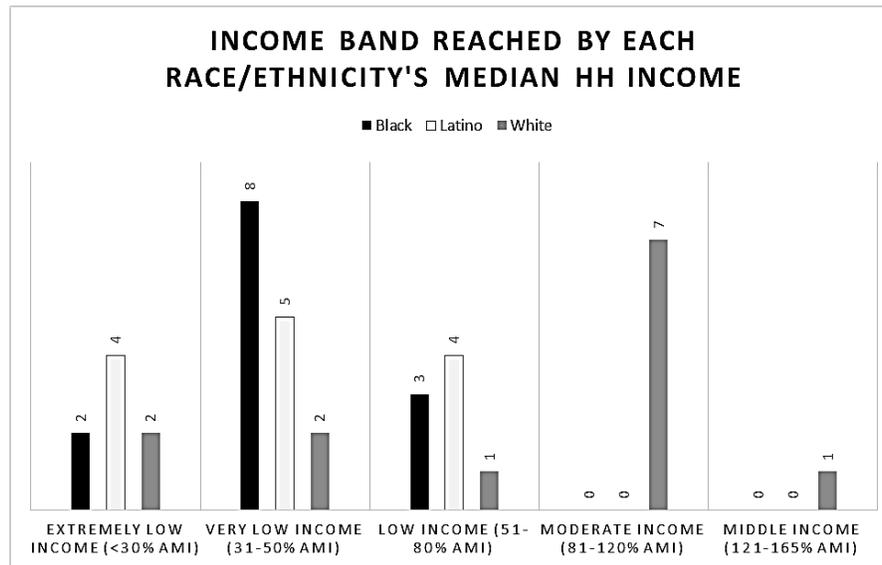
101. *Average Household Size: ACS 2016 (5-Year Estimates)*, SOCIAL EXPLORER, <https://www.socialexplorer.com/2986b12e4f/view> [<https://perma.cc/5SYT-DBEW>] (last visited Jan. 11, 2019) [hereinafter 2016 ACS Average Household Size] (showing average household size as estimated by the U.S. Census Bureau American Community Survey). Median household size, a preferable unit of comparison for an analysis of median household incomes, was not available in the aggregated data.

102. Save the PUMAs for Brooklyn CD 6, Manhattan CD 3, and Queens CD 1. For these PUMAs, the analysis instead relies on HUD’s income limit calculations for two-person households.

103. HOUSING NEW YORK 2.0, *supra* note 32, at 11. For two-person households, AMIs above 80% were calculated by the author using HUD’s Fair Market Rent income limit guidelines. *See New York HUD Metro FMR Area FY 2017 Income Limits Summary, supra* note 32. *Compare* tbl.3, *supra*, with Appendix A, *infra*, which presents the racial composition of each PUMA as well as the median income by race for each household. Data for the entirety of New York City is included as a point of reference.

Across the selected PUMAs, median Black and Latino households tended to fall in the lowest income bands, while median white households in in most PUMAs fell into the Moderate or Middle Income bands. Figure 1 presents this phenomenon in graphical form.

FIGURE 1: INCOME BAND IN WHICH EACH RACE/ETHNICITY'S MEDIAN HOUSEHOLD INCOME FALLS¹⁰⁴



In all but three of the PUMAs above, and in New York City broadly, the median income of white households substantially exceeds those of Black and Latino households. In one PUMA, the median white household out-earns the median Latino household while earning a comparable amount to the median Black household; in another, Black and Latino New Yorkers' median household earnings substantially exceed that of white New Yorkers. The ensuing analysis discusses both Figure 1 and survey the data in Appendix A.

104. This chart demonstrates that the clear majority of median Black and Latino household incomes for a household of the average size in a PUMA fall in the Extremely and Very Low Income bands, for which relatively small shares of units are set aside (see *supra* Table 2), while, by this same metric, a majority of median white household incomes qualify for Moderate Income housing.

1. *Black and Latino Median Household Incomes Are Too Low to Adequately Benefit from the Plan*

Under Housing New York, Black and Latino New Yorkers often must compete for very limited housing targeted at their median household incomes, particularly in the most segregated neighborhoods. The median Black household falls in the Extremely Low Income band for the respective areas' average household size in two PUMAs and the Very Low Income band in eight PUMAs. The median Latino household is in the Extremely Low Income band for the respective PUMAs' average household size in four PUMAs and the Very Low Income band in five PUMAs. However, despite the deep poverty in the PUMAs Housing New York targets, only 25% of affordable units produced under the program are set aside for Extremely and Very Low Income households.¹⁰⁵ The median Black household income in each PUMA qualifies for Low Income housing — for which the majority (55.5%) of Housing New York's affordable units are targeted¹⁰⁶ — in only three of the thirteen PUMAs examined (and comes close in one more) for the respective areas' average household size. Similarly, the median Latino household can reach this band in four PUMAs. Within the context of MIH, the squeeze becomes further accentuated.¹⁰⁷

105. *See supra* tbl.2.

106. *Id.*

107. Apart from the affordability set-aside, the remaining units are market rate. Under Option 1, 25% of floor area is set aside for an average income of 60% AMI in those units. *See supra* tbl.1. Given that 10% of overall floor area is specifically set aside for households at the 40% AMI threshold (about \$34,400 for a family of three), that means that the remaining 15% of the set-aside must average 73% of AMI (about \$62,700 for a family of three) to reach the overall 60% average (about \$51,500 for a family of three).

The median Black household income is within ten percent of the 40% AMI income threshold for a PUMA's average household size in four PUMAs. It is below this range in five PUMAs and above this range in four PUMAs. The median Latino household income is within ten percent (a figure whose only significance is to capture a range of like neighborhoods) of the 40% AMI income threshold for a PUMA's average household size in three CDs, below this range in five PUMAs and above this income threshold in five PUMAs. Thus, using these thresholds, in three PUMAs where Blacks and Latinos combine for about three-quarters or more of the population and one where they combine for one-third of the population, over half of their households are ineligible for the most affordable housing option, of which only ten percent of floor area is available in the first place. This is to say nothing of the other neighborhoods where one or the other group face these particularly egregious mismatches. For the remaining 15% of units, despite their share of the overall population, the income eligibility guidelines will limit them to steeper competition with higher-earning white households.

2. *White Median Household Incomes Substantially Outpace those of Black and Latino New Yorkers*

In general, white households in the City out-earn Black and Latino households. In ten of thirteen PUMAs, the median white household substantially out-earns the median Black and Latino households. Even in the three PUMAs where white households' advantage is narrower or lags behind Black and Latino households, white households' share of the PUMAs' respective populations is so small (under 4.5%) that it could reflect noisy data or other factors. Citywide, the median white household out-earns the median Black household by 88%, and the median Latino household by 114%. In five of the PUMAs listed, the median white household exceeds those respective margins over *both* Black and Latino households and surpasses that margin for one of those groups in one additional PUMA.¹⁰⁸

Furthermore, the income bands that the median white households in these PUMAs reach reflect a much more balanced range of incomes. In two PUMAs, the median white household is in the Extremely Low Income band for the PUMAs' respective average household size, but white New Yorkers constitute less than 5% of the population. In two PUMAs, it is in the Very Low Income band for the respective PUMAs' average household size, and white New Yorkers constitute less than 2% of residents. In one PUMA, it is in the Low Income band for that PUMA's average household size, narrowly falling short of the Moderate Income band. It is in the Moderate Income band in seven PUMAs for the respective PUMAs' average household size and reaches the Middle Income band in one PUMA for its average household size,

As for the other MIH options, the available math does not much improve. Although it is impossible to predict the exact floor area distribution that yields a combination of households earning an average of 80% AMI, it bears noting that in none of these PUMAs does the median Black or Latino household come close to that income threshold for a two- or three-person household. The same design issue plagues extended calculations on the Deep Affordability option: while setting the 40% AMI target as an average likely helps some Black and Latino households in the Extremely Low Income and Low Income bands qualify for more housing, the distribution of units may render the quantity of available housing quite small. The Workforce Development option is not worth assessing here; in none of these PUMAs does the median Black or Latino income even reach 70% AMI for a two- or three-person household, the low end of that option's set-aside.

All figures are calculated by the author using HUD's New York FMR income limits. See *New York HUD Metro FMR Area FY 2017 Income Limits Summary*, *supra* note 32.

108. For these districts, noisy data for whites is much less of a concern — the lowest white share of households is 14.82% in Bushwick.

barely avoiding earning too much money to qualify for any affordable housing.

3. *White Median Household Incomes Uniquely Benefit from Housing Produced for Upper Income Bands*

When comparing white households' income distribution to the income distribution for Black and Latino households in these same PUMAs at each PUMA's respective average household size, it becomes clear that, while many low-income Black and Latino households must compete for Extremely and Very Low Income housing, whites have limited competition for Moderate and Middle Income housing, which constitute a combined 19.5% of Housing New York's target housing output.¹⁰⁹ When surveying their eligibility for housing under MIH, their situation further improves.¹¹⁰ Given that the in-migration of college-educated white New Yorkers compounds the gentrification crisis,¹¹¹ they figure to do even better in affording market-rate apartments, which effectively shuts out many of the disproportionately low-income Black and Latino New Yorkers in these neighborhoods.

