CityLab | Perspective

# Why Are Zoning Laws Defining What Constitutes a Family?

It's wrong to exclude safe uses of housing because of who belongs to a household. Like family law, zoning ordinances should prioritize functional families.


A large house advertised as for sale in California. Should zoning ordinances restrict what kind of functional family can inhabit this house? *Ben Margot/AP*

By Kate Redburn
June 17, 2019 at 7:47 AM CDT

Laura Rozza and Simon DeSantis were overjoyed to discover that the mansion on Scarborough Street was within their price range. The ten-bedroom, five-bathroom home in Hartford, Connecticut, could be theirs for $453,000, and would have plenty of room for their family. In July of 2012 they purchased the property but just a few weeks after moving in, they received a cease-and-desist letter from the city of Hartford ordering them to leave, as first covered by the *Hartford Courant*.

According to the city, Rozza, DeSantis, and their chosen family–totaling eight adults and three children–violated the definition of "family" in the Hartford zoning code. The ordinance allowed an unlimited number of people related

by blood, marriage, civil union, or adoption to constitute a zoning family, bu only two unrelated people could legally co-habitate in a dwelling designated for a single family. The "Scarborough 11," as they came to be known, refused to leave their home, and Hartford sued them in federal court. After years of litigation, including a countersuit from the Scarborough 11, the city dropped the suit in 2016 citing costs, and the town even revised its zoning ordinance to increase the number of legal unrelated cohabitants to three. Although they have been able to stay in their home, the Scarborough 11 faced blatant discrimination because their family is "functional" rather than "formal."

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Formal family zoning punishes the millions of Americans who choose alternatives to nuclear family, but it also has under-appreciated effects on the ability of functional families to access important family law obligations and protections. In a paper recently published in the Yale Law Journal, I show how formal family zoning may undermine progressive family law doctrines in many states, and what we should do to fix it.

Today, when courts ask "what makes a family?" they often look beyond blood, marriage, and adoption to see if people have made other meaningful, familial commitments that qualify for the obligations and benefits that family law provides. As functional family law developed, cohabitation became one of the most important factors, if not the determining factor, in these kinds of cases. The problem is that zoning laws often prevent these same functional families from living together in the first place. Through this underlying connection to zoning, functional developments in family law are much more vulnerable than they appear.

"Formal family" regulations in zoning are pervasive, and come with the imprimatur of the nation's highest court. In the 1974 case *Village of Belle Terre v. Boraas,* the U.S. Supreme Court ruled that municipalities can legally differentiate between related and unrelated families. In the intervening years, courts in 14 states have ruled that "formal-family" zoning is permitted by state constitutions, and the issue remains undecided in an additional 30 states. Only four state courts, in New Jersey, California, Michigan, and New York, have refused to sanction this form of discrimination, and lawmakers in Iowa recently became the first legislators to ban it. The Supreme Court has only revisited the issue once, in 1978, to clarify that the zoning definition of family cannot prevent blood relatives from living together.

The first zoning ordinances didn't define "family," at all. Throughout the first 50 years of their operation, courts often ruled that functional families of all kinds could live together in peace.

Zoning law can serve its historic functions without defining family at all. We can amend zoning codes to protect health, safety, and wellness by limiting cohabitation based on the health and safety limits of residential structures. By uncoupling the definition of family from residential limits, all kinds of chosen families–foster families, communes, students, seniors, and group homes–would be able to live together legally.

Recent data on the prevalence of functional families helps drive home the urgency of addressing the problem. According to analysis of the most recent census, 7.7 million Americans live in unmarried couples, 40 percent of whom are raising at least one biological child of either partner. An additional 5.2 million people are "doubling up" with roommates. These numbers have increased over the past 40 years, and are especially prevalent among younger people. In the annual America's Families and Living Arrangements data for 2018, Census researchers found that 9 percent of Americans aged 18-24 are cohabiting with a partner, a figure which climbs to nearly 15 percent for Americans aged 25-34 (and only 30 percent of 18-34 year olds are married, down from 59 percent in 1979).

