Defining “Family” for Zoning: Contemporary Policy Challenges, Legal Limits and Options

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Contemporary Policy Challenges, Legal Limits and Options

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Introduction

Is it time to reconsider the definition of “family” in your zoning ordinance? Single family zones are ubiquitous, diversely-defined, and both popular and controversial. Much of the controversy stems from definitions of “family” that determine who is excluded from living in these zones, especially in suburbs. Whatever current definition your jurisdiction is using now, there are several policy and legal reasons why localities might want to reconsider the definition of “family” in their zoning ordinance. The number and variety of non-traditional households have increased. Contemporary planning theories are challenging the assumptions underlying single family zones. And there are vibrant cultural debates about the meaning of “family.” Attorneys representing localities should be aware of the legal as well as policy and practical implications of the definition of family in their jurisdiction’s ordinance.

After reviewing single family zones, policy rationales for them, and the basic types of definitions of family, this article will survey contemporary policy challenges and legal limits to definitions of “family.” Because localities’ histories, land use situations, and other relevant factors are diverse, this article will not recommend one solution. Rather, it will articulate how localities can reassess their definitions and identify relevant considerations.

What are single family zones?

At their most basic level, single family zones are residential zones defined by two requirements: a “single family” building structure (e.g. usually requiring a single kitchen) and “single family use” as the primary permitted use. Definitions of “single family use” can include up to five elements: (1) composition of the members of the household; (2) requirement for a single “head of household”; (3) functioning as a single housekeeping unit,
e.g. not living in subdivided spaces and sharing cooking or meals; (4) operating for a non-profit purpose; and (5) being stable and sufficiently permanent. These elements can overlap. Neither localities nor courts have been consistent or clear in understanding and applying these elements. Yet, a locality’s definition of “family” for purposes of what constitutes “single family use” is critical in determining who is included and who is excluded.

Why do localities have single family zones?

The typical policy rationales for single family zones include two types of goals: traditional land use concerns (e.g. controlling overcrowding, density, noise, traffic, and parking) and community or neighborhood character goals (e.g. preserving “family values,” supporting child rearing, and controlling transiency). Once single family zones are established, the owners of property in these zones have a strong interest in protecting their property values.

The land use goals are directly related to intensity of use. These goals are most amenable to control through a variety of traditional land use regulations, e.g. building size limits, lot size limitations, etc. In addition, most jurisdictions have adopted numerical residential occupancy standards which limit the legal occupancy based upon health and safety reasons, either by specifying maximum numbers of persons allowed per bedroom or as a function of persons per square feet of living space. The single family zoning designation combined with planning code requirements and residential occupancy standards can limit density and thus control the density-related impacts. As discussed below, the role of the definition of single family use in controlling density is disputed.

The promotion and preservation of a particular neighborhood character is a far more complex and nebulous goal for land use regulation to achieve. Localities want to promote a sense of social order and community life in their residential zones where many children will likely be raised. One way localities promote the desired commu-
nity character is by planning standards and zoning requirements that create a physical environment that it is intended to promote community, e.g. low density and inclusion of parks.10

In addition, many localities use their family definition as the building block of a desired social structure. The California Supreme Court articulated this view in Miller v. Board of Public Works, a case upholding the exclusion of multi-family residences from a single family zone.11 There are two ways to understand how the single family use definition can create the desired neighborhood character. One version treats the traditional family structure as inherently valuable but vulnerable, and seeks to preserve it by only allowing the same use in the neighborhood. For many decades under Euclidian zoning, single family zones have been low-density and considered the most vulnerable to potential threats by other inconsistent uses. On this view, the neighborhood character is achieved by and constituted by the uniformity of single family use in the neighborhood, not by any presumed relationships among the households. Preserving the integrity of the family unit amounts to excluding any different or incompatible uses from the zone.

The second version is based upon the assumption that the single family unit will espouse and enact particular values and conduct within the household and externally among other households in the neighborhood (e.g. stability, responsible care for property, and neighborhood). In turn, those values and conduct would create and maintain the desired neighborhood character both by how these families conduct themselves and by the dominant social norms they create and enforce.

These views assume that all families are essentially uniform in their structure and membership; and that all such families generally share the same values, interests, and habits. In effect, they treat the family unit as a proxy for the desired values and conduct for the district.12

Both versions represent at least an implied suspicion about alternative forms of communal living and whether they are likely to embrace and promote the desired values and conduct. Any group living together merely for convenience or economic reasons is automatically suspect. Students (whether living together informally or as a fraternity or sorority) and congregate living by recovering alcoholics, former substance abusers, persons with disabilities, or former prisoners are also dubious.13 Sometimes even religious communities are questionable.14

One court articulated some of the reasons underlying these views.15 Non-traditional families are voluntary with fluctuating membership. The members have no legal obligations of support to each other. The lack of permanence, the uncertainty associated with mere voluntariness as the basis for their association and the absence of any legal obligations to strengthen and secure the social bonds among the members brews suspicion or at least a lack of confidence that these forms deserve legal protection. (As discussed below, some localities recognize the value of these households if they function as a “single housekeeping unit.”)