109. See *supra* tbl.2.

110. Although white median household income is more than ten percent higher than the 40% AMI set-aside in Option 1 and the 40% average AMI target in the Deep Affordability option for each respective PUMA's average household size in ten of the thirteen sampled PUMAs, the same metric primes them to do well in the unpegged portion of Option 1, Option 2, and in the Workforce Development Option. Given that the households living in the floor area unpegged to a specific income (fifteen percent of floor area) in Option 1 should average an income that is 73% AMI (about \$62,700) to reach the overall 60% average AMI target, median white household earnings can plausibly be competitive for housing in six of the sampled PUMAs at those PUMAs' respective average household size. Option 2's 80% average AMI target is somewhat more permissive, granting whites better odds at competing for housing in seven PUMAs given those CDs' respective average household size. The Workforce Development is tailor-made for these same households; its broad, higher-end income targets render their median household income eligible for housing in those same seven PUMAs.

111. See STATE OF NEW YORK CITY'S HOUSING AND NEIGHBORHOODS IN 2015, *supra* note 5, at 10 fig.5, 12 tbl.9 (demonstrating that, since 2010, the share of college-educated residents rose the most in gentrifying neighborhoods and that gentrifying neighborhoods are the only category of neighborhoods in the City where the white share of the population has risen); see also N.Y.C. PLANNING, MANDATORY INCLUSIONARY HOUSING: PROMOTING ECONOMICALLY DIVERSE NEIGHBORHOODS 16 tbl.1 (2015), https://www1.nyc.gov/assets/planning/download/pdf/plans-studies/mih/mih_report.pdf [<https://perma.cc/74J4-A2YZ>] (demonstrating that a greater share of domestic in-migrants have college degrees than do domestic out-migrants or longer-term city residents); see also *id.* at 26 fig.12 (mapping NTAs where, *inter alia*, the growth in the share of residents working in management, professional, or related occupations outpaced those of the City as a whole by more than 10%).

This analysis, which compares all groups' median incomes against the income bands for three-person households, likely understates the advantages white households hold in obtaining housing through Housing New York. As Part II.B further details, and as the City partially acknowledges,¹¹² the greater prevalence of nonfamily households, many of them white and in gentrifying neighborhoods, reflects individuals' decisions to join incomes and live as roommates in multi-room apartments. Thus, while these individuals are still considered a household, they are not structurally comparable to families with a child given that they have much more flexibility in parting ways, including pursuing new housing opportunities. Accordingly, housing that accommodates families with children may reasonably accommodate nonfamily households, but the converse is unlikely to be true. Longitudinal microdata specific to these movers, distinguishable by race, would make such an analysis possible.

B. THE PLAN'S HOUSEHOLD TARGETS DISPROPORTIONATELY DENY HOUSING TO BLACK AND LATINO FAMILIES

Housing New York's strategy of prioritizing the construction of studio and one-bedroom apartments over two-bedroom apartments, in failing to account for the Household Differential,¹¹³ further disproportionately denies housing to Black and Latino New Yorkers and perpetuates segregated living patterns. Housing New York is expressly silent on its concept of household size and composition, and the average household size in New York City does not reflect meaningful variation along racial and ethnic lines.¹¹⁴ The Plan's failure to adequately account for household size and composition creates unfortunate consequences for Black and Latino families.

In the absence of granular PUMA-level data available to connect variations in household composition by race directly, this analysis relies upon national trends and aggregated citywide da-

112. See HOUSING NEW YORK I, *supra* note 23, at 24 (noting the increasing prevalence of roommates to rent multi-bedroom apartments).

113. For a definition of this term, see *supra* Part I.

114. This is not to suggest, of course, that these lines *explain* these differences or are even a driving factor. However, an accurate understanding of variance in household composition provides a better understanding of what kinds of housing various households need and can reasonably afford. When these differences manifest themselves across racial lines, it is important to understand their fair housing implications.

ta. First, Table 4 (below) demonstrates the combined Black and Latino share of the PUMA’s population (given their commonalities in trends on family structure and their shared barriers to housing affordability under Housing New York) in conjunction with the average household size, the share of households with at least one person under age eighteen (an intentionally broad measure to capture diverse family arrangements), the share of households where the householder is a single parent, and the share of households that are nonfamily and have no residents under the age of eighteen. Data for New York City as a whole are included for reference.

TABLE 4: BLACK AND LATINO POPULATION OF PUMAS AND
SELECTED HOUSEHOLD CHARACTERISTICS¹¹⁵

Geographic Area of Measurement	% Black and Latino	Average HH Size	HH w/ ≥ 1 Person Under 18	% HH led by Single Parent	% HH Nonfamily with No Person Under 18
New York City	51.26%	2.7	30.09%	12.83%	40.06%
BX 5—University Heights/Fordham	96.16%	3	43.66%	30.28%	32.07%
BX 4—High Bridge/Concourse	94.88%	2.9	40.26%	26.67%	35.62%
BX 3 & BX 6—Morrisania and Crotona/ Belmont and East Tremont	93.57%	2.9	43.09%	30.44%	33.84%
BK 5—East New York and Starrett City	89.32%	2.9	38.81%	23.61%	31.95%
BK 4—Bushwick	78.79%	2.9	33.70%	19.37%	42.32%
MN 12—Washington Heights and Inwood	77.96%	2.9	28.78%	16.27%	43.39%
MN 11—East Harlem	74.98%	2.4	27.94%	18.27%	46.89%
QN 14—Rockaway and Broad Channel	58.88%	2.9	37.51%	18.64%	33.33%
SI 1—St. George and Stapleton	51.45%	2.8	37.77%	14.85%	30.25%
QN 1—Astoria and Long Island City	33.51%	2.3	19.08%	6.71%	49.71%
MN 3—Chinatown and Lower East Side	32.81%	2.1	15.68%	7.95%	58.39%
BK 6—Park Slope and Carroll Gardens	24.27%	2.3	28.56%	6.80%	44.87%
QN 7—Flushing and Whitestone	19.71%	2.8	28.91%	6.78%	28.88%

115. Data compiled by the author using the U.S. Census's 2012–16 American Community Survey data via Social Explorer. Unlike in Tables 4 and 5, this table is using the share of Latinos of any race and of non-Black Latinos to get a combined share of Blacks and Latinos in a PUMA. *Total Population: Hispanic or Latino, Not Hispanic or Latino: Black or African American Alone: ACS 2016 (5-Year Estimates)*, SOCIAL EXPLORER, <https://www.socialexplorer.com/25950b4ef5/view> [<https://perma.cc/WVQ4-Y3QV>] (last visited Jan. 24, 2018); *Households by Presence of People Under 18 Years by Household Type: ACS 2016 (5-Year Estimates)*, SOCIAL EXPLORER, <https://www.socialexplorer.com/e4cf3c4437/view> [<https://perma.cc/ED6P-VXQM>] (last visited Jan. 11, 2018) [hereinafter 2016 ACS Households by Presence of People Under 18]; *Average Household Size*, *supra* note 101.

Within this set, three correlations appear between the combined Black and Latino share of the PUMA and the selected household factors. For one, there is a strong positive correlation ($r = 0.81$) between the combined Black and Latino share of a PUMA's population and its average size per household. There is a similarly strong positive correlation ($r = 0.75$) between the combined Black and Latino share of a PUMA's population and the share of its households with at least one person under the age of eighteen. The correlation between the combined Black and Latino share of the PUMA and the percentage of households led by a single parent ($r = 0.95$) is stronger still.

Taken together, these findings suggest that a greater share of residents of Black and Latino households in the selected PUMAs are children than in white households.¹¹⁶ When considering this factor in conjunction with the greater frequency of single parenthood, it is likely that there are fewer people in the home able to contribute to the household's income in comparison to households that might feature two parents — potentially two working parents, and one child — and which are more commonly white. Thus, even though the City uses the citywide mean of three-person household as its housing benchmark,¹¹⁷ setting aside significant amounts of housing for *higher-income* three-person families is plainly a mismatch for the largely *low-income* communities of color living in those areas.

C. THE COMMUNITY PREFERENCE POLICY'S EXACERBATION OF THE PLAN'S DISPARATE IMPACTS

The City's community preference policy compounds Housing New York's perpetuation of segregation by limiting residents' ability to move between neighborhoods via the lottery and by giving a disproportionate advantage to nonfamily households. The policy, currently being challenged in *Noel v. City of New York*, may change as a result of the litigation.

116. In fact, the share of households with at least one person under the age of eighteen and the combined share of family household members who are children or grandchildren is very similar. See *2016 ACS Households by Presence of People Under 18*, *supra* note 115; cf. *Total Population: in Households: in Family Households: Child: ACS 2016 (5-Year Estimates)*, SOCIAL EXPLORER, <https://www.socialexplorer.com/7abc92c78a/view> [https://perma.cc/LMR9-PYB9] (last visited Jan. 12, 2018).

117. See, e.g., HOUSING NEW YORK 2.0, *supra* note 32, at 11.

That the community preference policy gives a disproportionate preference to higher-income households is clear. Given the strong relationship between race and income, the Part A.1 examination of the PUMAs encompassing areas targeted for re-zoning, and the fact that the City refuses to release its housing lottery outcomes by race,¹¹⁸ using income as a proxy for race, while imperfect, is reasonably useful in this context. In that light, a case study of the policy's effects is possible.

City Limits analyzed the outcome of a four-building lottery in Prospect Heights, Brooklyn in 2017.¹¹⁹ The first building received nearly 92,743 applicants for 297 units. That lottery drew 2,783 applicants¹²⁰ (3% of all applicants) for one set of 148 apartments (50% of all units) in the Middle Income band, 4,609 applicants (5% of all applicants) for another set of 44 apartments (15% of all units) in the Middle Income band, 18,680 applicants (20% of all applicants) for 15 apartments (5% of all units) in the Moderate Income band, and a staggering nearly 67,000 applicants (72% of all applicants) for 90 units (30% of all units) in two sets of Low Income bands.¹²¹ *City Limits* noted that “a good number” of applicants failed to qualify for the Low Income units because their incomes were too low or they fell between the specified Low Income bands.¹²² In the second housing lottery, the pool was “nearly as skewed,” though more evenly distributed across the lower income tiers.¹²³

In this lottery, the odds of an eligible applicant winning ranged from about 1 in 15 for the first band of Moderate Income units to 1 in 1245 for applicants in the Low Income band.¹²⁴

118. Greg B. Smith, *Lawsuit Claims de Blasio is Hiding Affordable Housing Info that Shows City is Supporting Segregation*, N.Y. DAILY NEWS (Aug. 8, 2017), <http://www.nydailynews.com/new-york/lawsuit-claims-housing-info-shows-nyc-supports-segregation-article-1.3392336> [<https://perma.cc/7V8D-UB52>].