The good news is that formal family zoning is of surprisingly recent vintage. There is a long history of functional family approaches to zoning in American jurisprudence, dating back to the early 20th century advent of

zoning law. The first zoning ordinances didn't define "family," at all, and throughout the first 50 years of their operation, courts often ruled that functional families of all kinds–from gay couples and religious adherents to cult followers and sororities–could live together in peace. Even as "blood, marriage, or adoption" ordinances became more common, courts continued to rule that functional families fell within their wide interpretive ambit.

The fortunes of functional families began to shift in the mid-1960s as fears of the family in crisis swept the nation. The rising New Right dovetailed with a generation of politicized post-war homeowners, both of which saw formal-family zoning as a vindication of their values. For social conservatives, formal-family zoning could help stave off the decline in nuclear family formation, and for homeowners, it could protect their property values against their perception that having abnormal neighbors might drive prices down.

Neither is a persuasive reason to discriminate against functional families in zoning codes. Formal family zoning is a familiar song–the same legal mechanisms that famously reinforced housing discrimination on the basis of race, also discriminate against families that vary from the nuclear ideal of a heterosexual couple raising their biological children. There is also compelling evidence that low-density zoning, like formal family ordinances, is a significant driver of racial and class segregation. In short, formal family zoning discriminates against non-normative families, but it also reinforces the racial and economic segregation effects of low-density zoning in general.

And from a purely practical perspective, using the definition of family in zoning as social regulation doesn't work. More and more Americans are forming functional families, meaning that the only real effect of these ordinances is to make it more difficult for people to live with their loved ones. The laws aren't channeling more people into nuclear families, but penalizing the growing share of Americans who choose other kinds of kinship.

More importantly, it's wrong to exclude perfectly healthy and safe uses of residential housing simply because some of the neighbors disapprove of the form that family takes. In another famous decision from the height of the

counterculture, U.S. Supreme Court Justice Brennan wrote, that if "the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare desire to harm a politically unpopular group cannot constitute a legitimate governmental interest." In other words, Justice Brennan believed that distaste is no justification for discrimination. That same logic surely holds today.

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# PRACTICE INCLUSIVE ZONING

# Modern Family: Zoning and the Non-Nuclear Living Arrangement

By Brian J. Connolly and David A. Brewster

The list of residential land uses contained in the typical zoning code is fairly formulaic. Household living arrangements permitted by a code generally include single-family dwellings, two-family or duplex dwellings, and multifamily dwellings. From there, the code often goes on to allow a few other types of residential uses: live/work units, assisted living facilities, nursing homes, perhaps a variety of group living arrangements, boarding houses, shelters, and sometimes, student housing. Single-room occupancy motels, short-term rentals, and accessory dwelling units may also be permitted, in limited circumstances. For the household living uses, the term "dwelling" is generally defined with respect to a living space and, frequently, cooking, bathing, and sleeping facilities.

The lines between several of the zoning classifications described above can be blurry. In many cases, they turn upon the people who live in these various forms of housing, rather than the physical characteristics of the housing types themselves. Indeed, many zoning codes define the term "family"—as used in the terms single-family or multifamily dwelling—as a group of people related by blood, marriage, or adoption, or up to a certain number who are unrelated.

These classifications of residential land uses, and the definitions of "dwelling" and "family" that accompany them, have proven durable. But modern social and cultural changes are testing their permanency. The U.S. population has moved markedly away from the household unit comprised of a married couple and their children. Unaffordable housing has pushed families to live with extended family members, groups of unrelated roommates to cohabitate, and home seekers to find smaller, more efficient forms of housing. At the same time, contemporary treatment methods for disabilities has resulted in increased demand for group living arrangements.

While aimed at establishing stable neighborhoods, historical definitions of "family" contained in zoning codes have regularly excluded a wide variety of groups, and the forms of housing prescribed by more traditional zoning codes fail to accommodate many of these groups. Examples of these include unmarried couples, same-sex couples, religious organizations that live in communities, group homes for people with disabilities, post-incarceration halfway houses, foster families, and others. All of these forms of housing are necessary in our modern society.

As the amorphous concepts of "family" and "household" evolve and become increasingly difficult to define, the law still prescribes meaning to these terms in various forms. For example, the Internal Revenue Service allows us to file taxes individually or as a family while evolving to incorporate same-sex marriages. The U.S. Census collects information on households and families, and these classifications have broadened as well. Yet, while certain legal frameworks have adapted to the changing face of American families and households, local zoning laws, in many respects, have not.

