1-1981

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Linda M. Grady

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Single-Family Zoning: Ramifications of State Court Rejection of Belle Terre on Use and Density Control

By Linda M. Grady*

The 1974 Supreme Court decision of Village of Belle Terre v. Boraas held constitutional a zoning ordinance in which “family” was defined to permit an unlimited number of related persons to reside together while allowing no more than two unrelated individuals to do so. Since that decision, the supreme courts of New Jersey and California have invalidated similar restrictive definitions of “family” on state constitutional grounds. While the Belle Terre Court perceived the purpose of single-family zoning to be the preservation of residential areas accommodating the needs and values of the traditional related family and held an ordinance distinguishing between related and unrelated households to be a reasonable means to effectuate this goal, the state courts have interpreted “family values” to specify a concept more aptly described as a “family style of living,” and the legitimate objective of single-family zoning to be the preservation of the underlying characteristics conducive to that lifestyle, such as low population density and

* B.A., 1972, University of California, Berkeley. Member, Second Year Class.
2. Id. at 2. See notes 49-54 & accompanying text infra.
5. 416 U.S. at 9.
6. Id.
residential use. From the state court perspective, an ordinance based on consanguinity is unrelated to furthering these goals and, according to the California Supreme Court, unnecessarily burdens the privacy rights of unrelated individuals to choose their living companions.

In striking down restrictive definitions of family, the California and New Jersey courts have proposed alternative methods of achieving the aims of single-family zoning. The New Jersey courts, in particular, strongly advocate that use of dwellings in single-family zoned areas be restricted to bona fide single housekeeping units and that density be controlled by standards based on the relationship of habitable floor space to the number of occupants. The California Supreme Court cited New Jersey's proposal as a reasonable means of effectuating the goals of single-family zoning, thereby implying that the approach would be upheld under the strict scrutiny standard of judicial review that is applied when a statute affects an individual's fundamental right of privacy. New Jersey's approach therefore warrants careful consideration to determine whether it in fact achieves the goals of single-family zoning, complies with substantive due process requirements, and does not infringe upon the privacy rights of individuals to choose their living companions.

This Note first examines the development of single-family zoning. The Note then explores the problems and viability of the approach suggested by the New Jersey and California courts for communities to utilize in achieving the objectives of single-family zoning.

8. Id. at 133, 610 P.2d at 441, 164 Cal. Rptr. at 544.
10. 27 Cal. 3d at 131-34, 610 P.2d at 439-42, 164 Cal. Rptr. at 542-45.
11. See text accompanying notes 130-46 infra.
12. 27 Cal. 3d at 133-34, 610 P.2d at 441-42, 164 Cal. Rptr. at 544-45.
13. Under a traditional analysis of a statute's constitutionality, a court must defer to the judgment of the legislature and uphold a statute as long as the means employed in effectuating its purposes bear a rational relation to the state's interest. See Williamson v. Lee Optical of Oklahoma, 348 U.S. 483, 487 (1955); United States v. Carolene Prod. Co., 304 U.S. 144, 152 (1938). Thus, a statute "will not be set aside if any state of facts reasonably may be conceived to justify it." McGowan v. Maryland, 366 U.S. 420, 426 (1961). While the traditional rational basis test continues to be applied in the area of economic regulation, with respect to certain fundamental personal rights a strict scrutiny test has been developed. Under a strict scrutiny test, a statute will not be upheld unless it is shown that the state interest is compelling or overriding, and that the means are precisely drawn to the accomplishment of that end. See Sugarman v. Dougall, 413 U.S. 634, 643 (1973); Roe v. Wade, 410 U.S. 113, 154 (1973); Shapiro v. Thompson, 394 U.S. 618, 638 (1966).
zoning. The Note concludes that a carefully drafted definition of
the single housekeeping unit is a method that successfully may be
used to regulate the kind of use to which a single-family residence
is put, but that an occupant-to-area ratio is not a feasible means of
maintaining low-density. In advocating an occupant-to-area ratio
as a means of density control, these state courts have couched their
reasoning in terms of preventing overcrowding. Preventing over-
crowding and maintaining low population density are two discrete
goals. The Note suggests that the judiciary must recognize this dis-
tinction if the preservation of low-density districts is to remain a
viable zoning objective.

The Historical Development of Single-Family
Zoning

Zoning has been defined as the regulation “of the use of land
within the community as well as of the buildings and structures
which may be located thereon . . . .” 14 A relatively recent phe-
nomenon, 15 the power of a municipality to zone comprehensively
was first given constitutional approval by the United States Su-
preme Court in the 1926 decision of Village of Euclid v. Ambler
Realty Co. 16 The Court in Euclid held zoning ordinances to be a
valid exercise of a community’s police power if they are substan-
tially related to the public health, safety, morals, or general wel-
fare. 17 The Supreme Court further found that the establishment of
residential enclaves separated from commercial and industrial

15. The first zoning ordinance in the United States was enacted by New York City in
1916. See Rathkoff, supra note 14, § 1.01, at 1-6. The text of that ordinance is reprinted in
full in J. Metzenbaum, The Law of Zoning 330 (1930) [hereinafter cited as Metzenbaum].
16. 272 U.S. 365 (1926). The extent of the decision’s impact is evident from the fact
that the case lent its name to the predominant system of zoning in the United States. “Eu-
clidean zoning” refers to the division of a municipality into districts coupled with an assign-
ment of particular uses to each district according to type and intensity, such as single-family
residential, multi-family residential, commercial, and heavy industrial. The system is theo-
retically hierarchical and cumulative. Thus, a single-family residence, the “highest” use of
land, can be located in a multifamily area, but a multifamily residence cannot be located in
a single-family district. See 1 R. Anderson, American Law of Planning § 3.01, at 73 n.3 (2d ed. 1978) [hereinafter cited as Anderson].
areas was in fact related to the public welfare and recognized the need for single-family districts of low population density where children might enjoy "the privilege of quiet and open spaces for play."

Traditional single-family zoning essentially involves two interrelated factors: low population density and restriction of use to that of a residential family-style living arrangement. Density control traditionally has been justified as a valid objective of zoning because of its relation to the public health. In fact, many of the early zoning ordinances resulted from an awareness of health and safety hazards inherent in the overcrowding of urban land. Density control of single-family districts historically has been effected by prohibiting more intensive uses in the area, such as apartment houses, as well as by regulating the bulk and size of buildings and of the lots upon which they stand. Underlying this form of density control are the assumptions that a "family" will consist of the traditional nuclear family and that the size of a building will determine the number of occupants therein. Using this technique, a community in planning its development theoretically could determine and anticipate the population density of a particular area.

In contrast, the use of a dwelling in a single-family district traditionally has been regulated by defining "family" as an unlimited number of individuals residing as a single housekeeping unit.

18. 272 U.S. at 394.
19. Id.
20. See generally 1 ANDERSON, supra note 16, § 7.06, at 545-46; 2 N. WILLIAMS, AMERICAN LAND PLANNING LAW § 63.06, at 646-47 (1975) [hereinafter cited as WILLIAMS]. Additionally, the Standard State Zoning Enabling Act, recommended by the Department of Commerce in 1926 and subsequently adopted with variations by all 50 states, legitimized density control as a permissible objective of zoning. STANDARD STATE ZONING ENABLING ACT § 3, reprinted in METZENBAUM, supra note 15, at 304.
21. 1 ANDERSON, supra note 16, § 7.06, at 545-46.
22. 2 RATHKOFF, supra note 14, § 34.03, at 34-38.
23. 2 WILLIAMS, supra note 20, § 52.01, at 349. This assumption is also inferred from many of the earliest definitions of "family," which did not distinguish between related and unrelated individuals. See the ordinances cited in note 24 infra. It was not until the 1960's brought a change in living patterns that communities redefined the term "family" in a restrictive manner, thereby acknowledging the fact that single-family residences will not necessarily be inhabited by traditional families. See text accompanying notes 34-37 infra.
24. The zoning ordinance at issue in Euclid defined family as "any number of individuals living and cooking together on the premises as a single housekeeping unit." ZONING ORDINANCE OF VILLAGE OF EUCLID, OHIO § 2(k), reprinted in METZENBAUM, supra note 15, at 338. Chicago's first zoning ordinance, adopted in 1923, as well as Cleveland's, adopted in 1929, had similar definitions of "family." METZENBAUM, supra note 15, at 354-55, 392. See
though the term "single housekeeping unit" has yet to be given a precise and uniform definition,26 courts have evaluated whether a challenged group constitutes a single housekeeping unit by using factors generally associated with a family lifestyle.26 Whether a group cooks together,27 has access to the entire dwelling,28 or lives in a relatively stable arrangement as opposed to a transient one associated with a hotel or fraternity29 may be critical in determining whether the group constitutes a single housekeeping unit.

