

# ZONING**PRACTICE**

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## **PRACTICE REDEFINING FAMILY**

A large, bold, black number '2' is positioned in the lower center of the cover. The background of the entire cover features red silhouettes of a family: a man, a woman, a child, and a stroller, all rendered in a solid red color against a white background.

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# Ozzie and Harriet Don't Live Here Anymore: Time to Redefine Family

By Dwight H. Merriam, FAICP

The composition of American households has changed dramatically in the last several decades, but plans and regulations have not.

🕒 The rainbow flag on a charming American home. This international symbol for gay equality also reflects a rapidly changing culture. Gay couples have been in state courts across America defending their right to live together as a legal unit, and often with children. One value is timeless: the desire for family.



Gabriel Eckert

having outlived their usefulness. For example, today's drive-up service prohibitions are often merely a vestige of the disdain for carhops of the 1950s, and not a blatant disregard for today's single mothers who need to get prescriptions filled yet cannot herd a gaggle of sick, screaming babies into a pharmacy.

This issue of *Zoning Practice* exposes the inertia of rest in the definition of family. What may have worked 50 years ago in regulating single-family uses when your author was in the fifth grade, or even 20 years ago when the new generation of planners and *Zoning Practice* subscribers were entering school, is very different from American life in 2007. The timeless challenge remains: accommodating modern needs without destroying the character of single-family neighborhoods.

## SHOW ME THE NUMBERS

On the Richter scale of demographics the numbers point to a tectonic shift:

Married couples as percent of total households: down from 78 percent in 1950 to 52 percent in 2000. The number has since fallen below the 50 percentile. Indeed, the majority household type today is single or unmarried people. This is a far cry from *Ozzie and Harriet*.

The storied married-couple household where dad works and mom stays at home with the children is represented in a mere 14 percent of households today. In other words, on a typical American street just one in seven of your neighbors' homes is a *Leave it to Beaver* household.

What about household size? This has also changed, shrinking like the gabardine pants your post-boomer offspring threw in

What do planners and zoning officials need to know about these changes, and how should plans and regulations be altered to fit contemporary households?

## GONE ARE THE OLD DAYS

Baby Boomers—born between 1946 and 1964—grew up in households profoundly different from those today. Period television shows such

as *Ozzie and Harriet*, *Father Knows Best*, *Leave it to Beaver*, and *The Brady Bunch* represented the typical household of the period, or at least the ideal. The reality was that such families were few and far between and that they were adept at concealing the painful realities of familial dysfunction.

Municipal plans and regulations suffer from the inertia of rest, holding on long after

## ASK THE AUTHOR JOIN US ONLINE!

Go online from March 19 to 30 to participate in our “Ask the Author” forum, an interactive feature of *Zoning Practice*. Dwight H. Merriam, FAICP, will be available to answer questions about this article. Go to the APA website at [www.planning.org](http://www.planning.org) and follow the links to the Ask the Author section. From there, just submit your questions about the article using an e-mail link. The author will reply, and *Zoning Practice* will post the answers cumulatively on the website for the benefit of all subscribers. This feature will be available for selected issues of *Zoning Practice* at announced times. After each online discussion is closed, the answers will be saved in an online archive available through the APA *Zoning Practice* web pages.

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with the wash: down 25 percent over 50 years from 3.38 to 2.59 persons. Planners: if your community had zero population growth over the last 50 years, the housing stock still had to grow by 25 percent just to keep up with household formation. Since 1970, the change is still 17 percent. In short, our national housing stock is physically, functionally, and economically obsolescent.

And marriage? Well, for men, the median age rose from 23 to 27 in the last 50 years, and for women—up from 20 to 25. The shifts mean that smaller, single-person households and groups of unrelated people—unmarried and without kids at home—are now living together.

### TELL IT TO THE JUDGE

More than three decades ago, against a backdrop of the demographics and zoning of the 1950s, the U.S. Supreme Court had before it a case on the definition of family. The restrictive definition was expressly intended to protect single-family “values” and neighborhoods against the worst of all invasions: college students (see *Zoning News*, May 2002, for many strategies to fend off such hordes). The place was the Village of Belle Terre, New York, and the invaders were students from Stony Brook University. In *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974), the Court upheld this definition of family under the U.S. Constitution:

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.

