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## Siting Homeless Shelters in New York City: Fair Share Versus Borough-Based

Madeline Halimi

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## SITING HOMELESS SHELTERS IN NEW YORK CITY: FAIR SHARE VERSUS BOROUGH-BASED

*Madeline Halimi\**

### ABSTRACT

*New York City is currently experiencing a housing crisis and, in turn, a homelessness crisis.<sup>1</sup> In 2017, in response to rising numbers of individuals and families experiencing homelessness, Mayor Bill de Blasio released Turning the Tide on Homelessness in New York City, a report aimed to address the issue by creating 90 new centralized shelters.<sup>2</sup> However, there is a fundamental divide between the Mayor and the New York City Council over where to locate the new shelters. The de Blasio Administration advocates for a borough-based siting approach, which would place the new shelters near the shelter residents' "home communities."<sup>3</sup> In contrast, a report the New York City Council released promotes a "fair share" siting approach, which would distribute the new shelters evenly throughout the five boroughs.<sup>4</sup> This Note examines which approach is best for New York City and recommends a modified fair share approach that prioritizes the allocation of a proper budget and the preferences and needs of shelter residents.*

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1. See *Basic Facts About Homelessness: New York City*, COAL. FOR HOMELESS, <https://www.coalitionforthehomeless.org/basic-facts-about-homelessness-new-york-city/> [perma.cc/79M5-89NM] (last visited Sept. 3, 2020) ("In recent years, homelessness in New York City has reached the highest levels since the Great Depression.").

2. See CITY OF N.Y., TURNING THE TIDE ON HOMELESSNESS IN NEW YORK CITY iv (2017), <https://www1.nyc.gov/assets/dhs/downloads/pdf/turning-the-tide-on-homelessness.pdf> [https://perma.cc/2AG2-43VJ].

3. See *id.* at 84.

4. See N.Y. CITY COUNCIL, DOING OUR FAIR SHARE, GETTING OUR FAIR SHARE: REFORMING NYC'S SYSTEM FOR ACHIEVING FAIRNESS IN SITING MUNICIPAL FACILITIES 12–17 (2017), <http://council.nyc.gov/wp-content/uploads/2017/02/2017-Fair-Share-Report.pdf> [https://perma.cc/8V7W-HXH3].

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### INTRODUCTION

In February 2017, Mayor Bill de Blasio and the New York City Council (the City Council) both released plans for siting new homeless shelters, advocating for polar opposite strategies.<sup>5</sup> Mayor de Blasio’s plan, *Turning the Tide on Homelessness in New York City*, outlines his Administration’s intent to develop 90 new shelters and expand approximately 30 existing shelters.<sup>6</sup>

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5. See generally CITY OF N.Y., *supra* note 2; N.Y. CITY COUNCIL, *supra* note 4.

6. See CITY OF N.Y., *supra* note 2, at 78, 84.

Disagreement has arisen, though, over where to locate these new shelters. In *Turning the Tide*, Mayor de Blasio advocates for a “borough-based” siting approach, which would place the new shelters near shelter residents’ home communities.<sup>7</sup> The report contends that a borough-based approach would keep residents close to their schools, jobs, and houses of worship at a time when they need their social supports the most.<sup>8</sup> In contrast, in *Doing Our Fair Share, Getting Our Fair Share: Reforming NYC’s System for Achieving Fairness in Siting Municipal Facilities*, the City Council advocates for a “fair share” siting approach, which would place the new shelters in neighborhoods with few or no existing homeless shelters, and avoid neighborhoods already hosting their fair share of shelters.<sup>9</sup> The report contends that evenly distributing the new shelters throughout New York City’s five boroughs would prevent low-income, marginalized neighborhoods from being overburdened with “local unwanted land uses” (LULUs).<sup>10</sup>

This Note explores the debate between Mayor de Blasio’s borough-based approach and the City Council’s fair share approach. Part I provides background information on homelessness in New York City, New York State’s (the State) legal obligation to provide shelter to people experiencing homelessness, Mayor de Blasio’s plan to build new shelters, and the Fair Share Criteria already in the New York City Charter (City Charter). Part II outlines the benefits and drawbacks of each approach. While the borough-based approach keeps shelter residents near their social supports, is more cost-effective, and better allows the State to comply with its legal obligation to provide shelter, it also has the potential to concentrate homelessness in low-income, marginalized neighborhoods and perpetuate housing segregation.<sup>11</sup> On the other hand, while the fair share approach would more evenly distribute the shelters, give the residents access to greater resources and opportunities, and avoid overburdening low-income, marginalized neighborhoods with LULUs, it may also delay homeless shelters’ development at a time when housing instability is at its height.<sup>12</sup> Part III recommends a modified fair share approach in which the City prioritizes shelter residents’ individual needs and preferences, allocates a proper budget to site the new shelters in

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7. *See id.* at 84.

8. *See id.* at 98.

9. *See* N.Y. CITY COUNCIL, *supra* note 4, at 15.

10. *See id.* at 2.

11. *See infra* Section II.A.

12. *See infra* Section II.B.

under-concentrated areas, and enforces the criteria as binding rules rather than mere guidance.<sup>13</sup>

## I. HOUSING AND HOMELESSNESS IN NEW YORK CITY

### A. The Homelessness Crisis

According to the Coalition for the Homeless (the Coalition), a New York City advocacy and direct services organization, in May 2020, 59,308 people slept in municipal homeless shelters each night in New York City.<sup>14</sup> This includes 13,523 families and 20,044 children.<sup>15</sup> The number of people sleeping in municipal shelters each night in 2020 is 61% higher than in 2010.<sup>16</sup>

These numbers do not include those who do not use municipal shelters and instead sleep on the streets, in the subway, or in other public spaces.<sup>17</sup> Thousands of “street homeless” individuals go unsheltered every night, but there is no accurate measurement of this population.<sup>18</sup> According to the Coalition, surveys significantly underestimate the number of street homeless New Yorkers.<sup>19</sup> However, a 2017 New York City Department of Homeless Services report revealed a 39% increase from the prior year, the highest increase since 2005.<sup>20</sup>

Furthermore, housing instability and homelessness disproportionately impact Black and Latinx New Yorkers.<sup>21</sup> Around 57% of heads of households in shelters are Black and 32% are Hispanic and Latinx.<sup>22</sup> This is largely due to racial discrimination in the housing market, leading Black, Hispanic, and Asian renters to face greater difficulty finding and

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13. See *infra* Part III.

14. See *Basic Facts About Homelessness: New York City*, *supra* note 1. The Coalition is the oldest advocacy and legal services organization in the country for the homeless, and has worked to secure affordable housing, sufficient food, and a living wage for New Yorkers since 1981. See *About Us*, COAL. FOR HOMELESS, <https://www.coalitionforthehomeless.org/about-cfh/> [perma.cc/9EMM-P9DA] (last visited Sept. 3, 2020).

15. *Basic Facts About Homelessness: New York City*, *supra* note 1.

16. *Id.*

17. See *id.*

18. See *id.*

19. See *id.*

20. Melissa Russo, *Street Homelessness in NYC Increased by Almost 40 Percent: Report*, NBC N.Y. (July 6, 2017, 12:39 PM), <https://www.nbcnewyork.com/news/local/homeless-nyc-increase-40-percent-de-blasio-432688953.html> [perma.cc/ZA9H-ASA7].

21. See *Basic Facts About Homelessness: New York City*, *supra* note 1.

22. *Id.*

keeping housing.<sup>23</sup> Studies show that landlords and brokers show minority renters fewer units, offer Black and Hispanic renters higher rent,<sup>24</sup> and deny Black renters leases more frequently than they do white renters.<sup>25</sup> For example, one study found that African Americans submit more housing applications and experience more difficulties when searching for a home than white people do.<sup>26</sup> Similarly, the Urban Institute found that real estate agents recommend and show fewer houses and apartments to minority groups than to white people.<sup>27</sup> Such discrimination, paired with gentrification and decades of redlining practices, has led to massive numbers of families pushed out of their apartments and neighborhoods with nowhere else to go.<sup>28</sup>

### B. The Loss of Affordable Housing

Rising homelessness is primarily due to a shortage of affordable housing for low-income New Yorkers.<sup>29</sup> Over approximately the past two decades, New York City has lost over 1.1 million apartments with rent below \$800 per month,<sup>30</sup> and currently has a deficit of over 500,000 apartments needed in that price range.<sup>31</sup>

This lack of affordable housing is the result of high demand for apartments as increasingly more people wish to live in New York City.<sup>32</sup>

23. See U.S. DEP'T OF HOUS. & URB. DEV., OFF. OF POL'Y DEV. & RSCH., HOUSING DISCRIMINATION AGAINST RACIAL AND ETHNIC MINORITIES 2012 xi-xxiv (2013), [https://www.huduser.gov/portal/Publications/pdf/HUD-514\\_HDS2012.pdf](https://www.huduser.gov/portal/Publications/pdf/HUD-514_HDS2012.pdf) [perma.cc/6FPA-LKU9].

24. See *id.* at 39–46.

25. See Maria Krysan, *Does Race Matter in the Search for Housing? An Exploratory Study of Search Strategies, Experiences, and Locations*, 37 SOC. SCI. RES. 581, 597 (2008).

26. See *id.*

27. See *Exposing Housing Discrimination*, URB. INST., <https://www.urban.org/features/exposing-housing-discrimination> [perma.cc/2CWB-6C8S] (last visited Sept. 3, 2020).

28. See generally RICHARD ROTHSTEIN, *THE COLOR OF LAW* (2017).

29. See GISELLE ROUTHIER, COAL. FOR THE HOMELESS, STATE OF THE HOMELESS 2020, at 22 (2020) [hereinafter ROUTHIER, COAL. FOR THE HOMELESS 2020], <https://www.coalitionforthehomeless.org/wp-content/uploads/2020/03/StateofTheHomeless2020.pdf> [perma.cc/9XMS-FC27].

30. According to the number of low-income households. GISELLE ROUTHIER, COAL. FOR THE HOMELESS, STATE OF THE HOMELESS 2019, at 9 (2019) [hereinafter ROUTHIER, COAL. FOR THE HOMELESS 2019], <https://www.coalitionforthehomeless.org/wp-content/uploads/2019/04/StateOfTheHomeless2019.pdf> [perma.cc/AG59-29JE].

31. *Id.*

32. See Catherine Rampell, *Why the Rent Is So High in New York*, N.Y. TIMES (Apr. 26, 2013, 10:00 AM), <https://economix.blogs.nytimes.com/2013/04/26/why-the-rent-is-so-high-in-new-york/> [perma.cc/VDK4-TPU3].

While developers jumped at the opportunity to build luxury apartment buildings to meet this demand, Mayor de Blasio has failed to ensure the production of enough low-rent units in those buildings.<sup>33</sup> Between 2011 and 2017, the number of high-rent units increased from 8% to 13%, or 170,000 to 280,000 units, while the number of unassisted low-rent units decreased from 21% to 14%, or 445,000 to 300,000 units.<sup>34</sup>

Although tenants in regulated units have some protections against sharp rent increases, landlords use loopholes, such as Major Capital Improvements (MCI) and vacancy bonuses, to raise the rent on those apartments and deregulate the units.<sup>35</sup> Meanwhile, unregulated, low-rent units are disappearing because unregulated tenants do not have a right to a lease renewal, making it easy for landlords to kick them out and raise the rent.<sup>36</sup>

33. See ROUTHIER, COAL. FOR THE HOMELESS 2019, *supra* note 30, at 10–11.

34. OKSANA MIRONOVA, CMTY. SERV. SOC'Y, WHERE HAVE ALL THE AFFORDABLE RENTALS GONE? 1 (2019), [https://smhttp-ssl-58547.nexcesscdn.net/nycss/images/uploads/pubs/Where\\_Have\\_All\\_the\\_Affordable\\_Rentals\\_Gone\\_-\\_web.pdf](https://smhttp-ssl-58547.nexcesscdn.net/nycss/images/uploads/pubs/Where_Have_All_the_Affordable_Rentals_Gone_-_web.pdf) [perma.cc/8BU2-3VHC].

