

Making Inclusionary Zoning More Inclusive: How D.C. Should Reform Its Inclusionary Zoning Policy to Account for Income, Racial, and Geographic Segregation

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Washington, D.C. has experienced major demographic shifts in the past few decades as white, upwardly mobile individuals increasingly moved into the city. These changes have simultaneously resulted in high levels of displacement for older residents in gentrifying neighborhoods. In response to the displacement of lower income, predominantly Black residents, the D.C. government has implemented an inclusionary zoning (IZ) policy. D.C.'s inclusionary zoning policy requires developers to allocate the greater of 8–10% of total square footage or 50–70% of the bonus density for affordable housing. Inclusionary zoning is a step in the right direction but fails to play a more expansive and effective role in affordable housing production. In particular, the policy currently ignores the realities of D.C.'s income, racial, and geographic segregation. This paper argues that inclusionary zoning laws in D.C. should take a graduated, ward-specific approach for delineating median family income qualifications and percentage set-aside requirements, with a focus on increasing the affordability of IZ units for the lowest income individuals, the number of affordable housing units created, and the level of integration in these communities.

I. INTRODUCTION	172
II. WHAT IS INCLUSIONARY ZONING?.....	174
A. Inclusionary Zoning Requirements	174
B. History of Inclusionary Zoning	175
III. INCLUSIONARY ZONING IN WASHINGTON, D.C.	177
A. Requirements.....	177
B. Goals	177
C. Trends in the D.C. Housing Market	178

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<i>D. Effect of D.C.'s Inclusionary Zoning Program on Housing Production</i>	180
IV. PROBLEMS WITH INCLUSIONARY ZONING IN D.C.	180
<i>A. Inclusionary Zoning Does Not Benefit the Lowest-Income D.C. Residents</i>	181
<i>B. Inclusionary Zoning Fails to Create Racially and Economically Integrated Neighborhoods</i>	183
<i>C. D.C.'s Inclusionary Zoning Policy Bases Its Income Qualifications on the Washington Metropolitan Statistical Area Median Family Income, Which Inflates Qualification Cutoffs</i>	184
<i>D. Inclusionary Zoning Does Not Increase the Level of Affordable Housing in Wards 7 and 8</i>	184
V. EXPANDING D.C.'S INCLUSIONARY ZONING POLICY	185
<i>A. Base IZ Income Requirements on Ward MFIs</i>	185
<i>B. Give Developers the Option to Build Units for Varying MFI levels at Varying Set-Aside Levels</i>	186
<i>C. Give Density Bonuses to Developers Setting Aside Units Affordable to Households at or Below 30% MFI and In Wards with Lower MFIs</i>	188
<i>D. Use D.C.'s Housing Production Trust Fund to Buy IZ Units and Rent to D.C.'s Lowest-Income Residents</i>	190
<i>E. Offer D.C. Tax Credits to Developers Setting Aside a Higher Percentage of IZ Units in Ward 3</i>	190
<i>F. Base D.C.'s Inclusionary Zoning Income Requirements on MFI for D.C. Alone</i>	191
VI. POTENTIAL UNRESOLVED PROBLEMS WITH INCLUSIONARY ZONING	192
<i>A. Inclusionary Zoning is Dependent on Market Forces</i>	192
<i>B. Inclusionary Zoning Does Not Address Underlying Problems Arising from Gentrification</i>	192
<i>C. Inclusionary Zoning Creates Community Externalities</i>	194
VII. CONCLUSION	195

I. INTRODUCTION

Washington, D.C. is a city in transition. Like other major metropolitan areas throughout the country, D.C. has experienced significant demographic changes in the past two decades, because younger, whiter, and more upwardly mobile people have moved in.¹ These newcomers brought a mixed bag of benefits and detriments

1. See, e.g., Natalie Hopkinson, *Farewell to Chocolate City*, N.Y. TIMES (June 23, 2012), <https://www.nytimes.com/2012/06/24/opinion/sunday/farewell-to-chocolate-city.html>; Cordilia James, *D.C. Has Had the Most Gentrifying Neighborhoods in the Country, Study Finds*, DCIST (Mar. 19, 2019), <https://dcist.com/story/19/03/19/d-c-has-had-the-most-gentrifying-neighborhoods-in-the-country-study-finds/>; Kate Rabinowitz, *A decade of demographic change in D.C.: Which neighborhoods have changed the most?*, D.C. POL'Y CTR. (Mar. 2, 2017), <https://www.dcpolicycenter.org/publications/demographic-change-d-c-neighborhoods>.

to existing residents. All residents likely benefited from the greater access to government services, increased safety, and stronger business presence that trailed the arrival of wealthier, whiter residents.² However, these new residents also brought surging housing prices.³ Businesses moved into the area but catered to newcomers instead of the existing population and pushed housing prices up even further.⁴ Increasing numbers of longtime residents were driven out by rising costs of living and displaced into surrounding areas or homelessness.⁵

The D.C. government has responded with some success to the city's growing need for affordable housing. Inclusionary zoning (IZ) is one of the many policy tools that the government has adopted to increase the level of affordable housing and prevent displacement of low-income D.C. residents.⁶ In inclusionary zoning, developers are required to, or may voluntarily, set aside a certain percentage of total square feet in a residential development for low-income residents.⁷ In exchange, developers usually receive some type of benefit, such as a density bonus in D.C.'s case.⁸

Inclusionary zoning has contributed to growing numbers of affordable units in D.C. but has faced criticism for its relatively modest impact. D.C.'s IZ policy currently provides affordable housing for individuals at 50% and 60% of median family income (MFI) but does not provide housing options for the lowest-income

2. See Lance Freeman & Frank Braconi, *Gentrification and Displacement New York City in the 1990s*, 70(1) J. OF AM. PLAN. ASS'N 39, 39, 48 (2004) (showing that residents in gentrifying New York neighborhoods have a lower probability of moving than in non-gentrifying neighborhoods and hypothesizing that gentrifying neighborhoods' disadvantaged residents stay due to neighborhood improvements); Lauren Sullivan, *Gentrification May Actually Be Boon to Longtime Residents*, NPR (Jan. 22, 2014), <https://www.npr.org/2014/01/22/264528139/long-a-dirty-word-gentrification-may-be-losing-its-stigma>; Aaron Wiener, *For Longtime Residents, Sometimes Gentrification Isn't All Bad*, WASH. CITY PAPER (Jan. 22, 2014), <https://www.washingtoncitypaper.com/news/housing-complex/blog/13123903/for-longtime-residents-sometimes-gentrification-isnt-all-bad>.

3. See Bobette Banks, *June 2019 Washington, DC Market Trends Report Median Sales Price Highest June Level on Record; Scarce Supply Continues to Drive Seller's Market*, GREATER CAPITAL AREA ASS'N OF REALTORS (July 12, 2019), <https://files.constantcontact.com/4965beab001/25a22736-d354-4a9a-a4b4-ec4a3f25228e.pdf>; Kevin Schaul, Dan Keating, & Kathy Orton, *The D.C. Region's 2018 Housing Market, Mapped*, WASH. POST (Mar. 27, 2019), <https://www.washingtonpost.com/graphics/local/2018-real-estate>.

4. See JOHNSON GARDNER, AN ASSESSMENT OF THE MARGINAL IMPACT OF URBAN AMENITIES ON RESIDENTIAL PRICING 31–32 (2007), <http://www.reconnectingamerica.org/assets/Uploads/JohnsonGardner-Urban-Living-Infra-Research-Report.pdf>; *Homes Near Trader Joe's, Whole Foods Stores Appreciate Faster*, ZILLOW, <http://zillow.mediaroom.com/2016-01-25-Homes-Near-Trader-Joes-Whole-Foods-Stores-Appreciate-Faster> (last visited Nov. 17, 2019).

5. *Low Income Displacement and Concentration in U.S. Census Tracts, 2000 to 2016*, INST. ON METRO. OPPORTUNITY, <https://myottetm.github.io/USMapBoxIMO/USLwDispConc.html> (last visited Nov. 17, 2019); Marissa J. Lang, *Gentrification in D.C. means widespread displacement, study finds*, WASH. POST (April 26, 2019), https://www.washingtonpost.com/local/in-the-district-gentrification-means-widespread-displacement-report-says/2019/04/26/950a0c00-6775-11e9-8985-4cf30147bdca_story.html.

6. *Inclusionary Zoning Fact Sheet*, D.C. DEP'T OF HOUS. & CMTY. DEV., https://dhcd.dc.gov/sites/default/files/dc/sites/dhcd/service_content/attachments/Inclusionary%20Zoning%20Program%20Fact%20Sheet%202018.pdf (last visited Nov. 17, 2019).

7. See *id.*; ALEX F. SCHWARTZ, HOUSING POLICY IN THE UNITED STATES 283 (3d. ed. 2015).

8. See SCHWARTZ, *supra* note 7, at 284. A density bonus is a commonly used incentive in inclusionary zoning that allows developers to build more housing units in a given area than typically permitted by local zoning laws. See *id.*

individuals.⁹ The level of economic and racial segregation in D.C. means that 60% MFI is still higher than the median income in D.C.'s poorest wards.¹⁰ The failure to account for geographic segregation along racial and class lines means that inclusionary zoning is not sufficiently reaching its goals of increasing the level of affordable housing and integration in D.C.

To increase inclusionary zoning's effectiveness, this Note argues that inclusionary zoning laws in D.C. should take a graduated, ward-specific approach for delineating household income qualifications and percentage set-aside requirements, with a focus on increasing the affordability of IZ units for the lowest-income individuals, the number of affordable housing units, and the level of integration in these communities. Part II of this Note will discuss what inclusionary zoning is and how the policy began. Part III will describe D.C.'s inclusionary zoning requirements and the policy's effect on the local housing market. Part IV will then delve into why D.C.'s inclusionary zoning policy cannot more effectively achieve its goals of building affordable housing and creating economically and racially integrated communities. This Part will focus particularly on the racial and economic segregation that persists in D.C. Part V will offer potential solutions to fix the described problems and improve inclusionary zoning's ability to provide more affordable and integrated housing. Lastly, Part VI will discuss some potentially unresolved problems with inclusionary zoning.