The state courts consistently have rejected arguments that the term "single housekeeping unit" refers exclusively to occupancy by related individuals.30 Generally, the rationale of the courts has been couched in terms of legislative intent: If a municipality intended to restrict occupancy of single-family dwellings to related individuals, it was free to have so provided.31 Underlying this justification, however, was the implicit recognition that the single housekeeping unit referred to the use to which a dwelling was put rather than to the consanguinity of the occupants.32

Possibly in response to the emergence during the 1960's of new lifestyles and living arrangements,33 municipalities increasingly redefined "family" in a more restrictive manner.34 The term

also 2 ANDERSON, supra note 16, § 9.30, at 169-70.
25. Generally, the concept connotes "use of the premises as a family, or in the manner of a family." Brady v. Superior Court, 200 Cal. App. 2d 69, 78, 19 Cal. Rptr. 242, 247 (1962).
26. See text accompanying notes 153-61 infra.
27. See Neptune Park Ass'n v. Steinberg, 138 Conn. 357, 84 A.2d 687 (1951).
29. See Robertson v. Western Baptist Hosp., 267 S.W.2d 395 (Ky. 1954).
31. "Had it been the pleasure of the legislative body when defining the word 'family,' to have excluded in the district any dwelling use of premises there situated, by a group of individuals not related to one another by blood or marriage, it might have done so." Missionaries of Our Lady of La Salette v. Village of Whitefish Bay, 267 Wis. 609, 615, 66 N.W.2d 627, 630 (1954).
32. This is most clearly evidenced in those cases involving ordinances that failed to define "family." For example, a California appellate court refused to interpret the undefined term to mean a household related by consanguinity or affinity, stating it was beyond the court's authority to do so. However, the court did not hesitate then to define "family" as a group of persons, related or unrelated, living as a single housekeeping unit in the "manner of a family." Brady v. Superior Court, 200 Cal. App. 2d 69, 78, 19 Cal. Rptr. 242, 247-48 (1962). Yet, evidence of legislative intent supporting this interpretation was just as negligible as that sustaining a more restrictive definition of family.
33. See 2 ANDERSON, supra note 16, § 9.30, at 170.
34. See, e.g., Prospect Gardens Convalescent Home, Inc. v. City of Norwalk, 32 Conn.
typically was defined as an unlimited number of individuals related by blood, marriage, or adoption, but only a limited number of unrelated individuals living together as a single housekeeping unit. In some instances, the definition excluded unrelated households entirely. With the enactment of regulations expressly distinguishing between related and unrelated groups, the state courts were forced to deal directly with issues that previously were avoided under the rationale of "legislative intent" and to examine the implicit presumption that zoning's function and purpose lies in regulating land use rather than household composition.

Prior to the 1974 Supreme Court decision in Village of Belle Terre v. Boraas, restrictive definitions of family generally were rejected by the state courts. The rationale for the disapproval of restrictive definitions of family is found in the manner in which these courts defined the purposes of single-family zoning. For example, the Illinois Supreme Court perceived the objectives of single-family zoning to be the preservation of stable low density areas with a minimum of traffic and congestion. The court observed that a zoning ordinance limiting the use of single-family dwellings

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Supp. 214, 217, 347 A.2d 637, 639 (1975). A 1974 amendment to § 118-1 of Norwalk's zoning ordinance changed the definition of "family" from "single-housekeeping unit" to "[o]ne (1) or more persons occupying a single dwelling unit, provided that unless all members are related by blood or marriage (or adoption), no such family shall contain more than five (5) persons." Id. at 217, 347 A.2d at 639. See also Town of Durham v. White Enterprises, Inc., 155 N.H. 645, 648, 348 A.2d 706, 708 (1975). This is not to say that restrictive definitions of "family" did not exist prior to this time. See, e.g., Kellog v. Joint Council of Women's Auxiliaries Welfare Ass'n, 265 S.W.2d 374 (Mo. 1954).

35. See, e.g., the ordinances cited in notes 34 supra and 84 infra.

36. The City of Des Plaines ordinance, cited in City of Des Plaines v. Trottner, 34 Ill. 2d 432, 216 N.E.2d 116, 117 (1966), provided: "A 'family' consists of one or more persons each related to the other by blood (or adoption or marriage), together with such relatives' respective spouses, who are living together in a single dwelling and maintaining a common household."


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to members of related families did little to further these objectives:
[A] group of persons bound together only by their common desire
to operate a single housekeeping unit, might be thought to have a
transient quality that would affect adversely the stability of the
neighborhood. . . . An ordinance requiring relationship by blood,
marrige or adoption could be regarded as tending to limit the
intensity of land use. And it might be considered that a group of
unrelated persons would be more likely to generate traffic and
parking problems than would an equal number of related persons.

But none of these observations reflects a universal truth. Family
groups are mobile today, and not all family units are in-
ternally stable and well-disciplined. Family groups with two or
more cars are not unfamiliar. And so far as intensity of use is
concerned, the [present] definition . . . can hardly be regarded as
an effective control upon the size of family units.40

The Illinois court cautiously chose to invalidate the regulation
on the basis that the municipality had exceeded its zoning author-
ity as delegated to it by the state legislature.41 A subsequent New
Jersey decision42 went one step further in holding a similar ordi-
nance to be in violation of the constitutional requirements of sub-
stantive due process.43 The controversy in New Jersey centered on
a restrictive definition of "family"44 that a seaside resort commu-
nity had adopted to prevent large groups of "unruly" young people
from renting dwellings on a seasonal basis.45 The court acknowl-

40. 34 Ill. 2d at 437-38, 216 N.E.2d at 119.
41. Id. at 438, 216 N.E.2d at 120. General law cities have no inherent police powers,
but derive their authority from the state. A municipality may not exceed the authority
deleated to it by the state. See 2 E. McQuillan, THE LAW OF MUNICIPAL CORPORATIONS,
§§ 4.04, 10.15a, at 12-13, 790 (3d ed. 1979). As a result of the Trottner decision, the Illinois
Legislature revised the zoning enabling act to provide: "[T]he corporate authorities in each
municipality have the following powers: . . . (9) to classify, to regulate and restrict the use
of property on the basis of family relationship, which family relationship may be defined as
one or more persons each related to the other by blood, marriage or adoption and maintain-
Kirsch represents the first articulation of the constitutional issues involved in restrictive
definitions of "family" on a state supreme court level. The problems previously were identi-
fied in the New Jersey lower court decision of Gabe Collins Realty, Inc. v. City of Margate
43. The court did not specify whether it rested its holding on state or federal due
process guarantees. As the decision predates Belle Terre, however, the distinction was not
yet important. See notes 49-57 & accompanying text infra.
44. The ordinance at issue defined "family" as either a related group living as a single
housekeeping unit or as a group of unrelated individuals "whose association is [not] tempo-
rary and resort-seasonal in character or nature." 59 N.J. at 247, 281 A.2d at 516.
45. Id. at 248, 281 A.2d at 515.
edged that the community has a legitimate objective in its desire to prevent overcrowding and “obnoxious personal behavior.” However, a zoning ordinance limiting seasonal occupancy to related individuals “preclude[s] so many harmless dwelling uses” that do not contribute to the problem sought to be terminated that it must be considered “sweepingly excessive.” The court thus found the regulation to be unreasonable and without a substantial relation to its intended objective. As in the earlier cases concerning “single housekeeping units,” the court’s focus was on the kind of use to which a dwelling is placed and the compatibility of such use with the character of the district.

**Belle Terre and Moore**

The United States Supreme Court decision in *Village of Belle Terre v. Boraas* added a new dimension to the concept of single-family zoning—and a new basis for conflict. *Belle Terre* concerned several unrelated college students who lived together in a single-family dwelling despite a village ordinance prohibiting more than two unrelated individuals from so residing. Upon being served with a notice of violation, three of the students and the owners of the property filed a civil rights action challenging the constitutionality of the ordinance. Among other contentions, the plaintiffs asserted that the regulation infringed upon their rights of privacy, association, and travel. The majority, speaking through Justice Douglas, quickly rejected the arguments that fundamental rights had been violated. Rather, the ordinance was found to be a form of socioeconomic legislation; thus, the proper test to determine the validity of the ordinance was whether it was reasonable and rationally related to a permissible state objective. The Court delineated the permissible state objective to be “a land-use project addressed

46. *Id.* at 253, 281 A.2d at 520.
47. *Id.* at 251-52, 281 A.2d at 518-19.
48. *Id.*
50. “The word ‘family’ as used in the ordinance means, ‘[o]ne or more persons related by blood, adoption, or marriage, living and cooking together as a single housekeeping unit, exclusive of household servants. A number of persons but not exceeding two (2) living and cooking together as a single housekeeping unit though not related by blood, adoption, or marriage shall be deemed to constitute a family.” *Id.* at 2.
51. *Id.* at 7.
52. *Id.* at 8.
to family needs . . . [and] values;"53 therefore, an ordinance differentiating between related and unrelated households furthered a legitimate legislative objective and was valid.54

_Belle Terre_ represented a radical departure from prior state court decisions.55 Whereas state courts consistently perceived the purpose of single-family zoning in terms of the characteristics associated with such environments,56 the _Belle Terre_ Court regarded the purpose of single-family zoning as the preservation of residential enclaves designed specifically for habitation by traditional families.57 The state courts reasoned that only an ordinance regulating the use of the dwelling could be considered rationally related to the state's objective; _Belle Terre_ held that an ordinance dictating the kinship of a household is a reasonable means to achieve a state's zoning objective and therefore satisfies the demands of substantive due process.