35. See *id.* at 2. There are approximately 1.2 million rent-regulated apartments remaining in New York City, according to the Rent Guidelines Board. See N.Y.C. RENT GUIDELINES BD., 2020 HOUSING SUPPLY REPORT 4 (2020), <https://rentguidelinesboard.cityofnewyork.us/wp-content/uploads/2020/05/2020-HSR.pdf> [perma.cc/HH7T-M7W7]. Rent stabilization prohibits landlords from raising the rent beyond 1% or 2% on certain units. See *Rent Increases*, NYC.GOV., <https://portal.311.nyc.gov/article/?kanumber=KA-03296#:~:text=Rent%20increase%20percentages%20for%20rent,2%20year%20lease%3A%202.5%25> [perma.cc/87D5-QTJB] (last visited Sept. 3, 2020). However, landlords often get around this restriction through the MCI Program, which allows landlords to raise the rent higher when they make significant improvements to rent-regulated properties. See *Major Capital Improvement (MCI)*, NYU FURMAN CTR., [https://furmancenter.org/coredata/directory/entry/major-capital-improvement-program#:~:text=The%20Major%20Capital%20Improvement%20\(MCI,based%20on%20eligibl e%20construction%20costs](https://furmancenter.org/coredata/directory/entry/major-capital-improvement-program#:~:text=The%20Major%20Capital%20Improvement%20(MCI,based%20on%20eligibl e%20construction%20costs) [perma.cc/82AH-ACBS] (last visited Sept. 3, 2020). Similarly, vacancy bonuses permit landlords to raise rents up to 20% when units become vacant. See Jarrett Murphy, *Rent Board's Subtle Move Revives 'Vacancy Bonus,'* CITY LIMITS (May 11, 2020), <https://citylimits.org/2020/05/11/rent-boards-subtle-move-revives-vacancy-bonus/> [perma.cc/L8VQ-GDFT]. Fortunately though, the Housing Stability and Tenant Protection Act of 2019 eliminates some of these loopholes, extends the rent regulation laws, and provides a handful of other tenant protections. See *From the Field: New York State Legislators Pass 'Housing Stability and Tenant Protection Act of 2019,'* NAT'L LOW INCOME HOUS. COAL. (July 1, 2019), <https://nlihc.org/resource/field-new-york-state-legislators-pass-housing-stability-and-tenant-protection-act-2019#:~:text=New%20York%20Governor%20Andrew%20Cuomo,states%20history%2C%20on%20June%202014.&text=The%20%E2%80%9CHousing%20Stability%20and%20Tenant%20Protection%20Act%20of%202019%E2%80%9D%20does,laws%20and%20makes%20them%20permanent> [perma.cc/T5KR-U6N5].

36. See Oksana Mironova, *Opinion: Why NYC Is Rapidly Losing Low-Rent Apartments,* CITY LIMITS (May 13, 2019),

Furthermore, as rents rise, wages have not kept up, creating an impossible rent burden for some low-income households and forcing people onto the streets.<sup>37</sup> In 2020, the fair market rent for a two-bedroom apartment in New York is \$1,691.<sup>38</sup> To afford this level of rent, a household must earn at least \$67,653 annually.<sup>39</sup> The household would have to work a total of 110 hours per week at minimum wage to afford this rent.<sup>40</sup>

### C. The Right to Shelter in New York

New York is not the only state currently experiencing high rates of homelessness. Half of all people experiencing homelessness in the United States reside in New York, California, Florida, Texas, and Washington combined.<sup>41</sup> However, New York is unique in that it is a “right to shelter” state, meaning state and local governments have a legal obligation to provide shelter to people experiencing homelessness.<sup>42</sup>

In 1979, the founding members of the Coalition brought a class action lawsuit against the City and State on behalf of all New York City homeless men in *Callahan v. Carey*, arguing that the state constitution implies a right to shelter.<sup>43</sup> Article XVII of the New York State Constitution declares, “the aid, care and support of the needy are public concerns and shall be provided by the state and by such of its subdivisions.”<sup>44</sup> The City of New York settled and signed a consent decree, which mandated that it provide all homeless men shelter and

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<https://citylimits.org/2019/05/13/opinion-why-nyc-is-rapidly-losing-low-rent-apartments/> [perma.cc/9H73-5Z5G].

37. See NAT’L LOW INCOME HOUS. COAL., OUT OF REACH: THE HIGH COST OF HOUSING iii (2020), [https://reports.nlihc.org/sites/default/files/oor/OOR\\_BOOK\\_2020.pdf](https://reports.nlihc.org/sites/default/files/oor/OOR_BOOK_2020.pdf) [perma.cc/MD8V-HWYK].

38. *Id.* at 174.

39. *Id.* This calculation is based on the general standard, which is that renters should not pay more than 30% of their income on rent. *See id.*

40. *See id.* Minimum wage in New York was \$11.80 as of July 2020. *Id.*

41. See Casey Leins, *10 Facts about Homelessness in the U.S.*, U.S. NEWS & WORLD REP. (Sept. 23, 2019), <https://www.usnews.com/news/cities/articles/2019-09-23/10-facts-about-homelessness-in-america> [perma.cc/W83M-ZT75].

42. See *The Callahan Legacy: Callahan v. Carey and the Legal Right to Shelter*, COAL. FOR HOMELESS [hereinafter *The Callahan Legacy: Callahan v. Carey*], <https://www.coalitionforthehomeless.org/our-programs/advocacy/legal-victories/the-callahan-legacy-callahan-v-carey-and-the-legal-right-to-shelter/> [perma.cc/6MNT-T73G] (last visited Sept. 3, 2020).

43. See *The Callahan Consent Decree, Callahan v. Carey*, No. 79-42582 (N.Y. Sup. Ct. 1981); *The Callahan Legacy: Callahan v. Carey*, *supra* note 42.

44. N.Y. CONST. art. XVII, § 1 (2002).



maintain the shelters at basic health and safety standards.<sup>45</sup> In 1982, *Eldredge v. Koch* extended this right to homeless women,<sup>46</sup> and in 1983, *McCain v. Koch* extended this right to homeless families.<sup>47</sup>

Because of this legal obligation to provide shelter to people experiencing homelessness, New York City has one of the lowest levels of unsheltered people in the nation at about 5%.<sup>48</sup> In contrast, for example, in Los Angeles, 75% of homeless individuals go unsheltered because the state government is not required to provide shelter.<sup>49</sup> However, the City's mandate does not address the root cause of the housing crisis, which is the lack of affordable housing.<sup>50</sup> Therefore, while the development of new shelters will put a much-needed band-aid on the issue, it does not provide a sustainable solution to homelessness in New York City.<sup>51</sup>

#### D. The New Shelters

In the 2017 *Turning the Tide on Homelessness* report, the de Blasio Administration stated its goal to create 90 new shelters over a period of five years and expand 30 existing shelters over seven years.<sup>52</sup> The report stated that the new shelters would be “purpose-built” and nonprofit-owned to ensure optimal design.<sup>53</sup> Furthermore, according to the report, the shelters would be clean, safe, and livable — the New York Police Department (NYPD) would oversee security, the City would assess and update facilities to “meet high standards of cleanliness,” and residents

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45. See The Callahan Consent Decree, *supra* note 43. A consent decree is “[a] court order which all parties have agreed. It is often done after a settlement between the parties that is subject to approval by the court.” *Consent Decree*, CORNELL L. SCH., LEGAL INFO. INST., [https://www.law.cornell.edu/wex/consent\\_decree](https://www.law.cornell.edu/wex/consent_decree) [perma.cc/L2K5-K5JP] (last visited Sept. 3, 2020).

46. See generally *Eldredge v. Koch*, 459 N.Y.S.2d 960 (Sup. Ct.), *rev'd*, 469 N.Y.S.2d 744 (App. Div. 1983).

47. See generally *McCain v. Koch*, 502 N.Y.S.2d 720 (App. Div. 1986), *rev'd in part*, 70 N.Y.2d 109 (1987).

48. Michael Waters, *Unsheltered Homeless Rate Is Fifteen Times Higher in L.A. Than New York*, OUTLINE (June 19, 2018, 3:17 PM), <https://theoutline.com/post/4975/los-angeles-new-york-homeless-shelter?zd=1&zi=yyjebxon> [perma.cc/69FA-UMSQ].

49. *Id.*

50. See Jacquelyn Simone, *City Leaders Focus on Shelters and Siting with Too Little Focus on Housing Solutions*, COAL. FOR HOMELESS (Mar. 2, 2017), <https://www.coalitionforthehomeless.org/city-leaders-focus-shelters-siting-little-focus-housing-solutions/> [perma.cc/XJP2-52L2].

51. See *id.*

52. See CITY OF N.Y., *supra* note 2, at iv.

53. See *id.* at 89.

would be provided with social services such as mental health and substance abuse counseling on site.<sup>54</sup>

Mayor de Blasio's plan also included shutting down 360 "cluster site" and hotel shelter locations,<sup>55</sup> which the City had been renting to house the homeless as the main shelters reached capacity.<sup>56</sup> The plan referred to these shelter sites as "the product of decades of short-term responses to an evolving long-term problem," and claimed the City has already gotten out of 647 units.<sup>57</sup> According to the report, the move would reduce the number of shelter facilities by nearly 45%.<sup>58</sup>

Additionally, *Turning the Tide* included a handful of "long-needed operation reforms" to improve shelter conditions, security, and homeless services, and set a goal to reduce the number of people in shelters by 2,500 over five years.<sup>59</sup> The plan also aimed to incorporate a 3% nightly vacancy rate to provide for flexibility in placing families and individuals in a shelter that meets their needs.<sup>60</sup>

### E. The Two Siting Approaches and the History of Fair Share

Mayor de Blasio's "reimagined shelter strategy" included a specific approach to siting the new shelters, termed "borough-based."<sup>61</sup> According to *Turning the Tide*, this borough-based siting approach would "[k]eep[] homeless people as close as possible to their own neighborhoods

54. *See id.* at iv, 84.

55. *See id.* at iv.

56. *See* Rajvi Desai, *Cluster Sites Explained: De Blasio's Shutdown Plans, History, and More*, AMNY (Dec. 4, 2018), <https://www.amny.com/news/nyc-cluster-sites-explained-1-15560249/> [perma.cc/TK9K-4SPJ]. Cluster site shelter units, originally termed "the scatter-site program," were first implemented in 2000 under Mayor Rudy Giuliani to comply with the City's legal obligation to provide shelter to the homeless. *See id.* The City rented "clusters" of apartment units in private buildings, paying \$2,900 per month for each unit. *See id.* The strategy has not only been criticized as expensive, but also unsafe and ineffective. *See id.* The units were poorly maintained and there were little to no social services available on site. *See id.* In 2016, two toddlers were killed after a radiator exploded in one of the units. *See id.* In addition to the cluster sites, the City has also rented out rooms in commercial hotels as makeshift shelter units, which has been met with similar criticism. *See* David Brand, *NYC's Homeless Hotel Population Surges as City Grapples with Housing Crisis*, CITY LIMITS (Jan. 29, 2020), <https://citylimits.org/2020/01/29/nycs-homeless-hotel-population-surges-as-city-grapples-with-housing-crisis/> [perma.cc/QK7A-Z4RU].