How Do Localities Define “Family”? 

There are five basic types of definitions of “family” for single family zones along with many local variations.16 First, Legal Status definitions of “family” are based solely upon the legal relationships among the members of the household, usually restricting family membership to relationships by blood, marriage, or adoption. Examples include the ordinances at issue in Kirsch Holding Co. v Manasco,17 and City of White Plains v. Ferraioli.18 Legal Status definitions of “family” always include the “nuclear family” (married heterosexual parents and their biological children), but may not include all “extended family.”19

Second, Legal Status Plus definitions primarily limit “family” by legal status, but also allow an additional specified number of “unrelated” persons to be members of the household, usually between two to four. The ordinance challenged in and Town of North Hempstead v. Griffen is an example.20 These definitions enabled families to have live-in servants or au pairs.
Third, some localities employ a *Legal Status or Specified Number of Unrelated Persons Combination*, defining family as any number of people related by legal status or a specified number of unrelated persons, usually six or less. This type of definition was challenged in *Village of Belle Terre v. Boraas* and was the subject of litigation in *City of Edmonds v. Oxford House, Inc.* Usually the unrelated persons must be living as "single housekeeping unit" to qualify under the definition. Under this definition, both types of families may live in single family zones as of right.

Fourth, there are *Functional Family* definitions. Instead of relying on legal status, these definitions define a family in a functional way, e.g. as a "single housekeeping unit," along with certain required activities that household members engage in to meet the functional definition. These usually include cooking or eating together, but may also include a requirement that the household share a common domestic bond, have a single head, and be relatively permanent. Often, the underlying form animating the functional definition is the "traditional family," but these definitions do not require legal status relationships among the members of the household, and they do not usually have numerical limitations. Historically, these definitions were common in the decades when comprehensive zoning was spreading. The famous Village of Euclid employed this definition as did the Town of Atherton (California).

These ordinances would usually include unmarried couples raising their children as well as small groups of unrelated individuals who live together in intimate ways. Depending upon the precise definitions and court's applications of them, these definitions may or may not include groups of students or group homes for persons with disabilities.

Finally, in localities employing *Legal Status as of Right and Functional Family by Special Permit Combination* definitions, households that meet the Legal Status definition can occupy homes in single family zones as of right and functional families (as defined) are allowed only with a special use permit. These ordinances may provide for several variations on what constitutes a functional family, and specifically identify types of households that are not included (e.g. fraternities, lodges, students, former convicts, or individuals living together for a temporary time). There may or may not be a numerical limitation on the number of persons who can comprise a functional family. Examples of localities with these definitions include Ames, Iowa and Ann Arbor, Michigan.

Who is Included and Excluded by the Definitions?

The following table demonstrates the effects of applying various definitions of family to a range of household types without consideration of any other laws. "Y" means a household would generally be included; "N" means a household would generally be excluded; and "D" means inclusion or exclusion would depend upon the specific definition. As the chart demonstrates, Legal Status and Legal Status Plus definitions are usually the most restrictive because they exclude many contemporary types of non-traditional households.
<table>
<thead>
<tr>
<th>Legal Status</th>
<th>Legal Status Plus</th>
<th>Legal Status and Specified Number of Unrelated Persons Combination</th>
<th>Functional Family</th>
<th>Legal Status as of Right and Functional Family with Special Use Permit Combination</th>
</tr>
</thead>
<tbody>
<tr>
<td>Nuclear family</td>
<td>Y</td>
<td>Y</td>
<td>Y</td>
<td>Y</td>
</tr>
<tr>
<td>Extended family</td>
<td>D</td>
<td>D</td>
<td>D</td>
<td>Y</td>
</tr>
<tr>
<td>Married couple and foster children</td>
<td>N</td>
<td>D</td>
<td>Y</td>
<td>Y</td>
</tr>
<tr>
<td>Single parent with biological children</td>
<td>Y</td>
<td>Y</td>
<td>Y</td>
<td>Y</td>
</tr>
<tr>
<td>Unmarried couple with biological children of one or both</td>
<td>N</td>
<td>D</td>
<td>Y</td>
<td>Y with SUP</td>
</tr>
<tr>
<td>Married couple with biological children of one or both (&quot;blended family&quot;)</td>
<td>Y</td>
<td>Y</td>
<td>Y</td>
<td>Y</td>
</tr>
<tr>
<td>Same sex couple</td>
<td>N</td>
<td>N</td>
<td>Y</td>
<td>Y with SUP</td>
</tr>
<tr>
<td>Same sex couple with children</td>
<td>N</td>
<td>D</td>
<td>Y</td>
<td>Y with SUP</td>
</tr>
<tr>
<td>Group home</td>
<td>N</td>
<td>N</td>
<td>D</td>
<td>Y</td>
</tr>
<tr>
<td>Persons with disabilities living together independently</td>
<td>N</td>
<td>N</td>
<td>D</td>
<td>D</td>
</tr>
<tr>
<td>Religious community</td>
<td>N</td>
<td>N</td>
<td>D</td>
<td>Y with SUP</td>
</tr>
<tr>
<td>Non-religious communal group</td>
<td>N</td>
<td>N</td>
<td>D</td>
<td>Y with SUP</td>
</tr>
<tr>
<td>Students</td>
<td>N</td>
<td>N</td>
<td>D</td>
<td>D</td>
</tr>
<tr>
<td>Fraternity or sorority</td>
<td>N</td>
<td>N</td>
<td>D</td>
<td>D</td>
</tr>
<tr>
<td>Seniors living together</td>
<td>N</td>
<td>N</td>
<td>D</td>
<td>Y</td>
</tr>
<tr>
<td>Unrelated people sharing house for economic or convenience reasons</td>
<td>N</td>
<td>N</td>
<td>N</td>
<td>N</td>
</tr>
<tr>
<td>Boarding house</td>
<td>N</td>
<td>N</td>
<td>N</td>
<td>N</td>
</tr>
</tbody>
</table>
What are the Contemporary Policy Challenges to Definitions of “Family” in Zoning?

