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Equal Protection in Zoning - Restricting Dwelling Use to No More Than Two Unrelated Persons Is Constitutional.

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CASE NOTES

CONSTITUTIONAL LAW—Equal Protection In Zoning—Restricting Dwelling Use To No More Than Two Unrelated Persons Is Constitutional.

Village of Belle Terre v. Boraas, ___ U.S. ___, 94 S. Ct. 1536, 39 L. Ed. 2d 797 (1974).

The Village of Belle Terre, a one square mile suburban municipality in New York, was zoned exclusively for one-family dwellings in 1971.[1] The ordinance prohibited more than two unrelated persons from occupying a residence within the confines of the village.

On December 31, 1971, plaintiffs Edwin and Judith Dickman rented their six-bedroom home to six unrelated students, including plaintiffs Bruce Boraas, Anne Parish and Michael Truman. On June 8, 1972, the students were informed that they were violating the zoning ordinance. On July 31, 1972, the Dickmans were served with an "Order to Remedy Violations" which notified them that failure to correct the violation might subject them to liability commencing on August 3, 1972.[2]

On August 2, 1972, plaintiffs commenced an action in the United States District Court for the Eastern District of New York[3] against the mayor and trustees of Belle Terre alleging that the zoning ordinance deprived them of

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1. 40 BROOKLYN L. REV. 226 (1973), *quoting* VILLAGE OF BELLE TERRE, N.Y., BUILDING ZONE ORDINANCE, art. I, § D-1.35a (1971), which defined family as follows:

> Family. One 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.

2. 40 BROOKLYN L. REV. 226 (1973), *quoting* VILLAGE OF BELLE TERRE, N.Y., BUILDING ZONE ORDINANCE, art. VIII, § M-1.4a(2) (1971), which provided for the following enforcement of the zoning code:

> Each violation of this Ordinance shall constitute disorderly conduct. Every person violating this Ordinance, including the owner . . . and lessee or tenant of an entire building or structure or premise in which part such violation has been committed or shall exist . . . or any person who knowingly commits, takes part or assists in any such violation . . . shall be a disorderly person and shall be liable for and pay a penalty not exceeding One Hundred Dollars ($100.00) or by imprisonment for a period not exceeding 60 days or by both such fine and imprisonment. A separate and distinct offense shall be committed on each day during or on which a violation occurs or continues.

3. Boraas v. Village of Belle Terre, 367 F. Supp. 136 (E.D.N.Y. 1972), *rev'd*, 476 F.2d 806 (2d Cir. 1973), *rev'd*, — U.S. —, 94 S. Ct. 1536, 39 L. Ed. 2d 797 (1974).

equal protection of the law and violated their constitutional rights of association and privacy. The defendants alleged that the ordinance was a valid exercise of police power because it controlled population density, prevented traffic and parking congestion, and promoted a family neighborhood. The district court upheld the validity of the ordinance. On appeal, the Court of Appeals for the Second Circuit[4] reversed, holding the ordinance to be a denial of equal protection. The Village of Belle Terre appealed to the United States Supreme Court. Held—*Reversed.* A zoning ordinance which restricts land use to families or not more than two unrelated persons does not impinge on any *fundamental* constitutional rights, and is valid because it bears a rational relationship to a permissible state objective of providing a quiet, uncongested neighborhood attractive to families.[5]

Zoning is the division of a community into districts by legislative regulations which prescribe the uses to which buildings may be put.[6] Since every zoning ordinance restricts the way a person may use his property, it follows that such ordinances represent a restriction on every person's freedom to exercise the prohibited use.[7] However, the government's power to interfere with the rights of a landowner or user by restricting the character of permitted uses is not unlimited.[8] Once a municipality has the authority to pass a zoning ordinance, there are two criteria which can be applied to determine if the ordinance is valid.[9]

The first test in resolving the validity of a zoning law is to ascertain whether it is reasonably related to the public health, safety, morals, or general welfare.[10] In determining the "reasonableness" of a zoning law, cog-

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4. Boraas v. Village of Belle Terre, 476 F.2d 806 (2d Cir. 1973).