57. CITY OF N.Y., *supra* note 2, at iii, ix.

58. *Id.* at 78.

59. *Id.* at iv, ix.

60. *Id.* at 93.

61. *Id.* at 78.

and on a path to get back on track.”<sup>62</sup> In other words, Mayor de Blasio advocated for placing the new shelters in neighborhoods close to shelter residents’ home communities, contending that it is important to keep the homeless near their schools, jobs, houses of worship, medical care, and social supports at a time when they need that stability the most.<sup>63</sup> *Turning the Tide* asserted that a borough-based siting approach would help move people out of shelters more quickly, whereas placing people in shelters far from their communities would disrupt “key anchors of daily life” and make it harder for shelter residents to transition into stable housing.<sup>64</sup>

*Turning the Tide* also included the implementation of community advisory boards<sup>65</sup> and protocols for notifying community leaders at least 30 days in advance of a shelter siting,<sup>66</sup> stating “the City needs the help of community leaders to find locations for new shelters that are best for neighborhoods and for the lives of homeless families.”<sup>67</sup> The plan welcomed community engagement and asked for New Yorkers to have compassion for the homeless and work with the City to find locations for the new shelters, while also accounting for the concerns of residents in the surrounding neighborhoods.<sup>68</sup> The report asserted:

As the City moves forward to accomplish this goal, it will constantly balance the immediate need for new capacity with the siting equity aims of this plan, which may require opening shelters in neighborhoods that are currently home to a significant number of existing shelters. Ultimately, the City plans to develop community districts’ shelter capacity consistent with their residents’ need for shelter, while ensuring that communities do their fair share.<sup>69</sup>

Although the report here mentions fair share, Mayor de Blasio’s borough-based approach is the polar opposite of fair share siting. Under the borough-based approach, the Mayor would avoid the restrictions of even distribution and instead site shelters in neighborhoods already concentrated with homeless shelters “consistent with their residents’ need[s].”<sup>70</sup>

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62. *Id.* at iii.

63. *See id.* at 93.

64. *See id.* at 77.

65. *See id.* at 104.

66. *See id.* at xi.

67. *Id.* at xii.

68. *See id.* at 78, 93.

69. *Id.* at 105.

70. *Id.*

In contrast to Mayor de Blasio’s borough-based approach, the City Council advocated for a “fair share” approach to siting shelters in *Doing Our Fair Share, Getting Our Fair Share*.<sup>71</sup> This approach placed the new shelters in neighborhoods with few or no existing shelters in an effort to more evenly disperse homeless shelters throughout the five boroughs.<sup>72</sup> The City Council contended that a fair share siting approach would prevent overburdening low-income, marginalized communities with such facilities.<sup>73</sup>

However, unlike Mayor de Blasio’s approach, the concept of fair share is already written into the City Charter.<sup>74</sup> In 1990, New York City leaders sought to provide some guidance to City Agencies regarding the siting of “unwanted city facilities” and added the “Fair Share Criteria” (the Criteria) to the City Charter.<sup>75</sup> The Criteria requires the City to “consider the relative fairness of burdens — as well as benefits — during the land-use process.”<sup>76</sup> Specifically, Section 203 requires the City Planning Commission (CPC) to promulgate rules that

further the fair distribution among communities of the burdens and benefits associated with city facilities, consistent with community needs for services and efficient and cost effective delivery of services and with due regard for the social and economic impacts of such facilities upon the areas surrounding the sites.<sup>77</sup>

In addition, Section 204 requires the Mayor to submit “a citywide statement of needs concerning city facilities prepared in accordance with the criteria established pursuant to section two hundred three.”<sup>78</sup> This Statement of Needs is intended to give elected officials and the public advance notice of the City’s siting plans for the subsequent two years, along with data and a map with which to determine the fairness of its siting plans.<sup>79</sup>

71. See N.Y. CITY COUNCIL, *supra* note 4, at 12–17.

72. See *id.* at 3.

73. See *id.* at 20.

74. N.Y. CITY CHARTER §§ 203, 204 (2004).

75. See N.Y.C. DEP’T OF CITY PLAN., FAIR SHARE: AN ASSESSMENT OF NEW YORK CITY’S FACILITY SITING PROCESS 1 (1995) [hereinafter N.Y.C. DEP’T OF CITY PLAN., FAIR SHARE], <https://www1.nyc.gov/assets/planning/download/pdf/about/publications/fair.pdf?r=1216> [perma.cc/7AS9-JXYN].

76. N.Y. CITY COUNCIL, *supra* note 4, at 5.

77. N.Y. CITY CHARTER § 203.

78. *Id.* § 204.

79. See N.Y. CITY COUNCIL, *supra* note 4, at 5.

The CPC promulgated its first Fair Share Criteria to take effect in 1991.<sup>80</sup> According to the City Council, the Criteria was intended to help city agencies “interpret and apply the new regulations in their siting decisions.”<sup>81</sup> The Giuliani Administration provided an updated guide to the Criteria in 1998, based on “the experience of many agencies over the past seven years and reflects the practices, interpretations, and judicial rulings that have emerged since 1991.”<sup>82</sup>

In *Doing Our Fair Share, Getting Our Fair Share*, the City Council called for a rejuvenation of the 1998 Fair Share Criteria, asserting that the guidelines were ineffective and outlining several recommendations towards achieving the 1989 Charter Revision Commission’s original goals.<sup>83</sup> The City Council’s report provided four main recommendations: (1) greater transparency in the siting process, (2) an overhaul of the Fair Share Criteria which addresses excluded facilities, (3) reforms to the Citywide Statement of Needs, and (4) enforcement of the Fair Share Criteria as binding rules rather than guidelines, to prohibit unfair sitings in highly over-concentrated areas.<sup>84</sup> Around the same time it released the report, the City Council also introduced a package of bills to enact these reforms.<sup>85</sup>

However, while the City Council had its mind set on the rejuvenation of fair share, the Mayor planned to employ the reverse approach to siting the new shelters, creating a fundamental divide between the City’s leaders on an issue that would impact thousands of New Yorkers experiencing homelessness.<sup>86</sup>

## II. THE TWO APPROACHES

Because New York has a legal obligation to provide the homeless shelter, the question at hand is not whether new shelters should be built, but rather where to put them. The placement of LULUs like homeless shelters has long been met with community opposition.<sup>87</sup> All cities must

80. *See id.*

81. *See* N.Y.C. DEP’T OF CITY PLAN., “FAIR SHARE” CRITERIA: A GUIDE FOR CITY AGENCIES 1 (1998), [https://greaterharlem.nyc/wp-content/uploads/2019/03/fair\\_share\\_guide.pdf](https://greaterharlem.nyc/wp-content/uploads/2019/03/fair_share_guide.pdf) [perma.cc/FNQ2-C35G].

82. *Id.* at 2.

83. *See* N.Y. CITY COUNCIL, *supra* note 4, at 3–5.

84. *See id.* at 20–21.

85. INTROS. 1490—1495, 2017 N.Y. City Council, Reg. Sess. (2017); Res. 1392, 2017 N.Y. City Council, Reg. Sess. (2017).

86. *See* CITY OF N.Y., *supra* note 2, at iii.

87. *See* Peter D. Kinder, *Not in My Backyard Phenomenon*, ENCYC. BRITANNICA (June 14, 2016), <https://www.britannica.com/topic/Not-in-My-Backyard-Phenomenon>

develop various public facilities, but while parks, libraries, and museums are usually welcomed, waste dumps, jails, and homeless shelters are often met with intense backlash from residents who do not want such facilities in their communities.<sup>88</sup> Opposing the sitings, residents fear that such facilities would lower their property values, increase pollution, traffic, and crime, and change their neighborhoods' demographic composition.<sup>89</sup>

Such community opposition has been termed the "NIMBY" phenomenon, or "Not in My Backyard."<sup>90</sup> In response to this movement, elected officials must choose between buckling under the pressure or losing constituents.<sup>91</sup> Unfortunately, buckling under this pressure has led to an overconcentration of LULUs in neighborhoods where politicians know there will not be as intense community opposition.<sup>92</sup> Usually, those neighborhoods are low-income, "Black, Indigenous, and people of color" (BIPOC) communities where residents have less time, money, resources, and political influence to object.<sup>93</sup>

The following Sections address the debate over where to site one type of LULU: homeless shelters. Advocates on both sides believe either a borough-based or fair share approach is best for New York City, while courts are more concerned with the two siting mechanisms' legality.

#### A. The Mayor's Borough-Based Approach

In *Turning the Tide*, Mayor de Blasio advocates for a borough-based approach to siting 90 new homeless shelters.<sup>94</sup> This approach would place the new shelters in neighborhoods near shelter residents' home communities, often low-income areas already hosting their fair share of

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[<https://perma.cc/2VF2-M5JC>]; Susan Saiter, *Local Opposition Is Stalling Development of Waste Sites*, N.Y. TIMES (June 18, 1983), <https://www.nytimes.com/1983/06/18/us/local-opposition-is-stalling-development-of-waste-sites.html> [[perma.cc/T6TN-TS84](https://perma.cc/T6TN-TS84)].

88. See N.Y. CITY COUNCIL, *supra* note 4, at 3.

89. See *id.*; Kinder, *supra* note 87.

90. See *NIMBY (Not in My Backyard)*, HOMELESS HUB, <https://www.homelesshub.ca/solutions/affordable-housing/nimby-not-my-backyard> [[perma.cc/C67U-TFAJ](https://perma.cc/C67U-TFAJ)] (last visited Sept. 3, 2020).

91. See Michael B. Gerrar, *The Victims of NIMBY*, 21 FORDHAM URB. L.J. 495, 499–502 (1994).

92. See Sheila Crowley, *NIMBYism Newsbrief*, NEW VILL., <https://www.newvillage.net/Journal/Issue1/1nimby.html> [[perma.cc/MUE2-M94A](https://perma.cc/MUE2-M94A)] (last visited Sept. 3, 2020) (“Even local elected officials who are sympathetic to the housing needs of their low income citizens will buckle under NIMBY pressure from more prosperous residents who cite the certainty of declining property values as the justification for their objections.”).

93. See Gerrar, *supra* note 91, at 495–96.

94. See CITY OF N.Y., *supra* note 2, at 89.

shelters.<sup>95</sup> The Mayor contends that borough-based siting would allow shelter residents to remain close to their schools, jobs, houses of worship, and social supports when they need them most.<sup>96</sup> Additionally, the borough-based plan's advocates argue that it would be quicker, more affordable, and better allow the State to comply with its legal obligation to provide shelter to people experiencing homelessness.<sup>97</sup>

*i. Keeping Shelter Residents near Social Supports*

The primary argument in favor of a borough-based siting approach implied in *Turning the Tide* is the idea that keeping shelter residents near their home communities, rather than tearing them from their social networks, is important in reducing homelessness.<sup>98</sup> By keeping children in their schools, adults in their jobs, and families near their churches, the de Blasio Administration contends that a borough-based approach would help shelter residents maintain relationships within their social networks that can help lift them out of poverty and, in turn, out of the shelters.<sup>99</sup>

The Coalition and the Legal Aid Society of New York (Legal Aid) both favor this idea.<sup>100</sup> According to a joint statement the two organizations issued, keeping shelter residents close to their communities has stabilizing benefits.<sup>101</sup> They stated that while there are benefits to more evenly distributing municipal services throughout the boroughs, the City must provide the homeless with “placements in the communities where they attend school, hold jobs, go to church, seek medical care, and have social ties they need to get back on their feet.”<sup>102</sup>

Maintaining such connections results in a particular benefit to children.<sup>103</sup> Children who experience a residential move perform less well

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95. *See id.* at 105.