II. WHAT IS INCLUSIONARY ZONING?

Inclusionary zoning is a municipal-, county-, or state-level policy that generally requires or encourages developers to designate a portion of produced housing units to low- or moderate-income households.¹¹ IZ policies have increasingly gained popularity in the past two decades and have spread to both urban and suburban areas.

A. Inclusionary Zoning Requirements

Various localities differ in the specific characteristics of their inclusionary zoning policies. Some inclusionary zoning policies are mandatory, whereas other policies are voluntary in exchange for certain building incentives.¹² In localities that provide developer incentives in exchange for allocating a certain percentage

9. *Inclusionary Zoning Fact Sheet*, *supra* note 6. This Note uses the term "median family income." because D.C.'s inclusionary zoning policy and the U.S. Department of Housing and Urban Development (HUD) use this term. "Area median income" is another term used in the housing industry and is generally synonymous to median family income. See *FY 2018 Income Limits: Frequently Asked Questions*, HUD USER, <https://www.huduser.gov/portal/datasets/il/il18/FAQs-18r.pdf> (last visited Nov. 17, 2019).

10. D.C. DEP'T OF HOUS. & CMTY. DEV., INCLUSIONARY ZONING 2019 MAXIMUM INCOME, RENT AND PURCHASE PRICE SCHEDULE 2 (2019), <https://dhcd.dc.gov/sites/default/files/dc/sites/dhcd/publication/attachments/IZ&t20Income%20Schedule%20as%20of%20October%202018.pdf>; See *Summary Data for Ward: Ward 7*, D.C. HEALTH MATTERS, <http://www.dchealthmatters.org/?module=demographicdata&controller=index&action=index&id=131494§ionId=> (last visited Nov. 17, 2019); *Summary Data for Ward: Ward 8*, D.C. HEALTH MATTERS, <http://www.dchealthmatters.org/?module=demographicdata&controller=index&action=index&id=131495§ionId=> (last visited Nov. 17, 2019).

11. SCHWARTZ, *supra* note 7, at 283–91.

12. *Id.*

of low- or moderate-income units, the incentives usually include a density bonus, which permits developers to construct additional market rate units above what would normally be allowed under zoning laws.¹³ The bonus is typically a twenty percent density increase. Other incentives include waiving various development and building fees, reduced land requirements for parking, less stringent design standards, or expedited review of application processes.¹⁴ Inclusionary zoning policies also include income caps for individuals who qualify for renting IZ units at reduced rent. Depending on housing prices in different localities, income caps have varied from less than 50% MFI to 120% MFI.¹⁵

B. History of Inclusionary Zoning

Inclusionary zoning policies first emerged in the U.S. during the 1970s in response to rising home prices and re-segregation.¹⁶ White flight and historically exclusionary government policies entrenched both racial and class segregation.¹⁷ Many local and state governments felt a growing urgency to address economic and racial re-segregation because of the debilitating social issues that accompanied poverty concentration.¹⁸ During this period, the federal government also shifted its involvement in housing programs in favor of local policymaking.¹⁹ State and local governments received greater control and flexibility to adapt federal funding for housing programs to their communities' particular needs.²⁰ The combination of these factors led local and state governments to develop inclusionary zoning laws as one of many new experimental housing policies.

Through legislative and judicial action, state and local governments established inclusionary zoning policies. On the state level, Massachusetts passed legislation in 1969 to create one of the first inclusionary zoning programs in the country.²¹ Massachusetts permitted developers building low- and moderate-

13. *Id.* at 288.

14. *Id.*

15. *Id.*

16. SCHWARTZ, *supra* note 7, at 257–87; Michael Diamond, *Deconcentrating Poverty: Deconstructing a Theory and the Failure of Hope*, in COMMUNITY, HOPE, AND IDENTITY, at 1–2 (Michael Diamond & Terry Turnipseed, eds. 2012).

17. *See generally, e.g.*, RICHARD ROTHSTEIN, *THE COLOR OF LAW* vii (2017) (detailing the extensive history of redlining, racially restrictive covenants and deeds, racial violence, and public housing discrimination in forming segregated communities); Camille Zubrinsky Charles, *The Dynamics of Racial Residential Segregation*, 29 ANN. REV. SOC. 167, 168 (2003); Diamond, *supra* note 16. This Note will focus solely on the history of inclusionary zoning in the United States.

18. A general consensus exists that concentrations of poverty exacerbate the socioeconomic problems that low-income families living near those concentrations face. Once a neighborhood reaches a thirty to 40% threshold, certain externalities, such as increased teen pregnancy, crime rates, drug use, and school dropouts, become widespread. *See generally, e.g.*, WILLIAM JULIUS WILSON, *THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY* 21–22 (2d ed. 2012). For an education-related example, a child living in poverty is more likely to miss school days. If that child goes to a middle-class suburban school, a teacher can focus increased attention on that child to ensure the child stays on track. However, in an area of concentrated poverty, if high numbers of students are absent, the teacher would not have the extra time to dedicate to all the absent students and may end up teaching at a more remedial pace for the entire class.

19. *See* SCHWARTZ, *supra* note 7, at 265.

20. *See id.*

21. *See* MASS. GEN. LAWS ch. 40B, § 21 (1969); SCHWARTZ, *supra* note 7, at 286.

income housing to bypass local zoning restrictions by petitioning the local zoning board.²² The state legislature also issued a general declaration that localities with less than 10% of year-round subsidized housing needed more affordable housing.²³ This declaration led to local governments enacting IZ ordinances across the state.²⁴ Since 1969, this law has produced over 30,000 affordable housing units.²⁵ California similarly amended legislation in 1975 to require that local governments create IZ policies setting aside a fair proportion of units and resources for affordable housing.²⁶ The legislation did not have much effect until the early 1990s, when local governments became proactive in increasing affordable housing to combat rapidly rising home prices.²⁷ By 2007, nearly one-third of California's jurisdictions, mainly in the state's most expensive housing markets, had IZ programs.²⁸

Unlike Massachusetts and California, New Jersey's inclusionary zoning arose out of a state court order. In *South Burlington County N.A.A.C.P. v. Mount Laurel Township*, the New Jersey Supreme Court held that every municipality must use their zoning powers to create affirmative policies that increase affordable housing production to meet a "fair share" of the region's housing needs.²⁹ *Mount Laurel* enabled developers to sue local governments that impede affordable housing developments and spurred many New Jersey localities to adopt affordable housing policies in response.³⁰ New Jersey later revised its municipal zoning regulations to require one affordable unit or sixteen newly created jobs for every five new market rate units.³¹

On a local level, Montgomery County, Maryland has implemented a particularly effective inclusionary zoning program. The Moderately Priced Dwelling Unit (MPDU) program has produced more IZ units (13,000 units) than all other jurisdictions and most states since 1973.³² Unlike most places, the county's IZ policy has a cap of 65% MFI, and the public housing authority purchases 33% of the affordable units from developers to subsidize units for low- and very low- income renters.³³ Montgomery County also provides below-market interest financing to help low- and moderate-income households, as well as nonprofit organizations, purchase affordable units.³⁴ Units must remain affordable for thirty years for sale units (homeownership) or ninety years for rental units.³⁵ The inclusionary zoning policies in Massachusetts, California, New Jersey, and

22. See MASS. GEN. LAWS ch. 40B, § 21.

23. SCHWARTZ, *supra* note 7, at 286.

24. *Id.*

25. *Id.* at 287.

26. *Id.* at 285.

27. *Id.*

28. *Id.* California's inclusionary zoning policies currently may be in jeopardy because of *Palmer/Sixth Street Properties, L.P. v. Los Angeles*, in which a California appellate court held that inclusionary zoning policies violated state law prohibiting rent control. 96 Cal. Rptr. 3d 875, 886–87 (Cal. Ct. App. 4th 2009).

29. See *S. Burlington Cty. N.A.A.C.P. v. Mount Laurel Twp.*, 456 A.2d 390, 490 (N.J. 1983).

30. SCHWARTZ, *supra* note 7, at 283–84.

31. See *id.* at 284.

32. See SCHWARTZ, *supra* note 7, at 287.

33. *Id.*

34. *Id.*

35. *Id.*

Montgomery County represent the earliest forays into inclusionary zoning as a way to combat racial and economic segregation.

III. INCLUSIONARY ZONING IN WASHINGTON, D.C.

A. Requirements

During the late 1990s, inclusionary zoning, which initially began in suburban areas, spread to urban areas in response to rising home prices and gentrification. In D.C., the D.C. Council enacted its first inclusionary zoning policy in 2006.³⁶ The regulation went into effect in 2009.³⁷ D.C.'s inclusionary zoning policy currently applies to new residential projects that 1) contain ten or more units, or 2) add ten or more units in most zoning districts.³⁸ Developers must set aside the greater of 8–10% of total square footage or 50–75% of the bonus density, and must make those units affordable to individuals at 60% MFI for rental units and 80% MFI for sale units.³⁹ If a new development includes a penthouse, all required IZ units must be eligible to individuals at 50% MFI.⁴⁰ In exchange, developers receive a density bonus dependent on the area's zoning classification that usually includes a combination of increasing the permissible lot occupancy percentage and building height.⁴¹ The D.C. government publishes an annual maximum income, rent, and purchase schedule for qualifying IZ units based on unit and household size.⁴² Additionally, the D.C. government provides IZ orientation classes for individuals interested in registering for the program and uses random lotteries to select households.⁴³ IZ participants sign one-year leases and must re-certify that their incomes meet the program's requirements each year.⁴⁴

B. Goals

Inclusionary zoning in D.C. has two main goals: 1) to increase the production of affordable housing units, and 2) to preserve diversity and economic integration for D.C. residents.⁴⁵ Inclusionary zoning uses the private market to achieve these goals, which makes the policy's near-zero city budget expenditure attractive. The policy aims to achieve these goals in the context of both rental and purchased units.⁴⁶

36. D.C. CODE § 6-1041.01 (2007); *Inclusionary Zoning Fact Sheet*, *supra* note 6.

37. *Inclusionary Zoning Fact Sheet*, *supra* note 6.