5. — U.S. —, 94 S. Ct. 1536, 1541, 39 L. Ed. 2d 797, 804 (1974).

6. Miller v. Board of Pub. Works, 234 P. 381, 384 (Cal. 1925); City of Elizabeth City v. Aydlett, 161 S.E. 78, 79 (N.C. 1931). *See also* 8 E. McQUILLAN, MUNICIPAL CORPORATIONS § 25.07, at 28 (3d ed. 1965).

7. Circuit Court Judge Mansfield stated:

> [W]e start on the premise that almost every local zoning ordinance represents a resriction upon citizens' freedom of action in the exercise of otherwise lawful and constitutional rights with respect to the use of their land, whether it be in the operation of a business or the construction of a home.

Boraas v. Village of Belle Terre, 476 F.2d 806, 812 (2d Cir. 1973).

8. In Meyer v. Nebraska, 262 U.S. 390 (1923), the Court stated: "Determination by the legislature of what constitutes proper exercise of police power is not final or conclusive but is subject to supervision by the courts." *Id.* at 400. *See also* Nectow v. City of Cambridge, 277 U.S. 183, 188 (1928); Miller v. Board of Pub. Works, 234 P. 381, 383 (Cal. 1925).

9. 8A E. McQUILLIN, MUNICIPAL CORPORATIONS § 25.294, at 342-43 (3d ed. 1965).

10. All zoning ordinances are required to benefit the municipality in some manner. Nectow v. City of Cambridge, 277 U.S. 183, 188 (1928); Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926); Cusack Co. v. City of Chicago, 242 U.S. 526, 531 (1917); Crownover v. Musick, 107 Cal. Rptr. 681, 693 (1973); Baccus v. City of Dallas, 450 S.W.2d 389, 392 (Tex. Civ. App.—Dallas 1970), *writ ref'd n.r.e.*, 454 S.W.2d 391 (Tex. Sup. 1970); Reichert v. City of Hunter's Creek Village, 345 S.W.2d

nizance must be taken of the problem to be solved by the municipality.[11] If the classifications made between prohibited and permissible uses are not arbitrary or unreasonable, the zoning law will be upheld.[12] In fact, if the validity of the legislative classification for zoning purposes is "fairly debatable," the legislative judgment will be allowed to control.[13] This test is simply a process of discovering the objectives sought by the legislative body in enacting the law, and then determining whether the law, through these objectives, advances the health, safety, morals, or general welfare of the community.

Even though a zoning ordinance might be found pertinent to the health, safety, or general welfare of the community, the ordinance must meet still a further test in that it must not be in violation of the Equal Protection Clause of the 14th Amendment.[14] The right to equal protection of the law is a constitutional protection against what is frequently referred to as class legislation;[15] there must always be a reasonable ground for making a distinction between those falling within a given class and those who do not.[16] The initial step in resolving the equal protection question is to decide whether the challenged classification is to be tested according to the *traditional* standard or the *strict scrutiny* standard.[17]

The traditional equal protection test requires that the zoning ordinance be rationally related to a permissible state objective.[18] There must be a

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838, 842 (Tex. Civ. App.—Houston 1961, writ ref'd n.r.e.). *See also* 8 E. McQUILLIN, MUNICIPAL CORPORATIONS § 25.18, at 55 (3d ed. 1965).

11. Reed v. Reed, 404 U.S. 71, 76 (1971); Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920); Gabe Collins Realty, Inc. v. City of Margate City, 271 A.2d 430, 433 (N.J. Super. 1970).

12. Eisenstadt v. Baird, 405 U.S. 438, 447 (1972); Reed v. Reed, 404 U.S. 71, 76 (1971); Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926); Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920); Cusack Co. v. City of Chicago, 242 U.S. 526, 529 (1917); Kirsch Holding Co. v. Borough of Manasquan, 281 A.2d 513, 518 (N.J. 1971); Baccus v. City of Dallas, 450 S.W.2d 389, 391-92 (Tex. Civ. App.—Dallas), *writ ref'd n.r.e.*, 454 S.W.2d 391 (Tex. Sup. 1970).