96. *See id.* at 93.

97. *See Statement in Opposition to Intros. 1490, 1491, 1492, 1493, 1494, and 1495 and Resolution 1392*, COAL. FOR HOMELESS & LEGAL AID SOC'Y (May 10, 2017) [hereinafter *Statement* in *Opposition*], [https://www.coalitionforthehomeless.org/wp-content/uploads/2017/05/CFTH\\_LAS\\_FairShareOpposition\\_5-10-17.pdf](https://www.coalitionforthehomeless.org/wp-content/uploads/2017/05/CFTH_LAS_FairShareOpposition_5-10-17.pdf) [perma.cc/RQ6D-4VZP].

98. *See CITY OF N.Y.*, *supra* note 2, at 93.

99. *See id.*

100. *See Statement in Opposition*, *supra* note 97. The Legal Aid Society is the largest social justice law firm in New York City. *See Our History*, LEGAL AID SOC'Y, <https://www.legalaidnyc.org/about/> [perma.cc/E99S-CHU2] (last visited Sept. 3, 2020).

101. *See id.*

102. *Id.*

103. *See Shana Pribesh & Douglas B. Downey, Why Are Residential and School Moves Associated with Poor School Performance?*, 36 DEMOGRAPHY 521, 521 (1999).

in school than students who do not move, primarily due to changing schools and, in turn, losing social connections.<sup>104</sup> One study states:

The social capital explanation for the negative association between moving and school performance is that moving often damages, and sometimes completely severs, important social ties that “inhere in family relations and in community organization and that are useful for the cognitive or social development of a child or young person.”<sup>105</sup>

Similarly, moving under circumstances of high stress and few resources, as is most often the case for those in shelters, can pose serious threats to child development.<sup>106</sup> Furthermore, a study of children in Michigan found that homeless students have the highest rate of chronic absenteeism compared with other categories based on race, disability, and income.<sup>107</sup> Therefore, placing children in shelters near their schools can have a significant impact on their attendance and academic performance.

Additionally, a borough-based approach has the potential to help shelter residents maintain employment.<sup>108</sup> Relocating to a shelter far from workers’ home communities may result in increased tardiness and absenteeism, putting their jobs at risk at a time of already high financial instability.<sup>109</sup> Therefore, moving farther away from a worksite can lead to job loss.<sup>110</sup>

Research also shows that the availability and proximity to social supports can significantly impact psychological well-being and, in turn, housing stability.<sup>111</sup> One study found that homeless mothers received less help from people in their social networks, such as family and friends, than housed mothers, possibly due to this discrepancy in support.<sup>112</sup> Another study that observed the social support networks of homeless adults in

104. *See id.*

105. *Id.* (citation omitted).

106. *See* NAT’L RSCH. COUNCIL & INST. OF MED., STUDENT MOBILITY: EXPLORING THE IMPACT OF FREQUENT MOVES ON ACHIEVEMENT 1 (2010), <https://www.nap.edu/catalog/12853/student-mobility-exploring-the-impacts-of-frequent-moves-on-achievement> [perma.cc/JDL4-WCW6].

107. *See* JENNIFER ERB-DOWNWARD & PAYTON WATT, UNIV. OF MICH., POVERTY SOLS., MISSING SCHOOL, MISSING A HOME: THE LINK BETWEEN CHRONIC ABSENTEEISM, ECONOMIC INSTABILITY AND HOMELESSNESS IN MICHIGAN (2018), <https://poverty.umich.edu/10/files/2018/11/PovertySolutions-MissingSchoolMissingHome-PolicyBrief-r4.pdf> [perma.cc/G6K7-CW7Y].

108. *See* Matthew Desmond & Carl Gershenson, *Housing and Employment Insecurity Among the Working Poor*, 63 SOC’Y FOR STUDY SOC. PROBS. 46, 47 (2016).

109. *See id.* at 50.

110. *See id.* at 57–59.

111. *See* Bethany L. Letiecq et al., *Social Support of Homeless and Permanently Housed Low-Income Mothers with Young Children*, 45 FAM. RELS. 265, 270 (1996).

112. *See id.*



Florida found that those with more social supports experience fewer episodes of homelessness, emphasizing the importance of maintaining and strengthening the social supports of shelter residents.<sup>113</sup>

Relocating outside one's home community can also sever medical ties.<sup>114</sup> Research shows that transiency may disrupt relationships with doctors and clinics, preventing proper care.<sup>115</sup> A study on pre- and postnatal homelessness found that limited social capital may be correlated with reduced maternal self-care, due to a lack of material resources and emotional support.<sup>116</sup>

In sum, research indicates that moving away from the home community has negative impacts on shelter residents' education, employment, and mental and physical health. Such findings support the need for a borough-based approach to siting homeless shelters, as asserted in Mayor de Blasio's *Turning the Tide* plan.

#### *ii. Restrictions during High Need*

Advocates in favor of Mayor de Blasio's approach also argue that a borough-based siting mechanism is more efficient.<sup>117</sup> In their joint statement, the Coalition and Legal Aid argued that the alternative approach — fair share — would delay the opening of new shelters.<sup>118</sup> The two organizations explained,

[i]t is shortsighted and counterproductive to limit the City's ability to site shelters at a time of continuing record homelessness . . . [b]y limiting the City's ability to open shelters quickly at a time of such great need, the proposed bills would unquestionably result in prolonged suffering for homeless children and adults.<sup>119</sup>

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113. See Carole B. Zugazaga, *Understanding Social Support of the Homeless: A Comparison of Single Men, Single Women, and Women with Children*, 89 FAMS. SOC'Y 447, 454 (2008).

114. See Letiecq et al., *supra* note 111. BIPOC may also be more likely to avoid the doctor altogether due to ongoing discrimination in medical treatment. See generally Irena Stepanikova & Gabriela Oates, *Perceived Discrimination and Privilege in Health Care: The Role of Socioeconomic Status and Race*, 52 AM. J. PREVENTATIVE MED. S86 (2017). Therefore, for these communities, it may be especially important to maintain ties with medical professionals they are familiar with, and who look like them or are culturally competent. See generally *id.*

115. See Letiecq et al., *supra* note 111, at 269.

116. See Megan Sandel et al., *Timing and Duration of Pre- and Postnatal Homelessness and the Health of Young Children*, 142 PEDIATRICS 1, 5 (2018).

117. See *Statement in Opposition*, *supra* note 97.

118. See *id.*

119. *Statement in Opposition*, *supra* note 97.

Homeless Services United also came out against the City Council's fair share approach and in favor of the Mayor's borough-based approach.<sup>120</sup> Executive Director Catherine Trapani stated, "the solutions they have come up with don't make it easier to place programs where they need to [be] placed. They only make it more challenging to open programs at a time where we desperately need capacity."<sup>121</sup>

The City Charter's Fair Share Criteria does include an emergency provision.<sup>122</sup> Section 315 of the City Charter contains an emergency procurement exception, in which emergency contracts are exempt from the fair share process when the comptroller and corporation counsel find that there is an "unforeseen danger to life, safety, property or a necessary service."<sup>123</sup> In 2010, the Department of Homeless Services declared that an increase in the number of homeless single adults seeking shelter was an emergency that required the use of the emergency procurement provision because ordinary procurement would not adequately address the need.<sup>124</sup> Since then, many facilities have been sited under the emergency procurement process to avoid the restrictions of fair share.<sup>125</sup>

However, courts do not always give weight to the City's argument that a homelessness emergency necessitates a fair share exemption when siting shelters.<sup>126</sup> In *Rebirth of Bergen Street Block Ass'n v. City of New York*, community groups sought to enjoin the City from opening a homeless shelter in the Crown Heights neighborhood of Brooklyn, claiming the area is already overburdened with homeless shelters, and the Department of Homeless Services failed to conduct a fair share review.<sup>127</sup> They further asserted that if more shelters are built in their neighborhood, Crown Heights would "suffer irreparable harm in the nature of loitering, littering, overtaxing of municipal services and an increase in crime."<sup>128</sup>

120. See Simone, *supra* note 50.

121. See *id.*

122. See N.Y. CITY CHARTER § 315.

123. *Id.*

124. See N.Y.C. COMPTROLLER, DOWN AND OUT: HOW NEW YORK CITY PLACES ITS HOMELESS SHELTERS 11 (2013), [https://comptroller.nyc.gov/wp-content/uploads/documents/20130509\\_NYC\\_ShelterSite\\_Report\\_v24\\_May.pdf](https://comptroller.nyc.gov/wp-content/uploads/documents/20130509_NYC_ShelterSite_Report_v24_May.pdf) [perma.cc/9U4E-CBHQ]. Under the emergency procurement provision, the City is permitted to site shelters before issuing a Fair Share Statement, often allowing the City to bypass the fair share restrictions altogether. See N.Y. CITY COUNCIL, *supra* note 4, at 13.

125. See *id.*

126. See, e.g., *Rebirth of Bergen St. Block Ass'n v. City of New York*, 2017 N.Y. Misc. LEXIS 1008, at \*1 (Sup. Ct. Mar. 28, 2017).

127. See *id.*

128. *Id.*

At the time of *Rebirth* in 2017, three of the five shelters developed under the *Turning the Tide* plan had already been opened or were set to open in their neighborhood.<sup>129</sup> In response, the City argued that it would be unable to place the homeless men set to enter the shelter if it is prohibited from opening the shelter in Crown Heights, claiming irreparable harm in the face of the current homelessness crisis.<sup>130</sup> However, the Kings County Supreme Court rejected this argument, stating, “the homeless crisis has existed for many years . . . and there is no new immediate exigency caused by the delay in opening this shelter.”<sup>131</sup>

The City Council’s *Doing Our Fair Share, Getting Our Fair Share* report makes a similar argument. The report states, “[t]he City’s homelessness crisis is undoubtedly a moral and public policy emergency — but not one that justifies sitings without attention to issues of equity.”<sup>132</sup> Further, the City Council contends that the City over-relies on emergency contracting as a means of avoiding fair share review altogether.<sup>133</sup>

Although emergency shelters that bypass the traditional procurement process are meant to be temporary, many end up as permanent shelters.<sup>134</sup> Therefore, there is disagreement over whether the ongoing housing crisis merits an exemption from the Fair Share Criteria or whether the City is taking advantage of the emergency procurement provision to avoid fair share altogether.

### iii. *The Cost*

Unsurprisingly, another factor in this siting debate is cost. The new fair share bills would restrict siting shelters in oversaturated areas, but do not provide for the allocation of additional resources needed to rent or purchase more expensive properties elsewhere.<sup>135</sup> In contrast, the borough-based approach would not place this restriction on the City, allowing for more cost-efficiency in siting decisions. According to Deputy Executive Director for Policy at the Coalition, Shelly Nortz, “the bills would make it nearly impossible to open new, urgently needed shelters in many neighborhoods — without making it any easier to open shelters in

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129. *See id.*

130. *See id.* at \*2.