_Belle Terre_ 's newly articulated objective of single-family zoning, the promotion of "family needs," was strengthened by the Court's subsequent decision in _Moore v. City of East Cleveland_.58 In _Moore_, a city ordinance defined "family" so restrictively that in effect only a nuclear family was permitted to reside in a single-family dwelling.59 Mrs. Moore lived in her home with her grand-
sons. Because her grandsons were cousins rather than brothers, the arrangement violated the ordinance and Mrs. Moore was fined and sentenced to jail. In a five to four decision, the Court held that the ordinance failed to meet the requirements of substantive due process. The plurality opinion acknowledged that "the family is not beyond regulation." However, a regulation affecting family living arrangements burdens the "long recognized . . . freedom of personal choice in matters of marriage and family life [that] is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment," and must therefore be carefully considered. The Court found that an ordinance establishing classifications of related groups did little to further a city's legitimate goals of controlling overcrowding, traffic, or congestion, and was therefore an unreasonable means to effectuate these goals.

This observation would seem to undermine the strength of Belle Terre in that the same reasoning seems equally applicable to individuals related to the nominal head of the household or to the spouse of the nominal head of the household living as a single housekeeping unit in a single dwelling unit, but limited to the following: (a) Husband or wife of the nominal head of the household. (b) Unmarried children of the nominal head of the household or of the spouse of the nominal head of the household, provided, however, that such unmarried children have no children residing with them. (c) Father or mother of the nominal head of the household or of the spouse of the nominal head of the household. (d) Notwithstanding the provisions of subsection (b) hereof, a family may include not more than one dependent married or unmarried child of the nominal head of the household or the spouse of the nominal head of the household and spouse and dependent children of such dependent child. For the purpose of this subsection, a dependent person is one who has more than fifty percent of his total support furnished for him by the nominal head of the household and the spouse of the nominal head of the household. (e) A family may consist of one individual."
an ordinance distinguishing between related and unrelated households. However, both the plurality opinion and the concurring opinion of Justices Marshall and Brennan cited Belle Terre in support of Moore's holding. The ordinance in Belle Terre in no way inhibited the choice of related individuals to live together. Rather, it simply barred unrelated individuals from constituting a household in a single-family zone. As such, the regulation served to encourage and protect "family needs." East Cleveland's regulation, on the other hand, "slice[d] deeply into the family itself," thereby circumventing the essential purposes of single-family zoning.

Belle Terre rejected contentions that unrelated individuals have a constitutionally protected right to choose their living companions and place of residence. Moore, on the other hand, extended constitutional protection to the living arrangements of the extended family. In light of Belle Terre and Moore, federal constitutional law apparently allows zoning authorities to distinguish related households from unrelated ones, but prohibits any regulation that will affect the choice of related individuals to reside together. Moore, therefore, underscores and sustains Belle Terre's formulation that the objective of single-family zoning is to protect and encourage the institution of the traditional family.

Baker and Adamson: State Court Rejection of Belle Terre

Belle Terre has been widely and justifiably criticized. By establishing "family needs" as a permissible goal of single-family zoning.

67. 431 U.S. at 498.
68. Id. at 511 (Brennan, J., concurring).
69. See id.
71. 431 U.S. at 498.
73. Belle Terre's ordinance did allow two unrelated individuals to reside together. It is questionable whether an ordinance expressly prohibiting two unrelated persons from residing together would withstand judicial scrutiny.
74. See 4 RATHKOPF, supra note 14, at 252 (Supp. 1979).
75. See, e.g., L. TRIBE, AMERICAN CONSTITUTIONAL LAW, §§ 15-18, at 975-80 (1978); Williams & Doughty, Studies in Legal Realism: Mount Laurel, Belle Terre and Berman, 29 Rutgers L. Rev. 73 (1975).
zoning, the Court has permitted zoning to reach beyond the regulation of land use and enter the realm of social control. Judicial approval has been provided for a community to exclude living arrangements it deems objectionable without consideration of the household's effect on the character, population density, or traffic level of the district.77

*Belle Terre* has not been universally followed by state courts. While at least three state supreme courts have accepted zoning for the needs of the traditional family as legitimate,78 three other state courts have refused to restrict the occupancy of residences located in single-family zoned districts to related households.79 Of these, New Jersey80 and, more recently, California81 have expressly invali-
dated restrictive definitions of "family" on state constitutional
grounds.82

The leading New Jersey case of State v. Baker83 concerned a
woman and her three children who lived in a single-family dwelling
along with a married couple and their three children in violation of
an ordinance prohibiting more than four unrelated individuals
from residing together.84 The New Jersey Supreme Court reiter-
ated and expounded upon the substantive due process objections
articulated in the pre-Belle Terre cases,85 noting in particular that
classifications based on biological or legal relationships "operate to
prohibit a plethora of uses which pose no threat to the accomplish-
ment of the end sought to be achieved."86 The court approved of
the Illinois Supreme Court's observation87 that ordinances distin-
guishing between related and unrelated households were grounded
on invalid and generalized assumptions regarding the characteris-
tics of each type of living arrangement and the effect of the respec-
tive arrangements on the legitimate goal of maintaining a family
style of living in a residential neighborhood.88 Enactment of a zon-
ing ordinance that essentially "regulate[s] the internal composition
of housekeeping units,"89 therefore, was held to constitute an un-
reasonable exercise of municipal zoning power, as it did not "bear
a real or substantial relation to a legitimate municipal goal."90

The California Supreme Court also has rejected Belle Terre,
holding that zoning ordinances that distinguish between related

81. City of Santa Barbara v. Adamson, 27 Cal. 3d 123, 610 P.2d 436, 164 Cal. Rptr. 539
(1980).
82. Belle Terre is the current interpretation of federal constitutional law. State courts
remain free to interpret their own state constitutions less restrictively, as Justice Brennan
emphasizes in a recent article. Brennan, State Constitutions and the Protection of Individ-
84. Section 17:3-1(a)(17) of the CITY OF PLAINFIELD ZONING ORDINANCE, cited in State
v. Baker, 81 N.J. 99, 103-04, 405 A.2d 368, 370 (1979), defined the term “family” as: “One
(1) or more persons occupying a dwelling unit as a single non-profit housekeeping unit.
More than four (4) persons . . . not related by blood, marriage or adoption shall not be
considered to constitute a family.”
85. See notes 42-48 & accompanying text supra.
86. 81 N.J. at 107, 405 A.2d at 371.
87. See text accompanying notes 39-40 supra.
88. 81 N.J. at 103-04, 405 A.2d at 371.
89. Id. at 106, 405 A.2d at 371.
90. Id. at 105, 405 A.2d at 371. See generally Note, Zoning According to Biological or
Legal Relationships is Violative of the New Jersey Constitution, 11 Seton Hall L. Rev.
112 (1980).
and unrelated groups violate the fundamental right of privacy, a right specifically guaranteed by the California Constitution. In City of Santa Barbara v. Adamson, Ms. Adamson lived in her large ten bedroom home along with eleven other individuals, none of whom were related by blood, marriage, or adoption. Santa Barbara’s definition of “family” prohibited more than five unrelated persons from living together. The California Supreme Court found the prohibition to violate the privacy rights of unrelated individuals to choose their living companions. In evaluating the ordinance, the court applied the strict scrutiny standard necessitating that the city show a compelling state interest to justify burdening the fundamental rights of members of unrelated households. Santa Barbara failed to meet this exacting standard. The majority found that the classification distinguishing between related and unrelated individuals did little to promote the factors that gave a residential family neighborhood its unique characteristics. Stability and peacefulness are not necessarily inherent in modern family groups, nor are transience and disorderliness necessarily characteristic of unrelated groups. Restricting households consisting of unrelated individuals to a specified number of persons while imposing no such ceiling on households formed by related individuals thus rationally does little to limit population density or combat the problems of traffic and congestion.

Adamson represents the first state court decision to invalidate this type of zoning ordinance on a fundamental rights theory. In

91. “All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining safety, happiness and privacy.” Cal. Const. art. I, § 1.
92. 27 Cal. 3d 123, 610 P.2d 436, 164 Cal. Rptr. 539 (1980).
93. Section 28.04.230 of Santa Barbara’s zoning ordinance, cited in City of Santa Barbara v. Adamson, 27 Cal. 3d 123, 127, 610 P.2d 436, 437-38, 164 Cal. Rptr. 539, 540-41 (1980), provided: “Family. 1. An individual, or two (2) or more persons related by blood, marriage or legal adoption living together as a single housekeeping unit in a dwelling unit. . . . 2. A group of not to exceed five (5) persons, excluding servants, living together as a single housekeeping unit in a dwelling unit.”
94. Id. at 130-34, 610 P.2d at 439-42, 164 Cal. Rptr. at 542-45.
95. Id. at 131, 610 P.2d at 440, 164 Cal. Rptr. at 543.
96. Id. at 134, 610 P.2d at 442, 164 Cal. Rptr. at 545.
97. Id. at 132-33, 610 P.2d at 440-42, 164 Cal. Rptr. at 544-45.
98. Id.
99. The Baker court, in dictum and in a footnote, observed that the ordinance in question violated the privacy of unrelated individuals, but the holding rested squarely on substantive due process grounds. 81 N.J. at 109, 114 n.10, 405 A.2d at 372, 375.
so doing, California has departed from the traditional deference that courts since *Euclid*\(^\text{100}\) have afforded communities in zoning matters\(^\text{101}\).