38. *Id.*

39. *Id.*; D.C. MUN. REGS. tit. 11, §§ C1003.1-C1003.3 (2016); D.C.'s inclusionary zoning policy previously required developers to make rental units affordable to individuals at 80% MFI instead of 60%. *See* D.C. DEP'T OF HOUSING & CMTY. DEV., *supra* note 10. Any developer who received a building permit prior to June 5, 2017 only had to meet an 80% MFI affordability level for rental units. *See id.*

40. D.C. MUN. REGS. tit. 11, § C1003.7 (2016).

41. D.C. MUN. REGS. tit. 11, §§ C1002.2-C1002.4 (2017).

42. D.C. DEP'T OF HOUS. & CMTY. DEV., *supra* note 10, at 2–4.

43. *Inclusionary Zoning Fact Sheet*, *supra* note 6.

44. *Id.*

45. D.C. MUN. REGS. tit. 11, § C1000.1 (2016).

46. *Id.*

Additionally, since D.C.'s socioeconomic inequality correlates with race,⁴⁷ an increase in economic diversity will also indirectly increase racial diversity as well.

C. Trends in the D.C. Housing Market

Inclusionary zoning emerged in D.C. as a method for combatting gentrification and displacement of longtime, mostly Black, D.C. residents.⁴⁸ Although gentrification and displacement have become nationwide trends in many urban areas, the level of gentrification and displacement in Washington, D.C. is particularly severe. A recent study by the Institute on Metropolitan Opportunity found that D.C. had the worst gentrification and low-income displacement trends of any major city, with nearly 36% of the population living in areas with strong displacement under way.⁴⁹ The study defined gentrifying tracts as Census tracts experiencing low-income displacement, meaning that the tracts are economically expanding but have a shrinking low-income population.⁵⁰ A study from *Governing* analyzing Census data in 2000 and 2010 also found that 51.9% of D.C.'s Census tracts are gentrifying.⁵¹ The *Governing* study defined gentrification based on income potential, education attainment, and home value. First, a Census tract is deemed "eligible for gentrification" if the tract's median income and median home value were both in the bottom fortieth percentile in the D.C. metropolitan area in the 2000 Census.⁵² Second, a Census tract that is "eligible for gentrification" has gentrified if the 2010 Census shows that the tract's increase in educational attainment is in the top one-third percentile, the tract's median home price increased, and the percentage increase in the tract's median home value is in the top one-third percentile.⁵³ Between 2000 and 2010, D.C. ranked as the second-most rapidly gentrifying city in the U.S., after Portland, Oregon.⁵⁴ The most rapidly gentrifying neighborhoods in D.C. are Columbia Heights, Petworth, NoMa, Navy Yard, and Southwest.⁵⁵ This pace of gentrification represents a sharp

47. *Prepared Residents: Household Income by Race and Ward*, D.C.'S ECON. STRATEGY, <http://dceconomicstrategy.com/household-income> (last visited Nov. 17, 2019).

48. Gentrification is a controversial term that has many different definitions. The baseline definition is "the process of repairing and rebuilding homes and businesses in a deteriorating area (such as an urban neighborhood) accompanied by an influx of middle-class or affluent people and that often results in the displacement of earlier, usually poorer residents." *Gentrification*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/gentrification> (last visited Nov. 17, 2019). Many definitions of gentrification in the U.S. also recognize and include gentrification's racial, educational, and cultural ramifications. See *Gentrifying Report Methodology*, GOVERNING: THE STATES AND LOCALITIES (Feb. 2015), <https://www.governing.com/gov-data/gentrification-report-methodology.html>.

49. INST. ON METRO. OPPORTUNITY, AMERICAN NEIGHBORHOOD CHANGE IN THE 21ST CENTURY 19, 25 (2019), https://www.law.umn.edu/sites/law.umn.edu/files/metro-files/american_neighborhood_change_in_the_21st_century_-_full_report_-_4-1-2019.pdf.

50. *Id.*

51. Mike Maciag, *Gentrification in America Report*, GOVERNING: THE STATES AND LOCALITIES (Feb. 2015), <https://www.governing.com/gov-data/census/gentrification-in-cities-governing-report.html> (showing that out of DC's 104 Census tracts, 54 are gentrifying).

52. *Gentrifying Report Methodology*, GOVERNING: THE STATES AND LOCALITIES (Feb. 2015), <https://www.governing.com/gov-data/gentrification-report-methodology.html>.

53. *Id.*

54. Maciag, *supra* note 51.

55. *Id.*

increase from the previous decade. Between 1990 and 2000, only 4.9% of D.C.'s Census tracts were gentrifying.⁵⁶

In addition to socioeconomic changes, gentrification often changes the racial composition of a city. The *Governing* study found that gentrifying areas had higher growth of non-Hispanic whites and lower poverty than areas that did not gentrify.⁵⁷ D.C. is no exception—the population of Blacks fell below 50% for the first time in 2015.⁵⁸ A study by the Fordham Institute, which defined gentrification based on the increase in a ZIP code's non-Hispanic white population, found that three D.C. ZIP codes (20001, 20005, and 20010) are within the top twenty fastest gentrifying ZIP codes in the U.S.⁵⁹ The Columbia Heights neighborhood (20010), lost over 25% of its Black population and nearly 20% of its Latino population.⁶⁰ Gentrification has thus caused massive levels of displacement in D.C. for low-income, predominantly minority residents due to growing unaffordability.

Low-income residents who were able to stay in D.C. also faced higher rent burdens. Scholars generally consider a household “cost-burdened” if the household spends 30%⁶¹ or more of its income on rent.⁶² Wards 7 and 8, which have the lowest median incomes and highest percentage of Black residents of all wards,⁶³ have the highest percentage of households who are cost-burdened by rent at 55% and 63% respectively.⁶⁴ These two wards also experienced the largest increases in the percentage of cost-burdened households.⁶⁵ However, the cost burdens for other wards have either stayed the same or actually decreased despite higher prices.⁶⁶ Rising home values and rents have priced out many low-income minority residents and raised questions about whose interests D.C. policies prioritized in the past two decades.

56. *Washington, D.C., Gentrification Maps and Data*, GOVERNING: THE STATES AND LOCALITIES, <https://www.governing.com/gov-data/washington-dc-gentrification-maps-demographic-data.html> (last visited Nov. 17, 2019).

57. Maciag, *supra* note 51.

58. Mike DeBonis, *D.C., where blacks are no longer a majority, has a new African American affairs director*, WASH. POST (Feb. 4, 2015), https://www.washingtonpost.com/local/dc-politics/dc-where-blacks-are-no-longer-a-majority-has-a-new-african-american-affairs-director/2015/02/04/e8bd65a0-ac8e-11e4-ad71-7b9eba0f87d6_story.html.

59. Michael J. Petrilli, *The fastest-gentrifying neighborhoods in the United States*, FORDHAM INST. (June 14, 2012), <https://fordhaminstitute.org/national/commentary/fastest-gentrifying-neighborhoods-united-states>.

60. J.B. Wogan, *Why D.C.'s Affordable Housing Crisis is Losing to Economics*, GOVERNING: THE STATES AND LOCALITIES (Feb. 2015), <https://www.governing.com/topics/urban/gov-washington-affordable-housing-protections-gentrification-series.html>.

61. Some scholars have disputed using 30% as a threshold for “cost-burdened.” For example, a household with \$500,000 in income will have much more money left over after spending 30% on rent than a household with \$30,000 in income. *See Rent Burdens: Rethinking Affordability Measures*, U.S. DEP'T HOUS. & URB. DEV., <https://www.governing.com/topics/urban/gov-washington-affordable-housing-protections-gentrification-series.html> (last visited Nov. 17, 2019).

62. THE PEW CHARITABLE TRS., AM. FAMS. FACE A GROWING RENT BURDEN 4 (2018), https://www.pewtrusts.org/-/media/assets/2018/04/rent-burden_report_v2.pdf.

63. *See Summary Data for Ward: Ward 7*, *supra* note 10; *Summary Data for Ward: Ward 8*, *supra* note 10.

64. *See Rent Burden by Ward*, D.C.'S ECON. STRATEGY, <http://dceconomicstrategy.com/rent-burden-ward> (last visited Nov. 17, 2019).

65. *See id.*

66. *See id.*

D. Effect of D.C.'s Inclusionary Zoning Program on Housing Production

D.C.'s inclusionary zoning program initially had very little effect on affordable housing due to the financial crisis, which severely depressed the housing market, and developer lawsuits.⁶⁷ In 2011, the program had produced only two rental units in one development.⁶⁸ No one bought any IZ condominium units until mid-2013.⁶⁹ However, as the housing market recovered, developers began building new housing again and consequently produced more IZ units as well.⁷⁰ In 2016 alone, D.C.'s inclusionary zoning program produced 191 units (140 for rent and 51 for sale) in twenty-two new developments.⁷¹ This trend sustained into 2017 and 2018 with 192 and 198 inclusionary zoning units produced in each respective year.⁷² Of the 198 units produced in 2018, thirty-six units were set aside at prices affordable to households at 50% MFI, seven units were set aside at prices affordable to households at 60% MFI, and 155 units were set aside at prices affordable to households at 80% MFI.⁷³ IZ units compose a relatively small portion of the 9,285 affordable units built between 2015 and 2018.⁷⁴ However, inclusionary zoning has made a substantial impact in certain wards. For example, in Ward 3, fifty-three IZ units are the only source of affordable housing built since 2015.⁷⁵ Inclusionary zoning has thus far played an important role in D.C.'s housing market but also shows room for potential growth in the policy's impact.