119. Norman Oder, *The Real Math of an Affordable Housing Lottery: The Real Disconnect*, CITY LIMITS (Apr. 19, 2017), <https://citylimits.org/2017/04/19/the-real-math-of-an-affordable-housing-lottery-huge-disconnect-between-need-and-allotment/> [<https://perma.cc/U5JH-2MWH>] (using data obtained from a Freedom of Information Law request).

120. This is the only band for which the story specified the exact number of applicants eligible (2,203) for the units in question at the exclusion of the total number of applicants for the set of apartments. However, given that all other applicants for the other apartments being accounted for, the author calculated this number.

121. Oder, *supra* note 119.

122. *Id.*

123. *Id.*

124. *Id.*

However, the situation becomes more striking when factoring in community preferences: for 44 two-bedroom units within the Middle Income band, only 360 households initially qualified.¹²⁵ Since half of the units are reserved for applicants from the designated community districts (given that the development was large and spanned four different CDs), the 111 residents from those CDs “seemingly had a one-in-five chance for 22 apartments.”¹²⁶

Thus, residents of a neighborhood got a significant preference simply for having lived there for an undefined amount of time. This phenomenon is particularly troublesome in gentrifying neighborhoods, where many Black and Latino households are too low-income to afford even the most affordable housing, and where the median white household income is meaningfully higher than the Black or Latino median household income, as documented in Part III.A. In these settings, an already-diminished share of Black and Latino households is eligible for the available affordable housing in their own community districts’ lotteries. If these households lose their local lotteries, they will be at a disadvantage in seeking to try their luck again in other areas of the City, since as newcomers to other areas, the community preference policy will disfavor them.¹²⁷ In this way, the community preference policy makes Black and Latino families even less likely to qualify for affordable housing under Housing New York.

Housing New York has another similar, if not more straightforward, effect on Black and Latino families. As Part III.B documented, the significant share of studio and one-bedroom apartments among the new housing in gentrifying areas compounds the Plan’s perpetuation of segregation. Black and Latino families seeking affordable housing would then need to look to other neighborhoods — likely either non-gentrifying or already high-income — where the share of nonfamily households has been flat or is growing at a slower pace over the long term.¹²⁸ In doing so, however, these families once again lose their community preference, rendering them less likely to qualify for affordable housing produced under Housing New York.

125. *Id.*

126. *Id.*

127. And if, for any reason, more middle class or upper-income Blacks and Latinos wished to move out of their present neighborhood into a gentrifying one, they would also face steeper odds of doing so.

128. STATE OF NEW YORK CITY’S HOUSING AND NEIGHBORHOODS IN 2015, *supra* note 5, at 11 tbl.7.

Accordingly, the community preference policy perpetuates segregated living patterns in New York City. Indeed, one may view the policy as an anti-gentrification tool, if one believes that such a policy will meaningfully boost Black and Latino residents' ability to move to affordable housing within their neighborhood. However, as has been documented at length, the housing produced is insufficiently affordable, particularly in the neighborhoods targeted for MIH re-zonings. In addition, the fact that this residency preference does not consider length of residency means that relative newcomers to a predominantly Black and/or Latino neighborhood may derive equal benefit from the policy relative to longtime Black and Latino residents. Accordingly, the policy's design and the context in which it exists severely undermines its utility as an anti-gentrification tool. Even so, a policy that would function with the needed adjustments would remain very likely to perpetuate segregation by race.

In sum, the Plan's income distribution, its failure to account for the Household Differential, and the community preference policy all, independently and collectively, indicate Housing New York's disproportionate denial of housing to Black and Latino families and the perpetuation of segregated living patterns. Having satisfied this first step in the burden-shifting disparate impact analysis, the next Part examines the remainder of the framework.

IV. COMPLETING THE DISPARATE IMPACT ANALYSIS: CAUSALITY, THE CITY'S INTERESTS, AND AVAILABLE ALTERNATIVES

The statistical evidence in Part II is only the first step in the burden-shifting disparate impact analysis. Under *Inclusive Communities* — which the Second Circuit observed to have effectively adopted the HUD framework¹²⁹ — there must be a “robust causality” between a defendant's policies or practices and the statistical disparity to establish a prima facie case of disparate impact.¹³⁰ Subsequently, a defendant can contend, with empirical support, that the challenged policy or practice is necessary to

129. *Mhany Mgmt., Inc. v. Cty. of Nassau*, 819 F.3d 581, 618 (2d Cir. 2016) (“The Supreme Court implicitly adopted HUD’s approach” (citing *Texas Dep’t. of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2518 (2015))).

130. *Inclusive Communities*, 135 S. Ct. at 2523.

serve a substantial, legitimate, nondiscriminatory interest. Should the defendant meet that burden, a plaintiff can then counter by demonstrating that there are less discriminatory ways to serve such interests.¹³¹

This Part explores these final steps in the burden-shifting disparate impact analysis. Part IV.A details the robust causality between the City’s planned allocation of housing by income and household size and the perpetuation of segregation. Part IV.B presents and rebuts many of the City’s anticipated justifications, likely foreclosing a finding that the City had substantial, legitimate, and nondiscriminatory interests in advancing Housing New York as currently constructed. Part IV.C puts forth available less discriminatory alternative policies to advance the City’s stated objectives. These alternatives double as plausible remedies.

A. THE ROBUST CAUSALITY BETWEEN THE PLAN’S TARGETS AND THE PERPETUATION OF SEGREGATION

The “robust causality” requirement in *Inclusive Communities* — which demands that a defendant’s policies or practices be the impetus behind the alleged statistical disparity — is subject to a wide variety of interpretations. Yet, under any of them, a challenge to the City’s Housing New York policy on these perpetuation of segregation grounds meets this test.¹³²

131. 24 C.F.R. § 100.500(c)(2)–(3) (2018) (cited by *Inclusive Communities*, 135 S.Ct. at 2514–15).

132. Some courts and commentators view the test as a more exacting pleading standard for Fair Housing Act cases. See, e.g., *Burbank Apartments Tenant Ass’n v. Kargman*, 48 N.E. 3d 394, 411 n.29 (Mass. 2016) (“Our understanding is that the Court’s call for ‘adequate safeguards,’ including a ‘robust causality requirement’ [. . .] indicates a higher burden for disparate impact plaintiffs under the [Fair Housing Act] than under Title VII.” (citation omitted)); Elizabeth L. McKeen et al., *Robust Causality and Cautionary Standards: Why the Inclusive Communities Decision, Despite Upholding Disparate Impact Liability, Establishes New Protections for Defendants*, 132 BANKING L.J. 553, 557 (2015) (noting that *Inclusive Communities* offers “new protections” to defendants while conceding that the Court’s discussion of the disparate impact theory as having “always been properly limited”). However, others see the test as a re-affirmation of higher pleading standards set out broadly in federal cases. See, e.g., Stacy Seicshnaydre, *Disparate Impact and the Limits of Local Discretion After Inclusive Communities*, 24 GEO. MASON L. REV. 663, 678–679 (2017) (arguing that the *Inclusive Communities* standard is line with the exacting *Twombly/Iqbal* pleading standards and that cases additionally fail because of “the fundamental nature of the deficiencies in the dismissed complaints”) (citations omitted). Given the relative similarities between the standard laid out in *Tsombanidis*, see *supra* note 89, which was decided in 2003, and that articulated in *Inclusive Communities*, the reality in the Second Circuit is likely closer to the latter view.

To begin, Housing New York is a policy and not a one-time decision. The plan describes itself as having “policy goals”¹³³ and lists its major “Policies and Programs,” among them “Implement[ing] a Mandatory Inclusionary Housing Program.”¹³⁴ And, almost by definition, the fact that the City has completed, initiated, or otherwise attempted seven re-zonings and is expected to propose another five¹³⁵ lays to rest any question that this constitutes a one-time decision. Furthermore, as described above, key components of Housing New York, including MIH and ZQA, required a change in local law,¹³⁶ which the *Mhany* court posited warrants a classification as a “general policy.”¹³⁷ The original Housing New York plan identified some initial required policy changes that are analogous in nature, such as changing term sheets for city loan subsidy programs for affordable housing development.¹³⁸

The fact that one of the theories set out here is a perpetuation of segregation theories can simplify the analysis. By definition, a challenge alleging a perpetuation of segregation sets out to eliminate a policy or practice that perpetuates segregated housing patterns. The Supreme Court acknowledged as much in *Inclusive Communities*, both recognizing the perpetuation of segregation theory as a viable theory of liability¹³⁹ and describing exclusionary zoning cases as “resid[ing] at the heartland of disparate-impact liability.”¹⁴⁰ While the Housing New York policies at issue plainly do not involve exclusionary zoning, they impact Black and Latino families in analogous ways. If Black and Latino households, and families in particular, cannot qualify to live in a building because they do not meet the City’s income guidelines, are more likely to be too large to fit in apartments built with fewer

133. HOUSING NEW YORK I, *supra* note 23, at 101 (“HPD and HDC will release a revised set of program terms to implement the policy goals of the Plan”).