In light of the *Adamson* court’s reasoning, it was unnecessary to invalidate the ordinance on a fundamental rights ground.\(^\text{102}\) The reasons used to show the lack of a compelling state interest would have supported invalidation had the less strict substantive due process standard been applied as in the New Jersey case.\(^\text{103}\)

The right to privacy in California, however, is in an embryonic stage of development. It was only in 1972 that the voters amended the state constitution expressly to guarantee the right of privacy,\(^\text{104}\) and prior to *Adamson*, the state’s supreme court had decided only two privacy cases based on the amendment.\(^\text{105}\) Both of those cases unequivocally interpreted the intent underlying the privacy amendment, as expressed by the proponents’ argument in the electoral pamphlet, to be the curtailing of information gathering activities by the government.\(^\text{106}\) Yet in *Adamson*, the court departed

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100. "If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control." Village of Euclid v. Amber Realty Co., 272 U.S. 365, 388 (1926) (citing Radice v. New York, 264 U.S. 292, 294 (1924)). See also Lockard v. City of Los Angeles, 33 Cal. 2d 453, 202 P.2d 38 (1949).


102. See note 13 supra.

103. See text accompanying notes 83-90 supra.

104. See note 91 supra.


106. "Although the general concept of privacy relates . . . to an enormously broad and diverse field of personal action and belief, the moving force behind the new constitutional provision was a more focused privacy concern, relating to the accelerating encroachment on personal freedom and security caused by increased surveillance and data collection activity in contemporary society. The new provision's primary purpose is to afford individuals some measure of protection against this most modern threat to personal privacy." White v. Davis, 13 Cal. 3d 757, 773-74, 533 P.2d 222, 233, 120 Cal. Rptr. 94, 105 (1975) (footnotes omitted). After delineating the intent underlying the passage of the privacy amendment, the court in *White* held that it was a violation of privacy for police officers to pose as students at a university. *Id.* at 776, 533 P.2d at 234-35, 120 Cal. Rptr. at 106-07. In People v. Privitera, 23 Cal. 3d 697, 691 P.2d 919, 153 Cal. Rptr. 431 (1979), the court rejected the contention that a state law prohibiting the use of laetrile constituted an invasion of privacy, again emphasizing that the intent of the amendment was to curtail information gathering activities by the government, and that "[i]n the absence of any evidence that the voters in amending the California Constitution to create a right of privacy intended to protect [the use of laetrile], we have no hesitation in holding that its prohibition does not offend that constitutional provision." *Id.* at 709-10, 591 P.2d at 926, 153 Cal. Rptr. at 438.
from its prior reasoning to interpret the voter's intent as also encompassing the right of unrelated individuals to determine their living companions.\textsuperscript{107} This interpretation was based on several statements in the voter's pamphlet.\textsuperscript{108} When these statements are read in context, however, little support is provided for the Adamson majority's conclusion that the amendment was intended to extend the protection of privacy to zoning matters in general, and to the choice of individuals to form associational families specifically,\textsuperscript{109} a point emphasized by the dissent.\textsuperscript{110} The court perhaps regarded Adamson not so much as a zoning question but as an opportunity to delineate further the parameters of the privacy right in California. As such, the decision may prove to be of little precedential value with respect to single-family zoning issues in other jurisdictions, particularly in those lacking an express constitutional guarantee of privacy.\textsuperscript{111}

The essential difference between Belle Terre and those cases

\textsuperscript{107} 27 Cal. 3d at 130, 610 P.2d at 439-40, 164 Cal. Rptr. at 542.

\textsuperscript{108} "The right of privacy is the right to be left alone. It is a fundamental and compelling interest. It protects our homes, our families, our thoughts, our emotions, our expressions, our personalities, our freedom of communion and our freedom to associate with the people we choose." Id. (emphasis added by the court).

\textsuperscript{109} The section of the voter's pamphlet quoted by the court stated: "The proliferation of government snooping and data collecting is threatening to destroy our traditional freedoms. Government agencies seem to be competing to compile the most extensive sets of dossiers of American citizens. Computerization of records makes it possible to create 'cradle-to-grave' profiles on every American.

"At present there are no effective restraints on the information activities of government and business. This amendment creates a legal and enforceable right of privacy for every Californian.

"The right of privacy is the right to be let alone. It is a fundamental and compelling interest. It protects our homes, our families, our thoughts, our emotions, our expressions, our personalities, our freedom of communion and our freedom to associate with the people we choose. It prevents government and business interests from collecting and stockpiling unnecessary information about us and from misusing information gathered for one purpose in order to serve other purposes or to embarrass us." Proposed Amendments to Constitution, Proposition and Proposed Laws Together with Arguments 26-27 (Nov. 7, 1972) (compiled by George H. Murphy, Legislative Counsel, State of California) (emphasis in original).

When the section is read as a whole, it is obvious that the amendment was proposed to protect individuals from government intelligence gathering, as the California Supreme Court stated in White v. Davis, 13 Cal. 3d 757, 533 P.2d 222, 120 Cal. Rptr. 94 (1975).

\textsuperscript{110} 27 Cal. 3d at 143, 610 P.2d at 447-48, 164 Cal. Rptr. at 550-51 (Manuel, J., dissenting).

\textsuperscript{111} The only state other than California that expressly guarantees the right of privacy in its constitution is Alaska. ALASKA CONST. art. 1, § 22. Alaska's Supreme Court has held that the citizens of Alaska have a basic right to privacy in their homes. Ravin v. State, 537 P.2d 494, 504 (Alaska 1975).
rejecting it seems to rest on the defined purposes of single-family zoning. The Supreme Court in Belle Terre envisioned single-family districts for use exclusively by traditional families. In contrast, courts in California, New Jersey, and similar jurisdictions perceive these residential areas to be designed for use more aptly described as a "family style of living." Such courts emphasize the qualities generally evoked by the phrase and view the preservation of stable, uncongested residential areas of low population density as a legitimate goal of single-family zoning. From this perspective, it is irrational to focus on the biological or legal relationship among the users because neither consanguinity nor affinity necessarily guarantees stability, few cars, or low population density. Rather, it is the kind of use to which a dwelling is put, and the number of users, whether related or unrelated, that is important.

Use and Density: The Problems Faced by Communities in States Rejecting Belle Terre

Municipalities located in jurisdictions declining to follow Belle Terre are faced with the challenge of devising ordinances that will preserve successfully the unique characteristics of single-family zoning without infringing upon the constitutional rights of the residents. Essentially, the problem is twofold. First, the ordinance must ensure that the kind of use to which a dwelling is put is compatible with the residential characteristics of the single-family zoned area. Second, and more importantly, the issue of density control must be addressed.

Low population density is the essence of single-family zoning,

112. See text accompanying notes 53-54 supra.
115. "Local governments are free to designate certain areas as exclusively residential and may act to preserve a family style of living. A municipality is validly concerned with maintaining the stability and permanence generally associated with single family occupancy. . . . [A] municipality has a strong interest in regulating the intensity of land use so as to minimize congestion and overcrowding." State v. Baker, 81 N.J. 99, 106, 405 A.2d 368, 371 (1979) (citations omitted).
116. See text accompanying notes 38-39, 80-83 supra.
117. At least 37 California communities had restrictive definitions of "family" at the time the decision was rendered. City of Santa Barbara v. Adamson, 27 Cal. 3d 123, 138 n.1, 610 P.2d 436, 444, 164 Cal. Rptr. 539, 547 (1980) (Manuel, J., dissenting).
the characteristic that distinguishes it from other types of residential zoning. Municipalities long have had the unquestioned authority to establish classifications of residential districts based on intensity of use and to exclude multifamily residences and apartment houses from areas comprised of single-family dwellings. The traditional rationale for this authority was first expressed by the Euclid Court, which reasoned that the increased noise, traffic, and congestion resulting from high density land use would pose serious dangers to children and possibly destroy the residential character of the neighborhood.