IV. PROBLEMS WITH INCLUSIONARY ZONING IN D.C.

The inclusionary zoning program in D.C. has created some affordable housing but faces certain problems that prevent the program from being more effective.

67. Andrew Giambrone, *D.C. Affordable Housing Program Begins Seeing Results*, WASH. CITY PAPER (Aug. 18, 2017), <https://www.washingtoncitypaper.com/news/housing-complex/blog/20972914/dc-affordable-housing-program-begins-seeing-results>; Benjamin Schneider, *CityLab University: Inclusionary Zoning*, CITYLAB (July 17, 2018), <https://www.citylab.com/equity/2018/07/citylab-university-inclusionary-zoning/565181>.

68. D.C. DEP'T OF HOUS. & CMTY. DEV., INCLUSIONARY ZONING FISCAL YEAR 2016 ANNUAL REPORT 6 (2017), https://dhcd.dc.gov/sites/default/files/dc/sites/dhcd/publication/attachments/DHCD%20FY2016%20IZ%20Annual%20Report_0.pdf.

69. Giambrone, *supra* note 67.

70. *Id.*; Schneider, *supra* note 67.

71. INCLUSIONARY ZONING FISCAL YEAR 2016 ANNUAL REPORT, *supra* note 68, at 6.

72. D.C. DEP'T OF HOUS. & CMTY. DEV., INCLUSIONARY ZONING FISCAL YEAR 2018 ANNUAL REPORT 5 (2019), https://dhcd.dc.gov/sites/default/files/dc/sites/dhcd/page_content/attachments/FY%202018%20Inclusionary%20Zoning%20Annual%20Report_0.pdf [hereinafter FISCAL YEAR 2018 ANNUAL REPORT]; D.C. DEP'T OF HOUS. & CMTY. DEV., INCLUSIONARY ZONING FISCAL YEAR 2017 ANNUAL REPORT 5 (2018), <https://dhcd.dc.gov/sites/default/files/dc/sites/dhcd/publication/attachments/DHCD%20FY2017%20IZ%20Annual%20Report%20final.pdf> [hereinafter FISCAL YEAR 2017 ANNUAL REPORT].

73. *See* FISCAL YEAR 2018 ANNUAL REPORT, *supra* note 72. Prior to June 5, 2017, the inclusionary zoning program only required developers to make their affordable rental units available at 80% MFI. The DC Zoning Commission reevaluated the program and chose to lower the MFI to 60%. *Inclusionary Zoning Fact Sheet*, *supra* note 6.

74. Andrew Giambrone, *Map: Nearly all of D.C.'s new affordable housing is being developed east of Rock Creek Park*, CURBED (Sept. 11, 2018), <https://dc.curbed.com/2018/9/11/17846984/map-affordable-housing-rock-creek-park-dc-fpi>.

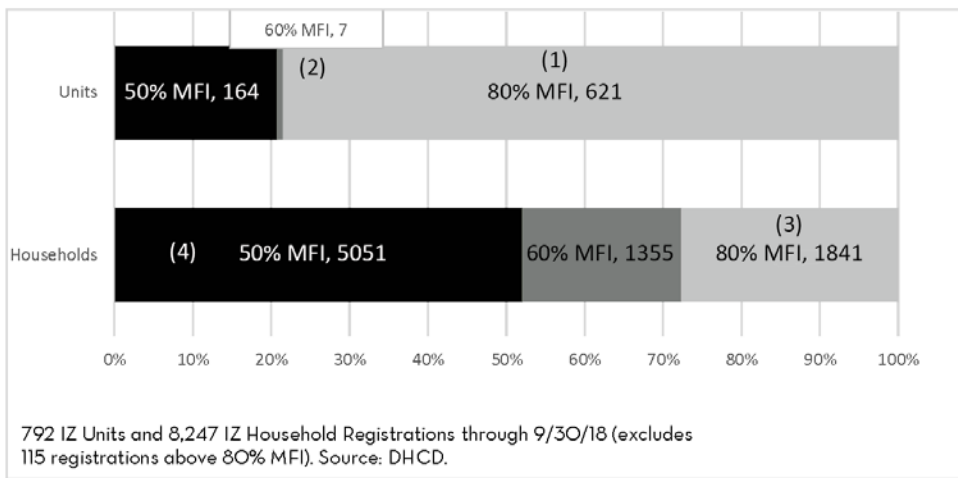
75. *Id.*

These problems impede inclusionary zoning’s ability to create more affordable housing units and increase socioeconomic integration.

A. Inclusionary Zoning Does Not Benefit the Lowest-Income D.C. Residents

A major problem with D.C.’s inclusionary zoning program is that the program does not benefit D.C.’s lowest-income residents. A mismatch exists between IZ rental unit prices and income levels for many low-income people. Although D.C.’s inclusionary zoning program currently caps the maximum income level for households renting IZ units at 60% MFI, the program previously placed the limit at 80% MFI (in addition to the 50% MFI penthouse requirement).⁷⁶

Figure 1: IZ Unit Affordability Levels vs. Household Registration



As shown in Figure 1, (1) nearly 80% of all IZ units built were priced for households making between 61% and 80% MFI.⁷⁷ (2) Around 20% of IZ units built were affordable for households making up to 50% MFI.⁷⁸ However, (3) less than 30% of households registered in the IZ database have income levels between 61% and 80% MFI.⁷⁹ (4) Over 50% of households have incomes at 50% of median family income or less.⁸⁰ The 2018 statistics for new IZ units largely mirrored the

76. Claire Zippel, *DC is One Step Closer to A Stronger Inclusionary Zoning Program*, D.C. FISCAL POL’Y INST. (Feb. 10, 2017), <https://www.dcfpi.org/all/dc-one-step-closer-stronger-inclusionary-zoning-program>; D.C. MUN. REGS. tit. 11, § C1003.7 (2016) (If a new development includes a penthouse, all required IZ units must be made eligible to individuals at 50% MFI).

77. FISCAL YEAR 2018 ANNUAL REPORT, *supra* note 72, at 9; D.C. MUN. REGS. tit. 11, § C1003.7 (2016).

78. *Id.*

79. *Id.*

80. *Id.*

composition of previous years' IZ unit prices as well.⁸¹ This mismatch in unit affordability and household MFI means that there are only enough units affordable at 50% MFI for 3.2% of households registered at 50% MFI.⁸² However, there are enough units affordable at 80% MFI for 33.7% of households registered at 80% MFI.⁸³

D.C.'s inclusionary zoning policy has thus largely benefitted households in the lower middle class instead of the city's lowest-income residents. In 2018, the average rent for a discounted studio under inclusionary zoning was \$1307, which means an individual at 30% MFI would spend nearly 62% of her annual income on housing.⁸⁴ Even an individual at 50% MFI would spend nearly 37% of his or her annual income on housing, which is still 7% higher than the recommended 30% cost-burden.⁸⁵ These numbers indicate that many individuals in need of housing are left out of IZ units due to prohibitive costs. Households at 30% MFI in particular (considered very low-income) receive very few benefits from inclusionary zoning. Furthermore, for households that receive IZ units, the affordability mismatch between incomes of registered households and IZ unit prices means that a number of households are likely paying more than the recommended 30% of annual income for IZ units. Inclusionary zoning has thus far failed to provide adequate housing relief to D.C.'s lowest-income households.

In 2017, the D.C. Council and Mayor's Office adopted the Zoning Commission's recommendation to change D.C.'s inclusionary zoning program by capping the eligible households for rental units to 60% MFI.⁸⁶ These changes went into effect in June 2017 and meant to decrease the maximum rent of a studio from \$1590 to \$1190.⁸⁷ The 50% MFI requirement for all units located in a development containing a penthouse has not changed. The 2018 Annual Report on inclusionary zoning demonstrated that this legal change has had some impact on the affordability of IZ rental units. The average rent for a studio apartment dropped from \$1,510 to \$1,307.⁸⁸ Despite the slight decrease in rent, inclusionary zoning is still unaffordable for D.C.'s lowest-income residents. Inclusionary zoning favors the lower middle class and does not provide housing solutions for D.C.'s lowest-income residents.

81. *See* FISCAL YEAR 2017 ANNUAL REPORT, *supra* note 72, at 8; D.C. DEP'T OF HOUS. & CMTY. DEV., *supra* note 68, at 8. The Inclusionary Zoning Fiscal Year 2016 Annual Report also reported that families making between 0 and 30% of median family income composed 22% of all IZ household registrations, and families making between 30% and 50% of median family income composed 37% of all IZ household registrations. *See id.* Subsequent annual reports do not provide this information.

82. FISCAL YEAR 2018 ANNUAL REPORT, *supra* note 72, at 9.

83. *Id.*

84. *Id.* at 12; *see* INCLUSIONARY ZONING 2019 MAXIMUM INCOME, RENT AND PURCHASE PRICE SCHEDULE, *supra* note 10, at 2.

85. FISCAL YEAR 2018 ANNUAL REPORT, *supra* note 72, at 12; *see* D.C. DEP'T OF HOUS. & CMTY. DEV. *supra* note 10, at 2.

86. Zippel, *supra* note 76.

87. *See id.*; FISCAL YEAR 2018 ANNUAL REPORT, *supra* note 72, at 9.