13. In Radice v. State, 264 U.S. 292 (1924), the Court stated:

> Where the constitutional validity of a statute depends upon the existence of facts, courts must be cautious about reaching a conclusion respecting them contrary to that reached by the legislature; and if the question of what the facts establish be a fairly debatable one, it is not permissible for the judge to set up his opinion in respect of it against the opinion of the lawmaker.

Id. at 294. *See also* Baccus v. City of Dallas, 450 S.W. 389, 392 (Tex. Civ. App.—Dallas), *writ ref'd n.r.e.*, 454 S.W.2d 391 (Tex. Sup. 1970); Reichert v. City of Hunter's Creek Village, 345 S.W.2d 838, 842 (Tex. Civ. App.—Houston 1961, writ ref'd n.r.e.).

14. *E.g.*, Reed v. Reed, 404 U.S. 71, 75 (1971).

15. Myer v. Myer, 66 N.Y.S.2d 83, 90 (Sup. Ct. 1946).

16. Cotten v. Wilson, 178 P.2d 287, 290 (Wash. 1947).

17. Alexander v. Kammer, 363 F. Supp. 324, 325 (E.D. Mich. 1973).

18. San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 40, 93 S. Ct. 1278, 1300, 36 L. Ed. 2d 16, 47 (1974); Eisenstadt v. Baird, 405 U.S. 438, 447 (1972); Reed v. Reed, 404 U.S. 71, 76 (1971); McGowan v. Maryland, 366 U.S. 420,

legitimate public interest behind the classification contained in any zoning ordinance. Equal protection is denied only if the classification is without any reasonable basis.[19] If, upon judicial scrutiny, there is any evidence which would indicate a reasonable basis for the zoning ordinance, the ordinance will be sustained.[20] Under the traditional approach, the party challenging an ordinance has the burden of proving that the classification is arbitrary because there is a *presumption* of reasonableness, validity, and constitutionality of zoning ordinances.[21]

The strict scrutiny test is applicable when a *fundamental* or constitutional right is concerned.[22] This test was clearly stated by the Supreme Court in *Shapiro v. Thompson*:[23]

> [A]ppellees were exercising a constitutional right, and any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a *compelling* governmental interest, is unconstitutional.[24]

The strict scrutiny equal protection test demands that the municipality show a *compelling* reason for passing a zoning ordinance which violates a fundamental right. Unlike the traditional test, the burden of proof shifts to the municipality when a fundamental right is concerned as there is no longer a presumption of validity.[25]

425-26 (1961); Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920); Alexander v. Kammer, 363 F. Supp. 324, 325 (E.D. Mich. 1973).

19. Eisenstadt v. Baird, 405 U.S. 438, 447 (1972); McGowan v. Maryland, 366 U.S. 420, 426 (1961); Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911); Baccus v. City of Dallas, 450 S.W.2d 389, 391-92 (Tex. Civ. App.—Dallas), *writ ref'd n.r.e.*, 454 S.W.2d 391 (Tex. Sup. 1970).

20. A good definition of the traditional equal protection test was articulated by Chief Justice Warren in McGowan v. Maryland, 366 U.S. 420 (1961):

> [T]he Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. . . . A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.

Id. at 425-26.

21. McGowan v. Maryland, 366 U.S. 420, 425 (1961); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78-79 (1911); City of Lubbock v. Stewart, 462 S.W.2d 48, 49 (Tex. Civ. App.—Beaumont 1970, no writ); Baccus v. City of Dallas, 450 S.W.2d 389, 391 (Tex. Civ. App.—Dallas); *writ ref'd n.r.e.*, 454 S.W.2d 391 (Tex. Sup. 1970). *See also* 8A E. McQUILLIN, MUNICIPAL CORPORATIONS § 25.295, at 345-46 (3d ed. 1965).

22. San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 17, 93 S. Ct. 1278, 1287, 36 L. Ed. 2d 16, 33 (1973); Shapiro v. Thompson, 394 U.S. 618, 634 (1969); Alexander v. Kammer, 363 F. Supp. 324, 325 (E.D. Mich. 1973).