The balance of this article examines the changing face of modern American families, and the increasing demand and need for housing types that recognize nontraditional or "non-nuclear" families and households. It also evaluates existing law as it pertains to regulation of household structure and offers suggestions for how zoning might be tweaked to respond to many of the changing norms of American family and household life.

## NUCLEAR NO MORE

In the years following World War II, the concept of the "nuclear" family, composed of two opposite-sex married partners and their non-adult, unmarried children, pervaded the American zeitgeist. The nuclear family has been extensively studied, critiqued, and debated over the past 50 years. As David Brooks of the *New York Times* recently commented, "[w]hen we have debates about how to strengthen the family, we are thinking of the two-parent nuclear family, with one or two kids, probably living in some detached family home on some suburban street" (Brooks).

Increasingly, however, the nuclear family is a foreign concept to most American households. In 2017, the U.S. Census Bureau estimated that less than half of households were headed by a married couple, and less than 30 percent of households had children of the householder at home. Nearly 30 percent of households were single people living alone. Other households included everything from grandparent-headed households—an estimated 7.2 million grandparents were raising their grandchildren in 2017—to single-parent households, which comprised 17.3 percent of all households. Of the U.S. population living in a household, 6.2 percent, or nearly 20 million people, were unrelated to the householder by blood, marriage, or adoption.

This is a significant change from the middle of the 20th century. According to the Pew Research Center, in 1960, roughly 87 percent of children in the United States lived in a two-parent household. A 2015 Pew study revealed that, in 2014, roughly 64 percent of children under the age of 18 lived in a household with two parents. In turn, just over one-fourth of children in the United States live in one-parent households, compared to nine percent in 1960. The U.S. Census Bureau's Current Population Survey recently estimated that nearly 35 percent of children now live in "nonfamily"

households, which are defined as those households not headed by a parent.

These developments also complement changing gender roles within families. In the period between 1950 and 1965, when the nuclear family was in its heyday, Brooks writes that "most women were relegated to the home" and "[d]emeaning and disempowering treatment of women was rampant" (Brooks). By 1993, roughly one-third of households in the United States were headed by women (Dandekar). A 2019 Center for American Progress study found that a national average of 41 percent of households in the United States are headed by "breadwinning" mothers, those who earn the highest income in the family (Glynn).

An analysis of changing gender roles is incomplete without discussion of the evolving institution of marriage. In 1949, roughly 78.8 percent of American households contained married couples, while in 2017, less than half of households contained married couples. Contributing to this decline are steadily increasing divorce rates since 1990, the fact that couples are choosing to marry later in life, and an increasing number of people who choose not to marry at all. Yet, while marriage rates continue to decline, the Census Bureau reports that cohabitation among nonmarried partners between the ages of 25 and 34 has steadily increased, and the number of one-person households has also increased "fivefold since 1960." Pew also reports that older Americans are among the highest demographic of one-person households. In the United States, 27 percent of adults ages 60 and older live alone, compared with 16 percent of adults in 130 countries and territories recently studied.

As households continue to evolve, so has the U.S. population in group quarters, which include everything from correctional facilities to nursing homes, student housing, and group homes for people with disabilities. In 2017, the Census Bureau estimated that more than eight million Americans live in group quarters arrangements. Of these, 2.2 million were incarcerated, and 2.7 million were living in on-campus student housing. That leaves more than three million Americans who lived in nursing homes or other types of group living arrangements. Given that the Centers for Disease Control estimated in 2018 that one in four Americans has a disability that limits a major life activity (and two in five Americans over 65 fall in that category), we can assume that there is significant unmet demand for group living.

## CHANGING FAMILIES, CHANGING HOMES

As the concept of the nuclear family fades, so too does the traditional living style associated with that construct—the single-family home. Increasingly, Americans are opting, whether by choice or by reason of circumstance, for alternatives to the single-family home. For starters, the average size of new single-family home builds is decreasing. Data from the National Association of Home Builders reveals that the median square footage of a new single-family home decreased for the third straight year in 2018. This shift toward smaller single-family housing is likely a reaction to high demand from younger buyers attempting to purchase entry-level housing.