As noted previously, traditional density control techniques relied on the assumption that dwellings in single-family districts would be inhabited by the traditional family and that the number of occupants in each dwelling therefore could be theoretically anticipated. From this perspective, restrictive definitions of family merely provide an additional means of regulating density by ensuring that associational families remain more or less within the numerical limits of traditional families. The state courts invalidating restrictive definitions of family have refused to accept this argument, however, reasoning that such definitions will not limit the number of residents in a related household and therefore will do little to control density successfully. Yet, recent census figures indicate that during the past twenty years, the average related household has been composed of less than four persons, and that the number has been steadily decreasing. The ordinances at issue in both the Adamson and the Baker cases, however, established ceilings on the number of occupants in unrelated households in excess of these figures. Taken together, these facts undermine judicial objections to restrictive definitions of family as a form of

120. 272 U.S. at 394.
121. See notes 20-23 & accompanying text supra.
123. Id. at 132, 610 P.2d at 441, 164 Cal. Rptr. at 544; State v. Baker, 81 N.J. 99, 110, 405 A.2d 368, 373 (1979).
124. Preliminary results from the 1980 census indicate that the average related household is composed of 3.28 persons; in 1970, the figure was 3.58; and in 1960, the figure was 3.67. U.S. DEP’T OF COMMERCE, CENSUS BUREAU, HOUSEHOLDS AND FAMILIES BY TYPE, Series P-20, No. 357 (Oct. 1980).
125. See notes 84, 93 supra.
density control as the definitions allow a density greater than that in the average family.\textsuperscript{126}

This argument does not suggest that the courts were mistaken in invalidating restrictive definitions of family. Standing alone, such definitions present too many opportunities for potential abuse to justify their use as a means of density control. Furthermore, in the present era of double digit inflation\textsuperscript{127} and skyrocketing housing prices,\textsuperscript{128} it is not unlikely that more unrelated people will form households simply to be able to afford the cost of a dwelling in a residential area. As long as the use of a dwelling by an unrelated household of reasonable size is compatible with the character of the district and the infrastructure of the community is not overtaxed, there is insufficient justification to warrant intrusion into the choice of individuals to reside together.

However, the ramifications of density control extend beyond the single family district to land use planning in general. Regulation of density is crucial for developing communities with limited sewage, water, or other essential systems and services.\textsuperscript{129} Without a means of regulating the number of occupants in a residence, the assumptions upon which the traditional means of controlling density depend are undermined, thereby affecting the efficacy of the techniques themselves. Traditional density limitations, such as restrictions on lot or building size, may not alone serve to limit the number of occupants as effectively as when coupled with a regulation directly affecting the permissible number of residents, such as a restrictive definition of family. A developing community that has planned its expansion using traditional techniques can no longer be assured that its public facilities will not be overtaxed by associational families of greater size than the average related household.

\textsuperscript{126} See Palo Alto Tenants' Union v. Morgan, 321 F. Supp. 908, 912 (N.D. Cal. 1970), aff'd per curiam, 487 F.2d 883 (9th Cir. 1973), cert. denied, 417 U.S. 910 (1974). Of course, this reasoning is not applicable to ordinances that define "family" as less than four unrelated persons.

\textsuperscript{127} The Bureau of Labor Statistics recently reported that inflation rose by 12.4\% in 1980. San Francisco Chronicle, Jan. 24, 1981, at 1, col. 5.

\textsuperscript{128} According to a study by the Bay Area Council, the average single-family residence in the nine-county San Francisco Bay Area now costs $109,000, as compared to between $25,000 and $30,000 in 1970. San Francisco Chronicle, Dec. 6, 1980, at 5, col. 1.

The New Jersey Approach

The New Jersey courts have been the most active forum for litigating restrictive definitions of "family" and have developed a twofold approach to the dilemma faced by communities in zoning for single-family residential areas, an approach that the Adamson court apparently agrees is the most reasonable solution to the problem. The New Jersey Supreme Court has recommended that use of single-family dwellings be restricted to bona fide single housekeeping units, and that density be controlled by restricting the number of occupants in proportion to habitable floor space.

The concept of the bona fide single housekeeping unit was first articulated by the New Jersey Supreme Court in Berger v. State. The court suggested in dictum that communities could achieve the legitimate goal of "maintaining a peaceful family residential style of living" by "restrict[ing] single family dwellings to a reasonable number of persons who constitute a bona fide single housekeeping unit" rather than through restrictive definitions of family. Without explaining what constitutes a bona fide single housekeeping unit, the court reasoned that this requirement would not only promote the qualities associated with single-family areas, such as permanence and stability, but also would exclude the potentially incompatible uses associated with "boarding houses, dor-

130. Since 1971, the New Jersey Supreme Court has heard three cases directly on the issue: State v. Baker, 81 N.J. 99, 405 A.2d 368 (1979); Berger v. State, 71 N.J. 206, 364 A.2d 993 (1976); and Kirsch Holding Co. v. Borough of Manasquan, 59 N.J. 241, 281 A.2d 513 (1971). Additionally, a number of cases concerning restrictive definitions of "family" have been heard by the state's lower courts. See, e.g., Gabe Collins Realty, Inc. v. City of Margate City, 112 N.J. Super. 341, 271 A.2d 430 (1970). In contrast, there is only one California appellate level decision on this issue, see Brady v. Superior Court, 200 Cal. App. 2d 69, 19 Cal. Rptr. 242 (1962), and one federal court decision prior to Adamson, see Palo Alto Tenants' Union v. Morgan, 321 F. Supp. 908 (N.D. Cal. 1970), aff'd per curiam, 487 F.2d 883 (9th Cir. 1973), cert. denied, 417 U.S. 910 (1974).

131. See 27 Cal. 3d at 133-34, 610 P.2d at 442, 164 Cal. Rptr. at 545. See also Moore v. City of East Cleveland, 491 U.S. 494, 500 n.7 (1997).


134. 71 N.J. 206, 364 A.2d 993 (1976). The controversy in Berger centered on whether a state home for handicapped children violated the local ordinance's definition of "family." The court did not directly reach this issue as it found state homes to be immune from local zoning ordinances. Id. at 218, 281 A.2d at 999.

mitory and institutional living." Further, as the term refers to the type of use to which a single-family dwelling is put rather than to the consanguinity of the users, the regulation would avoid the pitfalls of excessive ness and thus would comply with the requirements of substantive due process.

In the subsequent Baker decision, the New Jersey court reiterated its support for the concept of the bona fide single housekeeping unit as a means of achieving the goals of the ordinance, although it still failed to offer a definition of the term. The dissent, however, pointed out that the bona fide single housekeeping criterion would do little to ensure the low population density of single-family districts. Rather, standing alone, the requirement may allow for multifamily occupancy or for an unrestricted number of unrelated persons living together. The majority disagreed, implying, without further elaboration, that the qualification of "bona fide" would prevent multifamily occupancy and noting that municipalities may limit population by requiring a minimum amount of habitable floor space per occupant. A restriction of this nature, applicable to both related and unrelated households, is more rationally related to a community's legitimate aim of controlling population density, reasoned the Baker court, than an ordinance placing a numerical ceiling on the number of individuals that may live in unrelated households while allowing an unrestricted number of related persons to occupy a single dwelling. The decision failed to indicate, however, what a reasonable occupant-to-area ratio would be.

New Jersey's twofold approach would appear to resolve many of the constitutional problems faced by communities in jurisdictions rejecting Belle Terre, including California. By defining "fam-

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136. 71 N.J. at 225, 364 A.2d at 1003.
137. Id.
139. Id. at 108-09, 405 A.2d at 372.
140. "Municipal officials remain free to define in a reasonable manner what constitutes such a unit." Id. at 109 n.3, 405 A.2d at 373.
141. Id. at 115-16, 405 A.2d at 376 (Mountain, J., dissenting).
142. Id. See text accompanying notes 166-70 infra.
143. The dissent's objection, stated the majority, "ignores the fact that municipalities are empowered to restrict residences to groups which actually constitute bona fide single-housekeeping units—the true criterion of single residence dwellings." 81 N.J. at 109 n.3, 405 A.2d at 372.
144. Id. at 110, 113, 405 A.2d at 373-74.
145. Id.
ily" as a bona fide single housekeeping unit, an ordinance would focus on the kind of use to which a dwelling is placed instead of on the kinship of the users.\textsuperscript{146} Occupant-to-area ratios as a means of density control can be applied to both related and associational families. Thus, the method does not unfairly affect the rights of individuals to choose their living companions and does not exclude living arrangements that "bear the generic character of a family unit . . . in every but a biological sense."\textsuperscript{147}

A critical evaluation of New Jersey's twofold approach, however, raises suspicions regarding its efficacy in maintaining the singular qualities of single-family zoning, particularly in its ability to preserve the low density character of these districts. First, the concept of a "bona fide" housekeeping unit has not been given precise definition.\textsuperscript{148} While this problem is not insurmountable and, in fact, may provide a convenient and unobjectionable means for a community to control the use to which a dwelling in a single-family zone is placed,\textsuperscript{149} it will not limit the number of occupants in a residence,\textsuperscript{150} contrary to the Baker majority's assertion. Furthermore, occupant-to-area ratios will not fulfill this objective. Not only do occupant-to-area ratios present serious problems that the New Jersey and California courts have overlooked,\textsuperscript{151} but, given the special constitutional protections afforded to families as articulated by Moore, it is unlikely that an occupant-to-area ratio will be enforced against related households.\textsuperscript{152}