131. *Id.* (upholding the stay pending further oral argument).

132. N.Y. CITY COUNCIL, *supra* note 4, at 17.

133. *See id.*

134. *See* N.Y.C. COMPTROLLER, *supra* note 124, at 22.

135. *See* Shelly Nortz, *The City Council’s Fair Share Bill Is Unfair to Homeless Families*, CITY & STATE N.Y. (Aug. 22, 2017), <https://www.cityandstateny.com/articles/opinion/new-york-city-council-fair-share-bill-unfair-to-homeless-families.html> [perma.cc/P6ZY-Z2D9].

other places, and without the additional resources the city would need for more expensive properties.”<sup>136</sup>

According to the New York City Comptroller’s Office, spending on shelters has almost doubled to \$1.9 billion since 2014.<sup>137</sup> However, shelter contracts show that some cost far more than others due to differences in property values.<sup>138</sup> For example, proposed contracts for a pair of shelters in the Park Slope neighborhood of Brooklyn show that the City could pay nearly \$10,000 a month per unit from 2019 to 2028.<sup>139</sup> In contrast, the City pays \$5,442 a month per unit for a pair of shelters in the East New York neighborhood of Brooklyn, and \$5,943 for a family shelter in the Bronx.<sup>140</sup>

A 2017 audit by the New York State Comptroller’s Office concluded that the Department of Homeless Services did not push back against the prices shelter providers set, creating significant disparities between costs for different shelters.<sup>141</sup> For example, the audit found that the City was paying \$328.58 per person per day for one shelter, while paying \$103.19 for another shelter with similar capacity.<sup>142</sup>

In *Doing Our Fair Share, Getting Our Fair Share*, the City Council conceded that land costs widely vary depending on the neighborhood, but stated that they “would not deny any neighborhood a police station, a firehouse, or an elementary school because the real estate was too expensive. By the same token, we should all expect to do our fair share to solve problems and address the challenges of sharing a city.”<sup>143</sup> Further, the report admitted that siting facilities in low-income neighborhoods was more cost-efficient because of lower real estate prices, but insisted that increased cost should not be an excuse for failing to fairly site shelters.<sup>144</sup> The City Council contended that the Fair Share Criteria should prohibit facility siting decisions based solely on costs to prevent

136. *Id.*

137. Tyler Blint-Welsh, *Brooklyn Community Fights Homeless Shelters, Citing Cost, Building Safety and Transparency Concerns*, WALL ST. J. (Aug. 18, 2019, 7:00 AM), <https://www.wsj.com/articles/brooklyn-community-fights-homeless-shelters-citing-cost-building-safety-and-transparency-concerns-11566126000> [perma.cc/Y2YP-GP5E].

138. *See id.*

139. *Id.*

140. *Id.*

141. *See* Nikita Stewart, *Homeless Shelters Name Their Own Rates in New York, Audit Finds*, N.Y. TIMES (Oct. 15, 2017), <https://www.nytimes.com/2017/10/15/nyregion/homeless-shelter-rates-contracts-new-york-city.html> [perma.cc/VCW9-RTUN].

142. *See id.*

143. N.Y. CITY COUNCIL, *supra* note 4, at 2.

144. *See id.* at 5.

overburdening low-income neighborhoods with LULUs simply because it is more affordable for the City.<sup>145</sup> However, while the City Council argued that the City of New York should not entirely neglect cost efficiency, it did not go further to articulate a budget plan or spending criteria.

In regards to cost, Mayor de Blasio's *Turning the Tide* plan stated that his Administration would work to make it easier to finance shelters, especially for nonprofit ownership.<sup>146</sup> It explained, "[o]ver the next two years, the City w[ould] spur shelter development by removing barriers to nonprofit ownership of purpose-built shelters, for instance, by establishing mechanisms to help nonprofit partners finance large-scale capital projects and by expediting the shelter approval process to meet the realities of the real estate market."<sup>147</sup> However, again, there was no specific budget plan outlined in the report.

#### *iv. Compliance with the Right to Shelter Mandate*

Advocates in favor of the de Blasio Administration's borough-based approach also assert that it will better allow the City to comply with its legal obligation to provide shelter to people experiencing homelessness.<sup>148</sup> According to the Coalition's and Legal Aid's joint statement, the City has already paid millions of dollars in contempt fines for past violations of court orders that required it to provide shelter access.<sup>149</sup> The Coalition's Policy Director, Giselle Routhier, explained that the City Council's fair share plan "would result with the city not being able to comply with its moral and legal obligation to provide shelter to those in need."<sup>150</sup>

The argument surrounding compliance with the right to shelter mandate has also played out in court. In *Ocean Hill Residents Ass'n v. City of New York*, residents asked the Kings County Supreme Court to enjoin the City from constructing a shelter in the Ocean Hill neighborhood of Brooklyn.<sup>151</sup> The residents asserted that the neighborhood was already overburdened with shelters and that the City failed to conduct an adequate fair share analysis when deciding to site the shelter in Ocean Hill.<sup>152</sup> In response, the City explained that, when planning a new shelter, it uses an Open Ended Request for Proposals

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145. *See id.* at 20.

146. *See* CITY OF N.Y., *supra* note 2, at 90.

147. *Id.*

148. *See* Simone, *supra* note 50.

149. *See Statement in Opposition*, *supra* note 97.

150. *See* Simone, *supra* note 50 (quoting Giselle Routhier).

151. *See generally* Ocean Hill Residents Ass'n v. City of New York, 33 Misc.3d 1230(A) (N.Y. Sup. Ct. 2011).

152. *See id.* at \*7, \*11.

process in which nonprofit organizations offer their services as shelter operators and locate sites suitable for the shelter.<sup>153</sup> The City asserted that such an open-ended process is necessary to comply with its legal mandate to provide shelter to the homeless, especially during a time of rising homelessness.<sup>154</sup> However, the residents argued that this process incentivized nonprofits to locate shelters in low-income neighborhoods where property and development were cheaper.<sup>155</sup> The court held that, regardless of the legal mandate to provide shelter, the City must still conduct an adequate fair share analysis by considering alternative sites for the new shelter.<sup>156</sup> However, the court concluded that a more fully developed factual record was necessary to determine whether the City gave honest consideration of the Fair Share Criteria and whether there were indeed alternative sites available.<sup>157</sup>

While Mayor de Blasio's plan may seem like a veiled attempt to continue siting homeless shelters in neighborhoods where he will face little backlash, homeless advocates support his plan, and there are reasons to believe that it is, in fact, a more efficient approach to providing shelter during a housing crisis.

### **B. The City Council's Fair Share Approach**

In contrast to Mayor de Blasio's borough-based approach, the City Council contends that a properly enforced fair share siting approach is better for New York City.<sup>158</sup> Under fair share, the City would site municipal facilities, such as homeless shelters, evenly throughout the boroughs. The Fair Share Criteria, which took effect in 1991, includes the following procedures for siting or expanding facilities:

- a) Compatibility of the facility with existing facilities and programs, both city and non-city, in the immediate vicinity of the site.
- b) Extent to which neighborhood character would be adversely affected by a concentration of city and/or non-city facilities.
- c) Suitability of the site to provide cost-effective delivery of the intended services. Consideration of sites shall include properties not under city ownership, unless the agency provides a written explanation of why it is not reasonable to do so in a particular instance.

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153. *See id.* at \*8.

154. *See id.*

155. *See id.* at \*9.

156. *See id.* at \*9; *see also infra* Section II.B.

157. *See Ocean Hill Residents Ass'n*, 33 Misc.3d at \*12.

158. *See* N.Y. CITY COUNCIL, *supra* note 4, at 2.

d) Consistency with the locational and other specific criteria for the facility identified in the Statement of Needs or, if the facility is not listed in the Statement, in a subsequent submission to a Borough President.

e) Consistency with any plan adopted pursuant to Section 197-a of the Charter.<sup>159</sup>

According to *Doing Our Fair Share, Getting Our Fair Share*, this strategy would prevent over-concentrating vulnerable communities with LULUs, while shifting some of the burdens onto neighborhoods that do not carry their fair share.<sup>160</sup>

*i. Even Distribution of “Local Unwanted Land Uses”*

The even distribution of LULUs is the main argument in favor of a fair share approach.<sup>161</sup> Although the Fair Share Criteria was meant to more evenly distribute homeless shelters throughout the boroughs, the City Council’s 2017 report states that the even distribution of “residential bed facilities,” including homeless shelters, has actually worsened since the Fair Share Criteria was adopted in 1989.<sup>162</sup> A report that the Comptroller’s Office published shows that homeless shelters are not evenly dispersed throughout the five boroughs.<sup>163</sup> According to the report, the greatest numbers of shelters are in the Bronx, followed by Brooklyn, Manhattan, Queens, and Staten Island.<sup>164</sup> Furthermore, according to *Doing Our Fair Share, Getting Our Fair Share*, residential bed facilities are highly concentrated in BIPOC communities.<sup>165</sup> The ten community districts with the highest concentration of these facilities are Queens 14, Manhattan 11, Bronx 3/6, Bronx 11, Bronx 8, Bronx 1/2, Bronx 4, and Brooklyn 16, all of which are BIPOC communities.<sup>166</sup> From 1999 to 2015, the five districts with the largest increase in residential bed facilities were BIPOC communities, while the three districts that saw a decrease in these facilities were majority white.<sup>167</sup>

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159. See N.Y.C. DEP’T OF CITY PLAN., FAIR SHARE, *supra* note 75, at 6.

160. See N.Y. CITY COUNCIL, *supra* note 4, at 3.

161. See *id.*

162. See *id.* at 9. “Residential bed facilities” include correctional facilities, nursing homes, group foster homes, inpatient mental health treatment centers and inpatient chemical dependency treatment centers, homeless shelters, and transitional housing. See *id.* at 12.

163. See N.Y.C. COMPTROLLER, *supra* note 124, at 3.

164. See *id.*

165. See N.Y. CITY COUNCIL, *supra* note 4, at 12.

166. *Id.* This does not include Queens Community District 1, which has the highest concentration because it holds Rikers Island. See *id.*

167. See *id.*

The report references the borough-based argument that shelters located near shelter residents' home communities allow children to stay in their schools.<sup>168</sup> However, the City Council fights back against this conclusion, asserting that a New York City Independent Budget Office study found that the number of homeless families placed near their youngest child's school had decreased even as shelters continue to flood low-income BIPOC communities.<sup>169</sup>

The report contended that this distributional inequity arose in part because siting LULUs in low-income, marginalized neighborhoods is the "path of least resistance."<sup>170</sup> That is, such neighborhoods are often perceived as having less political power with which to fight back against unfavorable sitings.<sup>171</sup> In contrast, wealthier communities have the finances and influence to prevent elected officials from siting facilities that they do not want in their neighborhoods.

Litigation over fair share demonstrates how this issue plays out in court. In 1993, Lower East Side and Chinatown residents sued the City for siting a garage and fueling facility in their neighborhood, arguing that the area "already accommodate[s] a grossly disproportionate share of city facilities."<sup>172</sup> The petitioners listed four jails, 11 drug treatment centers, and 12 homeless shelters located in their neighborhoods, claiming that their neighborhood had become a "*de facto* dumping ground" for municipal facilities.<sup>173</sup> Seeking to enjoin the City from moving forward with the development, the petitioners asserted that the additional facility would add noise, pollution, and traffic, and have a generally negative impact on the social and economic state of their communities.<sup>174</sup> The New York County Supreme Court agreed with the petitioners and held that the City failed to engage in a fair share analysis stating,

[t]he Criteria require that respondent consider the effect of the *concentration* of facilities in the area and it is clear that [the Department of General Services (DGS)] failed to engage in such consideration . . . . [DGS] merely reiterated the Fair Share Criteria without conducting any meaningful analysis thereunder.<sup>175</sup>

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168. *See id.* at 13.