Read it again, please. If you are related, no problem: There is no limitation whatsoever on the number of people. When unrelated, however, only two people can live together legally.

Compare this definition with that of *Euclid*, Ohio, at the time the Supreme Court validated zoning in *Euclid v. Ambler* (1926): “Any number of individuals living and cooking together on the

who came in on the bus last week from L.A.—the household is legal. Also consider a young couple “wrongfully” cohabitating out of wedlock. These may be two unrelated people, but the living arrangement is allowed.

However, be you three Salvation Army troops living together to help others, you are illegal. Equally so, if you are a gay or lesbian couple with 25 years of life together, commit-

## The United States has 51 constitutions, and what might be perfectly constitutional under the federal constitution may be perfectly unconstitutional under a state constitution.

premises as a single housekeeping unit.” This functional (not relational) definition seems rather liberal compared to what happened later in many places to narrow the definition by “blood, marriage, and adoption.”

The *Belle Terre* decision is still good law, but it only interprets the U.S. Constitution and not the state constitutions. Remember, the United States has 51 constitutions, and what might be perfectly constitutional under the federal constitution may be perfectly unconstitutional under a state constitution. More on this later.

Try applying the U.S. Supreme Court-validated definition. If the family unit is related by blood—consider grandmother, three unemployed biker children with more tattoos than a Sturgis Festival attendee, the children’s children numbering a dozen or so from various illicit liaisons, and a handful of second cousins

ment ceremony rings, and a foster child, expect a visit from the local zoning enforcement officer.

### IN THE PRESS—NOT A GOOD THING

The implications of defining “family” hit home when none other than Miss Manners addresses it in her column, as she did on March 2, 2006, citing what she described as an “insidious” zoning ordinance. The part of the definition she found most troubling was the “cooking together” mandate, which she humorously predicted would create great tension among family members because of access to the stove (she advocates “eating together” as a better measure of family legitimacy). Miss Manners on zoning definitions; oh, how far planners have come!

Within the last year, Manassas, Virginia, made the *New York Times* for further restricting

⊕ Is any publicity good publicity? Not for Black Jack, Missouri, where the definition of family reached celebrity status when *People* magazine published an article about a couple who violated the city's prohibition of "more than three unrelated people" living together as a family. The couple was unmarried, and the woman had three children. The city ultimately amended the ordinance to include unmarried couples with children.



its definition of family to parents and children only. No aunts, uncles, or cousins are allowed. The measure was, apparently, a reaction to an influx of extended immigrant families.

Similarly, Milton, Massachusetts, made even the Seattle papers when it proposed a more restrictive definition, limiting the number of uncles, nieces, nephews, etc. (the second degree of consanguinity) to three and by creating a schedule of minimum floor areas. A Georgia municipal court judge invalidated a limitation on two to four or fewer unrelated people in multifamily neighborhoods, according to a news service report. Also in the news were the student-led riots that prompted Fort Collins, Colorado, to limit occupancy to no more than three persons. The Fort Collins website even has a detailed form and process for disclosing occupancy.

Black Jack, Missouri, a town of about 6,800 people in St. Louis County, made the pages of *People* magazine, quoting this humble author on the family definition problem, when Black Jack applied the *Belle Terre* definition with compulsive rigidity against a family consisting of an unmarried couple and the woman's three children. This

was more than the three unrelated people allowed by the ordinance. Despite national criticism, city officials were steadfast in their resolve to adhere to the ordinance. On August 15, 2006, however, the city council capitulated and unanimously voted to amend the definition of "family" to include unmarried couples with children.

#### RECENT CASES: THE STATE COURTS

A *Belle Terre* query on a legal search engine yields a handful of reported decisions over the past 10 years. In 2004, Lawrence, Kansas, was sued in federal court by a group of tenants over a definition that no more than three unrelated persons could live together except on owner-occupied property. The court tossed out the freedom of association claim, citing *Belle Terre* as "dispositive."