New and innovative ways of meeting entry-level housing demand, outside the traditional single-family model, are continuing to grow. A National Association of Home Builders study conducted in 2018, for example, revealed that more than half of Americans (and 63 percent of millennial Americans) would consider living in a tiny home of less than 600 square feet. As Ilana E. Strauss reports, companies and communities are also experimenting with cohousing, or living arrangements where "individuals or families generally have their own houses, bedrooms, or apartments but share things like kitchens and community spaces" (Strauss).

Still, while the cohousing model may be a new prospect to many Americans, states continue to rely heavily on group living arrangements for the elderly, medically dependent, and children without alternative housing options. According to a 2015 Pew report, Colorado, Rhode Island, West Virginia, and Wyoming have the greatest percentage of foster children living in group homes. Roughly 35 percent of children in Colorado's foster care system, for example, live in congregate group care living facilities. What is more, the U.S. Congressional Budget Office (CBO) noted in a 2013 report,

"[b]y 2050, one-fifth of the total U.S. population will be elderly" with the number of individuals age 85 or older growing the fastest (CBO). As such, the need for long-term group assisted living arrangements will likely gradually increase as baby boomers age.

Tiny homes, adult dormitories, and group living facilities are a small snapshot of the diverse and unique living arrangements growing in both popularity and need throughout the country. Demand for nontraditional housing types, like the evolution and growth of the nontraditional American family, is ever increasing.

However, embracing and promoting new forms of housing is not merely a trendy pandering to millennials. Emily Badger wrote in the *New York Times* in a 2019 column with respect to the campaign platforms of various 2020 Democratic presidential hopefuls, "[a] reckoning with single-family zoning is necessary, they say, amid mounting crises over housing affordability, racial inequality and climate change" (Badger). Driven by increasing home prices and generally stagnant incomes, America's affordable housing crisis has been characterized as a "ticking time bomb" waiting to blow. A shortage of affordable housing options in cities across the country has resulted in higher home prices, reductions in government subsidies for housing, and the concentration of home ownership among older, whiter, and wealthier Americans.

More significantly, a Joint Center for Housing Studies (JCHS) of Harvard University report observes that the affordable housing shortage has created an upturn in homelessness, increased threats of displacement due to natural disasters, and disproportionally burdened low-income and minority households. As its outlook, the study noted that, "[o]n the supply side, however, conditions at the lower end of the market will remain challenging as millions of low-income households compete for an already insufficient number of affordable rental units" (JCHS). Simply, the status quo will not suffice to provide housing for millions of Americans. Promoting new housing solutions to combat rising socioeconomic and climate threats must begin, at a local government level, with a "reckoning" with single-family zoning.

Future Atlas, Flickr

The prevalence of single-family zoning in the United States is challenged by major demographic and social changes.

What's more, as we write this article, the U.S. economy appears to be headed for a slowdown, triggered by the COVID-19 pandemic that has swept the world. As potentially millions of Americans face job losses and pay decreases, the need for affordable housing options will become only greater.

## JUDICIAL TREATMENT OF 'FAMILY' ZONING

With these changes in American household structure and demand for a variety of housing types in mind, we now turn to how the law addresses these issues. A careful reading of cases from the U.S. Supreme Court and lower courts suggests that, since its early days, one of the paramount goals and outcomes of zoning has been the protection and reinforcement of patterns of housing for traditional, nuclear families. And those goals have largely been met with judicial endorsement.

### *Euclid v. Ambler*

The Court was not shy in using its first opportunity to consider the constitutionality of zoning to gratuitously weigh in on the merits of development patterns predominated by single-family detached dwellings. In 1922, the Village of Euclid, Ohio, a Cleveland suburb characterized by largely low-density residential land-use patterns, adopted a zoning regulation that classified lands according to uses. The use districts established in the zoning ordinance included a "U-1" district that allowed only single-family dwellings and a "U-2" district that expanded its use allowances to two-family homes. Higher-intensity districts, which constituted a small proportion of the village's land area, allowed multifamily apartments as well as commercial and industrial uses.

Euclid's zoning ordinance was clearly intended to protect low-density neighborhoods characterized by detached dwelling units against higher-density forms of housing. It was also clear from the face of the ordinance that it supported nuclear families. The ordinance used the term "family" pervasively, but defined it as follows: "[a] 'family' is any number of individuals living and cooking together on the premises as a single housekeeping unit." The term "single housekeeping unit" was undefined in the Euclid ordinance, suggesting that groups of unrelated people might be permitted to occupy single-family dwellings if they shared common household responsibilities.