23. 394 U.S. 618 (1969).

24. *Id.* at 634.

25. San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 16, 93 S. Ct. 1278, 1288, 36 L. Ed. 2d 16, 33 (1973).

The plaintiffs in *Village of Belle Terre v. Boraas*[26] alleged that the zoning ordinance denied them equal protection of the law and violated their constitutional rights of association and privacy. The question of whether the zoning ordinance infringed on any constitutional right was crucial to the outcome of the case because the answer determined which equal protection test was applicable.

A fundamental constitutional right is one which is either explicitly or implicitly guaranteed by the Constitution.[27] The leading case of *Griswold v. Connecticut*[28] stated the requirement for finding an *implied* constitutional right as follows:

> The inquiry is whether a right involved "is of such a character that it cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions . . . ."[29]

Although the right of association is not mentioned in the United States Constitution, the first amendment has been construed to include the right of association as a constitutional right.[30] The right of association is the right to assemble for the advancement of beliefs and ideas[31] and the right to express one's attitudes and philosophies by membership in a group.[32]

The Supreme Court had little difficulty deciding that the plaintiffs' right of association had not been violated. Without stating the reasoning behind this determination, the Court simply stated: "It involves no 'fundamental' right guaranteed by the Constitution, such as . . . the right of association . . . ."[33]

Justice Marshall, however, based his dissent on the ground that the plaintiffs' constitutional rights had been violated, including the plaintiffs' right of association.[34] He felt that the ordinance "undertakes to regulate the way people choose to associate with each other within the privacy of their own homes."[35] As authority for his position, he cited three cases which held that unions had the right to associate with lawyers to assert their legal rights because it pertained to the social and economic benefit of the members.[36]

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26. — U.S. —, 94 S. Ct. 1536, 39 L. Ed. 2d 797 (1974).

27. San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 33, 93 S. Ct. 1278, 1297, 36 L. Ed. 2d 16, 43 (1973); Cieliczka v. Johnson, 363 F. Supp. 453, 457 (E.D. Mich. 1973).

28. 381 U.S. 479 (1965).

29. *Id.* at 493.

30. *Id.* at 482.

31. N.A.A.C.P. v. Button, 371 U.S. 415, 430 (1963); N.A.A.C.P. v. Alabama, 357 U.S. 449, 460 (1958).

32. Griswold v. Connecticut, 381 U.S. 479, 483 (1965).

33. Village of Belle Terre v. Boraas, — U.S. —, —, 94 S. Ct. 1536, 1540, 39 L. Ed. 2d 797, 803 (1974).

34. *Id.* at —, 94 S. Ct. at 1544, 39 L. Ed. 2d at 807-808.

35. *Id.* at —, 94 S. Ct. at 1545, 39 L. Ed. 2d at 809.

36. United Transp. Union v. State Bar, 401 U.S. 576 (1971); U.M.W. v. Illi-

Justice Marshall concluded that "the selection of one's living companions involves similar choices as to the emotional, social, or economic benefits to be derived from alternative living arrangements."[37]

The Belle Terre ordinance made it unlawful for three or more unrelated persons to live together within a village composed of a land area of about one square mile. The ordinance did not "regulate the way people choose to associate" or prohibit "the selection of one's living companions." Instead, the ordinance created a restriction on *where* people may associate. In fact, if Justice Marshall's reasoning were adopted, all zoning ordinances which prohibit certain uses of land would violate the right of association. For example, a family could assert that a zoning ordinance which restricts a certain land area to industries, a common zoning restriction in cities, violates their right of association because they are prohibited from associating in that area. In *Palo Alto Tenants Union v. Morgan*,[38] a case involving an almost identical ordinance to the one in question, the court stated: "The right to form such groups may be constitutionally protected, but the right to insist that these groups live under the same roof, in any part of the city they choose, is not."[39] Although one can only speculate as to the Court's reason for holding that the plaintiffs' right of association was not infringed, this might well have been its rationale.