88. FISCAL YEAR 2018 ANNUAL REPORT, *supra* note 72, at 12.

B. Inclusionary Zoning Fails to Create Racially and Economically Integrated Neighborhoods

Inclusionary zoning has also failed to fulfill its purpose of creating a more racially and economically integrated city. Many localities, including D.C., initially enacted inclusionary zoning to combat historically exclusionary zoning laws and covenants that have segregated neighborhoods by race and class.⁸⁹ In D.C., the remnants of this historic segregation are most prominent when comparing income and racial stratification between different wards and quadrants.⁹⁰ As of 2019, Wards 7 and 8, which are mostly east of the Anacostia River, have the lowest median incomes (approximately \$30,000–40,000) and highest percentage of Black residents (over 90% Black) in D.C.⁹¹ On the other hand, Ward 3, which is located in D.C.’s Northwest quadrant, has the highest median income (\$122,680) of all wards in D.C. and the highest percentage of white residents (over 80% white) in D.C.⁹² The continuing economic and racial segregation in D.C. demonstrates that on a macro level, inclusionary zoning has not had much effect on segregated residential patterns.

A micro-level analysis of inclusionary zoning may show a different picture with more mixed results on the impact of inclusionary zoning. Households able to obtain below-market housing through inclusionary zoning can remain in neighborhoods and apartment buildings that would have otherwise been unaffordable. However, merely being present in a neighborhood does not necessarily indicate that a household is well-integrated. Instead, factors such as health, social relationships, and children’s educational attainment provide more definitive measures of integration. While no comprehensive study on the ease of integration for participants of D.C.’s inclusionary zoning program exists, more generalized studies on poverty deconcentration efforts show that although low-income households tended to have better living and safety conditions in mixed-income neighborhoods, they also bore increased financial and psychological costs.⁹³ These costs include loss of social networks, higher transportation fares, and a greater sense of stigma and alienation in higher income communities.⁹⁴ Racial and economic integration thus often includes hidden costs for low-income households living in wealthier communities.

Anecdotal evidence may help illuminate certain benefits and difficulties of participating in inclusionary zoning. For example, the “poor door” phenomenon in many increasingly unaffordable cities demonstrates the extent to which low-income individuals in gentrifying or wealthier areas experience segregation within

89. *Id.* at 4; see *Maps Restricted Housing and Racial Change, 1940–1970*, MAPPING SEGREGATION DC, <https://mappingsegregationdc.org/#maps> (last visited Nov. 17, 2019) (showing housing lots in D.C. that were historically racially restricted by deed or petition to contribute to citywide segregation by ward).

90. See MAPPING SEGREGATION DC, *supra* note 89 (showing interactive map of D.C.’s nonwhite households in each neighborhood in 1940, 1950, 1960, and 1970).

91. *Prepared Residents: Household Income by Race and Ward*, *supra* note 47; *Summary Data for Ward: Ward 7*, *supra* note 10; *Summary Data for Ward: Ward 8*, *supra* note 10.

92. *Prepared Residents: Household Income by Race and Ward*, *supra* note 47; *Summary Data for Ward: Ward 3*, D.C. HEALTH MATTERS, <http://www.dchealthmatters.org/?module=demographicdata&controller=index&action=index&id=131490§ionId=> (last visited Nov. 17, 2019).

93. Diamond, *supra* note 16, at 14.

94. *Id.*

mixed spaces. In D.C. specifically, controversy erupted when the developers of Portner Place, a new mixed-income development on U Street, decided to build two separate doors in the development—one for market-rate tenants and the other for low-income tenants.⁹⁵ However, this image of socioeconomic discrimination became more complex when it emerged that the low-income tenants requested separate entrances.⁹⁶ Given a choice between being scattered among market-rate tenants and being concentrated in one segment of the building, the low-income tenants preferred staying together in one place.⁹⁷ This snapshot of a newly developed, mixed-income building reveals the extent to which low-income tenants in integrated—or gentrifying—neighborhoods feel unwelcome and illustrates the tenants’ desire to retain existing social networks and community.

C. D.C.’s Inclusionary Zoning Policy Bases Its Income Qualifications on the Washington Metropolitan Statistical Area Median Family Income, Which Inflates Qualification Cutoffs

D.C.’s inclusionary zoning program currently uses income caps that are not representative of individuals living in D.C. The Washington Metropolitan Statistical Area (WMSA) Median Family Income includes Fairfax, Arlington, and Alexandria in Virginia and Montgomery and Prince George’s County in Maryland.⁹⁸ Adding these counties inflates the median household income from \$82,327 (D.C. alone) to \$99,669.⁹⁹ Additionally, despite the WMSA having a higher median family income, the median property value in D.C. alone is nearly \$180,000 higher than in the WMSA.¹⁰⁰ These statistics demonstrate that the living condition in the Washington Metropolitan area is not representative of the actual city of D.C. Inclusionary zoning’s use of the Washington Metro Area’s income statistics invariably creates IZ units that are not actually affordable for D.C. residents at 60% MFI.

D. Inclusionary Zoning Does Not Increase the Level of Affordable Housing in Wards 7 and 8

Additionally, inclusionary zoning in D.C. fails to achieve its goal of providing affordable housing units in Wards 7 and 8. Inclusionary zoning units in new Ward 7 and 8 developments barely have any effect in providing affordable housing for existing residents, because the income levels developers are required to build for

95. Emily Badger, *When separate doors for the poor are more than what they seem*, WASH. POST (July 31, 2014), https://www.washingtonpost.com/news/wonk/wp/2014/07/31/when-the-poor-want-their-own-door/?noredirect=on&utm_term=.53d235b61c9c.

96. *Id.*

97. *Id.*

98. *Washington-Arlington-Alexandria, DC-VA-MD-WV Metro Area*, DATAUSA, <https://datausa.io/profile/geo/washington-arlington-alexandria-dc-va-md-wv-metro-area> (last visited Nov. 17, 2019); *Washington, DC*, DATAUSA, <https://datausa.io/profile/geo/washington-dc> (last visited Nov. 17, 2019).

99. *Compare Washington-Arlington-Alexandria, DC-VA-MD-WV Metro Area*, *supra* note 98, and *Washington, DC*, *supra* note 98.

100. *See supra* note 99.

are equivalent to the MFIs in Wards 7 and 8.¹⁰¹ The D.C. government lists recommended minimum annual incomes (50% rent burden) for renters of a one-bedroom apartment priced at 50% MFI as \$26,400 and 60% MFI as \$31,700; yet, the median incomes in Wards 7 and 8 are \$38,110 and \$34,824 respectively.¹⁰² In examining newly built luxury buildings in Ward 8, such as Sheridan Station and Maple View Flats, the market rate rent for all the available rooms is below IZ monthly rental prices at 60% MFI.¹⁰³ Newly built luxury apartment buildings in Ward 7 are similarly only around \$100–\$200 more expensive than the maximum rental price at 60% MFI.¹⁰⁴ Thus, inclusionary zoning has no effect on market prices in Ward 8 and barely any effect on market prices in Ward 7. Instead, apartment units priced at 60% MFI merely target relatively better off individuals in these wards and attract residents from outside of D.C., rather than those who already live in D.C. and are most in need of affordable housing. D.C.'s inclusionary zoning program does not meet its goal of building more affordable housing when the IZ units are placed in areas with equivalent market rate housing prices.

V. EXPANDING D.C.'S INCLUSIONARY ZONING POLICY

Although D.C.'s inclusionary zoning program currently has problems that impede its impact, the program still creates much-needed affordable housing units each year. To better achieve its goals of increasing the level of affordable housing and integration, the D.C. government should make its inclusionary zoning more aggressive through ward-specific policies that account for the lowest-income residents and target inaccessible locations. These improvements would help ensure that D.C.'s inclusionary zoning policy creates more impactful economic and racial integration, while increasing the number of affordable units overall.

A. Base IZ Income Requirements on Ward MFIs

First, the D.C. government should amend the inclusionary zoning policy's income and set-aside requirements by creating ward-specific income requirements. If a particular ward's median family income is below the entire city's median family income (\$109,150¹⁰⁵ for a family of three under D.C.'s inclusionary zoning policy), the D.C. government should alter income cutoffs based on that ward's median family income. Income cutoffs for wards with higher median family incomes would remain the same. D.C. is an economically and racially stratified

101. INCLUSIONARY ZONING 2019 MAXIMUM INCOME, RENT AND PURCHASE PRICE SCHEDULE, *supra* note 10; *Prepared Residents: Household Income by Race and Ward*, *supra* note 47.

102. INCLUSIONARY ZONING 2019 MAXIMUM INCOME, RENT AND PURCHASE PRICE SCHEDULE, *supra* note 10; *Summary Data for Ward: Ward 7*, *supra* note 10; *Summary Data for Ward: Ward 8*, *supra* note 10.

103. See *Floor Plans, MAPLE VIEW FLATS*, <https://www.kettler.com/property/maple-view-flats/171585> (last visited Nov. 17, 2019); *Sheridan Station Apartments*, WC SMITH, <https://www.sheridanstationapartments.com/floorplans> (last visited Nov. 17, 2019).

104. See *Washington, DC Listings*, HOTPADS, <https://hotpads.com/meadow-green-courts-washington-dc-20019-skme3u/pad?lat=38.8916&lon=-76.9529&z=15> (last visited Nov. 17, 2019).