169. *See id.*

170. *See id.* at 5.

171. *See id.*

172. *Silver v. Dinkins*, 601 N.Y.S.2d 366, 368 (Sup. Ct. 1993).

173. *See id.* at 370.

174. *See id.* at 368–69.

175. *Id.* at 370–71.



The court therefore granted the petition to declare the site selection invalid.<sup>176</sup>

However, some courts dismiss plaintiffs' claims based on fair share, setting a low bar for compliance with the Fair Share Criteria and employing limited discretionary review. In *Gjonaj v. City of New York*, the plaintiffs claimed that a disproportionate number of residential facilities, including homeless shelters and mental health facilities, were placed in the Bronx due to the City's failure to comply with the Fair Share Criteria.<sup>177</sup> The plaintiffs claimed that the overconcentration of such facilities had resulted in "substantial damage to residents and businesses . . . [and] diminished property values and exhaustion of other public resources."<sup>178</sup> However, the Bronx County Supreme Court dismissed the plaintiffs' complaint, stating that they had not "sufficiently pled direct and individualized harm" required to sustain standing in a private action for public nuisance.<sup>179</sup> Furthermore, the court held that the judiciary may not exercise discretion here, stating "irrespective of the severity of the problem presented and the Plaintiffs' undoubtedly sincere motivations, they 'may not interpose themselves and the courts into the management and operation of public enterprises.'"<sup>180</sup>

Plaintiffs sometimes face similar hurdles in court when seeking to enjoin municipal sitings based on the argument that their neighborhood already carries its fair share of LULUs. In *Tribeca Community Ass'n v. New York City Department of Sanitation*, the petitioners sought to enjoin the City from locating sanitation facilities in a particular area of the Tribeca neighborhood of Manhattan.<sup>181</sup> However, the Supreme Court of New York held that the City's efforts constituted "substantial compliance" with the Fair Share Criteria.<sup>182</sup> The court asserted that "[c]ourts have reiterated, as stated in the preface to the Fair Share Criteria, that the Fair Share Criteria are not regulations, but are merely criteria intended to guide the location of city facilities."<sup>183</sup> Therefore, the court dismissed the plaintiffs' claim that the City's siting decision was arbitrary and capricious and instead found substantial compliance.<sup>184</sup>

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176. *See id.* at 371.

177. *See Gjonaj v. City of New York*, 2018 N.Y. Misc. LEXIS 5566, at \*1 (Sup. Ct. 2018).

178. *Id.* at \*2 (internal quotations omitted).

179. *Id.* at \*3-4.

180. *Id.* at \*5.

181. *See Tribeca Cmty. Ass'n v. N.Y.C. Dep't of Sanitation*, No. 101498/09, 2010 WL 151534 (N.Y. Sup. Ct. Jan. 11, 2010), *aff'd*, 923 N.Y.S.2d 31 (App. Div. 2011).

182. *Id.* at \*11.

183. *Id.* at \*10.

184. *See id.* at \*11.

Similarly, in *Turtle Bay Ass'n v. Dinkins*, the petitioners challenged the siting of a residential treatment facility for homeless women, but the Appellate Division of New York held that “[r]espondents’ efforts, including inspection of 18 sites . . . , requesting the help of the Community Board members and the Borough President in their search, and reviewing whether the proposed site would have an average impact in the community, constitute substantial compliance with the fair share criteria.”<sup>185</sup>

Furthermore, in *Community Planning Board No. 4 v. Homes for the Homeless*, the New York County Supreme Court dismissed the plaintiffs’ complaint challenging the City’s conversion of a college dormitory into a homeless shelter, stating that “[s]ome deviation from the Criteria . . . is anticipated and implicitly allowed.”<sup>186</sup> Instead, the court held that only “flagrant disregard of the Criteria could give rise to a cause of action.”<sup>187</sup> Therefore, as demonstrated by the above cases, when communities challenge sitings in court based on the Fair Share Criteria, courts often set a low bar for the City’s compliance with the guidelines and offer little discretionary review.

In addition, courts sometimes hold that the Fair Share Criteria does not even apply to the development at hand. In *West 97th—West 98th Streets Block Ass’n v. Volunteers of America of Greater New York*, a neighborhood organization sought to enjoin the City from operating a multipurpose housing facility for the poor.<sup>188</sup> The New York Supreme Court dismissed the plaintiffs’ motion for a preliminary injunction, finding that the Fair Share Criteria was not applicable.<sup>189</sup> It stated, “the criteria come into force only where the City locates a new facility, significantly expands, closes or significantly reduces the size or capacity for service delivery of existing facilities.”<sup>190</sup> Therefore, changes to an existing facility often do not make the cut.

Courts have also emphasized that the Fair Share Criteria only applies to “city facilities.”<sup>191</sup> In *Wallabout Community Assoc’n v. City of New York*, where members of a community advocacy group opposed the

185. See *Turtle Bay Ass’n v. Dinkins*, 616 N.Y.S.2d 31, 31 (App. Div. 1994).

186. *Cnty. Plan. Bd. No. 4 (Manhattan) v. Homes for the Homeless*, 600 N.Y.S.2d 619, 623 (Sup. Ct. 1993).

187. *Id.*

188. See *W. 97th – W. 98th Sts. Block Ass’n v. Volunteers of Am.*, 597 N.Y.S.2d 318, 319 (App. Div. 1993).

189. See *id.* at 321.

190. *Id.*

191. *Wallabout Cmty. Ass’n v. City of New York*, 798 N.Y.S.2d 714 (Sup. Ct. 2004); see also *Ferrer v. Dinkins*, 635 N.Y.S.2d 965, 969 (App. Div. 1996); *Davis v. Dinkins*, 613 N.Y.S.2d 933, 936 (App. Div. 1994).

placement of a homeless shelter in their neighborhood, the New York County Supreme Court dismissed the proceeding, holding that the premises at hand were privately owned and operated.<sup>192</sup> Because the plaintiffs were unable to show a written agreement between the private developer and the City, the court found that the Fair Share Criteria did not apply.<sup>193</sup>

According to the N.Y. City Charter, a “city facility” is one which is “used or occupied or to be used or occupied to meet city needs that is located on real property owned or leased by the city or is operated by the city or pursuant to a written agreement on behalf of the city.”<sup>194</sup> In *Ferrer v. Dinkins*, the court explained that limiting the Criteria’s application to City facilities is consistent with the fair share rules’ policy purpose which, it asserts, “focuses on the ultimate possession and control of the land.”<sup>195</sup>

The City Council recognized this limited application and enforcement in *Doing Our Fair Share, Getting Our Fair Share*, stating that there are no real consequences in place for city agencies when they do not comply with fair share.<sup>196</sup> Therefore, the report advocates for a rejuvenation and strengthening of the Fair Share Criteria, particularly by transforming it from mere guidance to enforceable binding rules.<sup>197</sup> The City Council admits that the current Fair Share Criteria is not working because low-income, BIPOC communities continue to be overconcentrated with LULUs.<sup>198</sup> This is especially true given the emergency procurement provision, which allows the City to initially site shelters without a Fair Share Statement.<sup>199</sup> The City Council states that the emergency procurement provision is too far-reaching and allows the City to get away with unfair sitings too easily, explaining that the Fair Share Statement must still be included in the permanent contract but, by then, the shelter has already opened.<sup>200</sup>

#### ii. “Moving to Opportunity”

Aside from the even distribution of LULUs, there are reasons to believe that fair share is a beneficial siting approach for not only the surrounding

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192. *See Wallabout Cmty. Ass’n*, 798 N.Y.S.2d at 714.

193. *See id.* at 719.

194. N.Y. CITY CHARTER § 203(c).

195. *Ferrer*, 635 N.Y.S.2d at 969.

196. *See* N.Y. CITY COUNCIL, *supra* note 4, at 2.

197. *See id.* at 21.

198. *See id.* at 2.

199. *See id.* at 13.

200. *See id.*

communities but also the shelter residents themselves.<sup>201</sup> Studies imply that the fair share approach has the potential to improve life outcomes for families experiencing homelessness by moving them to neighborhoods of greater opportunity.<sup>202</sup>

Concentrating homeless shelters in low-income neighborhoods contributes to a cycle of poverty,<sup>203</sup> while placing shelters in higher-income neighborhoods provides shelter residents with access to better schools, public transit, medical facilities, and employment opportunities.<sup>204</sup> In 1994, a U.S. Department of Housing and Urban Development (HUD) experimental program, “Moving to Opportunity” (MTO), sought to test whether moving families from high-poverty to lower-poverty neighborhoods improves their social and economic prospects.<sup>205</sup> Under MTO, HUD gave low-income families living in high-poverty neighborhoods housing vouchers to move to lower-poverty neighborhoods.<sup>206</sup> The results did not indicate that moving to a lower-poverty neighborhood had a significant effect on adult earnings or employment, but did show that the move greatly improved mental and physical health, subjective well-being, and safety.<sup>207</sup> Furthermore, the research showed that moving to a lower-poverty neighborhood did have substantial positive impacts on young children.<sup>208</sup> Specifically, young children who “moved to opportunity” were more likely to attend college and have substantially higher incomes as adults.<sup>209</sup>

Therefore, the City Council’s fair share approach has the potential to improve adult’s health and young children’s economic and academic success by placing them in shelters located in neighborhoods with greater opportunity and lower poverty. Distributing homeless shelters throughout the City may contribute to breaking cycles of generational poverty.

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201. See generally *id.*

202. See generally Raj Chetty et al., *The Effects of Exposure to Better Neighborhoods on Children: New Evidence from the Moving to Opportunity Experiment*, 106 AM. ECON. REV. 855 (2016).

203. See Jens Ludwig, *Moving to Opportunity: The Effects of Concentrated Poverty on the Poor*, THIRD WAY (Aug. 22, 2014), <https://www.thirdway.org/report/moving-to-opportunity-the-effects-of-concentrated-poverty-on-the-poor> [perma.cc/4NKK-2Y5N].

204. See N.Y.C. COMPTROLLER, *supra* note 124, at 3.

205. See Chetty et al., *supra* note 202, at 855.

206. See *id.*

207. See *id.* at 856–59.

208. See *id.*

209. See *id.*

*iii. Housing Integration*

Furthermore, a fair share approach to siting the new shelters has the potential to promote housing integration in New York City. Although federal law prohibits housing discrimination,<sup>210</sup> current housing legislation continues to perpetuate racial segregation through zoning, tax incentives, and other affirmative tools which may appear facially neutral but nevertheless have a disparate impact on BIPOC communities.<sup>211</sup> However, because homelessness disproportionately impacts BIPOC, placing homeless shelters in wealthier neighborhoods where residents are majority white could contribute to reducing housing segregation.