In New Rochelle, New York, a nonprofit provider of housing services sought to establish a group home for 12 homeless youths age 16 to 21, but the city's denial of a permit brought them to federal court in 2004. New Rochelle's definition limits families to no more than three people, or four or more persons "living together as a traditional family or the functional equivalent

of a traditional family." Four or more people living together who are not related by blood, marriage, legal adoption, or in legal foster relationship are presumptively not a traditional or functional equivalent family, but they have the right to prove they are by showing they meet three criteria:

- They must share the entire living unit openly, including cooking facilities.
- The group cannot be transient or temporary (likely to preclude college students from being a functional family).
- The catch-all provision: They must address other factors related to whether or not they are a functional family.

Similar to the Lawrence case, this federal court cited *Belle Terre* with approval and found no federal constitutional infringement.

In the state forum, the game gets more interesting with no seemingly unassailable *Belle Terre* to hide behind. In a 2003 decision, a Delaware trial court heard a challenge by a landlord group taking issue with City of Newark ordinances intending to limit the presence of college students whose behavior was perceived to harm single-family neighborhoods. Rather than zone them out with the usual restrictive definition of family, the city decided to expressly define "student home" and then prohibit such houses in most places. Student homes are defined as those where college students live together but exclude otherwise permitted uses like rooming houses and fraternity or sorority houses. Where student homes were allowed, the ordinance mandated separation requirements—clearly, a deterrent to too many keggers in close proximity—equal to 10 times the minimum lot width in the district. Thus, if the district required 100-foot frontage, you could not have another student home within 1,000 feet.

Interpreting state law, the court found the landlords had shown that the ordinance discriminated on the basis of marital status in violation of state law because unmarried student couples had more limited housing possibilities. The significance of the case is the court's application of state law, which may be more protective than federal law. Although the Delaware case applies a state statute, California, Michigan, New Jersey, New York, Pennsylvania, and other states have ruled that restrictive definitions of family are unconstitutional under their constitutions.

Not only can courts make that decision, but activists can even amend state constitutions as they have in the post-*Kelo* amend-



⊕ (Left): Do not be fooled. The beautiful mansion is actually a college sorority housing a dozen or more young women. Many university towns exclude fraternities and sororities from the “functional family” definition. (Above): Definition of family even has implications for noxious uses, such as factory farms. For example, Mower County, Minnesota, officials had to rethink the distance requirements that kept extended family—the farmhands—away from the county’s feedlot operations.

ments to the constitutions in several states, essentially setting aside the U.S. Supreme Court’s approval of the eminent domain action in New London, Connecticut. Again, be mindful in family definition cases that there are 51 constitutions.

Similarly, states may take the initiative to amend their statutes to limit what local governments can do. We often forget that the power to regulate and zone is fundamentally a state power, some of which is handed down to local government through charters and the enabling laws to let them regulate local matters locally. Abuse of that grant could result in the local government being forced to relinquish some of that power back to the state. For example, New Jersey and Connecticut amended their enabling statutes decades ago to prohibit local governments from zoning out group homes for developmentally disabled adults.

Like politics, all zoning is local. Local governments can and do regularly change the definition of family. Last year, in what is a most unusual consideration of the definitional problem, Mower County, Minnesota, debated changing the definition of family as it affected distancing requirements from feedlot operations to allow extended families of the livestock operation owners to live closer to the feedlots than other types of families. Presumably, the family income is more important than avoiding the olfactory nuisance.

Similarly, the City of Knoxville and Knox County, in Tennessee, last year kicked the tires on proposals to reduce the number of unrelated people from five to two, while not limiting related persons. And around the same time, the city council in Albion, Michigan,

unanimously amended its definition of family to limit unrelated persons to four (previously unlimited) and require proof of traditional or functional family relationship.

#### THE FAIR HOUSING AMENDMENTS ACT (FHAA) AND STATE LAW

The FHAA basically allows protected classes of people—physically disabled or intellectually challenged, for example—to live in most places with a single-family use designation.



⊕ The bucolic American community shown in this image accurately depicts the entirety of the debate over the definition of family: the calm and relative tranquility engendered by single-family neighborhoods, and the threat brought on by change.

About half of the federal circuits support a “rule of eight,” limiting the homes to eight people. The FHAA trumps local zoning, and is used most often to permit the location of sober houses for recovering alcoholics and substance abusers. State statutes often mimic the federal law and provide their own level of protection.