105. INCLUSIONARY ZONING 2019 MAXIMUM INCOME, RENT AND PURCHASE PRICE SCHEDULE, *supra* note 10.

city, in which wealth and whiteness are generally concentrated in the Northwest quadrant. Wards 3 and 8 have the largest income gap with median family incomes at \$136,832 and \$34,824 respectively.¹⁰⁶ The maximum income cutoff for a family of three at D.C.'s median family income (\$65,500) is nearly twice the median family income in Ward 8.¹⁰⁷ IZ units in wards with significantly lower MFIs than the citywide MFI (Wards 4, 5, 7, and 8) do not benefit existing low-income members of the community and may merely attract wealthier outsiders to the area.¹⁰⁸ For these particular wards, the government should instead use ward-specific income thresholds to ensure IZ units are actually accessible to that particular ward's low-income residents. A potential adjustment to start with would be to require developers to set aside IZ units at prices affordable for individuals making 80% of the ward's MFI (\$27,859.20 for Ward 8 and \$30,488 for Ward 7), which is equivalent to about 30% of the citywide MFI for a family of two.¹⁰⁹ Based on development cost feasibility, the D.C. government may need to pair this policy with other policies discussed in greater detail below, such as adjusting set-aside percentages,¹¹⁰ giving height bonuses for set-asides at prices for lower-income levels,¹¹¹ or buying IZ units to rent at prices affordable to D.C.'s lowest-income individuals.¹¹²

*B. Give Developers the Option to Build Units for Varying MFI levels
at Varying Set-Aside Levels*

Besides using ward-specific median family incomes to determine cutoff points for IZ units, the D.C. government should also provide different set-aside options based on the target MFI bracket and ward. The D.C. government needs to adjust IZ set-aside requirements for two reasons. First, having a wide variety of set-aside percentages tied to different rental prices permits developers to build for very low-income occupants. Currently, the requirement that developers set aside 8–10% of total square feet for individuals making 60% MFI (or 50% MFI for developments with penthouses) means that individuals making less than 60% MFI must take on higher rent burdens to pay for IZ rooms. By changing the set-aside requirements in tandem with changing rent requirements, a building developer would have the option of setting aside a smaller percentage of total square feet in exchange for renting at lower prices to very low-income tenants. Below is a proposed rental price to set-aside chart that would create the same cost burden for developers as the existing 8-10% set-aside at 60% MFI for a one-bedroom apartment in D.C.

106. *Summary Data for Ward: Ward 3, supra* note 92; *Summary Data for Ward: Ward 8, supra* note 10.

107. *See Summary Data for Ward: Ward 8, supra* note 10; INCLUSIONARY ZONING 2019 MAXIMUM INCOME, RENT AND PURCHASE PRICE SCHEDULE, *supra* note 10.

108. The manager at Maple View Flats confirmed that most of the residents who lived in Maple View Flats, a luxury apartment building in Anacostia, are from outside of DC. Telephone Interview with General Manager, Bozzuto (May 10, 2019).

109. *Summary Data for Ward: Ward 3, supra* note 92; *Summary Data for Ward: Ward 8, supra* note 10; INCLUSIONARY ZONING 2019 MAXIMUM INCOME, RENT AND PURCHASE PRICE SCHEDULE, *supra* note 10.

110. *See infra* Part V.B.

111. *See infra* Part V.C.

112. *See infra* Part V.D.

Figure 2: Percentage set-asides at each rental price for various MFIs that result in the same cost burden

Income level ¹¹³	10% MFI	30% MFI	50% MFI	60% MFI	100% MFI
Rental price ¹¹⁴	\$220	\$660	\$1100	\$1320	\$2190
Set-aside (%) ¹¹⁵	3.53–4.42%	4.55–5.69%	6.39–7.98%	8–10%	--
Total cost burden	\$6960–8700 (based on a 100-unit development)				

Though the proposed set-aside percentages above are based on the existing cost burden on developers at 60% MFI with 8–10% set-aside, the D.C. government could potentially increase set-aside percentages at all MFI levels to strengthen IZ policy. Having various set-aside requirements help ensure that inclusionary zoning produces units for a wider variety of income levels.

Second, the D.C. government should also have varying set-aside requirements for inclusionary zoning by ward to accommodate the proposed income requirement changes *infra* Part V.A. Although using ward-specific income requirements for IZ qualification would increase access for low-income residents of that ward, the lowered rental price presents a greater cost burden for developers. For example, 60% of the median family income in Ward 8 is less than 30% of the city-wide median family income under the current inclusionary zoning policy.¹¹⁶ Without a method for offsetting the increased cost, developers would not choose to build in wards with lower MFIs if set-aside requirements remained constant for all wards. Thus, having lower set-aside requirements for wards with lower MFIs would help ensure that the inclusionary zoning cost burden for developers is uniform across all wards.

Set-aside requirements for inclusionary zoning that vary based on targeted income level raise two crucial issues: First, having varying set-asides based on MFI level means that developers produce a smaller quantity of IZ units for lower

113. The above table's income level and set-aside percentages are based on the assumption that the developer chooses to rent all available IZ units to the same income level. The developer could also potentially mix income levels and adjust set-aside rates accordingly based on cost-savings. However, allowing developers to mix income levels would likely be a bigger administrative burden.

114. See INCLUSIONARY ZONING 2019 MAXIMUM INCOME, RENT AND PURCHASE PRICE SCHEDULE, *supra* note 10, at 3. Rental prices for 30% MFI, 50% MFI, and 60% MFI are based on maximum allowable rental prices at each MFI percentage for a one-bedroom unit under D.C. inclusionary zoning laws. The rental price at 10% MFI was calculated based on the rental prices at 30% and 60% MFI.

115. Set-aside percentages at 10% MFI, 30% MFI, and 50% MFI are calculated based on the developer's cost burden for setting aside the required 8–10% for renters at 60% MFI (\$6960 to \$8700 cost burden for a 100-unit development). The equation used for set-aside percentage is:

$$x_{\text{set-aside}} = \left(\frac{\text{cost burden}}{2190 - \text{rent}_{\text{MFI}}} \right) \cdot \text{units}$$

116. See *Summary Data for Ward: Ward 8*, *supra* note 10 (showing that the median family income in Ward 8 is \$34,824). 60% of \$34,824 is \$20,894.40. The 2019 income guideline for 30% MFI under DC's inclusionary zoning policy is \$25,450 for a family of one. INCLUSIONARY ZONING 2019 MAXIMUM INCOME, RENT AND PURCHASE PRICE SCHEDULE, *supra* note 10.

income levels. This Note will address the quantity problem *infra* Part V.C. Second, some observers may question whether inclusionary zoning policy should lower the cost burden for developers in lower-income wards through decreasing set-aside requirements. By decreasing set-aside requirements based on whether the ward is below citywide MFI, the D.C. government may potentially encourage gentrification, whereas keeping higher cost burdens would discourage new developments and consequently discourage gentrification. Gentrification creates tension between inclusionary zoning's two goals. On the one hand, gentrification creates more racially and socioeconomically diverse communities as whiter and more affluent people move into largely Black and lower-income communities. On the other hand, gentrification may conflict with inclusionary zoning's goal of producing more affordable housing. If the influx of higher-income households leads to lower-income households being pushed out of increasingly unaffordable housing, then inclusionary zoning should potentially prioritize affordable housing availability over gentrification's racially and socioeconomically diversifying effects.¹¹⁷ However, if gentrification merely increases the number of higher-income individuals moving in without decreasing the quantity of affordable housing, then gentrification may potentially provide a net benefit.¹¹⁸ This Note will address the problem of inclusionary zoning and gentrification *infra* Part VI.B.

C. Give Density Bonuses to Developers Setting Aside Units Affordable to Households at or Below 30% MFI and In Wards with Lower MFIs

A major problem with varying set-asides for different income levels is that a developer who chooses to build for households at lower MFI percentages or in wards with lower MFIs would not be able to provide the same quantity of units for low-income households as a developer building for individuals at higher MFI percentages.¹¹⁹ To rectify this problem, D.C.'s inclusionary zoning policy should give increased density bonuses to developers building for households at 30% MFI or below, or building in Wards 7 or 8.¹²⁰ The developer must then set aside a percentage of the increased density bonus for households at 30% MFI or lower. Currently, D.C. gives a density bonus based on zoning classification to developers building inclusionary zoning units.¹²¹ Developers building at 30% MFI or lower should receive an additional 10–20% density bonus. By increasing the density bonus, developers are able to build more units at a cheaper per-unit cost, which lessens the cost burden for developers to set aside units for affordable housing.

117. See, e.g., Veronica Mosqueda & Rob Wohl, *A Columbia Heights rent strike highlights abuses low-income tenants face in DC*, GREATER GREATER WASH. (April 3, 2019), <https://ggwash.org/view/71558/a-columbia-heights-rent-strike-highlights-abuses-tenants-face-in-dc>; J.B. Wogan, *Low-Income Residents More Likely to Leave D.C.*, GOVERNING: THE STATES AND LOCALITIES (Feb. 1, 2015), <https://www.governing.com/topics/urban/gov-low-income-residents-district-columbia.html>.

118. J. Peter Byrne, *Two Cheers for Gentrification*, 46 HOW. L.J. 405, 406 (2003).

119. See *supra* Part V.B.

120. Wards 7 and 8 have the most dramatic median income differences (\$38,110 and \$34,824) when compared to the citywide MFI (\$109,150 for a family of three). See *Summary Data for Ward: Ward 7*, *supra* note 10; *Summary Data for Ward: Ward 8*, *supra* note 10; INCLUSIONARY ZONING 2019 MAXIMUM INCOME, RENT AND PURCHASE PRICE SCHEDULE, *supra* note 10.

121. D.C. MUN. REGS. tit. 11, §§ 1002.2-1002.4 (2017).

In addition to increasing the density bonus, the D.C. government should give developers height bonuses, with a certain percentage of the height bonus going to affordable units at 30% MFI or below. Height bonuses provide greater flexibility for developers because increasing the height of a building does not increase land costs or space requirements. The increase in building material costs is easily offset by the increased number of units added to the building, which creates a lower per-unit cost of the building. With an additional height bonus, developers will be able to increase the number of rooms set aside for affordable housing in a way that offsets the effect of a lowered set aside requirement (4.55–5.69%) for rooms priced at 30% MFI as proposed in *supra* Part V.B.¹²²

The main impediment to creating an inclusionary zoning height bonus is the Height of Buildings Act of 1910, which prohibits developers from building higher than 90 feet on residential streets.¹²³ D.C. could potentially petition Congress for a policy exception, which has previously happened five times, on the basis of increasing affordable housing.¹²⁴ Due to the greater control and autonomy that Congress has granted D.C. under the Home Rule Act of 1973,¹²⁵ Congress may be amenable to granting this exception for zoning and affordable housing purposes.¹²⁶ Amending height requirements for developers building units at 30% MFI would require a longer political process but would likely create a more sustainable inclusionary zoning bonus for developers.