Studies show that housing integration benefits everybody.<sup>212</sup> Students in integrated schools perform better on tests and are more likely to graduate and attend college.<sup>213</sup> Authors of a report entitled *The Benefits of School Diversity Run in All Directions*, explained, “students’ exposure to other students who are different from themselves and the novel ideas and challenges that such exposure brings leads to improved cognitive skills, including critical thinking and problem solving.”<sup>214</sup>

Research also indicates that white students who attend integrated schools demonstrate greater cross-racial understanding, civic engagement, awareness of discrimination, and heightened sensitivity to the treatment of others.<sup>215</sup> According to psychology professors Linda Tropp and Thomas Pettigrew, generally, “interactions between different groups reduce conflict and prejudice.”<sup>216</sup>

Additionally, research shows that racial and economic segregation has a negative impact on health.<sup>217</sup> Housing segregation is associated with heart disease, obesity, tuberculosis, reduced life expectancy, depression, and infant mortality, reflecting the effects of a concentrated lack of access

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210. 7 C.F.R. § 1901.203.

211. See Abraham Gutman et al., *Health, Housing, and the Law*, 11 NE. U. L. REV. 251, 254 (2019).

212. See *id.* at 265.

213. See *id.*

214. AMY STUART WELLS ET AL., CENTURY FOUND., HOW RACIALLY DIVERSE SCHOOLS AND CLASSROOMS CAN BENEFIT ALL STUDENTS 2 (2016), <https://tcf.org/content/report/how-racially-diverse-schools-and-classrooms-can-benefit-all-students/> [perma.cc/EVC6-ZTJH].

215. See Sherrilyn Ifill, *Focus on the Costs of Segregation for All*, NYU FURMAN CTR. (Jan. 2014), <https://furmancenter.org/research/iri/essay/focus-on-the-costs-of-segregation-for-all> [perma.cc/6MMV-9HAD].

216. See *id.*

217. See David R. Williams & Chiquita Collins, *Racial Residential Segregation: A Fundamental Cause of Racial Disparities in Health*, 116 PUB. HEALTH REPS. 404, 409 (2001).

to medical care, exposure to pollutants and health code violations, and availability of healthy food options.<sup>218</sup> Therefore, racial and economic housing integration can improve health and reduce healthcare costs.

Housing segregation also perpetuates the concentration of poverty, which amplifies the experience of poverty throughout a community.<sup>219</sup> This is, in part, due to a lack of business investment in low-income, marginalized neighborhoods, limiting job opportunities and perpetuating widespread unemployment in certain communities.<sup>220</sup> Concentrated poverty also increases crime while decreasing property values, causing entire neighborhoods to feel the effects of poverty and economic stagnation.<sup>221</sup>

A full analysis of the positive effects of housing integration in contrast to the damaging impact of segregation is beyond the scope of this Note. However, these key points provide support for the City Council's goal to distribute LULUs, such as homeless shelters, more equally. Under a fair share approach, the new shelters and, in turn, thousands of individuals and families experiencing homelessness would be placed in wealthier, predominately white neighborhoods, promoting both racial and socioeconomic diversity.

### III. A MODIFIED FAIR SHARE APPROACH

This Note explores the advantages and disadvantages of both borough-based and fair share siting. Advocates in favor of the borough-based approach argue that it will (1) keep shelter residents near their home communities and social supports, and (2) allow the City to provide the new shelters more efficiently and at a lower cost, enabling compliance with the right to shelter mandate.<sup>222</sup> On the other hand, the City Council argues that a fair share approach would (1) allow for the even distribution of LULUs, (2) allow shelter residents to “move to opportunity,” and (3) promote housing integration.<sup>223</sup>

This Note advocates for a modified fair share approach to siting homeless shelters. Although borough-based proponents argue that it is important to keep shelter residents near their home communities, a fair

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218. *See id.* at 405–11.

219. *See Memorandum: The Relationship Between Racial Integration and the Duty to Further Fair Housing*, OPPORTUNITY AGENDA (2010), <https://www.opportunityagenda.org/explore/resources-publications/memorandum-relationship-between-racial-integration-and-duty-further> [perma.cc/MS3S-PJ6M].

220. *See id.*

221. *See id.*

222. *See supra* Section II.A.

223. *See supra* Section II.B.

share approach would not eliminate the abundance of shelters already located in or near those communities. Under the fair share approach, there would continue to be a high number of shelters located in neighborhoods that many shelter residents call home. These neighborhoods are already overconcentrated with shelters.<sup>224</sup>

As discussed in Part II, this overconcentration of shelters in low-income, marginalized neighborhoods concentrates poverty and contributes to both racial and economic segregation.<sup>225</sup> In contrast, under fair share, the City would place the new shelters throughout the boroughs, allowing low-income BIPOC communities a chance to flourish. By siting the new shelters elsewhere, businesses in those communities would have greater ability to grow, and developers may be more willing to invest. In contrast, siting further homeless shelters in neighborhoods already hosting their fair share would continue to burden low-income BIPOC communities with high-poverty statistics that impair economic development, perpetuating a cycle of poverty and housing segregation.

However, in order to make fair share work for both the City and New Yorkers experiencing homelessness, the City must (1) prioritize individualizing shelter residents' needs and preferences, (2) prepare a budget plan which allocates sufficient funding to place shelters in areas with higher property values, and (3) enforce the Fair Share Criteria as binding rules rather than mere guidance.

#### A. Prioritize Individual Needs and Preferences

Shelter residents present different needs and preferences when it comes to placement. Some already have jobs that are located in their communities and would prefer to stay close by, while others are looking for employment opportunities and would benefit from moving to an area with more business investment. Similarly, while some families have young children in local schools who would be disadvantaged by a move, single adults and families without children are not constrained by school location and might prefer a shelter placement in an area closer to particular medical care or better public transportation. People facing homelessness and housing instability do not share identical experiences and, therefore, have differing needs and preferences. Policy should not lump those experiencing homelessness into a homogenous population requiring the same accommodations.

Instead, the City must use a siting approach that allows for choice and flexibility when placing shelter residents. Under the fair share approach,

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224. *See supra* Section II.B.i.

225. *See supra* Section II.B.iii.

shelters would be placed throughout the five boroughs, allowing the City to accommodate the varying preferences of individuals and families experiencing homelessness. In contrast, a borough-based approach would not provide this same flexibility and, instead, constrict shelter residents to certain areas.

In siting the shelters under fair share, however, the City should make efforts to place individuals and families on a case by case basis, considering specific needs such as proximity to employment, school, and medical care. More shelters would enable the City to make more-individualized accommodations and give more weight to preference when placing shelter residents.

### **B. Prepare a Budget Plan and Allocate the Money**

Critics of the City Council's fair share proposed legislation have indicated that, although there is a benefit to evenly distributing shelters throughout the five boroughs, the City has not provided additional resources to afford more expensive properties under this restriction.<sup>226</sup> There is concern that fair share would cause delays in siting new shelters because the proposed legislation fails to address the difficulties of siting facilities in other areas.<sup>227</sup> Furthermore, the City has a legal obligation to provide shelter to people experiencing homelessness, causing advocates to anticipate that a fair share siting approach would only lead the City into noncompliance and put the homeless on the streets.<sup>228</sup>

To address these concerns, the City must prepare a budget plan and allocate sufficient funds before passing fair share legislation that would prohibit siting homeless shelters in oversaturated areas. To avoid siting delays due to inadequate funding, the City Council should locate sample properties in neighborhoods where shelters are under-concentrated and determine how much it will cost to purchase those properties as shelter locations. The City should then set aside a budget specifically for siting homeless shelters in such neighborhoods with higher property values. If the City Council wants to evenly distribute the new shelters, it must first allocate the money. The City Council would be acting irresponsibly in forcing the City to site shelters in areas with higher property values, without fully and properly preparing for the inevitable increase in costs. Adequate financial preparation will reduce the risk that a fair share siting approach would cause delays in opening new shelters.

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226. See Nortz, *supra* note 135.

227. See Simone, *supra* note 50.

228. See *id.*



In preparing a budget plan, the City can employ several different mechanisms to redirect funding towards addressing homelessness, including exactions, developer impact fees, and redistribution of cluster-site shelter funding and the police budget, which the following Sections discuss. These mechanisms would provide potential solutions to the cost issue associated with a fair share siting approach and prevent delay in siting the new shelters.

*i. Employ Exactions and Developer Impact Fees to Finance Shelters in More Expensive Areas*

As the cost of homeless shelters increases, the State and the federal government have failed to adequately increase funding, leaving more of the burden on the City.<sup>229</sup> From 2013 to 2017, the cost of single adult shelters increased by 81%, but the State's contribution remained about the same.<sup>230</sup> Instead of allocating a proper budget, the City has increased the cost to taxpayers.<sup>231</sup> In 2017, taxpayers provided \$421 million in shelter funding, or 44% of total shelter costs.<sup>232</sup> In contrast, taxpayers paid \$151 million in 2013, or 31% of total costs.<sup>233</sup> This is not a sustainable budget strategy. Instead, the City should employ one or more of the various developer mitigation mechanisms to fund the new shelters.

One such mechanism is to impose exactions on developers to fund shelter sitings under fair share.<sup>234</sup> An exaction is a condition a developer must meet in order to obtain approval for its plans.<sup>235</sup> The condition is intended to counteract the anticipated negative externalities the developments will create.<sup>236</sup> Exactions may be monetary, such as impact fees or cash payments, or non-monetary, such as dedications of land for public use or restrictions on alienation.<sup>237</sup> For example, in Sacramento, commercial developers were required to pay a fee as a condition of approval of nonresidential building permits to offset the burdens on the

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229. See Erin Durkin, *City Paying More to Shelter the Homeless as Federal Funding Shrinks*, DAILY NEWS (Feb. 21, 2018, 5:45 PM), <https://www.nydailynews.com/new-york/city-paying-shelter-homeless-article-1.3834281> [<https://perma.cc/SJJ9-J82F>].

230. *Id.*

231. *See id.*

232. *Id.*

233. *Id.*

234. See *Exactions and Impact Fees*, UNIV. OF FLA., LEVIN COLL. OF LAW 1, [https://www.law.ufl.edu/\\_pdf/academics/centers-clinics/clinics/conservation/resources/exactions.pdf](https://www.law.ufl.edu/_pdf/academics/centers-clinics/clinics/conservation/resources/exactions.pdf) [[perma.cc/JH9X-8NWB](https://perma.cc/JH9X-8NWB)] (last visited Sept. 3, 2020).

235. *See id.*

236. *See id.*

237. *See id.*

city caused by an influx of low-income workers who would move to the area to fill jobs created by the development.<sup>238</sup> Similarly, in New York City's Chinatown, the City Planning Commission required one developer to financially contribute to subsidize or rehabilitate low-income housing as a condition for approval of construction of a residential building in the area.<sup>239</sup> Lastly, a developer in D.C. was required to provide bicycle parking spaces, helmets, and repair stations to mitigate the development's negative impact on pedestrian safety, parking, and traffic.<sup>240</sup>

Therefore, monetary and non-monetary exactions not only enable the City to hold developers accountable for the negative externalities they create but can also provide an opportunity to raise money for the development of affordable housing and homeless shelters. While it may be more expensive to site shelters in redeveloped areas with high property values, the City can condition the approval of developers' plans on the funding of a nearby shelter in that area or other needs of the surrounding community.

#### *ii. Redirect NYPD Funding*

The City can also redistribute the NYPD's budget to fund a fair share siting approach. On June 30, 2020, the City Council passed a budget that called for the redistribution of \$1 billion from the NYPD budget.<sup>241</sup> The budget shifts that funding to spending for young people and public housing.<sup>242</sup> However, some advocates argue that this move does not go far enough and are calling on the City to make a larger shift.<sup>243</sup> Council Speaker Corey Johnson said, "[t]o everyone who is disappointed — and I know that there are many, many people who are disappointed that we could not go further, I am disappointed as well. I wanted us to go deeper."<sup>244</sup> Similarly, Representative Alexandria Ocasio-Cortez called

238. *See* Com. Builders of N. Cal. v. City of Sacramento, 941 F.2d 872, 873 (9th Cir. 1991).