134. *Id.* at 8.

135. See *ZoneIn*, *supra* note 95 (presenting a keyed map with these proposals).

136. See Durkin, *supra* note 38.

137. *Mhany Mgmt., Inc. v. Cty. of Nassau*, 819 F.3d 581, 619 (2d Cir. 2016).

138. HOUSING NEW YORK I, *supra* note 23, at 101.

139. *Texas Dep’t. of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2522 (2015) (“[T]he [Fair Housing Act] aims to ensure that [governmental] priorities can be achieved without arbitrarily creating discriminatory effects or perpetuating segregation.”).

140. *Id.* at 2521–22 (citing *Town of Huntington v. Huntington Branch, N.A.A.C.P.*, 488 U.S. 15, 16–18 (1988); *United States v. City of Black Jack*, 508 F.2d 1179, 1182–88 (8th Cir. 1974)).

bedrooms at the behest of the City,¹⁴¹ and are functionally restricted to applying to homes in already-segregated community districts, then the policies perpetuate segregated living patterns. In this way, the impact of these policies is deeply evocative of what the Second Circuit describes in their analyses in *Huntington II*, *Mhany Management*, and *Tsombanidis* because Black and Latino New Yorkers are in greater need of affordable housing, especially deeply affordable housing, compared to white New Yorkers, and these policies directly affect the availability of affordable housing to the affected communities.¹⁴²

One can draw a similar comparison from another dimension: the physical apartment sizes the City permits in new construction. Under the ZQA amendments, the City permitted taller buildings for buildings in MIH zones and greater density within buildings in high-density residential zones without allowing increased square footage except for affordable senior housing.¹⁴³ The City justified the change by stressing the importance of higher ceilings and architectural diversity.¹⁴⁴ However, these changes similarly encourage more apartments with fewer bedrooms, as is the City’s stated goal, which, when aggregated, incentivize further reductions in the kinds of housing for which Black and Latino families may be eligible under Housing New York and resemble the spatial role that minimum lot sizes play in exclusionary zoning.

Courts have recognized the significant discriminatory effects such policies may have. For example, the court in *Broadway Triangle Community Coalition v. Bloomberg*¹⁴⁵ recognized the dis-

141. Tucked into its Consolidated Plan, which HUD grantee recipients must submit to the agency in order to qualify for federal funds, the City declares its intention to amend the regulation governing the size of the units that HPD requires from new construction. The plan notes that the current policy requires developers to build either fifty percent two-bedroom units or thirty percent two-bedroom units and ten percent three-bedroom units. N.Y.C. PLANNING, CONSOLIDATED PLAN: 2015–19 FIVE-YEAR STRATEGIC PLAN SP-80 (Dec. 16, 2016), <https://www1.nyc.gov/assets/planning/download/pdf/about/consolidated-plan/2015-conplan-strategic-plan.pdf> [https://perma.cc/CAD4-WQPB] [hereinafter CONSOLIDATED PLAN]. Developers, the City notes, frequently opt for the former option; however, the City intends to promote the latter in order to build the remaining sixty percent of units as studios and one-bedroom units to meet what it asserts are the growing number of one- and two-person households. *Id.*

142. See discussion of *Huntington II*, *Tsombanidis*, *Gallagher*, and *Mhany Mgmt. supra* notes 89–91, and accompanying text.

143. See *supra* notes 40–42, and accompanying text.

144. *City Council ZQA Overview, supra* note 39.

145. *Broadway Triangle Cmty. Coal. v. Bloomberg*, 35 Misc. 3d. 167 (N.Y. Sup. Ct. Dec. 23, 2011).

parate impact of the share of apartments with certain numbers of bedrooms in a development. The court recognized that a city-chosen developer's affordable housing development built a disproportionately high share of three- and four-bedroom apartments, which disproportionately benefitted the Hasidic population of Williamsburg¹⁴⁶ and its atypically large families at the expense of nearby Black and Latino households, and established a prima facie showing of disparate impact on the area's Black and Latino families under *Huntington II*.¹⁴⁷ Although this decision preceded *Inclusive Communities*, the *Broadway Triangle* decision would nevertheless satisfy the "robust causality" standard, since the perpetuation of segregation there stemmed from the specifications of the housing proposed by city-chosen developers.

Over time, the *Broadway Triangle* plan's contours have been much broader than a specific development. Nevertheless, the general principle remains applicable to Housing New York, since the perpetuation of segregation at issue stems from the City's all-but-expressed desire to build housing to accommodate what are ultimately largely white and nonfamily households that, in light of racial differences in household size and composition, disproportionately deny housing to Black and Latino families and perpetuate segregated living patterns.

B. REBUTTING THE CITY'S ANTICIPATED JUSTIFICATIONS

The City would face steep difficulties in asserting a legally sufficient justification for its income and household size targets. In response to the analyses in Parts III and IV.A,¹⁴⁸ the City would assert that its policies are "necessary to achieve one or more substantial, legitimate, nondiscriminatory interests."¹⁴⁹ This Subpart first rebuts an anticipated assertion that, as presently constructed, the Plan is the most economically viable way to deliver affordable housing for New Yorkers. Next, it demonstrates that the City cannot support an assertion that there has been an increased demand for homes for nonfamily households without

146. It is important to note that the *Broadway Triangle* court considered the Williamsburg Hasidim to be white for the purposes of its FHA analysis. See generally *id.*

147. *Id.* at 173–75.

148. From this point forward, the arguments in those sections will be treated *arguendo* as having established a prima facie showing of disparate impact.

149. 24 C.F.R. § 100.500(e)(2) (2018) (cited by Texas Dep't. of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc., 135 S. Ct. 2507, 2515 (2015)).

children. Lastly, this Subpart outlines how the City fails to meet its own stated goals for Housing New York.

1. *The Market Inefficiencies of Housing New York*

The most obvious justification the City may offer for the current construction of the Plan — especially its MIH component and the Plan’s share of housing geared toward Moderate and Middle Income households — is that it is the most economically viable way to deliver affordable housing for New Yorkers. Mayor de Blasio has further described the targeted neighborhoods as areas where the City has “the opportunity to make the biggest impact” by building affordable housing and increasing amenities.¹⁵⁰ He has also asserted that low-income communities of color are those best-suited for increased development.¹⁵¹

However, the City’s own data refutes that assertion. The City commissioned a study by Bay Area Economics to develop industry-guided indices for market strength by Neighborhood Tabulation Area (NTA) and for project viability. The study found that, in “Strong” and “Very Strong” housing markets, a combination of MIH and state and federal tax credits made most rental projects that set aside between 20% and 50% of floor area at 60%, 75%, and 90% average AMI thresholds viable for most mid- and high-rise buildings.¹⁵² Furthermore, it found that “Moderate” and “Weak” markets would likely require public subsidies to make MIH viable.¹⁵³ Still, the City has only contemplated pursuing MIH re-zonings in one NTA with a Very Strong Market (China-

150. Sam Raskin, *Questions Arise as de Blasio Rezones Series of Low-Income Neighborhoods*, GOTHAM GAZETTE (Mar. 7, 2018), <http://www.gothamgazette.com/city/7521-questions-arise-as-de-blasio-rezones-series-of-low-income-neighborhoods> [<https://perma.cc/C36J-U59U>].

151. *Id.*

152. BAE URBAN ECONOMICS, INC. ET AL., MARKET & FINANCIAL STUDY: NYC MANDATORY INCLUSIONARY HOUSING 49–53, 54 tbl.21 (2015), http://www1.nyc.gov/assets/planning/download/pdf/plans-studies/mih/bae_report_092015.pdf [<https://perma.cc/SA3Z-V37V>] [hereinafter BAE MIH STUDY].

153. *Id.* at 50. The Furman Center reached the same conclusion on neighborhoods with weaker housing markets. See JOSIAH MADAR, FURMAN CTR. FOR REAL ESTATE & PUB. POLICY, INCLUSIONARY HOUSING POLICY IN NEW YORK CITY: ASSESSING NEW OPPORTUNITIES, CONSTRAINTS, AND TRADE-OFFS 19 (2015), http://furmancenter.org/files/NYUFurmanCenter_InclusionaryZoningNYC_March2015.pdf [<https://perma.cc/RZ5D-6896>] [hereinafter FURMAN CTR. MIH STUDY] (“Clearly, whether or not it is efficiently designed or fiscally prudent, there are many neighborhoods where an inclusionary housing policy that relies entirely on cross-subsidy and property tax exemption is unlikely to be a sufficient tool for providing affordable housing.”).

town) and one NTA with a Strong Market (East Harlem South).¹⁵⁴ For whatever its reasons, the City has chosen to subsidize development in weaker markets instead of capitalizing on the economic path of least resistance to deliver greater and deeper affordable housing.

Simultaneously, the City has offered mixed signals about its willingness to further subsidize low-income housing, particularly in MIH areas. On the one hand, the New York City Department of City Planning calls MIH “the floor, not the ceiling, of affordability that would ultimately be achieved in new development.”¹⁵⁵ On the other hand, Deputy HPD Commissioner for Development Molly Park told *City Limits*, “The City explicitly did not intend to contribute funds that might subsidize MIH units.”¹⁵⁶ As is, the City has nevertheless begun to do so. As part of the 2016 East New York re-zoning plan, the City agreed to only subsidize buildings that are 100% affordable in the Low and Extremely Low income bands, committing at least 40% of all units in those buildings to households making less than 50% AMI, with the remainder going to households making 60% AMI.¹⁵⁷ The City has also provided funding to subsidize affordable housing in the recently passed Inwood re-zoning plan.¹⁵⁸

The City may further assert that it has an interest in developing a substantial share of Moderate and Middle Income housing. To support this contention, it may point to the growing rent burden on some households in these income bands¹⁵⁹ and the fact

154. See BAE MIH Study, *supra* note 152, at 59 tbl.59. Cf. *supra* note 95 and accompanying text (listing neighborhoods where the city has expressed an interest in MIH rezonings).