The plaintiffs also asserted that the ordinance violated their fundamental right of privacy.[40] The implied constitutional right of privacy is as vague as the implied constitutional right of association, as shown by this statement in *Roe v. Wade*:[41] "[O]nly personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty' are included in this guarantee of personal privacy."[42]

Disagreeing with the majority, Justice Marshall felt that the plaintiffs' right of privacy had been violated because the choice of household companions "involves deeply personal considerations as to the kind and quality of intimate relationships within the home."[43] As authority for his belief that such a *personal* interest should be constitutionally protected, he cited three

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nois State Bar Ass'n, 389 U.S. 217 (1967); Brotherhood of R.R. Trainmen v. Virginia *ex rel.* Virginia State Bar, 377 U.S. 1 (1964). These cases all held that unions had the right to hire lawyers and associate for the purpose of asserting their legal rights under the constitutional right of association.

37. Village of Belle Terre v. Boraas, — U.S. —, —, 94 S. Ct. 1536, 1544, 39 L. Ed. 2d 797, 808 (1974).

38. 321 F. Supp. 908 (N.D. Cal. 1970).

39. Id. at 911-12.

40. Village of Belle Terre v. Boraas, — U.S. —, —, 94 S. Ct. 1536, 1540, 39 L. Ed. 2d 797, 803 (1974).

41. 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973).

42. *Id.* at 152, 93 S. Ct. at 726, 35 L. Ed. 2d at 176.

43. Village of Belle Terre v. Boraas, — U.S. —, —, 94 S. Ct. 1536, 1544, 39 L. Ed. 2d 797, 808 (1974).

cases which uphold the right of privacy in three areas involving personal and intimate relationships—the right of unmarried women to use contraceptives,[44] the right of married women to use contraceptives,[45] and the right to read obscene material within the privacy of one's home.[46]

As evidenced by the cases cited, the constitutional right of privacy has been upheld only when private or personal relationships have been involved. It is not clearly ascertainable whether the ordinance in question imposes a restriction on a relationship as personal as those in past cases. Since the test of whether a fundamental right is involved is so vague,[47] the issue of whether unrelated persons should be afforded the constitutional right of privacy in having absolute freedom in selecting their living companions is not only a debatable question, but also one of personal opinion. The majority evidently felt that no personal rights were invaded by the ordinance.[48] Furthermore, even if one were to believe that the choice of unrelated living companions warrants constitutional protection, the ordinance in question would still be constitutional due to the particular fact situation in *Belle Terre*. Belle Terre encompasses only a one square mile land area and there is no present threat that exclusion from Belle Terre would deny to the plaintiff students the right to live as the group that they are. On the other hand, if a city were to pass an ordinance prohibiting more than two unrelated persons from living together anywhere in the entire city, it is safe to speculate that such ordinance would be held unconstitutional.[49]

Since the majority found that the ordinance did not impinge on any fundamental rights of the plaintiffs, it applied the less stringent traditional equal protection test, rather than the strict scrutiny test. If an ordinance promotes a legitimate public interest it must be upheld under the traditional test.[50]

The Village of Belle Terre alleged that the ordinance was enacted to control population density, prevent traffic and parking congestion, and to promote a family neighborhood.[51] In determining if the ordinance denied equal protection, the Court was left with two questions: (1) are any of

44. Eisenstadt v. Baird, 405 U.S. 438, 447 (1972).
45. Griswold v. Connecticut, 381 U.S. 479, 515-16 (1965).
46. Stanley v. Georgia, 394 U.S. 557, 558 (1969).
47. Griswold v. Connecticut, 381 U.S. 479, 493 (1965).
48. The majority opinion gave no reason for holding that the constitutional right of privacy was not involved. The opinion merely stated that it does not involve "any rights of privacy." Village of Belle Terre v. Boraas, — U.S. —, —, 94 S. Ct. 1536, 1540, 39 L. Ed. 2d 797, 803 (1974).
49. If a large city were to pass a similar ordinance, the burdens and hardships placed on unrelated persons would probably be held to be "unreasonable." Such an ordinance would be invalid because all zoning laws must be reasonable. Eisenstadt v. Baird, 405 U.S. 438, 447 (1972).
50. *E.g.*, Eisenstadt v. Baird, 405 U.S. 438, 447 (1972); Reed v. Reed, 404 U.S. 71, 76 (1971); McGowan v. Maryland, 366 U.S. 420, 425-26 (1961).
51. Village of Belle Terre v. Boraas, — U.S. —, —, 94 S. Ct. 1536, 1543, 39 L. Ed. 2d 797, 807 (1974).

these objectives a legitimate state interest; and (2) if so, was the objective reasonably achieved by the ordinance?