The ordinance was challenged by a business that was dissatisfied with its classification under the ordinance. The case made its way to the U.S. Supreme Court. In *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), the Court ruled zoning a constitutional exercise of the police power.

In so doing, however, the Court emphasized the importance of protecting

single-family homeowners from noxious effects of higher-density residential and nonresidential uses. The Court's characterization of single-family detached development patterns and family life paint a picture of idyllic suburbia, characterized by public safety, healthy environs, and growing families. In particular, the Court observed that the segregation of single-family, two-family, and other land uses would "increase the safety and security of home life, greatly tend to prevent street accidents, especially to children, by reducing the traffic and resulting confusion in residential sections, decrease noise and other conditions which produce or intensify nervous disorders, preserve a more favorable environment in which to rear children, etc."

The Court then saved its most pointed observations for the distinctions between apartments and more low-density forms of residential uses. The Court refers to the apartment house as a "mere parasite" that "monopolizes the rays of the sun" and whose automobile traffic is "depriving children of the privilege of quiet and open spaces for play."

The Court's rhetoric in *Euclid* was emblematic of a widespread cultural acceptance of the benefits of low-density living in the early part of the 20th century. Following a period of largely unregulated industrialization in U.S. cities that resulted in unsanitary, crowded conditions, New York City adopted the nation's first zoning ordinance 10 years before *Euclid*. Other jurisdictions quickly followed. In the same year the Court decided *Euclid*, the U.S. Department of Commerce promulgated the Standard State Zoning Enabling Act, which recited the lessening of congestion, reduction of fire risk, promotion of public health, assuring adequate light and air, and reducing concentrations of population as the core purposes of zoning. The Court's unvarnished description of a suburban idyll where children frolic free from the nuisances of higher-density urban areas was characteristic of common views of urban development. At the same time, however, its discussion of the merits of detached dwellings—undertaken at a time when the Court was composed of nine white men and long before it invalidated racially restrictive covenants, school segregation, or disability discrimination—is devoid of any suggestion of racial or cultural diversity (the Court invalidated racially restrictive municipal regulation just one year after the New York City zoning ordinance was adopted in the case of *Buchanan v. Warley*, 245 U.S. 60 (1917)), same-sex couples, accommodation for low-income families, or housing for people with disabilities.

### *Village of Belle Terre v. Boraas*

The Court's next occasion to visit the constitutionality of single-family zoning came nearly 50 years later in the case of *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974). That case, which arose from circumstances in another small suburban community, addressed the constitutionality of a more restrictive definition of the term "family." A one-square mile community with just 220 homes, the Village of Belle Terre is located near the State University of New York at Stony Brook. An attractive place for prospective landlords to rent to student tenants, the village adopted a zoning ordinance defined family as "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."

Thus, to reside in a single-family dwelling in Belle Terre, it was not sufficient to simply constitute a single housekeeping unit. Familial relatedness was obligatory.

A group of unrelated tenants and their landlord challenged the law. The group asserted that it violated several rights inherent in the Due Process Clause of the Fifth Amendment, including rights of association and privacy. Included in the *Belle Terre* challenge was a suggestion that the law was aimed at producing a homogeneous community. The Supreme Court eventually disagreed with these assertions.

Although the Court had recently expanded privacy rights in the cases of *Griswold v. Connecticut* and *Roe v. Wade*, in which it famously approved of contraception and abortion, the right to privacy would not be extended to group living arrangements. Returning to its historical preference for low-density, single-family development, the Court observed that "boarding houses, fraternity houses, and the like present urban problems. More people occupy a given space; more cars rather continuously pass by; more cars are parked; noise travels with crowds." The Court followed its indictment of nontraditional living arrangements with one of its most memorable paragraphs regarding land-use regulation. As in *Euclid*, the Court accepted the invitation to hail the benefits of suburban residential development as follows:

> 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.