155. *Mandatory Inclusionary Housing*, N.Y.C. PLANNING (Mar. 22, 2016), <https://www1.nyc.gov/site/planning/plans/mih/mandatory-inclusionary-housing.page> [<https://perma.cc/7MLK-FFKP>].

156. Abigail Savitch-Lew, *Advocates, Council Continue Push for Deeper Affordability*, CITY LIMITS (Sept. 14, 2017), <https://citylimits.org/2017/09/14/advocates-council-continue-push-for-deeper-affordability/> [<https://perma.cc/H2TW-GM8J>].

157. *East New York Neighborhood Plan*, N.Y.C. PLANNING, <http://www1.nyc.gov/site/planning/plans/east-new-york/east-new-york-1.page> [<https://perma.cc/6LZE-R376>] (last visited Jan. 28, 2018).

158. See Sadeef Ali Kully, *Council Approves Inwood Rezoning Amid Protest*, CITY LIMITS (Aug. 9, 2018), <https://citylimits.org/2018/08/09/council-approves-inwood-rezoning-amid-protest/> [<https://perma.cc/Q8JG-KQ3N>] (last visited Sep. 21, 2018).

159. See STATE OF NEW YORK CITY'S HOUSING AND NEIGHBORHOODS IN 2015, *supra* note 5, at 15 tbl.12 (demonstrating that Moderate Income households have had the largest percentage-point growth in share of rent-burdened households); see also RAHUL JAIN, CITIZEN'S BUDGET COMM'N, WHOSE BURDEN IS IT ANYWAY? 3 tbl.2 (2015), https://cbcnyc.org/sites/default/files/media/files/REPORT_RENTBURDEN_11122015_0.pdf

that MIH works in part by getting units with higher-income tenants to cross-subsidize lower-income tenants.¹⁶⁰ This defense is flawed for two reasons. First, as previously established, in the neighborhoods that are in the Moderate and Weak market categories as defined by Bay Area Economics, developers will still need rent subsidies to build under MIH. Re-zoning for greater density in weaker markets is insufficient to enable these units to cross-subsidize lower-income housing.¹⁶¹ Second, affordable rental housing particularly geared at Middle Income housing has not been particularly successful. The affordable housing lottery manager for the units described in Part III.C described leasing to Middle Income tenants as “really tough,” given that their financial position enables such tenants to pursue other options. In fact, as of November 2017, eighty units designated for Middle Income households were still empty and being advertised on online residential database, StreetEasy.¹⁶²

Accordingly, the economic theory upon which the City would likely rest its justification for the current construction of Housing New York — specifically, its MIH component and the share of units aimed for Moderate and Middle Income households — is severely flawed.

2. *The Plan’s Erroneous View of Household Size Trends*

The City has justified its intention to incentivize a shift in the construction of new units to studios and single-family homes,¹⁶³ while neglecting the need for housing for median-size Black and Latino households, by pointing to an increased demand in the need for those homes. The City’s assertion, however, is misguided. In 2005, the citywide share of nonfamily households was 39.2%; by 2015, the nonfamily share of households had only in-

[<https://perma.cc/KK3K-KU2L>] [hereinafter CBC RENT BURDEN STUDY] (demonstrating that 150,000 middle- and moderate-income households are rent-burdened).

160. Norman Oder, *The Real Math of an Affordable Housing Lottery: The Real Disconnect*, *supra* note 119 (“The middle-income units [. . .] contribute to the long-term financial viability of the development,” said Stephanie Mavronicolas, director of external affairs for HDC, “while meeting a genuine need for middle income households finding it harder to afford to stay in New York City.”).

161. FURMAN CTR. MIH STUDY, *supra* note 153, at iii.

162. Ginia Bellafante, *At \$3,700 a Month, ‘Affordable’ Apartments Go Begging*, N.Y. TIMES (Nov. 17, 2017), <https://www.nytimes.com/2017/11/17/nyregion/at-3700-a-month-affordable-apartments-go-begging.html> [<https://perma.cc/QL66-7T2D>].

163. HOUSING NEW YORK I, *supra* note 23, at 24. *Accord* CONSOLIDATED PLAN, *supra* note 141, at SP-80.

creased one percentage point to 40.4%.¹⁶⁴ In 2016, that share was effectively flat, constituting 40.2% of households.¹⁶⁵ By contrast, these margins have fluctuated within various neighborhoods. Between 2005 and 2015, although the share of nonfamily households fell in many parts of the City, including parts eastern Queens and southern Brooklyn, this share increased by over five percentage points in SBAs for Bushwick, Bedford Stuyvesant, Brownsville/Ocean Hill, East Flatbush, Crown Heights South, Astoria, Morningside Heights/Hamilton Heights, Washington Heights/Inwood, and Williamsbridge/Baychester.¹⁶⁶ Of these nine SBAs, the Furman Center identifies seven as gentrifying and calls the remaining two (East Flatbush and Williamsbridge/Baychester) high-income.¹⁶⁷ Re-orienting the City's desired housing production in such a context suggests that the City is most interested in building new housing for people moving into gentrifying neighborhoods, not for low-income people living in the same neighborhoods or citywide.

The City could attempt to justify its interest in smaller apartments by pointing to the dip in families with children, but this explanation would be insufficient. Between the 2005–2009 ACS and the 2009–2014 ACS, the share of families with children dropped by just over one percentage point in the City overall, with a two-percentage point drop in both gentrifying and non-gentrifying neighborhoods.¹⁶⁸ While the difference is not negligible, it alone is not sufficient to spawn a reorientation of New York City's housing policy.

The City may conceivably argue that such a shift would nevertheless be an acceptable concession to the realities of gentrification. This justification, too, would fail for three reasons. First, as the City has itself acknowledged, individuals in nonfamily house-

164. FURMAN CTR. FOR REAL ESTATE & PUB. POLICY, STATE OF NEW YORK CITY'S HOUSING AND NEIGHBORHOODS IN 2016 7 (2016), http://furmancenter.org/files/sotc/SOC_2016_Full.pdf. [<https://perma.cc/RTE5-KA7Y>] [hereinafter STATE OF NEW YORK CITY'S HOUSING AND NEIGHBORHOODS IN 2016].

165. *Households: Nonfamily Households: ACS 2016 (5-Year Estimates)*, SOCIAL EXPLORER, <https://www.socialexplorer.com/9b910f0374/view> (last visited Jan. 12, 2019) (on file with the *Columbia Journal of Law and Social Problems*).

166. STATE OF NEW YORK CITY'S HOUSING AND NEIGHBORHOODS IN 2016, *supra* note 164, at 7 fig.2.

167. STATE OF NEW YORK CITY'S HOUSING AND NEIGHBORHOODS IN 2015, *supra* note 5, at 6.

168. *Id.* at 12 tbl.8. Compare with the longer-term trend beginning in 1990 discussed in note 15 *supra* and the accompanying text.

holds may live together as roommates;¹⁶⁹ by contrast, many family households, particularly those with children, cannot reasonably fit in a one-bedroom apartment. Second, as has been previously established, the City relies on subsidizing construction in neighborhoods whose markets cannot even yet support the scale the City wishes to see in these neighborhoods — in other words, the City is willfully encountering serious hurdles to pursue a contrived sense of reality. Third, and perhaps most salient, pursuing such a noticeable shift in construction priorities citywide would make it ever more difficult for Black and Latino New Yorkers to ever benefit from affordable housing, and accommodating gentrification does not require pursuing an artificially expensive and exclusive course in this way.

3. *An Inadequate Public Policy Response*

Housing New York’s stated goal is to address the affordable housing crisis facing low- and middle-income city residents.¹⁷⁰ The City may further justify its plan by describing it as an adequate policy response to the City’s affordability challenge. While rebutting this point would likely be insufficient to overturn the Plan, it is important to outline the dire straits that the lowest income households find themselves in to reject the notion that the income targets¹⁷¹ or the household size targets¹⁷² are adequate solutions.

a) *The Income Targets Miss the Most Vulnerable Households*

Housing New York’s income targets under-target the most vulnerable households. In 2015, nearly 90% of Extremely Low Income households are rent-burdened to some degree.¹⁷³ Among Very Low Income households, about 80% were rent-burdened to

169. See HOUSING NEW YORK I, *supra* note 23, at 24.

170. See, e.g., HOUSING NEW YORK I, *supra* note 23, at 5 (noting the failure of markets and past direct government interventions to substantially address affordability challenges for low- and moderate-income New Yorkers).

171. See *infra* Part IV.B.3.a.

172. See *infra* Part IV.B.3.b.

173. STATE OF NEW YORK CITY’S HOUSING AND NEIGHBORHOODS IN 2016, *supra* note 164, at 25 fig.6. (demonstrating that 70% of Extremely Low Income households are severely rent-burdened and 20% are moderately rent-burdened).

some degree.¹⁷⁴ Nearly 60% of Low Income households were some measure of rent-burdened.¹⁷⁵ For Moderate Income households, the share of rent-burdened households was approximately 30%.¹⁷⁶ Lastly, for Middle Income households, approximately 20% of the income band was rent-burdened.¹⁷⁷

Even though the highest percentage-point increase over time for rent-burdened households has occurred in the Low, Moderate, and Medium Income bands,¹⁷⁸ the rent burden for Extremely Low and Very Low Income households — those which contain an exceptionally high share of Black and Latino residents in target areas — continue to experience increasingly severe rent burdens. Furthermore, these households do not have the option of simply moving out to escape their burdens. At the time of the Furman Center's analysis, Extremely Low Income households could only afford about 8% of recently available rental units, and Very Low Income households could only afford about 15% of recently available rental units.¹⁷⁹

The AMI-related affordability challenges that disproportionately affect Black and Latino New Yorkers span beyond those that occur under the direct spotlight of gentrification. The Furman Center found that households earning less than 80% AMI in non-gentrifying areas — five out of seven of which were over 85% Black and Latino¹⁸⁰ — are more rent-burdened than households

174. *Id.* (demonstrating that 40% of Very Low Income households were severely rent-burdened and another 40% were moderately rent-burdened).