A multitude of cases have held that the control of population density is a legitimate zoning objective.[52] The conflict in *Belle Terre* was whether the ordinance did in fact control population density and whether this objective was accomplished in a reasonable, non-arbitrary manner as required by the Equal Protection Clause.[53] The Belle Terre ordinance restricts more than two unrelated persons from living together, but contains no restriction on the number of related persons who may live together. The plaintiffs lived in a household containing six unrelated persons. An initial question might be whether a family containing less than six members will replace the plaintiffs in the Belle Terre home. Since many families contain less than six members, one's immediate response to this question might be that the ordinance appears to control population density. The number of persons sharing a home, however, is dependent on the relationship of the group and the number of rooms in the home. For example, parents usually share a room and in many instances young children share another room. The result is that a dwelling will normally accomodate a larger number of family members than unrelated persons.[54] Under this normal situation, it is very likely that, at least in some instances, the ordinance by removing unrelated persons from homes will actually operate to increase population density because families of a larger size will move into the vacant homes.[55]

Whether the population in Belle Terre would be limited by the ordinance also depends on the composition of families which move into the Village, because it cannot be disputed that many families are composed of more than three members.[56] This realization might have prompted the following statement by Circuit Judge Mansfield: "To theorize that groups of unrelated members would have more occupants per house than would traditional fam-

52. Euclid v. Ambler Realty Co., 272 U.S. 365, 392 (1926); Boraas v. Village of Belle Terre, 476 F.2d 806, 812 (2d Cir. 1973); Van Sicklen v. Browne, 92 Cal. Rptr. 786, 790 (Ct. App. 1971); Palo Alto Tenants Union v. Morgan, 321 F. Supp. 908, 912 (N.D. Cal. 1970), *aff'd*, 487 F.2d 883 (9th Cir. 1973); Midwest Bank & Trust Co. v. City of Chicago, 273 N.E.2d 519, 522 (Ill. Ct. App. 1971); Kirsch Holding Co. v. Borough of Manasquan, 281 A.2d 513, 520 (N.J. 1971); Josephs v. Town Bd., 198 N.Y.S.2d 695, 698-99 (Sup. Ct. 1960).

53. *E.g.*, Eisenstadt v. Baird, 405 U.S. 438, 447 (1972); Reed v. Reed, 404 U.S. 71, 76 (1971); Baccus v. City of Dallas, 450 S.W.2d 389, 391-92 (Tex. Civ. App.—Dallas), *writ ref'd n.r.e.*, 454 S.W.2d 391 (Tex. Supp. 1970).

54. *E.g.*, Boraas v. Village of Belle Terre, 476 F.2d 806, 809 (2d Cir. 1973), the six unrelated students all had separate bedrooms.

55. For example, a three bedroom home will normally accommodate only three unrelated persons, while a family of five or six could comfortably live in the same home with the parents and children sharing bedrooms.

56. There are some 220 residences in Belle Terre occupied by about 700 persons. The average family therefore consists of over three members. Village of Belle Terre v. Boraas, — U.S. —, —, 94 S. Ct. 1536, 1537, 39 L. Ed. 2d 797, 810 (1974).

ily groups, . . . would be rank speculation . . . ."[57] Furthermore, even if the ordinance could be construed to control population density, the manner in which the objective was sought is arbitrary. If the Village in fact intended to control population density, such objective could be achieved without discrimination against unrelated groups by simply limiting the occupancy of all homes, whether occupied by related or unrelated persons.[58] The majority opinion recognized that controlling population density is a valid zoning objective, but it failed to determine if the ordinance actually achieved this objective.