\textbf{Single Housekeeping Unit}

Although the New Jersey courts have failed to define "single housekeeping unit," ordinances that do define the term generally fall into one of three categories. One type of ordinance defines the term as any number of individuals living and cooking together.\textsuperscript{153}

\begin{itemize}
\item \textsuperscript{146} "[Z]oning ordinances are much less suspect when they focus on the use than when they command inquiry into who are the users." City of Santa Barbara v. Adamson, 27 Cal. 3d 123, 133, 610 P.2d 436, 441-42, 164 Cal. Rptr. 539, 544-45 (1980) (emphasis deleted).
\item \textsuperscript{147} City of White Plains v. Ferraioli, 34 N.Y.2d 300, 305-06, 313 N.E.2d 756, 758-59, 357 N.Y.S.2d 449, 453 (1974).
\item \textsuperscript{148} See notes 153-63 & accompanying text infra.
\item \textsuperscript{149} See text accompanying notes 164-65 infra.
\item \textsuperscript{150} See text accompanying notes 166-70 infra.
\item \textsuperscript{151} See notes 171-207 & accompanying text infra.
\item \textsuperscript{152} See text accompanying notes 197-202 infra.
\item \textsuperscript{153} "A family is one or more individuals living, sleeping, cooking or eating on premises as a single housekeeping unit." VILLAGE OF WHITEFISH BAY ZONING ORDINANCE
\end{itemize}
Another type distinguishes a group living as a single housekeeping unit from one occupying a boarding house, fraternity, club, or hotel. A third type defines the term by emphasizing access to common areas by all members of the household. Each of these definitions, in its own way, evokes the characteristics associated with a family lifestyle. Yet the variation in definition has resulted in courts evaluating the existence of a single housekeeping unit on the basis of different criteria, leading to disparate results in similar factual situations.

For example, a Kentucky and a Connecticut decision both concerned groups of nurses living in single-family dwellings owned and operated by their respective hospital employers. In both households residents had access to kitchen facilities for preparing snacks, but took their regular meals at the hospitals. The Connecticut court held that the group did not constitute a “family” because they did not cook or eat together as required by the definition of a single housekeeping unit. Conversely, the Kentucky opinion did not even consider whether the household cooked together because the local ordinance merely distinguished a single housekeeping unit “from a group occupying a hotel, club, fraternity or sorority house.” Because the household did not fit into one of the excluded categories, it was deemed to be a single housekeeping unit.

The purpose underlying an ordinance restricting use of a


154. “One or more persons occupying the premises as a single housekeeping unit, as distinguished from a group occupying a boarding house, lodging house, club, fraternity or hotel.” Town of Chester Zoning Regulations, art. IIg, cited in Oliver v. Zoning Comm’n of Chester, 31 Conn. Supp. 197, 205, 326 A.2d 841, 845 (C.P. 1974).


156. Robertson v. Western Baptist Hosp., 267 S.W.2d 395 (Ky. 1954).


158. Id. at 217, 347 A.2d at 639. The ordinance was amended in 1974 to prohibit occupancy by more than five unrelated individuals. At issue was whether 31 nurses living in three separate dwellings each constituted a single housekeeping unit, thereby qualifying as a nonconforming use under the amended regulation. See note 34 supra.

159. 267 S.W.2d at 397.

160. Id.
dwelling to a bona fide single housekeeping unit is to ensure that such use is compatible with a district characterized by a residential family style of living. An ordinance requiring that a household live and cook together may evoke the traditional image of family life. Regulating the internal activities of the household, however, seems just as objectionable as legislating the relationship of its members and has just as little relation to the overall characteristics of a neighborhood. On the other hand, an ordinance distinguishing a single housekeeping unit from a hotel or boarding house is obviously designed to exclude transient uses that would be inconsistent with the qualities of stability and permanence associated with single-family neighborhoods. There is a danger, however, in defining a single housekeeping unit in the negative in that the list of excluded uses may be incomplete. A court giving strict and literal construction to the ordinance then may allow an unspecified use of a dwelling that is essentially incompatible with the district. For example, a large group of nurses living with a “housemother,” not out of a common, voluntary choice to share their household, but by virtue of their employment, is such an incompatible use, more reminiscent of a dormitory arrangement than of a family style of living.

If the concept of a single housekeeping unit is to be characterized as a family-style living arrangement, as the state courts consistently hold, then arguably the essential underlying quality is that of unity. Not only are the household expenses and maintenance a matter of common concern to all members of the group, 161 An ordinance of this nature may satisfy the New Jersey standard. Although the Baker court declined to define “bona fide single housekeeping unit,” it decided, without elaboration, that the household in controversy “was of sufficient permanence so as to resemble a more traditional extended family” and thus constituted a bona fide single housekeeping unit. 81 N.J. at 114, 405 A.2d at 375. “Permanence” and “resemblance to a traditional family,” appear, therefore, to be the criteria to be used in determining the existence of a single housekeeping unit in New Jersey. However, these adjectives are also open to different interpretation and application. Compare City of White Plains v. Ferraioli, 34 N.Y.2d 300, 313 N.E.2d 756, 357 N.Y.S.2d 449 (1975) (group of college students lacked sufficient permanence to constitute a single housekeeping unit as the members would change each school year) with Town of Durham v. White Enterprises, 115 N.H. 645, 348 A.2d 706 (1975) (“permanence” was not a relevant factor in court’s finding that a group of college students constituted a single housekeeping unit).

162 See Robertson v. Western Baptist Hosp., 267 S.W.2d 395, 396 (Ky. 1954).

but most importantly the residence itself is used as a whole. It
therefore would seem that the third type of ordinance, which de-
fines a single housekeeping unit in terms of the occupants having
access to all parts of the dwelling, or at least to the common areas,
would be the most reasonable and effective means of restricting
use of single family dwellings. A 1962 California appellate court
decision most clearly articulates this approach. After defining
“single family dwelling” to refer to use by a group as a single
housekeeping unit rather than by a related household, the court
observed:

“Single family dwelling” designates the joint occupancy and
use of the dwelling by all of those who live there. The word “sin-
gle” precludes the segregation of certain portions or rooms for
rental. It forecloses multiple occupancy of certain portions of the
unit for rental as a segregated part, or parts, of the unit. “Dwell-
ing” means the whole of the premises used for living purposes. It
must include the use of the common rooms, such as the kitchen,
dining room, living room . . . by all occupants. It refers to and
reinforces, the concept of singular use, as opposed to multiple.
The “dwelling” cannot be fragmentized into broken bits of hous-
ing for rental return. “Family” signifies living as a family; it in-
hibits the breaking up of the premises into segregated units . . . .
The word refers to the use of the premises as a family. Such
family use, again, would and must be, a single and common use of
the premises.

An ordinance emphasizing use of the entire residence by all
household members would restrict occupancy to unified groups
without encountering the objections raised to the other ap-
proaches. Defining a single housekeeping unit in terms of area ac-
cess is more in keeping with the zoning function of regulating land
use than is defining the concept by reference to the internal activi-
ties of the household.

It therefore would appear that a carefully worded definition
of single housekeeping unit successfully may ensure that certain char-
acteristics associated with single-family zoning are preserved. By
restricting use of single-family dwellings to such living arrange-
ments, a community may have a viable means of excluding com-
mercial, transient, and institutional uses that are incompatible with
the residential quality of the district. This form of use restric-

165. Id. at 77, 19 Cal. Rptr. at 247 (emphasis in original).
tion, however, will not preserve the low population density of a single-family area, as the dissent in *Baker* validly emphasized. Case history indicates that, once the group in question has been found to be living as a single housekeeping unit, the courts will consider the number of the group irrelevant. As a result, twenty nurses, four sisters, their husbands and eight children, and sixty religious students have been found to constitute single housekeeping units.

**Regulating Number of Occupants in Relation to Floor Space**

The *Baker* court suggested that municipalities resolve the problem of density control by enacting regulations that limit the number of occupants in relation to habitable floor space. Both the *Baker* court and the *Adamson* court reasoned that an ordinance of this nature is more rationally related to a municipality's legitimate objective of preventing overcrowding than one that limits the number of occupants in unrelated households without placing a comparable ceiling on the number of individuals in related households. Because of this relationship, the ordinance would serve to further the public health and would thus constitute a valid exercise of a community's police power.

A major problem facing single-family districts, however, is not merely to prevent an overcrowded environment but to maintain an uncrowded environment. Space-related standards successfully may prevent overcrowding, and thus be directly related to the public health, yet not suffice to maintain the much lower population density of single-family districts. To illustrate, the American Public Health Association Model Housing Code recommends that a dwelling unit have a minimum of 150 square feet of habitable floor.

166. See text accompanying notes 141-42 supra.

167. "The city's legislative body has the right to define the term family. It has done so placing no limitation on the number of persons constituting a family . . . . We may not impose any restrictions not contained in the ordinance." Application of La Porte, 2 A.D.2d 710, 152 N.Y.S.2d 916, 918 (1956).