The result of *Belle Terre* was that many local governments—in college towns, suburbs and even large cities—eventually adopted zoning provisions defining the term "family" with respect to the relatedness of individuals residing in a housing unit, thereby ensuring that residential neighborhoods could only be occupied by nuclear families. Like *Euclid*, *Belle Terre*'s endorsement of suburban forms of development and family values appeared not to consider the impacts of predominantly single-family residential development patterns on non-white families, lower-income buyers and renters, groups of unrelated people, or people with disabilities. In the 60 years from the adoption of the first zoning ordinance to *Belle Terre*, the zoning power had morphed from one that regulated building form to full-scale regulation of the people that resided in those building forms.

### The Limits of *Belle Terre*

While a review of *Belle Terre* might lead an observer to guess that there was little to no constitutional limit to the regulation of living arrangements, the Court's decision in

that case was in many ways a legal apex for exclusionary zoning. In the intervening years since *Belle Terre*, it has been limited in several respects.

Just three years after it decided *Belle Terre*, in *Moore v. City of East Cleveland*, 431 U.S. 494 (1977), the Supreme Court rejected the use of zoning to restrict intrafamily living arrangements. There, East Cleveland, Ohio, another Cleveland suburb, sought not only to prohibit unrelated persons from residing together, but actually went so far as to define the term "family" as a *nuclear* family, consisting only of a husband or wife and either their unmarried children or their parents. The practical effect of the city's regulation, which had a legislative and procedural history evidencing unscrupulous racial motive, was to exclude groups of extended family members living together. A grandmother and her two grandchildren who resided together successfully challenged the regulation, which the Supreme Court decided on right to privacy grounds.

Several states have also limited the reach of *Belle Terre* on constitutional or statutory grounds. The first to do so was New Jersey in the case of *State v. Baker*, 405 A.2d 368 (N.J. 1979). There, the court determined that Plainfield Township could not, under the state constitution, prohibit two families from living together as a single housekeeping unit. The court's holding was based upon the idea that a local government restriction aimed at creating stable residential communities was not necessarily furthered by a prohibition on unrelated persons residing together. The New Jersey Supreme Court wrote: "The fatal flaw in attempting to maintain a stable residential neighborhood through the use of criteria based upon biological or legal relationships is that such classifications operate to prohibit a plethora of uses which pose no threat to the accomplishment of the end sought to be achieved. . . . The ordinance distinguishes between acceptable and prohibited uses on grounds which may, in many cases, have no rational relationship to the problem sought to be ameliorated."

Shortly after the New Jersey court invalidated "family" definitions, the California Supreme Court also concluded in *City of Santa Barbara v. Adamson*, 27 Cal. 3d 123 (1980), that familial relatedness requirements in a local zoning code violated the state constitutional right to privacy. Michigan and New York also followed suit, adopting similar rationale to these decisions.

The Fair Housing Act and its amendments, 42 U.S.C. § 3601 *et seq.*, also limit *Belle Terre*. In 1988, Congress amended the Fair Housing Act to specifically incorporate familial status and handicap as classes protected under the law. The addition of these two protected classes reaffirmed Congress's commitment to prohibiting discrimination, particularly against single parents with children and people with physical or cognitive disabilities, including those in recovery from addiction.

In particular, the Fair Housing Act's protections for people with disabilities often conflict with local definitions of "family" that restrict unrelated people from living together. In *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725 (1995), the Supreme Court confirmed that familial occupancy restrictions did not comport with the Fair Housing Act's allowance for maximum occupancy restrictions based on safety considerations. Several other cases have found that restrictive family definitions may not be used to exclude people with disabilities from living in group settings.

Similarly, as states have adopted state-law versions of the Fair Housing Act, many of them have placed limitations on family zoning. Many state-law equivalents of the Fair Housing Act add protected classes over and above those identified in the federal law, including, for example, marital status, sexual orientation, age, and others. These statutes may require local governments to vary familial-relatedness limitations if they interfere with protected classes' ability to buy or rent housing.

Present demand for affordable housing may be encouraging further federal action to limit local governments' exclusionary zoning actions. As of this writing, Congress is considering a law called the Yes In My Backyard Act, H.R. 4351, which passed in the House of Representatives on March 2, 2020. That law would require local governments that receive federal housing and urban development grants to track and implement land-use policies to encourage the production of housing. These policies include everything from allowing higher-density development by right to allowing manufactured housing, single-room occupancy uses, mixed-use development, and limiting dimensional and procedural restrictions on new housing.