Recent events have also revived debate over the Height of Buildings Act's impact on affordable housing and created greater political momentum to establish height exceptions for affordable housing purposes. In her second inaugural address, D.C. Mayor Muriel Bowser stated that “[D.C.] can no longer resist a close look at building taller and more densely where it makes sense. To do otherwise would be to ignore our growing affordable housing shortage.”¹²⁷ Mayor Bowser's newly appointed Director of the D.C. Office of Planning, Andrew Trueblood, wrote his Master's thesis on easing D.C.'s height restrictions to permit additional

122. *See supra* Part V.B.

123. D.C. CODE § 6-601.05(c) (2014).

124. *Part I: Historical Background on the Height of Buildings Act*, NAT'L CAPITOL PLANNING COMM'N (Sept. 10, 2018) at 4, https://www.ncpc.gov/heightstudy/docs/Historical_Background_on_the_Height_of_Buildings_Act_draft.pdf (Congress previously granted relief from the Height of Buildings Act to St. Matthew's Roman Catholic Church, the Harrington Hotel, the National Press Club, a proposed Masonic Temple, and Georgetown University Hospital.).

125. *See D.C. Home Rule*, COUNCIL OF THE DIST. OF COLUMBIA, <https://decouncil.us/dc-home-rule> (last visited Nov. 17, 2019). The Home Rule Act is a culmination of DC residents' advocacy for greater self-determination and gave residents the right to elect DC's mayor and council. *See id.* The Act elevated the Mayor and DC Council's “powers and duties . . . [to be] comparable to those held by state, county, and city legislatures.” *Id.* However, the Home Rule Act still gives Congress certain powers over DC in ways that limit the city's autonomy and self-rule, such as requiring Congress to review all legislation that the DC Council has passed. *See id.*

126. Many critics of the Height of Buildings Act argue that the height limitations imposed on DC artificially depress housing supply, which in turn increases housing prices and produces rampant inequality. *See, e.g.*, Andrew Trueblood, DC's Marble Ceiling: Urban Height and Its Regulation in Washington, DC 70–71, 84 (June 2009) (unpublished M.C.P. thesis, Massachusetts Institute of Technology) (on file with the MIT Libraries system); Matthew Yglesias, “Washington DC's aversion to skyscrapers has turned it into an American Versailles”, DEZEEN (June 19, 2015), <https://www.dezeen.com/2015/06/19/washington-dc-height-buildings-act-skyscrapers-inequality-housing-american-versailles>.

127. Muriel Bowser, Mayor, Washington, D.C., Second Inaugural Address (Jan. 2, 2019) (transcript available on DC.gov).

density in buildings and is charged with evaluating changes to building density and height requirements to meet D.C.'s affordable housing goals.¹²⁸ The growing urgency of providing affordable housing in D.C. has increased political will to challenge the Height of Buildings Act in order to provide more affordable housing options.

D. Use D.C.'s Housing Production Trust Fund to Buy IZ Units and Rent to D.C.'s Lowest-Income Residents

Another avenue for D.C. to bolster its inclusionary zoning program is through using its Housing Production Trust Fund to buy IZ units and make those units affordable to D.C.'s lowest-income residents.¹²⁹ This proposal mirrors the successful inclusionary zoning program in Montgomery County, Maryland, which currently has an arrangement that allows government and nonprofit entities to purchase up to 33% of affordable units produced through inclusionary zoning.¹³⁰ The county subsidizes these units for low- and very low-income people to rent.¹³¹ By buying IZ units, the government can ensure that these units will continually be made available to low and very low-income households.¹³² D.C. similarly should provide this type of financial support for its lowest-income renters. Whereas inclusionary zoning depends heavily on market forces to build affordable housing, having the government purchase a certain percentage of housing units injects a level of predictability into the affordable housing market and allows the government to rent to the lowest-income households.

E. Offer D.C. Tax Credits to Developers Setting Aside a Higher Percentage of IZ Units in Ward 3

D.C. should also strengthen its inclusionary zoning program by offering D.C. tax credits¹³³ to developers setting aside a larger percentage of units for inclusionary zoning in Ward 3. These tax credits would function as a state equivalent to federal Low-Income Housing Tax Credits. D.C.'s affordable housing program currently strengthens poverty concentration and likely strengthens racial segregation as well.¹³⁴ For example, less than 1% of D.C.'s new affordable housing

128. See, e.g., Andrew Trueblood, *DC's Marble Ceiling: Urban Height and Its Regulation in Washington, DC* 84 (June 2009) (unpublished M.C.P. thesis, Massachusetts Institute of Technology) (on file with the MIT Libraries system); Alex Koma, *Bowser ready to explore D.C. height limit changes in order to meet housing production goals*, WASH. BUS. J. (May 10, 2019), <https://www.bizjournals.com/washington/news/2019/05/10/bowser-ready-to-explore-d-c-height-limit-changes.html>.

129. *Housing Production Trust Fund*, DEP'T OF HOUS. & CMTY. DEV., <https://dhcd.dc.gov/page/housing-production-trust-fund> (last visited Nov. 17, 2019).

130. SCHWARTZ, *supra* note 7, at 287.

131. *Id.*

132. *Id.*

133. If necessary, the D.C. government can potentially increase taxes on commercial and industrial real property over \$5 million, vacant real property, and blighted real property to compensate for lost revenue. See *Real Property Tax Rates*, DC.GOV, <https://otr.cfo.dc.gov/page/real-property-tax-rates> (last visited Nov. 17, 2019).

134. Giambrone, *supra* note 67.

units built since 2015 are in Ward 3, D.C.'s wealthiest ward.¹³⁵ Instead, the highest number of affordable housing units built since 2015 are located in Ward 8, which also has the highest poverty rate of all wards.¹³⁶ The current pattern of building affordable housing creates harmful externalities that exacerbate existing wealth and racial segregation patterns.

By offering D.C. tax credits to developers who set aside a higher percentage of units for inclusionary zoning in Ward 3, the D.C. government would further inclusionary zoning's goal of creating more racially and economically integrated housing. Inclusionary zoning plays a particularly important role in expanding affordable units in Ward 3, with 100% of all new affordable units built since 2015 in Ward 3 coming from inclusionary zoning.¹³⁷ D.C. should continue this trend and encourage developers to build in Ward 3 because of the ward's access to certain higher quality services and goods as a wealthier, predominantly white residential area.¹³⁸ Low-income households gaining access to Ward 3 would simultaneously increase economic and racial integration. Additionally, Ward 3's high percentage of land zoned for single-family homes likely prevents many developers from building affordable housing in that area and leaves other wards to bear a disproportionate burden of D.C.'s low-income housing stock.¹³⁹ D.C. should prevent this uneven distribution of affordable housing and encourage developers building in Ward 3 to set aside a higher percentage of IZ units in exchange for tax credits.

F. Base D.C.'s Inclusionary Zoning Income Requirements on MFI for D.C. Alone

Lastly, a relatively straightforward improvement for D.C.'s inclusionary zoning program is to use income statistics solely for D.C. and not for the Washington Metropolitan Area. The Washington Metropolitan Area's median income inflates the median income for actual D.C. residents by including the surrounding Maryland and Virginia counties. These counties are overwhelmingly white and raise the median family income by nearly \$20,000. Using income statistics solely for D.C. residents would give a more accurate picture of housing cost burden for actual residents and create a better-tailored inclusionary zoning policy for D.C.

135. *Id.*

136. *Id.*

137. *Id.*

138. Brianna Losoya, *From ward to ward, where do DC kids go to school?* URB. INST. (April 25, 2014), <https://www.urban.org/urban-wire/ward-ward-where-do-dc-kids-go-school> ("Ward 3's [D.C. Public Schools] capture rate was an astounding 97%, which is logical, given that the ward is among DC's more affluent, and home to numerous high-quality public schools."); Randy Smith, *Food access in D.C. is deeply connected to poverty and transportation*, D.C. POL'Y CTR. (Mar. 13, 2017) <https://www.dcpolicycenter.org/publications/food-access-dc-deeply-connected-poverty-transportation> (showing that Ward 3 is the only D.C. ward without any food deserts); Tinsae Gebriel, *Economic Inequality in DC Reflects Disparities in Wages, Wealth, and Economic Mobility. Policy Solutions Should Too.*, D.C. FISCAL POL'Y INST. (Aug. 6, 2018), <https://www.dcfpi.org/all/economic-inequality-in-dc-reflects-disparities-in-income-wages-wealth-and-economic-mobility-policy-solutions-should-too>.

139. Yesim Sayin Taylor, *Taking Stock of the Nation's Housing Stock*, D.C. POL'Y CTR. (Mar. 27, 2018), <https://www.dcpolicycenter.org/publications/taking-stock-full-report>.

VI. POTENTIAL UNRESOLVED PROBLEMS WITH INCLUSIONARY ZONING

A. Inclusionary Zoning is Dependent on Market Forces

Although a major benefit of inclusionary zoning is that the policy requires nearly no public expenditure because of private market subsidization, the use of private markets for affordable housing means that inclusionary zoning is not an effective policy during economic downturns. D.C.'s inclusionary zoning policy demonstrates how the whims of market forces affect the IZ program's effectiveness. While D.C.'s inclusionary zoning policy went into effect in 2009, the policy did not produce any new units until 2011 because of the financial crisis.¹⁴⁰ Each year, inclusionary zoning did not produce more than thirty-seven units of housing in the entire city until 2015 when 124 units were produced.¹⁴¹ As the housing market recovered, new developments have increased, which led to an increase in IZ units as well.¹⁴² However, the unpredictable nature of private markets has meant that D.C.'s IZ program is completely dependent on market forces to provide affordable housing. The problem of relying on market forces to provide affordable housing is endemic to all IZ programs. The unpredictable nature of market forces means that D.C. and other cities with inclusionary zoning programs must supplement their IZ programs with other affordable housing programs, such as housing vouchers or subsidized low-income housing with tax credits, to ensure affordable housing is not left to market whims.