A second objective sought by the ordinance was to prevent traffic and parking congestion.[59] This also is recognized as a valid zoning objective.[60] The Village Council theorized that families usually own fewer cars than unrelated persons. Although such an assumption may not be universally true,[61] it is more probable that families will own a smaller number of cars than unrelated persons.[62] For example, it is unlikely that a family of three with a young child will own as many cars as a group of three unrelated persons. Of course, the number of cars in a family will depend on many varying factors, such as the age of the children, the family financial status, or whether both spouses have outside jobs, but it is safe to surmise that most families will own fewer cars than an equal number of unrelated persons. It is consequently *fairly debatable* whether families will own fewer cars than unrelated households. Under the traditional equal protection test, an ordinance who's validity is fairly debatable will be upheld.[63] Therefore, the objective of preventing traffic and parking congestion did not violate equal protection.

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57. Boraas v. Village of Belle Terre, 476 F.2d 806, 816 (2d Cir. 1973).

58. Judge Mansfield stated:

> [S]uch an objective could be achieved more rationally and without discrimination against unrelated groups by regulation of the number of bedrooms in a dwelling structure, by restriction of the ratio of persons to bedrooms, or simply by limitation of occupancy to a single housekeeping unit.

Id. at 817.

59. Village of Belle Terre v. Boraas, —U.S. —, —, 94 S. Ct. 1536, 1543, 39 L. Ed. 2d 797, 807 (1974).

60. *E.g.*, Euclid v. Ambler Realty Co., 272 U.S. 365, 392 (1926); Boraas v. Village of Belle Terre, 476 F.2d 806, 812 (2d Cir. 1973).

61. In Boraas v. Village of Belle Terre, 476 F.2d 806 (2d Cir. 1973), Circuit Judge Timbers in his dissent stated: "The Village need not establish that there *always* is a difference between unrelated groups and families with respect to these problems. It is enough that such differences usually exist." *Id.* at 824.

62. *Id.* at 824. "[T]he ordinance is related to the prevention of traffic, parking, and noise problems. These problems occur when one-family homes become occupied by large groups of unrelated persons. There are likely to be more people and more motor vehicles." *Id.* at 824.

63. Radice v. State, 264 U.S. 292, 294 (1924); Baccus v. City of Dallas, 450 S.W.2d 389, 392 (Tex. Civ. App.—Dallas), *writ ref'd n.r.e.*, 454 S.W.2d 391 (Tex. Sup. 1970); Reichert v. City of Hunter's Creek Village, 345 S.W.2d 838, 842 (Tex. Civ. App.—Houston 1961, writ ref'd n.r.e.).

Another objective sought through the ordinance was to promote a family neighborhood.[64] Circuit Judge Mansfield felt that the objective of making the Village of Belle Terre attractive to families was not a proper exercise of zoning authority: "Such social preferences, however, while permissible in a private club, have no relevance to public health, safety or welfare."[65] Even Supreme Court Justice Marshall, however, in his dissenting opinion, admitted that making a community attractive to families was a legitimate zoning objective.[66] This appears to be the better view. Most people would tend to agree that a community containing mostly families is more conducive to the happiness of married couples and is a better environment in which to raise their children.[67]

It could be asserted that if the Village had wanted to promote a family neighborhood, then all unrelated persons would have been banned from living in the neighborhood, instead of limiting the number of unrelated persons to two. Circuit Court Judge Timbers, in his dissent,[68] answered this problem effectively:

> The Village reasonably determined that two unrelated persons living in the same household would not substantially change the character of the neighborhood. Whether the limit should have been three or four unrelated persons, is a matter on which the Village is entitled to some flexibility. The limitation clearly contributes to the objectives of preserving a family neighborhood.[69]

The initial question concerning the validity of the Belle Terre ordinance was whether the plaintiffs' constitutional rights of association or privacy had been violated. The answer to this question was the key issue in the case because it determined which equal protection test, traditional or strict scrutiny, was applicable. There is no doubt that Belle Terre could not have met the strict scrutiny test requirement that a municipality must show a *compelling* reason for enacting a zoning ordinance. An analysis of the constitutional rights of association and privacy showed that the Supreme Court correctly held that no constitutional rights were invaded, making the traditional test controlling. The remaining issue was whether the Belle Terre ordinance achieved a permissible state objective in a reasonable, non-arbitrary manner. Although the objective of controlling population density was