175. *Id.* (demonstrating that over 10% of Low Income households were severely rent-burdened and about 50% were moderately rent-burdened).

176. *Id.* (demonstrating that about 5% of Moderate Income households were severely rent-burdened and about another 25% were moderately rent-burdened).

177. *Id.* (demonstrating that about 1% of Middle Income households were severely rent-burdened and under 20% were moderately rent-burdened).

178. *See* STATE OF NEW YORK CITY'S HOUSING AND NEIGHBORHOODS IN 2016, *supra* note 164.

179. *Id.* at 9 fig.7, 25. Notably, comparably to the measurements of rent burden by income band, the largest percentage point drops in the availability to afford recently available units belonged to Low and Moderate Income households. *Id.* Furthermore, it is not clear that the City could put forth the availability of other housing for the poorest residents as a justification. *See* Ave. 6E Invs. LLC v. City of Yuma, Ariz., 818 F.3d 493, 509 (9th Cir. 2016) (rejecting defendants' contention that the availability of housing for low-income residents in another part of the city precludes a disparate impact claim). *Contra* Homebuilders Ass'n of Miss. v. City of Brandon, Miss., 640 F. Supp. 2d 835, 843 (S.D. Miss. 2009) (rejecting plaintiffs' claim in part because they failed to consider the availability of available affordable housing alternatives).

180. *See* STATE OF NEW YORK CITY'S HOUSING AND NEIGHBORHOODS IN 2015, *supra* note 5, at 6 (identifying the SBAs of Highbriidge/South Concourse, Kingsbridge Heights/Moshulu, University Heights/Fordham, Soundview/Parkchester, Bensonhurst, Coney

in the same income bands in gentrifying neighborhoods.¹⁸¹ Furthermore, households living in non-gentrifying areas are more likely to experience crowding¹⁸² than households living in gentrifying or high-income neighborhoods across all income bands.¹⁸³

It bears repeating that this litany of Housing New York-wrought challenges facing the Black and Latino New Yorkers who disproportionately constitute Extremely and Very Low Income households, reside in non-gentrifying areas, or both would be insufficient to mount a Fair Housing Act challenge without the preceding disparate impact analysis.¹⁸⁴ Nevertheless, documenting these challenges clarifies the consequences of Housing New York’s legal and policy shortcomings in advancing its own stated aims. Thus, the documentation further undercuts the City’s ability to justify how the Plan advances a legitimate, bona fide, and non-discriminatory interest under the Fair Housing Act.

b) *The Size Targets Further Miss the Most Vulnerable Households*

Given their respective family structures, the prospects of Black and Latino families’ eligibility for homes under Housing New York are currently dimming. Of the six analyzed PUMAs with a higher than average rate of nonfamily households without anyone under eighteen years old, the Furman Center has identified five as gentrifying.¹⁸⁵ This is a consistent trend: according to

Island, and East New York/Starrett City as non-gentrifying); *see also* STATE OF NEW YORK CITY’S HOUSING AND NEIGHBORHOODS IN 2016, *supra* note 164, at 43–44, 46, 48, 58, 64, 66 (demonstrating that, in 2015, the combined Black and Latino populations of the CDs for Highbridge/Concourse (94%), University Heights/Fordham (96%), Kingsbridge Heights/Moshulu (85%), Soundview/Parkchester (85%), East New York/Starrett City (89%), Bensonhurst (17%), and Coney Island (27%)).

181. *See* STATE OF NEW YORK CITY’S HOUSING AND NEIGHBORHOODS IN 2015, *supra* note 6, at 15 tbl.12.

182. Households experiencing crowding are defined as those where there is more than one person per room on average. *Id.* at 16.

183. *Id.* at 15 tbl.14, 17.

184. *See supra* note 15.

185. STATE OF NEW YORK CITY’S HOUSING AND NEIGHBORHOODS IN 2015, *supra* note 5, at 6 (identifying the SBAs of Lower East Side/Chinatown, Bushwick, East Harlem, Washington Heights/Inwood, and Astoria as gentrifying). Although the SBA for Park Slope/Carroll Gardens, the seventh CD, was not defined as gentrifying because of its 1990 average household income, the rent increases have vastly outpaced the rent increase in the median SBA since 1990, which is the other threshold the Furman Center set in characterizing what neighborhoods gentrified. *Id.* (identifying Park Slope/Carroll Gardens as “high-income” are that has seen a 47.3% increase in the median rent since 1990). Of the remain-

Furman's 2015 analysis of New York City neighborhoods, the increase of nonfamily households as a share of households in gentrifying neighborhoods outpaced that of the City as a whole by a multiple of three between 1990 and the 2010–2014 ACS.¹⁸⁶ Accompanying this change was a six percentage-point drop in the share of families with children in gentrifying neighborhoods, outpacing the rate of change in the City by nearly a multiple of five in the same interval.¹⁸⁷ Furthermore, households with at least one child are more likely to be rent-burdened than renter households as a whole: by 2014, over one-third of these households were rent-burdened, and nearly another quarter of these households was severely rent-burdened (paying over fifty percent of their household income in rent).¹⁸⁸

Additionally, although waves of young, nonfamily households are moving into gentrifying neighborhoods, these new residents are not reflective of the hardest-hit rent-burdened population overall. Citywide, only 12% of under-29, low-income multi-adult households without children are rent-burdened, while 21% of single parents in that age group and 26% of households with the householder between ages 30 and 59 are rent-burdened.¹⁸⁹ Among households with multiple adults and children, the rates at which households are rent-burdened are 22% and 20%, respectively. In addition, the number of under-59, low-income, rent-burdened households with children (127,830) outnumbered the number of under-29, low-income, rent-burdened households without children (43,784).¹⁹⁰ Furthermore, the largest share of low-income rent-burdened singles are seniors, not the youngest adults.¹⁹¹ This data point indicates that inferring increased demand for singles and nonfamily housing from data that only applies to gentrifying neighborhoods misses the singles in actual need of more affordable housing.

ing seven PUMAs/SBAs, the Furman Center has identified one (Morrisania/Belmont, similar to the PUMA for Bronx CDs 3 and 6) as gentrifying. *Id.*

186. *Id.* at 11, 24 fig.7. Compare with more recent trends, *see supra* notes 164–167 and accompanying text.

187. STATE OF NEW YORK CITY'S HOUSING AND NEIGHBORHOODS IN 2015, *supra* note 5, at 12 tbl.8.

188. *Id.* at 13 fig.12, 15.

189. CBC RENT BURDEN STUDY, *supra* note 159, at 4 tbl.3b.

190. *Id.* at 4 tbl.3a.

191. *Id.* at 4 tbl.3b.

C. REMEDIES: CONSTRAINTS AND OPPORTUNITIES

Despite the Plan’s significant problems, available alternatives exist that would both make the Plan compliant with the Fair Housing Act and make housing more affordable for the neediest New Yorkers. First, this Part briefly surveys the narrowing range of available remedies under the Fair Housing Act before offering a policy alternative and, finally, offering three directions for remedies that are likely to be judicially available: bolstering housing production for households in the lowest-income bands, building sufficient housing to meet the demand of low-income families, and ending the community preference policy.

1. *The Narrowing Range of Remedies Available Under the Fair Housing Act*

FHA jurisprudence has evolved to limit the available remedies for ensuring compliance with the Act. In *United States v. Starrett City Associates*, the Second Circuit barred the use of quotas placing a ceiling on one group’s share of the racial composition to preserve integrated housing while casting a skeptical eye toward general racial classifications in housing.¹⁹² The Supreme Court in *Inclusive Communities* took this skepticism a step forward, emphasizing that courts must strive to eliminate racial disparities through race-neutral means.¹⁹³ The Court, noting that reading the Fair Housing Act to impose “onerous costs” on actors seeking to revitalize segregated communities would be “paradoxical,” stressed the need for state and local actors to have leeway when advancing their aims and asserted that the Act “does not decree a particular version of urban development.”¹⁹⁴

192. *United States v. Starrett City Associates*, 840 F.2d 1096, 1101–03 (2d Cir. 1988) (noting that racial classification is presumptively discriminatory while acknowledging that racial access quotas had been upheld and that race-conscious affirmative action plans do not inherently violate constitutional or statutory provisions).

193. *Texas Dep’t of Hous. & Cmty. Affairs v. Inclusive Communities Projects, Inc.*, 135 S.Ct. 2507, 2524 (2015) (citing *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 510 (1989) (plurality opinion)).

194. *Id.* at 2523.