#### THE ‘FUNCTIONAL FAMILY’

State decisions that are contrary to *Belle Terre* only appear to create an untenable conflict. One theme common to them is the similarity between the otherwise excluded households and the old-style 1950s family. Where a group of unrelated persons is the functional equivalent of a family, a court is likely to strike down a traditional definition as applied to the group. However, when the household does not resemble a family—consider a group of college students—the restrictive ordinance is typically upheld.

In 1989, New York’s highest court recognized functional families in a rent control case where two gay men had lived together for more than 10 years as “permanent life partners,” allowing the surviving man to take over the apartment when his partner died.

Definitional and procedural tools can protect the character of single-family residential districts and yet still allow greater numbers of unrelated people who share common bonds (i.e., a “functional family”) to live there.

For example, Ames, Iowa, home of Iowa State University, amended its definition of family to protect single-family neighborhoods, allow group homes under federal and state

## AMES, IOWA, FAMILY ORDINANCE

**Family:** A person living alone, or any of the following groups living together as a single nonprofit housekeeping unit and sharing common living, sleeping, cooking, and eating facilities:

- (a) Any number of people related by blood, marriage, adoption, guardianship, or other duly authorized custodial relationship;
- (b) Three unrelated people;
- (c) Two unrelated people and any children related to either of them;
- (d) Not more than eight people who are:
  - (i) Residents of "family home" as defined in Section 414.22 of the Iowa code; or
  - (ii) "Handicapped" as defined in the Fair Housing Act, 42 U.S.C. Section 3602 (h).  
This definition does not include those persons currently illegally using or addicted to a "controlled substance" as defined in the Controlled Substances Act, 21 U.S.C. Section 802 (6).
- (e) No more than five people who are granted a special use permit as a single nonprofit housekeeping unit (a "functional family") pursuant to Section 29.1503(4)(d) of the municipal code of the City of Ames, Iowa.
  - (i) Exception—The definition of a "family" does not include:
    - a. Any society, club, fraternity, sorority, association, lodge, combine, federation, coterie, or like organization;
    - b. Any group of individuals whose association is temporary or seasonal in nature; and
    - c. Any group of individuals who are in a group living arrangement as a result of criminal offenses.

A "functional family" is defined:

- (d) Special use permits for functional families
  - (i) Purpose. This section is to provide for the regulation of functional families that may request to reside in a single-family dwelling, two-family dwelling, or single-family attached dwelling. The regulations are also intended to prohibit larger groups of unrelated persons from residing in single-family dwellings, two-family dwellings, or single-family attached dwellings. Larger groups of unrelated persons have frequently shown to have a detrimental affect on single-family neighborhoods since larger groups of unrelated persons do not live as a family unit and do not have significant economic or emotional ties to a neighborhood.
  - (ii) Standards of Functional Families. The planning and zoning commission and zoning board of adjustment shall review each application for a special use permit for a functional family as provided for in this section after having determined that the application meets the following standards:
    - a. The functional family shares a strong bond or commitment to a single purpose (e.g., religious orders);
    - b. Members of the functional family are not legally dependent on others not part of the functional family;
    - c. Can establish legal domicile as defined by Iowa law;
    - d. Share a single household budget;
    - e. Prepare food and eat together regularly;
    - f. Share in the work to maintain the premises; and
    - g. Legally share in the ownership or possession of the premises.
- (e) Conditions. The board may impose such additional conditions as it deems necessary for the general welfare, for the protection of individual property rights, and for ensuring that the intent and objectives of this ordinance will be observed.

law, and accommodate alternative family types, as shown in the adjacent sidebar.

Your author drafted that ordinance more than a decade ago with the city's then planning director, Brian O'Connell, AICP. The definition remains intact today, having stood the test of time.

Importantly, the functional family approach respects the core holding in *Belle Terre* because three or more unrelated individuals may occupy a house in a single-family zoning district by demonstrating either a relationship characteristic of a family or the ability to live as a group in a single-family residence in a way that will not disrupt "zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people" as the Court said in *Belle Terre*.