64. Village of Belle Terre v. Boraas, — U.S. —, —, 94 S. Ct. 1536, 1543, 39 L. Ed. 2d 797, 807 (1974).

65. Boraas v. Village of Belle Terre, 476 F.2d 806, 815 (2d Cir. 1973).

66. Village of Belle Terre, — U.S. —, —, 94 S. Ct. 1536, 1543, 39 L. Ed. 2d 797, 807 (1974).

67. In Plaza Recreational Center v. Sioux City, 111 N.W.2d 758 (Iowa 1961), the court stated: "Zoning regulations promote the general welfare and are valid where they . . . promote the permanency of desirable home surroundings and add to the happiness and comfort of citizens." *Id.* at 763.

68. Boraas v. Village of Belle Terre, 476 F.2d 806, 818 (2d Cir. 1973).

69. *Id.* at 823.

shown to have been pursued in an arbitrary manner, the remaining two objectives, controlling traffic and parking congestion and promoting a family neighborhood, were proved to be valid exercises of zoning authority. Therefore, the Supreme Court's decision to uphold the ordinance was justified.

Although the Supreme Court was correct in its final decision, a bit of criticism is proper. The *Belle Terre* case received lengthy discussion at both the district court and appellate court levels. When the case came before the Supreme Court, it was given insufficient attention. The majority opinion did not discuss whether the council's objectives were actually being furthered by the ordinance, nor did it discuss why any constitutional rights were not involved. A better guide for the future would have resulted if the Supreme Court had given an insight to the reasoning behind the decision it rendered.

A possible consequence of the case may be a nationwide tendency to pass ordinances similar to the one in the instant case.[70] One danger of such a reaction would be a substantial limitation on unrelated persons living preferences and accommodations. This danger was recognized by the district court when the plaintiffs suggested that surrounding communities might pass similar ordinances, thereby preventing them from living together as a group: "Should that occur then plainly the facts will have changed and a different case will have been presented than is now presented."[71]

A further danger might be that communities will pass such ordinances under the guise of a proper legislative objective when in fact they are passing judgment on "undesirable" lifestyles. For example, a municipality might pass such an ordinance in order to prevent the cohabitation of unmarried persons, which is clearly outside the scope of zoning authority.[72]

The decision in *Belle Terre* must be kept in its proper perspective. Since the Village of Belle Terre contains a land area of only one square mile, it is doubtful whether a large city could pass a similar ordinance

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70. Ordinances in other states similar to the Belle Terre ordinance have been involved in litigation in the following states: California (Palo Alto Tenants Union v. Morgan, 321 F. Supp. 908, 909 (N.D. Cal. 1970), *aff'd*, 487 F.2d 883 (9th Cir. 1973)); Illinois (City of Des Plaines v. Trottner, 216 N.E.2d 116, 117 (Ill. 1966)); New Jersey (Gabe Collins Realty, Inc. v. City of Margate City, 271 A.2d 430, 435 (N.J. Super. 1970)); *cf.* District of Columbia (Moreno v. United States Dep't. of Agriculture, 413 U.S. 528 (1972)).

71. Boraas v. Village of Belle Terre, 367 F. Supp. 136, 147-48 (E.D.N.Y. 1972).

72. In fact, the plaintiffs in the Belle Terre case alleged that the ordinance was enacted to prevent unrelated persons from living together. The Supreme Court, in Village of Belle Terre v. Boraas, — U.S. —, 94 S. Ct. 1536, 39 L. Ed. 2d 797 (1974), gave this response:

> It is said that the Belle Terre ordinance reeks with an animosity to unmarried couples who live together. There is no evidence to support it; and the provision of the ordinance bringing within the definition of a "family" two unmarried people belies the charge.

Id. at —, 94 S. Ct. at 1541, 39 L. Ed. 2d at 804.