2. Available Remedies: Modest Proposals

This Note proposes two remedies that would bring Housing New York into compliance with the Fair Housing Act: (1) bolstering affordable housing production for households in the lowest-income band and (2) building housing suitable specifically for low-income families.¹⁹⁵ As was the Supreme Court's preference in *Inclusive Communities*, these proposals are race-neutral and leave flexibility in the hands of local policymakers.¹⁹⁶

These remedies are not as expansive as some advocates propose.¹⁹⁷ The most expansive and efficient policy alternative would be to focus MIH re-zonings on neighborhoods with the strongest housing markets. Refocusing MIH on these neighborhoods may initially make the project more viable by saving money on subsidizing weaker markets focusing more on low-income housing.¹⁹⁸ Yet, under a conservative read of the jurisprudence, such an alternative may fall outside of what is possible through litigation despite its race-neutrality. Given that *Inclusive Communities* frowns on litigation premised upon site selection for affordable housing, it is not clear that this remedy is judicially available.¹⁹⁹ But since this change would be a smart policy decision, advocates ought to push for it outside of the legal realm.²⁰⁰ Other policies that would aid the development of affordable housing, particularly in already-dense neighborhoods with strong

195. The elimination of the community preference policy will not be discussed at any more length, since it is already being challenged in court.

196. *Inclusive Communities*, 135 S.Ct. at 2523–24.

197. See, e.g., Abigail Savitch-Lew, *De Blasio Admin. Report on Housing Options Irks Advocates*, CITY LIMITS (May 17, 2017), <https://citylimits.org/2017/05/17/de-blasio-admin-report-on-housing-options-irks-advocates/> [<https://perma.cc/6G7W-ANK7>] (demonstrating advocates' disappointment with the outcome of a city-funded study that largely rejected a more ambitious MIH proposal from an affordable housing advocacy group).

198. It bears noting, however, that the corporate tax rate cuts in the Tax Cuts and Jobs Act of 2017 likely makes the LIHTC less valuable to developers. See Conor Dougherty, *Tax Overhaul is a Blow to Affordable Housing Efforts*, N.Y. TIMES (Jan. 18, 2018), <https://www.nytimes.com/2018/01/18/business/economy/tax-housing.html> [<https://perma.cc/SX7M-VT3Q>].

199. *Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Projects, Inc.*, 135 S.Ct. 2507, 2523 (2015) ("The FHA does not decree a particular vision of urban development; and it does not put housing authorities and private developers in a double bind of liability, subject to suit whether they choose to rejuvenate a city core or to promote new low-income housing in suburban communities.").

200. Advocacy groups such as Open New York seek to add more affordable housing in wealthy neighborhoods. See Sam Raskin, *The YIMBY Movement Comes to New York*, CURBED (Sep. 17, 2018, 12:56 PM), <https://ny.curbed.com/2018/9/17/17869546/open-new-york-yimby-rezoning-brooklyn-nimby> [<https://perma.cc/3PNY-KM2R>].

markets, would include lifting the FAR cap,²⁰¹ which is a state-level bill.²⁰²

Nevertheless, within the current legal landscape, there are still substantial options for improving Housing New York. To comply with the Fair Housing Act, the City should bolster the share of housing available to households in the Extremely and Very Low Income bands and build enough housing to support low-income families.

a) *Bolstering Housing Production for the Poorest Households*

The most direct way to address the Plan’s disproportionate denial of housing to Black and Latino New Yorkers is to bolster housing production for households in the Extremely and Very Low Income bands. The City currently has mechanisms in place to do this. Chief among them are its Extremely Low & Low-Income Affordability (ELLA) programs administered by HPD²⁰³ and the New York City Housing Development Corporation,²⁰⁴ which offer subsidized loans. HPD’s program helps fund construction of developments where at least 70% of units are available to households earning up to 60% of AMI and up to 30% of units available to households earning up to 100% AMI.²⁰⁵ The Housing Development Corporation’s (HDC) program subsidizes LIHTC units, which must be used for households earning no more than 60% of AMI, which must constitute 80% of the development.²⁰⁶ Developers can qualify for both programs at once in conjunction to LIHTC, state subsidies and tax credits, and other,

201. See generally MOSES GATES ET AL., REGIONAL PLAN ASS’N, CREATING MORE AFFORDABLE HOUSING IN NEW YORK CITY’S HIGH-RISE AREAS: THE CASE FOR LIFTING THE FAR CAP (2018), <http://library.rpa.org/pdf/RPA-12-FAR.pdf> [https://perma.cc/68N5-WNUW].

202. See S. Comm. on Rules, S6760, 2018 Leg., 2017–2018 Sess. (N.Y. 2018).

203. N.Y.C. DEPT OF HOUS. PRES. & DEV., EXTREMELY LOW & LOW-INCOME AFFORDABILITY (ELLA) PROGRAM TERM SHEET (2017), <http://www1.nyc.gov/assets/hpd/downloads/pdf/developers/term-sheets/ELLA-Term-Sheet.pdf> [https://perma.cc/4MZF-REYQ] [hereinafter HPD ELLA TERM SHEET].

204. N.Y.C. DEPT OF HOUS. PRES. & DEV., EXTREMELY LOW & LOW-INCOME AFFORDABILITY (ELLA) PROGRAM TERM SHEET (2016), http://www.nychdc.com/content/pdf/Developers/HDC_ELLA_Termsheet.pdf [https://perma.cc/82TD-H97Y] [hereinafter HDC ELLA TERM SHEET].

205. HPD ELLA TERM SHEET, *supra* note 203, at 2.

206. HDC ELLA TERM SHEET, *supra* note 204, at 1–2.

more targeted city subsidies.²⁰⁷ Table 5 lays out the specific affordability requirements of each ELLA program.

TABLE 5: HPD'S AND HDC'S ELLA REQUIREMENTS²⁰⁸

Share of Available Housing by Income Tier	HPD's ELLA Program		HDC's ELLA Program	
	Option 1	Option 2	Option 1	Option 2
Up to 30% AMI (underwritten at 27% AMI rents and below)	10%	0%	10%	30%
Up to 40% AMI (underwritten at 37% AMI rents and below)	10%	5%	15%	N/A
Up to 50% AMI (underwritten at 47% AMI rents and below)	10%	5%	15%	
Up to 60% AMI (underwritten at 47% AMI rents and below)	Remaining units	Remaining units	Remaining units	Remaining units
70–100% AMI	(Optional) < 30%	(Optional) < 30%	N/A	N/A
Up to 90% AMI				(Optional) < 20%
Formerly homeless individuals	10%	30%		30%

In addition to these programs, HPD also administers Mix & Match.²⁰⁹ Under Mix & Match, 40–60% of the units produced using the tax credits go to households making up to 60% AMI (with at least 10% set aside for formerly homeless individuals and 10% for households earning between 30–50% AMI).²¹⁰ The remaining 40–60% percent of units go to Moderate and/or Middle Income households making up to 130% AMI. Indeed, the share of Moderate and Middle Income households would need to decrease to allocate more housing to households in the Extremely and Very Low Income bands. Moses Gates, the Regional Planning Association's Director of Community Planning and Design, suggests that

207. See HPD ELLA TERM SHEET, *supra* note 203 and HDC ELLA TERM SHEET, *supra* note 204.

208. See HPD ELLA TERM SHEET, *supra* note 203 and HDC ELLA TERM SHEET, *supra* note 204.

209. N.Y.C. DEP'T OF HOUS. PRES. & DEV., MIXED INCOME PROGRAM (MIX & MATCH), <https://www1.nyc.gov/site/hpd/developers/development-programs/mixed-income.page> [<https://perma.cc/8JE7-PAZK>] (last visited Feb. 7, 2019).

210. N.Y.C. DEP'T OF HOUS. PRES. & DEV., MIXED INCOME PROGRAM: MIX & MATCH TERM SHEET (May 15, 2017), <http://www1.nyc.gov/assets/hpd/downloads/pdf/developers/term-sheets/mixed-income-mix-match-term-sheet.pdf> [<https://perma.cc/X5UZ-HHNN>] [hereinafter HPD MIX & MATCH TERM SHEET].

the City pivot to encouraging Middle Income households to pursue homeownership instead.²¹¹

While the precise contours of Moderate and Middle Income housing policy may fall beyond the scope of the remedy, the City must create more affordable housing for the lowest-income households to curb the Plan’s disproportionate denial of housing to Black and Latino New Yorkers. To that end, it can use its existing ELLA and Mix & Match Programs to do so.

b) *Build Enough New Housing to Support Low-Income Families*

In order for the City to dismantle its disproportionate denial of housing and perpetration of segregation via plans to build more one-bedroom and studio housing, it must ensure greater housing diversity in new construction initiatives. The analysis in Part IV.B.2 partially deconstructed the validity of the City’s claimed interest in building new housing for singles because it is necessarily driven by the disproportionate growth of these households in gentrifying areas. This is not to say that the City should not build households for singles. However, with further analysis, a well-structured ruling can allow the City to take less blunt measures and mitigate the racially disparate impact of determining the number of bedrooms that belong in new housing units.

V. CONCLUSION

Housing New York is a policy that misapplies otherwise sound ideas. In producing too much affordable housing at the upper income bands, inadequately creating homes that are viable for modest-sized families with children, and de facto restricting affordable housing applicant pools to community district residents, the City is disproportionately denying housing to Black and Latino New Yorkers, including families with children, and is perpetuating segregated living patterns.

211. Moses Gates, Letter to the Editor, *Middle-Class New Yorkers Need More Homes for Sale, Not Rent*, CRAIN’S NEW YORK (Mar. 16, 2017), <http://www.crainnewyork.com/article/20170316/OPINION/170319938/middle-class-new-yorkers-need-more-homes-for-sale-not-rent> [https://perma.cc/6UTV-K9V2]. The BAE report suggests this option has some potential. See BAE MIH STUDY, *supra* note 152 (finding that condominiums achieve strong Return on Cost rates in Strong and Very Strong markets).