239. *See* Asian Ams. for Equal. v. Koch, 514 N.Y.S.2d 939 (1987).

240. *See* Cole v. D.C. Zoning Comm'n, 210 A.3d 753, 765 (D.C. App. 2019).

241. *See* *New York City Passes Budget with \$1 Billion Cut to NYPD Amid City Hall Protest*, ABC7NY (July 1, 2020), <https://abc7ny.com/defund-police-protesters-black-lives-matter-mayor-bill-de-blasio/6284680/> [perma.cc/BX33-NRUV].

242. *See id.*

243. *See* Dana Rubenstein & Jeffery C. Mays, *Nearly \$1 Billion Is Shifted from Police in Budget That Pleases No One*, N.Y. TIMES (Aug. 10, 2020), <https://www.nytimes.com/2020/06/30/nyregion/nypd-budget.html> [perma.cc/3YGT-Z9CP].

244. *Id.* (internal quotations omitted).

the shift “budget tricks.”<sup>245</sup> The City should respond to these criticisms and move more of the NYPD’s budget towards addressing homelessness, in part, by funding the placement of homeless shelters in areas where property costs are high in order to comply with fair share.

Shifting NYPD funding to the provision of housing and social services for people experiencing homelessness would allow the City to take a preventative, rather than punitive, approach to addressing the housing crisis. Enforcement of anti-homeless ordinances, such as criminalizing sleeping in public, asking for donations, and general allegations of vagrancy and disturbing the peace, is costly.<sup>246</sup> Studies show that it costs taxpayers more to put someone in jail than to provide them housing.<sup>247</sup> While cities spend an average of \$87 per day to jail someone, it only costs an average of \$28 per day to provide them shelter.<sup>248</sup>

According to Comptroller Scott Stringer, from 2014 to 2019, the City spent \$41.1 billion on police and corrections and only \$9.9 billion on homeless services.<sup>249</sup> One police program, Mayor de Blasio’s “Subway Diversion Program,” recently received particularly intense backlash.<sup>250</sup> An anonymous letter from NYPD Transit Bureau Officers stated, “we are unjustly criminalizing individuals who have done nothing worse than the average person in the subway all because they have no home. It isn’t helping anyone.”<sup>251</sup> The Coalition similarly explained that Mayor de Blasio “has once again missed an opportunity to truly and humanely address homelessness and is driving our most vulnerable neighbors deeper

245. *Id.*

246. See *Cost of Criminalizing Homeless*, INVISIBLE PEOPLE, <https://invisiblepeople.tv/cost-criminalizing-homelessness/> [<https://perma.cc/2E5X-UL6N>] (last visited Sept. 7, 2020).

247. ALLARD K. LOWENSTEIN INT’L HUM. RTS. CLINIC, “FORCED INTO BREAKING THE LAW”: THE CRIMINALIZATION OF HOMELESSNESS IN CONNECTICUT 37 (2016), [https://law.yale.edu/sites/default/files/area/center/schell/criminalization\\_of\\_homelessness\\_report\\_for\\_web\\_full\\_report.pdf](https://law.yale.edu/sites/default/files/area/center/schell/criminalization_of_homelessness_report_for_web_full_report.pdf) [<https://perma.cc/ETF2-PRDB>].

248. *Id.*

249. Valeria Ricciulli & Caroline Spivack, *What NYC Could Do with Its \$6 Billion Police Budget*, CURBED N.Y. (June 5, 2020, 2:47 PM), <https://ny.curbed.com/2020/6/5/21279214/nyc-defund-nypd-police-budget-affordable-housing-homelessness> [<https://perma.cc/9PF8-KLBW>].

250. See *Homeless New Yorkers and Advocates Rally at City Hall to Oppose Criminalization of Homelessness*, COAL. FOR HOMELESS (Jan. 21, 2020) [hereinafter *Homeless New Yorkers and Advocates Rally at City Hall*], <https://www.coalitionforthehomeless.org/press/homeless-new-yorkers-and-advocates-rally-at-city-hall-to-oppose-criminalization-of-homelessness/> [[perma.cc/LWR4-VTBS](https://perma.cc/LWR4-VTBS)].

251. Letter from Officers of the New York Police Department Transit Bureau to Human.nyc & Coalition for the Homeless (Nov. 2019), <https://www.diversioniscoercion.nyc/anonymous-letter-from-nypd> [[perma.cc/MK64-FFKJ](https://perma.cc/MK64-FFKJ)].

into the shadows.”<sup>252</sup> Council Member Rafael Salamanca, Jr. said that relying on NYPD stigmatizes people experiencing homelessness as criminals, explaining, “[h]omeless New Yorkers and advocates have been very clear about what resources the administration should be offering to stem the rise of homelessness: more permanent housing and safe haven shelters, and outreach driven by qualified social service professionals.”<sup>253</sup>

Instead of funding NYPD to police those experiencing homelessness, the City should divert that money towards providing preventative services. Included in those services could be the provision of better quality homeless shelters. With the extra money from NYPD’s budget, the City could better afford siting those shelters in more expensive areas under the fair share siting approach.

### *iii. Redirect Funding from Cluster and Hotel Shelter Sites*

Part of Mayor de Blasio’s *Turning the Tide* plan is to shut all of the City’s cluster and hotel shelter sites.<sup>254</sup> As discussed in Part I, these make-shift shelters have cost the City millions in additional shelter costs.<sup>255</sup> By 2016, the City was paying \$125 million per year to rent out approximately 3,000 cluster units.<sup>256</sup> Since Mayor de Blasio plans to shut down all of these locations, that money can be redistributed back towards the more centralized shelter system outlined in *Turning the Tide*.<sup>257</sup>

### **C. Enforce the Fair Share Criteria as Binding Rules Rather Than Mere Guidance**

Lastly, to make fair share work, the City must enforce the Fair Share Criteria as binding rules rather than mere guidance to ensure compliance, as per the City Council’s recommendation in *Doing Our Fair Share, Getting Our Fair Share*.<sup>258</sup> Under pressure from NIMBYs, elected officials are more likely to continue to site shelters, as well as other LULUs, in areas where residents have less political power, time, and money to protest.<sup>259</sup> In order to prevent NIMBYs from swaying politicians into siting shelters

252. *Homeless New Yorkers and Advocates Rally at City Hall*, *supra* note 250.

253. *Id.*

254. *See supra* Section I.C.

255. *See supra* Section I.C.

256. *Mayor de Blasio Announces Three-Year Plan to Permanently End Use of Clusters as Homeless Shelters*, NYC.GOV (Jan. 4, 2016), <https://www1.nyc.gov/office-of-the-mayor/news/005-16/mayor-de-blasio-three-year-plan-permanently-end-use-clusters-homeless-shelters> [<https://perma.cc/MS4C-E2FH>].

257. *See generally* CITY OF N.Y., *supra* note 2, at 84.

258. *See* N.Y. CITY COUNCIL, *supra* note 4, at 21.

259. *See supra* Part II.

elsewhere, the City must pass fair share legislation that makes the Criteria enforceable under law. Although the City Council has already introduced fair share legislation, it must reassess the program based on these recommendations.

It is important to enforce fair share as binding rules because the case law discussed in this Note demonstrates that, otherwise, the Criteria will not be upheld.<sup>260</sup> Courts have set a low bar for the City's compliance with the Criteria outlined in the City Charter, only requiring "honest consideration" of and "substantial compliance" with the Criteria.<sup>261</sup> These courts note that the Criteria is merely meant to be a guide, and while "flagrant disregard" is not permitted, "some deviation" is allowed.<sup>262</sup> Further, courts have added that they have little judicial discretion in finding whether or not the Criteria has been met, stating that they may not interpose with the operation of public enterprises.<sup>263</sup> Passing fair share legislation would allow courts to better enforce the siting approach as law.<sup>264</sup>

### CONCLUSION

New York State is under a unique legal obligation to provide shelter to man, woman, or family who is experiencing homelessness.<sup>265</sup> Therefore, the question at hand is not whether we should build shelters but rather where to place them. In response to growing numbers of individuals and families experiencing homelessness, public officials are continuously looking for ways to site shelters without backlash from communities who do not want LULUs in their neighborhoods.<sup>266</sup>

Unfortunately, the Mayor's borough-based approach is really just a veiled excuse for failing to allocate proper funding while fearing a NIMBY backlash. The Mayor would like to appear as though he truly cares for New Yorkers experiencing homelessness by saying it would be best for them to stay near their home communities. However, Mayor de Blasio (as well as Governor Andrew Cuomo) has refused to allocate proper funding and resources to build affordable housing and, instead, instituted extra policing in the subways to punish these individuals for having

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260. *See supra* Section II.B.

261. *Tribeca Cmty. Ass'n v. N.Y.C. Dep't of Sanitation*, 2010 WL 151534 (N.Y. Sup. Ct. Jan. 11, 2010).

262. *Cmty. Plan. Bd. No. 4 (Manhattan) v. Homes for the Homeless*, 600 N.Y.S.2d 619, 623 (Sup. Ct. 1993).

263. *Gjonaj v. City of New York*, 111 N.Y.S.3d 805 (Sup. Ct. 2018).

264. *See* N.Y. CITY COUNCIL, *supra* note 4, at 22.

265. *See generally* ROUTHIER, COAL. FOR THE HOMELESS 2020, *supra* note 29, at 1.

266. *See supra* Part II.

nowhere else to go.<sup>267</sup> Furthermore, while Mayor de Blasio repeatedly mentions “cost-effectiveness” in *Turning the Tide*, he does not advocate for more funding to site shelters in more expensive areas.<sup>268</sup> Instead, he advocates for a borough-based approach, which is an easy way out for the Mayor to site the new shelters under the guise of doing what is “best” for New Yorkers experiencing homelessness. As stated in *State of the Homeless 2020*,

even as tens of thousands of New Yorkers struggle to avoid or overcome homelessness every day, Mayor de Blasio and Governor Cuomo seem content with minimalist, symbolic, and too-often harmful actions made under the pretense of attempting to *manage* the problem, rather than taking the substantive steps needed to *solve* it by fully embracing proven housing solutions on a scale commensurate with the enormity of the crisis.<sup>269</sup>

In contrast, enacting a modified fair share approach in which new shelters are placed in under-concentrated areas while retaining the shelters currently located in over-concentrated areas allows for flexibility in placing shelter residents according to their individualized needs. Although this approach is more expensive than the Mayor’s borough-based approach, the City could finance these sitings through various mitigation mechanisms and budget shifts. Creating a proper budget plan and allocating sufficient funds would eliminate advocates’ concerns that the fair share approach would delay shelter development and put individuals and families on the streets.

Ultimately, the best “shelter-siting approach” is not siting more shelters but rather siting more affordable housing throughout the five boroughs. Doing so would not only reduce homelessness but also lessen housing segregation and concentrated poverty, allowing all New Yorkers to benefit from racially and financially integrated communities. While shelters put a band-aid on the homelessness crisis, providing affordable housing for New Yorkers would eliminate the need for new shelters altogether and finally allow this wound to heal.

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267. See *supra* Section III.B.ii.

268. See generally CITY OF N.Y., *supra* note 2.

269. ROUTHIER, COAL. FOR THE HOMELESS 2020, *supra* note 29, at 1.