168. See Robertson v. Western Baptist Hosp., 267 S.W.2d 395 (Ky. 1954).


171. See text accompanying notes 130-31 supra.


173. Id. at 110, 405 A.2d at 373.
space for the first occupant and 100 square feet for each additional occupant, a standard cited with apparent approval in several New Jersey cases. The twenty-four room, ten bedroom house in the Adamson case had 6,231 square feet. Applying the American Public Health Association's figures, sixty-one individuals could occupy the dwelling without endangering the public health. Sixty-one people residing in a single residence hardly seems to be in keeping with Justice Douglas's vision of single-family districts in Belle Terre, a description legitimized as a proper objective of single-family zoning even by those jurisdictions disagreeing with Belle Terre's conclusion:

A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs. The police power is not confined to elimination of filth, stench and unhealthy places. It is ample to lay out zones where family values, youth values and the blessings of quiet seclusion and clean air make the area a sanctuary for people.

Space-related standards also defeat the essential rationale underlying the exclusion of apartment buildings or multifamily dwellings from single-family zoned districts. The result of large numbers of people residing in a single building is the same, whether it be a single-family dwelling or an apartment house. Yet, although a community has the unquestioned right to prohibit structures housing large numbers of people living in separate units, apparently it does not have the authority to do so if such individuals are living as one housekeeping unit and pose no threat to the public

174. See 2 Rathkopf, supra note 14, § 34.07, at 34-61.
175. See, e.g., Homebuilders League of S. Jersey, Inc. v. Township of Berlin, 81 N.J. 127, 143, 405 A.2d 381, 390 (1979). This opinion also points out that the standard is currently recommended by the United States Department of Housing and Urban Development. Id.
176. 27 Cal. 3d at 128, 610 P.2d at 438, 164 Cal. Rptr. at 541.
177. This computation assumes that all 6,231 square feet would be classified as "habitable" floor space. Typically, "habitable" floor space is defined as "gross floor area less garages, open patios, basements and unfinished attics." Homebuilders League of S. Jersey, Inc. v. Township of Berlin, 81 N.J. 127, 137, 405 A.2d 381, 387 (1979). See also Nolden v. East Cleveland City Comm'n, 12 Ohio Misc. 215, 232 N.E.2d 421 (1966).
180. See text accompanying notes 118-20 supra.
If limiting the number of residents in relation to floor space is to be effective, the adoption of a lower ratio of occupants to floor space in single-family districts is required. However, because this approach would be designed to maintain an uncrowded environment rather than to prevent an overcrowded one, it logically cannot be justified in terms of the public health. As long as density measures are justified in terms of the public health, arguably any departure from the American Public Health Association’s recommended standards required to maintain a healthy environment will arouse the suspicion of the courts. For example, in one New Jersey case, the plaintiff, his wife, and their five children lived in a four and one-half room apartment of 540 square feet. A town ordinance mandated a minimum of 150 square feet for each of the first two occupants and 100 square feet for each additional resident, which meant that the family required an additional 260 square feet. Although this standard was only slightly higher than that recommended by the American Public Health Association, the court raised serious questions in dictum regarding the validity of

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181. See text accompanying notes 182-92 infra.
182. For example, a recent decision held an ordinance requiring minimum floor space in new developments to be invalid if unrelated to other factors such as number of occupants. The New Jersey Supreme Court observed that different minima were required for various residential zones. However, as “minima necessary for public health, safety and morals in the [different] zones are unquestionably the same, it follows that the Township was not considering health, safety and morals when it enacted these provisions. . . . ‘It is ridiculous to suggest that a 1,100 square foot house may be ‘healthful’ in one part of town and not another.’” Homebuilders League of S. Jersey v. Township of Berlin, 81 N.J. 127, 143-44, 405 A.2d 381, 390 (1979)(quoting Home Builders League of S. Jersey v. Township of Berlin, 157 N.J. Super. 586, 601, 385 A.2d 295, 302 (1978)). See also Haar, Zoning for Minimum Standards: The Wayne Township Case, 66 HARV. L. REV. 1051 (1953); Note, Zoning — Municipalities Must Prove that Economically Exclusionary Minimum Floor Area Requirements Relate to Legitimate Zoning Goals, 11 RUT.-CAM. L.J. 517 (1980).
184. “Every dwelling unit shall contain at least 150 square feet of floor space for each occupant thereof up to a maximum of two occupants and at least 100 additional square feet of floor space for every additional occupant thereof . . . .” REVISED ORDINANCE OF CLIFTON ch. 9, art. 3, § 9-31(a), cited in Sente v. Mayor of Clifton, 66 N.J. 204, 212-13, 330 A.2d 321, 325 (1974).
185. See text accompanying note 165 supra.
186. 66 N.J. at 206, 330 A.2d at 322-23. The plaintiff and his family resided in the apartment as partial compensation for his employment as building superintendent. The time the case was heard on appeal, the plaintiff had moved. The civil liberties organization which carried on in the plaintiff’s name was deemed not to have standing and the controversy was considered moot.
the ratio. Although assuming that a community “may legitimately require a minimum floor area for living units based on the number and character of the occupants in the interest of the public health,”187 the majority concluded that the real issue was whether the prescribed minimum was reasonable, “and if so, whether the regulation was actually adopted for health reasons.”188 Because an ordinance of this kind drastically affects the availability of housing, particularly for large or poor families, the court wondered whether a municipality should not be required to demonstrate that the ratio actually prevents a substantial health hazard and is not merely a form of exclusionary zoning.189

The Baker court cited the foregoing decision in support of its conclusion that occupant-to-area ratios provide a more rational means of controlling density than do restrictive definitions of family.190 Yet the cited opinion evidenced strong doubts regarding the validity of a standard almost identical to that of the Model Housing Code, leading one to suspect that the legality of any such measure will be justified only upon the strongest showing of a public health problem.191 Further, if the court was hesitant to uphold an ordinance requiring 800 square feet for seven persons, it is doubtful that a higher standard sufficient to maintain a low-density environment would be found valid. In light of New Jersey’s inconsistency in advocating space-related restrictions while reviewing them with great wariness, one wonders whether the preservation of low-density districts truly remains a valid and viable objective of sin-

187. Id. at 208, 330 A.2d at 323.
188. Id.
189. Id. at 208-09, 330 A.2d at 323. Exclusionary zoning has been defined as “zoning that raises the price of residential access to a particular area, and thereby denies that access to members of low income groups.” Sager, Tight Little Islands: Exclusionary Zoning, Equal Protection and the Indigent, 21 STAN. L. REV. 767 (1969).
191. In a recent California appellate decision, the court admitted that the communal households in question were overcrowded. City of Chula Vista v. Pagard, 115 Cal. App. 3d 785, 789, 171 Cal. Rptr. 738, 742 (1981). While it suggested that occupant-to-area ratios may prevent such problems, the court noted that the Moore decision may preclude enforcement of such methods against related families while the Adamson decision precluded enactment of such ordinances aimed only at unrelated individuals. Id. at 798-99, 171 Cal. Rptr. 746. See also text accompanying notes 197-207 infra. The court suggested that a nuisance action may be brought against an overcrowded household as an alternative method of coping with this problem. 115 Cal. App. 3d at 800-01, 171 Cal. Rptr. at 747. Nuisance actions were the original method of land use control. See 1 ANDERSON, supra note 16, § 3.03, at 76.9. Adopting the court’s approach would essentially mean that land use regulation has come full circle.
gle-family zoning in those states rejecting Belle Terre. Unless the courts are willing to recognize this objective, any ratio of occupants to floor space sufficient to maintain the low density nature of a single-family area will be struck down.192

Judicial concern regarding exclusionary motives is not unwarranted; the cases have proven otherwise.193 It is reasonable, however, for density controls to be considered in light of a municipality’s total zoning plan rather than on an isolated basis. Should a community enact a low density ratio on a general basis, the motives would indeed be suspect. Suspicion may be alleviated, however, by using a low ratio applicable only to single-family districts coupled with an increase in the standard that is correlated to intensity of zoned uses.194 Of course, this variable ratio could survive judicial scrutiny only if it is accepted that the purpose is to maintain a low-density environment and not simply to prevent an overcrowding that directly threatens the public health.

An alternative solution may lie in the method by which the ratio of occupants to floor space is computed. Rather than using the total habitable square footage of a residence, the area of the common rooms could be discounted, leaving only the bedroom and bathroom areas to serve as a basis.195 This method would be in line

192. To date, only one other state court has confronted the issue. In that case, the minimum standards were identical to those recommended by the Model Housing Code. An Ohio court upheld the regulation as a valid means to prevent overcrowding and considered it rationally related to the public health. Nolden v. City of East Cleveland, 12 Ohio Misc. 205, 232 N.E.2d 421 (1966). Paradoxically, the New Jersey Supreme Court in Sente seems to cite Nolden with begrudging approval, noting that it had certain “ameliorating aspects” lacking in Clifton’s ordinance. Sente v. Mayor of Clifton, 66 N.J. 204, 207, 330 A.2d 321, 322 (1974). However, the tone of the Sente opinion indicates that the reasonableness of the standard would be critically examined even in a modified regulation.