The City should take it upon itself to produce a more affordable housing policy in Housing New York. Both the utility and equity of a housing policy that does not serve those most in need of it — the poorest New Yorkers, who are disproportionately Black and Latino — come deeply into question. While grassroots efforts have had some successes,²¹² it may be necessary to turn to the courts and use a fair housing theory that will get the City to respond adequately.

Needless to say, this Note is far from the last word on this question. When the City makes available more data by race, more sophisticated analyses specifically done by race will yield more precise results than those suggested here by a series of proxies and correlations. Pleading and commonality requirements may well force litigation of the Plan, were any to occur, to be piecemeal. And the most expansive and efficient solutions, such as to get the City to re-zone the neighborhoods recommended by the BAE report, may fall outside the judicial realm and thus require the continued work of grassroots advocates, government officials, and everyday citizens. Yet, in introducing this analysis to the legal domain, this Note aims to allow future scholars — and, potentially, litigators — to fine-tune its analyses and arguments with more precise information and use it to deliver more equitable outcomes to the most marginalized New Yorkers.

212. Such as the gradually more generous affordability targets in Housing New York and the higher affordability thresholds for subsidized housing in the East New York.

APPENDIX A — RACIAL COMPOSITION AND MEDIAN INCOME BY
RACE OF THE SELECTED PUMAS²¹³

Geographic Area of Measurement	Avg. HH Size	% Black Pop.	Black HH Median Income	% Latino Pop.	Latino HH Median Income	% White Pop.	White HH Median Income
New York City	2.7	24.4%	\$42,602	29.05%	\$37,489	32.26%	\$80,301
BX 3 & BX 6— Morrisania and Crotona/ Belmont and East Tremont	2.9	33.32%	\$24,474	63.5%	\$23,340	4.49%	\$22,863
BX 4—High Bridge/ Concourse	2.9	35.1%	\$32,075	64.05%	\$24,967	1.69%	\$32,850
BX 5— University Heights/ Fordham	3.0	31.23%	\$30,043	68.8%	\$22,114	1.27%	\$35,500
BK 4— Bushwick	2.9	28.8%	\$34,298	60.51%	\$33,404	14.82%	\$76,596

213. Data compiled by the author using the U.S. Census’s 2012–16 American Community Survey data via Social Explorer. In this subsequent table, Latinos are of any race, and whites are non-Latino. Population percentages may not add up to 100% because the household income figures do not distinguish between Blacks who identify as Latino and those who do not, thus requiring population counts reflecting the income data. *Total Population: Hispanic or Latino White Alone, Total Population: Not Hispanic or Latino: White Alone: ACS 2016 (5-Year Estimates)*, SOCIAL EXPLORER, <https://www.socialexplorer.com/18668e1de2/view> (last visited Jan. 24, 2018) (on file with the *Columbia Journal of Law and Social Problems*) [hereinafter *2016 ACS Population Race and Ethnicity 1*]; *Total Population: Black or African American Alone, Total Population: Asian Alone, SOCIAL EXPLORER*, <https://www.socialexplorer.com/6ef6a88c3b/view> (last visited Jan. 24, 2018) (on file with the *Columbia Journal of Law and Social Problems*) [hereinafter *2016 ACS Population Race and Ethnicity 2*]; *Median Household Income: White Alone Householder, Not Hispanic or Latino, Black or African American Alone Householder, Asian Alone Householder, Hispanic or Latino Alone Householder*, SOCIAL EXPLORER, <https://www.socialexplorer.com/5bfe5113a6/view> (last visited Jan. 11, 2018) (on file with the *Columbia Journal of Law and Social Problems*) [hereinafter *2016 ACS Median Household Income by Race*].

BK 5—East New York and Starrett City	2.9	57.37%	\$37,416	37.11%	\$36,516	3.81%	\$14,936
BK 6—Park Slope and Carroll Gardens	2.3	7.71%	\$40,752	17.49%	\$49,947	64.65%	\$126,698
MN 3—Chinatown and Lower East Side	2.1	9.21%	\$20,482	24.94%	\$25,787	33.09%	\$85,492
MN 11—East Harlem	2.4	34.49%	\$26,207	45.23%	\$22,480	15.15%	\$81,126
MN 12—Washington Heights and Inwood	2.9	12.95%	\$35,770	70.14%	\$33,872	17.8%	\$75,746
QN 1—Astoria and Long Island City	2.3	7.33%	\$29,154	27.18%	\$42,701	47.8%	\$67,799
QN 7—Flushing and Whitestone	2.8	2.57%	\$56,371	17.57%	\$52,271	25.56%	\$66,414
QN 14—Rockaway and Broad Channel	2.9	37.68%	\$42,689	23.53%	\$32,101	35%	\$71,619
SI 1—St. George and Stapleton	2.8	24.08%	\$45,480	29.35%	\$48,634	37.96%	\$75,663

APPENDIX B — GLOSSARY OF TERMS

Community district: 59 political units of New York City created by Local Law in 1975 that are represented by community boards.²¹⁴

214. *Community Districts Portal*, N.Y.C. PLANNING, <https://www1.nyc.gov/site/planning/community/community-portal.page> [<https://perma.cc/G3C8-YCCS>] (last visited Mar. 5, 2019); FURMAN CTR. FOR REAL ESTATE & PUB. POLICY, STATE OF NEW YORK CITY'S HOUSING AND NEIGHBORHOODS IN 2017 128 (2018), <http://furmancenter.org/files/sotc/>

Contextual zoning: regulations on the height and bulk of new buildings, the size of their setback from the street line, and their width along the street frontage to produce structures that are in line with the existing character of the neighborhood.²¹⁵

Density factor: measurements of the approximate average unit size permissible for a given type of zoning district.²¹⁶

Floor-to-area ratio (FAR): the measurement of a building's floor area relative to the size of the lot on which the building is situated.²¹⁷

Inclusionary zoning (IZ): programs requiring developers to set aside a certain percentage of units or floor area in new or rehabilitated properties toward affordable housing.²¹⁸

Mandatory Inclusionary Housing (MIH): New York City's form of inclusionary zoning, which requires developers to set aside a percentage of floor area in properties located in neighborhoods that are re-zoned to allow for more development.²¹⁹

Microdata: records collected about individuals and/or housing units.²²⁰

Neighborhood Tabulation Area (NTA): geographic units created by New York City. They use whole Census tracts and fit entirely within PUMA boundaries.²²¹

SOC_2017_Full_2018-08-01.pdf [https://perma.cc/S6AH-4HET] [hereinafter STATE OF NEW YORK CITY'S HOUSING AND NEIGHBORHOODS IN 2017].

215. *Glossary of Planning Terms*, N.Y.C. PLANNING, <https://www1.nyc.gov/site/planning/zoning/glossary.page> [https://perma.cc/5MSC-38J6] (last visited Mar. 5, 2019).

216. *Glossary of Planning Terms*, see *supra* note 215.

217. *Calculating Floor Area Ratio*, METRO. COUNCIL (2015), <https://metro council.org/Handbook/Files/Resources/Fact-Sheet/LAND-USE/How-to-Calculate-Floor-Area-Ratio.aspx> [https://perma.cc/TYM2-3ZSD].

218. *Inclusionary Zoning and Mixed-Income Communities*, U.S. DEP'T OF HOUS. & URB. DEV. (2013), <https://www.huduser.gov/portal/periodicals/em/spring13/highlight3.html> [https://perma.cc/2AWF-QJQY].

219. *Mandatory Inclusionary Housing*, N.Y.C. COUNCIL, <https://council.nyc.gov/land-use/plans/mih-zqa/mih/> [https://perma.cc/4AMG-47EB] (last visited Mar. 5, 2019).

220. Digital Social Sciences Center, *Census Microdata Overview*, COLUMBIA UNIV. LIBRARIES, https://library.columbia.edu/locations/dssc/data/census_microdata.html [https://perma.cc/B7AM-7Z3N] (last visited Mar. 5, 2019).

Public Use Microdata Area (PUMA): geographic units created by the U.S. Census Bureau that resemble community districts.²²² *See also* Sub-Borough Area.

Rent-burdened: Households paying over 30% of their income in rent. Households that pay between 30% and 50% of their income in rent are considered moderately rent-burdened. Households that pay over 50% of their income in rent are considered severely rent-burdened.²²³

Sub-borough Area (SBA): *See* Public Use Microdata Area.²²⁴

Set-aside: the percentage of units or floor area reserved for affordable housing.²²⁵

Zoning for Quality and Affordability (ZQA): a broad array of amendments to the New York City Zoning Resolution passed in 2016 as part of the push for MIH.²²⁶

221. *Neighborhood Tabulation Areas*, N.Y.C. PLANNING, <https://www1.nyc.gov/site/planning/data-maps/open-data/dwn-nynta.page> [<https://perma.cc/C25T-BNNS>] (last visited Mar. 5, 2019).

222. STATE OF NEW YORK CITY'S HOUSING AND NEIGHBORHOODS IN 2017, *supra* note 214, at 128.

223. STATE OF NEW YORK CITY'S HOUSING AND NEIGHBORHOODS IN 2016, *supra* note 164, at 25.

224. *See* STATE OF NEW YORK CITY'S HOUSING AND NEIGHBORHOODS IN 2017, *supra* note 214, at 128.

225. *See The Set-Aside Requirement*, INCLUSIONARY HOUSING, <https://inclusionaryhousing.org/designing-a-policy/onsite-development/the-set-aside-requirement/> [<https://perma.cc/4CHP-GUW5>] (last visited Mar. 5, 2019).

226. *Zoning for Quality and Affordability*, N.Y.C. PLANNING (June 22, 2016), <https://www1.nyc.gov/site/planning/plans/zqa/zoning-for-quality-and-affordability.page> [<https://perma.cc/86B4-VKRN>].