## MODERN APPROACHES FOR THE MODERN FAMILY

Federal constitutional law continues, at its core, to allow local governments to establish zoning policies allowing only single-family development patterns and to restrict that form of housing to related family members. However, the population and housing trends described above, and the legal limitations on *Belle Terre*, demand a thoughtful response from local zoning officials.

Opportunities abound for zoning authorities to embrace inclusionary practices. Zoning codes that permit a wide variety of housing types are an important first step. In 2019, Minneapolis became the first major U.S. city to abolish single-family zoning, allowing triplexes to be constructed in most neighborhoods that previously only allowed detached housing. Other cities have provided for additional accessory dwelling units, by-right multifamily zoning, and a variety of "missing middle" forms of housing. These forms of housing might include "slot homes," where row houses are oriented perpendicular to street frontages, or garden courts or row houses. These types of housing allow for increased density in residential areas that, if designed appropriately, can blend well with surrounding single-family development.

In considering the variety of housing types that might be permitted in a jurisdiction, zoning officials may also need to reconsider classifications of residential uses. For example, where a code defines a "boarding house" as a residential structure where rooms are rented out for permanent occupancy but generally restricts boarding houses throughout the municipality, it may prohibit new, "pod"-style multifamily development wherein units share common areas and cooking facilities but contain separate bedrooms and bathrooms.

Similarly, zoning officials might also reevaluate definitions of "dwelling" contained in codes, and the dimensional limits placed on housing units, to accommodate more creative forms of housing. Where a code prohibits small housing units or properties, tiny homes or other affordable forms of housing may be excluded from the community.

At the same time, local governments should consider whether definitions of "family" based on blood, marriage, or adoption serve the jurisdiction's planning goals. To the extent a municipality seeks to regulate land use for the purposes enshrined in the Standard State Zoning Enabling Act—lessening congestion, reducing risks of natural disasters, protecting for public health and safety, and others—restricting dwelling units to groups of related people is unlikely to directly accomplish these goals. A large family of related individuals is just as likely to produce congestion or overcrowding as an unrelated group of the same number of people.

Local governments that wish to avoid the problems created by restrictive "family" definitions might consider applying a definition of "single housekeeping unit" that focuses on the sharing of household chores or cooking and eating together. And of course, local governments should continue to adopt and enforce building and fire codes that limit that number of persons who may occupy a dwelling to avoid fire or public health risks.

Similarly, zoning officials must consider their obligations under state and federal fair housing laws. A local government utilizing a definition of "family" that would otherwise restrict groups of people with disabilities or others protected by fair housing acts must be prepared to grant reasonable accommodations where necessary to maintain compliance with the law. In general, local governments should adopt zoning procedures for granting reasonable accommodations if their codes restrict groups of unrelated people from living together. Zoning officials should also consider avoiding unnecessary restrictions on these living arrangements, including further land-use planning goals such as avoiding congestion or nuisances.

## CONCLUSION

We are in an unprecedented time of housing unaffordability and expanding notions of what constitutes a household or family. While the law has been somewhat slow to evolve, our local governments must consider how their zoning policies accommodate a wide variety of living arrangements.

## REFERENCES


Badger, Emily. 2019. Cities Across America Question Single Family Zoning. *New York Times*. June 18. Available at https://nyti.ms/3b5AdQd.

Brooks, David. 2020. The Nuclear Family Was a Mistake. *The Atlantic*. March. Available at: https://bit.ly/2XxneCV.

CBO. 2013. Rising Demand for Long-Term Services and Supports for Elderly People. Available at https://bit.ly/2IZqejt.

Dandekar, Hemalata C. 1993. *Shelter, Women and Development: First and Third World Perspectives*. Ann Arbor, Mich.: WG Wahr Publishing Co.

Glynn, Sarah Jane. 2019. "Breadwinning Mothers Continue To Be the U.S. Norm." Center for American Progress. Available at: https://ampr.gs/2X2Vm14.

JCHS. 2019. The State Of The Nation's Housing 2019. Available at https://bit.ly/2xhsmkb.

Strauss, Ilana E. 2016. "The Hot New Millennial Housing Trend Is a Repeat of the Middle Ages." *The Atlantic*. September 26. Available at https://bit.ly/3asunap.


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