B. Inclusionary Zoning Does Not Address Underlying Problems Arising from Gentrification

Inclusionary zoning does not address problems that occur with gentrification and merely lessens the impact by providing affordable housing at slightly below market value. Gentrification is a complex phenomenon that brings both benefits and detriments to the surrounding community. The most serious detriment is displacement. Gentrification in D.C. has priced out many longtime, low-income, and predominantly Black residents.¹⁴³ Critics charge that inclusionary zoning merely alleviates the effect of gentrification. Since inclusionary zoning is based on market forces, having an effective IZ program means that even more new market-priced housing units are built. The high levels of inclusionary zoning units in Wards 1, 5, and 6 indicate that developers are building increasingly unaffordable new units in those areas.¹⁴⁴ In bringing new people into the community, the surrounding area often adapts to the consumer demands of new higher-income

140. D.C. DEP'T OF HOUS. & CMTY. DEV., *supra* note 68, at 5–7.

141. *Id.*

142. *Id.*

143. See John A. Powell & Marguerite L. Spencer, *Giving Them the Old "One-Two": Gentrification and the K.O. of Impoverished Urban Dwellers of Color*, 46 HOW. L.J. 433, 434.

144. FISCAL YEAR 2018 ANNUAL REPORT, *supra* note 72, at 15; FISCAL YEAR 2017 ANNUAL REPORT, *supra* note 72, at 15.

residents.¹⁴⁵ These new amenities may provide much needed resources for the community but are often out of reach for many of the existing residents (such as \$4 Starbucks drinks and SoulCycle studios).¹⁴⁶ Inclusionary zoning may provide some reprieve in allowing a small number of residents to remain but does not come close to preventing displacement of longtime residents.

On the other hand, gentrification may increase racial and socioeconomic integration in D.C. Peter Byrne argues that gentrification may actually have positive effects by bringing in residents from a wider range of socioeconomic backgrounds to create more opportunities and access to amenities.¹⁴⁷ For example, Byrne suggests that gentrification can bring increased economic opportunity for low-income residents by increasing the availability of jobs that do not require a college education and alleviating the spatial mismatch as job opportunities move out of the suburbs to the city.¹⁴⁸ Gentrification may bring certain amenities as well.¹⁴⁹ Byrne notes that Powell and Spencer's description of a local Whole Foods in D.C. as a marker for gentrification from upwardly mobile whites had actually emerged from years of petitioning from the neighborhood for the store.¹⁵⁰ Certain amenities thought of as stereotypically "white" may also benefit and be desired by minorities as well.

Despite the inconclusive nature of the benefits and harms of gentrification for existing residents, studies have shown that gentrification has displaced longtime, mostly low-income and Black, D.C. residents.¹⁵¹ According to the National Community Reinvestment Coalition, over 20,000 Black residents have been displaced from D.C. between 2000 and 2013, which constitutes the highest number of Black residents displaced out of any city in the country.¹⁵² Many people in D.C. have vocally protested against gentrification and policies that favor gentrifiers over native residents.¹⁵³ To the extent that D.C. intends to combat displacement resulting from gentrification, inclusionary zoning does very little to address this

145. Edward Gleaser, Hyunjin Kim, & Michael Luca, *Nowcasting Gentrification: Using Yelp Data to Quantify Neighborhood Change 2* (Harvard Business School, Working Paper No. 18-077, 2018) (finding that entry of Starbucks and cafes more generally into a neighborhood is indicative of housing price growth across the US); Andrew Van Dam, *Starbucks, florists, and other warning signs home prices are about to go up*, WASH. POST (Sept. 6, 2018), https://www.washingtonpost.com/business/2018/09/06/starbucks-florists-other-warning-signs-home-prices-are-about-to-go-up/?utm_term=.ca26621f885b.

146. U Street, a historic African-American cultural hub, has experienced some of the most intense gentrification in D.C. and now contains two Starbucks stores, a Trader Joe's, and a SoulCycle.

147. See Byrne, *supra* note 118, at 5–8.

148. See *id.*, at 6.

149. See J. Peter Byrne, *Rhetoric and Realities of Gentrification: Reply to Powell and Spencer*, 46 HOW. L.J. 491, 492 (2003).

150. See *id.*

151. See Katharine Shaver, *D.C. has the highest "intensity" of gentrification of any U.S. city, study says*, WASH. POST (Mar. 19, 2019), <https://www.washingtonpost.com/transportation/2019/03/19/study-dc-has-had-highest-intensity-gentrification-any-us-city>.

152. See Jason Richardson, Bruce Mitchell, & Juan Franco, *Shifting Neighborhoods: Gentrification and cultural displacement in American cities*, NCRC (Mar. 19, 2019), <https://ncrc.org/gentrification>.

153. See Paul Schwartzman, *District government asks court to throw out \$1 billion gentrification lawsuit*, WASH. POST (July 2, 2018), https://www.washingtonpost.com/local/dc-politics/district-government-asks-court-to-throw-out-1-billion-gentrification-lawsuit/2018/07/02/e03d86ba-7e1a-11e8-bb6b-c1cb691f1402_story.html; Elliot Williams, *Why Last Night's #MOECHELLA Protest Was a Big Deal for DC*, WASHINGTONIAN (May 8, 2019), <https://www.washingtonian.com/2019/05/08/why-last-nights-moechella-protest-was-a-big-deal-for-dc>.

problem. At best, the policy plays a small role in retaining some of the low-income residents in the area but does not create any longer term or more widespread plan to combat displacement. Inclusionary zoning by its very nature relies on new development in order to have some impact on increasing affordable housing for existing residents. This limitation means that in order to fully address problems created by gentrification, the D.C. government will need to use other affordable housing programs in addition to inclusionary zoning.

C. Inclusionary Zoning Creates Community Externalities

Lastly, inclusionary zoning also creates certain externalities that the D.C. government must address. By giving density bonuses to developers under inclusionary zoning, inclusionary zoning may increase crowding, pollution, and noise levels. In D.C., having a higher density apartment complex may potentially lead to congestion in the nearby metro stop or an increased number of students that the local public school would have to accommodate. Policies that create mixed income residential areas may also have to contend with NIMBY-ism (an acronym for “not in my backyard”) from wealthier neighbors. NIMBY-ism refers to residents opposing certain developments due to proximity to their own neighborhood.¹⁵⁴ NIMBY-ism often connotes that the opposition stems from fear that proposed developments would bring undesirable populations based on class or race into a certain area and lower the neighborhood’s housing value.¹⁵⁵

A recent prominent example of NIMBY-ism occurred in Ward 3 in response to a proposed homeless shelter.¹⁵⁶ Residents complained of potential noise and filed a lawsuit against the shelter. The neighbors alleged a flawed process, because the neighborhood did not receive an opportunity to “make recommendations” for the project.¹⁵⁷ The neighbors eventually reached an agreement with the government, which included a 20% reduction in patio size, a limitation on the hours people are permitted to spend on the patio, and an installation of trees and shrubbery around the shelter’s deck to reduce noise levels.¹⁵⁸ This type of NIMBY-ism may make inclusionary zoning difficult to implement, especially in developments with affordable units that cater to the lowest-income individuals. These externalities may impede inclusionary zoning’s effectiveness and must be addressed with locale-specific solutions.

154. See Alena Semuels, *From ‘Not in My Backyard,’ to ‘Yes in My Backyard,’* THE ATLANTIC (July 5, 2017), <https://www.theatlantic.com/business/archive/2017/07/yimby-groups-pro-development/532437>.

155. See *id.*

156. See Andrew Giambrone, *D.C. agrees to cut size of patio at planned family homeless shelter after neighbors complain*, CURBED (Jan. 1, 2019), <https://dc.curbed.com/2019/1/11/18175877/dc-homelessness-shelter-families-northwest-ward-3>; Editorial Board, *NIMBYism in Ward 3*, WASH. POST (Aug. 27, 2016), https://www.washingtonpost.com/opinions/nimbyism-in-ward-3/2016/08/26/8692f112-6bb2-11e6-99bf-f0cf3a6449a6_story.html (“Sadly, it is not surprising that NIMBYism — not-in-my-backyard-ism — would rear its ugly head as the city seeks to build a series of alternative shelters . . .”).

157. Editorial Bd., *supra* note 156.

158. *Id.*

VII. CONCLUSION

Inclusionary zoning has become an increasingly powerful tool that uses the private market to build affordable housing. The critiques and potential solutions offered by this Note will hopefully bolster the policy's ability to reach low- and very low-income households and more effectively target geographic segregation. By using a graduated, ward-specific approach for delineating MFI qualifications and percentage requirements, D.C. can improve its IZ policy to increase the number of affordable housing units created and the level of integration for IZ participants in these communities. Most importantly, this solution accounts for D.C.'s racial wealth gap and geographic segregation through different income and set-aside requirements by MFI percentage and ward. This proposal also creates special development incentives for Ward 3, which consistently has less affordable housing than any other ward in D.C. The focus on increasing IZ units in Ward 3 will help to decrease poverty concentration, especially in Ward 8. Inclusionary zoning can thus potentially help work against prevailing trends of placing the greatest number of affordable housing units in Ward 8 and the least number in Ward 3. By creating a more nuanced inclusionary zoning policy that accounts for wealth and racial disparities among D.C.'s wards, the government can create a more effective policy that reaches the city's lowest-income individuals and increases wealth and racial integration.