194. One community has enacted this type of ordinance. Section 140 of the Durham, New Hampshire Zoning Ordinance allows for one occupant per 300 square feet in single detached dwellings, duplexes, and townhouses; 1.5 occupants per 300 square feet in apartments; 2 residents per 300 square feet in boarding houses; and 3 occupants per 300 square feet in dormitories. The restriction applies only to unrelated persons. See Town of Durham v. White Enterprises, 115 N.H. 645, 648, 348 A.2d 706, 708 (1975).

195. A New Jersey court cursorily suggested this as a possible method of limiting population. See Kirsh Holding Co. v. Borough of Manasquan, 59 N.J. 241, 254, 281 A.2d 513, 520 (1971). The United States Department of Housing and Urban Affairs also has proposed a similar plan in which the number of permitted occupants in a residence is based on the number of bedrooms in a dwelling. U.S. DEP’T OF HOUSING AND URBAN DEVELOPMENT, HOUS-
with defining single housekeeping unit in terms of access by all members to common areas.\textsuperscript{196} If all occupants have such access, then it is only the amount of the individual living space that is of import.

\textbf{Impact of Moore on Occupant-to-Area Ratio Method of Density Control}

Even if the courts were to acknowledge the validity of a density ratio designed to maintain the low population character of a single-family district, it is doubtful whether such an ordinance constitutionally could be enforced against a related household.\textsuperscript{197} As noted, \textit{Moore v. City of East Cleveland}\textsuperscript{198} extended constitutional protection to choices of the family concerning its living arrangements.\textsuperscript{199} By so doing, it has prohibited any zoning regulation that will impact on such decisions.\textsuperscript{200} An occupant-to-area ratio applicable to both related and unrelated households alike would not be aimed directly at interfering with the choice of families to determine their living arrangements, as was East Cleveland's ordinance. An area-related standard, however, could affect indirectly such choices by preventing family members in excess of the approved ratio from residing with their relatives.

In advocating occupant-to-area ratios, the \textit{Baker} court reasoned that such a restriction, applicable to all households, was related more rationally to density control than were restrictive definitions of family.\textsuperscript{201} Yet if such measures cannot be enforced against related households, as seems likely in view of \textit{Moore}, then the enactment of such measures would be tantamount to the enactment of restrictive definitions of family and would resurrect the same problems and objections.\textsuperscript{202}

\textsuperscript{197} See note 142 & text accompanying notes 154-56 \textit{supra}.
\textsuperscript{199} 431 U.S. 494 (1977).
\textsuperscript{200} \textit{Id.} at 500.
\textsuperscript{201} See text accompanying notes 58-60 \textit{supra}.
\textsuperscript{202} \textit{81 N.J. at 110, 113, 405 A.2d at 373, 374}.
Validity of Occupant-to-Floor-Space Ratio in California

The Adamson court approved the occupant-to-floor-space ratio method of density control advocated by New Jersey's supreme court. Because the method would apply equally to both related and unrelated households, the court implied that it would not unreasonably burden the privacy rights of unrelated persons to form a household. Like the New Jersey Supreme Court, however, the California court failed to take into consideration Moore's impact on this form of density control. Additionally, it did not consider the complications created by its holding that the choice of living companions is a fundamental right. A community may restrict this fundamental right only by showing a compelling state interest and by demonstrating that the means used is necessary to further that interest. Therefore, if an occupant-to-area ratio sufficient to maintain a low density environment is to be valid, the California court must acknowledge that a community's goal to preserve an uncrowded district is a compelling state interest and that an occupant-to-area ratio is a necessary method of effectuating that interest. Yet the California Supreme Court discussed density control, as did the New Jersey court, in terms of preventing overcrowding, thus indicating that the state's judiciary will be hesitant to find the state's interest in low-density residential districts to be compelling. Therefore, a space-related approach would be a less viable means of achieving the aims of single-family zoning in California than in a jurisdiction invalidating restrictive definitions of family using the lesser standard of substantive due process.

Conditional Use Permit as an Alternative

At least two communities have enacted ordinances requiring groups of unrelated individuals in excess of the ordinances' regulatory definitions of "family" to obtain a conditional use permit.

203. 27 Cal. 3d at 133-34, 610 P.2d at 442, 164 Cal. Rptr. at 545.
204. Id. at 132-34, 610 P.2d at 441-42, 164 Cal. Rptr. at 544-45.
205. Id. at 134, 610 P.2d at 442, 164 Cal. Rptr. at 544-45.
206. See note 13 supra.
207. "Regarding 'low density' ... the ordinance limits only the number of unrelated residents. It does not limit the number of related residents, or of servants. It does not appear to have been designed to prevent overcrowding which may be a legitimate zoning goal." 27 Cal. 3d at 132, 610 P.2d at 441, 164 Cal. Rptr. at 544. This excerpt from the court's opinion also serves to illustrate judicial confusion of the two separate issues of low density and overcrowding.
prior to residing together.\textsuperscript{208} This technique arguably meets substantive due process objections in that unrelated persons are not automatically prohibited from residing together by virtue of household size. By requiring a group of unrelated individuals who desire to reside together in a single-family residential district to apply for a conditional use permit, a municipality can determine whether the group meets the definitional requirements of a bona fide single housekeeping unit and, more importantly, whether the number of occupants reasonably relates to the size of the dwelling. The municipality thereby can ensure that the density level of an area, and consequently the infrastructure, would not be adversely affected. Of course, the validity of such a determination is dependent upon the standards used by the community in evaluating an unrelated group. Because the issuance of a conditional use permit is a discretionary matter, objective criteria are essential to prevent arbitrary denial of the license. Yet in formulating the standards, a community should be free to take into consideration any particular problems it faces in providing adequate services and facilities.\textsuperscript{209}

While the conditional use permit may be feasible in other states, Adamson’s reliance on a fundamental rights theory has precluded its use in California. The court in \textit{City of Chula Vista v. Pagard},\textsuperscript{210} the first California appellate level decision to interpret and apply Adamson, invalidated Chula Vista’s ordinance requiring unrelated groups to obtain a conditional use permit.\textsuperscript{211} The court admitted that the system was related to overcrowding, was a less restrictive means of achieving the community’s goals than are definitions of family based on consanguinity, and was “relevant and rationally related to [the] control of noise, traffic and parking congestion.”\textsuperscript{212} Because the ordinance was aimed only at unrelated households, however, the court found that it suffered the same de-

\textsuperscript{208} Menlo Park Mun. Code ch. 1681, § 16.81.010 (1980) provides: “Family—Non-Conforming. A group of persons, not otherwise qualified or defined as a ‘family’ under the terms of this title, may nonetheless be permitted to reside in a single family dwelling or in a single living unit in any residential zone provided, however, that the said use shall require a use permit.” \textit{See also City of Chula Vista Mun. Ordinance} § 19.04.105 \textit{cited in City of Chula Vista v. Pagard,} 115 Cal. App. 3d 785, 171 Cal. Rptr. 738 (1981).


\textsuperscript{210} Id.

\textsuperscript{211} Id. at 796, 171 Cal. Rptr. at 745.

\textsuperscript{212} Id. at 795, 171 Cal. Rptr. at 744. The court’s statement suggests that the conditional use permit approach would satisfy substantive due process requirements.
efficiencies inherent in restrictive definitions of "family" and there-fore failed to meet constitutional muster under Adamson. Most importantly, the court pointed out that requiring an unrelated household to be licensed essentially subjects the household members' exercise of their fundamental right to privacy to the discretion of the community's planning commission. This fact in itself should have been of sufficient weight for the court to have found the ordinance unconstitutional under the standards imposed by Adamson.

Conclusion

In striking down restrictive definitions of family, the Baker court commented that, "despite the inexactitude and overinclusiveness of such regulations, we would be reluctant to condemn them in the absence of less restrictive alternatives. Such options do, however, exist." In one sense the comment is valid. A carefully drafted definition of a bona fide single housekeeping unit successfully may restrict the use of a single-family dwelling to one which is compatible with a "family style of living" without unduly affecting the rights of unrelated individuals to form a household. However, it is apparent that density control remains the primary problem facing municipalities.

If low population districts dedicated to "family values and needs" are to remain a viable zoning objective, the judiciary must recognize that preventing overcrowding and maintaining low density are two entirely separate goals. If such districts are to remain a legitimate zoning objective, the courts must be willing to accept rationales for their existence that are not rooted in public health arguments.

With such acknowledgment, it may be possible for communities outside of California to formulate density control methods that will preserve single-family districts. The conditional use permit

213. Id. at 795-96, 171 Cal. Rptr. at 744-45.
214. Id. at 796, 171 Cal. Rptr. at 744.
technique may be such a method, for the rights of unrelated individuals can be balanced against the problems faced by municipalities. In California, however, the Adamson court’s well-intentioned but inappropriate reliance on the fundamental rights theory very well may have precluded enactment of any viable means of preserving low-density districts. 217

217. “Between the federal Scylla as defined in Moore v. East Cleveland . . . and the State of California’s Charybdis as exemplified in the Adamson . . . decision, few options would appear to remain open to the city desiring to retain and promote ‘family values’ and ‘family needs.’” City of Chula Vista v. Pagard, 115 Cal. App. 3d 785, 798, 171 Cal. Rptr. 738, 746 (1981).