The functional family definition predicated on special use permit criteria has been tested in at least one case: *Stegeman v. City of Ann Arbor* (213 Mich. App 487; 540 NW2d 724 (1995)), in which the Court of Appeals of Michigan upheld the validity of this regulation:

A dwelling may not be occupied by more persons than one of the following family living arrangements:

1. One or more persons related by blood, marriage, adoption, or guardianship living as a single housekeeping unit, in all districts.
2. Four persons plus their offspring living in a single housekeeping unit in all districts.
3. Six persons living in a single housekeeping unit in R4 districts.
4. A functional family living in a single housekeeping unit which has received a special exception use permit pursuant to Section 5:104.

In this section, functional family means a group of no more than six people plus their offspring having a relationship that is functionally equivalent to a family. The relationship must be of a permanent and distinct character with a demonstrable and recognizable bond characteristic of a cohesive unit. Functional family does not include any society, club, fraternity, sorority, association, lodge, organization, or group of students or other individuals with a common living arrangement or whose basis for the establishment of the housekeeping unit is temporary.

The definition of family found in zoning ordinances is primarily a use issue, and not one of occupancy. The latter is addressed in

⊕ **Is this a family?** College students are often at the center of communities grappling with the issue of defining family. Courts will likely strike down a traditional definition of family when a group of three or more unrelated persons is the functional equivalent of a family. But when the household do not resemble a family (i.e., four undergrads living together) the restrictive ordinance is typically upheld.



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housing codes, for instance the International Code Council International Property Maintenance Code. These types of codes establish maximum occupancy restrictions that are designed to prevent overcrowding of dwellings based on community health and safety considerations. It is precisely this type of code that the U.S. Supreme Court has found would be exempt from the Fair Housing Amendments Act. Local governments without housing codes—many communities are without them—should adopt one if they plan to expand the definition of family.

### AN ACTION PLAN FOR PLANNERS

Forty years ago, your author's first planning professor, Ted Bacon, of the University of Massachusetts at Amherst, characterized planning thusly: Finding what you had. Deciding what you wanted. Figuring out how to get it.

This is largely still the case, so consider the following when grappling with issue of how to define a family:

#### **Become familiar with your community's definition of family and research how it has been interpreted under state law.**

- Know what the Federal Fair Housing Amendments Act and your state law equivalents require.
- Consider an educational workshop to improve recognition of the issues: Identify the opportunities and limitations inherent in governing who lives where.
- Encourage discussion of the problems inherent in the inertia of rest of zoning regulation.

#### **Be realistic about your community.**

- Be ready for plain talk about sensitive social issues, including gay and lesbian families, unmarried couples with children, and group homes.
- Know the demographics today, and what the future holds.
- Be wary of the legal and ethical liability of excluding households.
- Have a method for advocating for disenfranchised or unrepresented constituencies.

#### **Understand group homes.**

- Identify every group home type and know the probability of one or more of them coming to town.
- Know which group homes have rights under the Fair Housing Amendments Act or state equivalents.
- Consider strategies for expressly including them by regulation. For example, are distancing requirements appropriate—and legal—under federal and state law?
- Regulate without stigmatizing. Some federal courts will not permit a conditional use procedure because it causes protected classes to go hat in hand for permission to live in a single-family neighborhood.

#### **Accommodate special-needs populations**

- Zone them in, not out. For example, college students should be allowed to live close to campus to reduce impacts from cars, parking, and noise.
- Zoning tools such as the overlay zone permit targeted, small-area siting.
- Consider the functional family approach. This is especially useful for households that

are difficult to categorize, including extended gay and lesbian households or a habitating group of nuns.

### IN SUMMARY

Planners may question the propriety of delving into the personal lives of people who simply want to live together, but the discomfort is a small price to pay for accomplishing the goal of accommodating all types of contemporary families. Functional family definitions open the door to greater diversity, preserve family values, and prevent unconventional families from intentionally violating the zoning ordinance. Zoning enforcement officers should not be left in the position of being legally required to force any family out of their home because of an antiquated definition.

Good planning and carefully articulated regulation will enable communities to preserve single-family values as they have evolved, integrating special-needs populations, and achieving the diversity that is beneficial to all.

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IS YOUR FAMILY LEGAL?

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