There are substantial policy and legal challenges to definitions of “family” in zoning. While these controversies are old—perhaps even perennial—they have taken on new vigor in the last decade. The three sources of policy challenges are demographic, planning theory, and cultural.

Demographic Changes

Dramatic, rapid, and apparently permanent demographic changes should prompt policy reviews. In the last several decades, the numbers of “traditional family” households as a proportion of all households has plummeted. In 2010, married couples comprised only 48.4% of total households. Changes in reproductive technology have enabled any person or couple to incorporate children into their household. Nuclear family households (heterosexual parents with the biological children of the woman) have reduced. The 2000 U.S. Census found that “nuclear” families made up only 23.5% of all U.S. households. By 2010, this number had dropped to 20.2%. Single parent families and extended family households have increased. Multigenerational families are growing because of the Great Recession and immigration. “The number of [multigenerational] households jumped by 14% from 2007 to 2010, and the number of Americans living in such arrangements has almost doubled since 1980...One of every six Americans now lives in a multigenerational household.”

A wide range of non-traditional households have increased, including “blended families” (a couple with children from a prior marriage), families with boomerang children (adult children living with their parents), and unmarried heterosexual couples (with or without children). The increase in homosexual couples has been a frequent subject of media coverage. Some of these couples’ relationships have no legal status; others are in legally-recognized civil unions; and an increasing number are in recognized same sex marriages. Many of these couples have no children, but some have children who may or may not be biologically-related to one partner. In addition, the diverse housing needs of a large and increasing senior population, including both independent and dependent elderly, have attracted increased attention from planners and developers. Add to this diversity the following non-traditional households: foster families, communal religious groups, nonreligious communal groups, group homes for people with physical or mental disabilities, persons with disabilities living independently, and two or more unrelated families living in the same household due to recent immigration or doubling-up because of the Great Recession.

Planning Theory

While single family zones have always allowed some additional uses, they generally allow only a few uses by right and are low density. Smart Growth and New Urbanism planning theories challenge the assumptions upon which traditional single family zones have been justified. Proponents of these contemporary theories have argued that a mixture of different housing types (e.g. single family and garden apartment), a blend of different uses (e.g. residential and retail), and higher densities are more conducive to the community formation that is the stated goal of the traditional single family neighborhood.

Cultural Changes

Like any zoning category, single family zones are inherently exclusive. Much of the criticism of single family zones comes from people and households that are excluded by the “family” definition. Whether intentional or not, single family zones ultimately rest on and seek to promote some value-laden view of society which includes views about role of “family” in the political and social well-being of the community. When these values and views are in controversy, as they are now, so are the zoning definitions that rely on and enforce them. Socially and culturally, the concept of “family” is in flux. These conflicts have now become legal conflicts, including in the now familiar same sex marriage battles.
What are the federal and state legal limits on zoning definitions of family?

Each definition of family is subject to a variety of legal limitations based in constitutional law, statutory law, and case law. While the law is not settled everywhere, the legal limits in most jurisdictions afford localities a fairly broad scope for charting their own course. This section will first present the general legal framework affecting family definitions and then discuss the specific legal issues associated with particular definitions. Most challenges are brought by persons or households excluded from a single family zone because of its definition, thus the legal doctrine is closely linked to particular definitions.

General Federal Law Limits

Several legal commentators have argued that all single family zoning is unconstitutional, but federal Constitutional law is largely permissive. Due process, equal protection, freedom of association, right to travel, and right of privacy are the most common types of challenges to single family zoning districts brought under the federal constitution. Sometimes litigants bring challenges under the free exercise of religion clause or the takings clause. All of these claims aim to subject single family zoning definitions to a more exacting standard of review than the traditional “rational basis” test by claiming that they infringe on a fundamental constitutional right.

In Village of Euclid v. Ambler Realty, the U.S. Supreme Court upheld comprehensive zoning against a due process claim and affirmed that single family zoning did not violate the federal Constitution. Euclid’s ordinance used a functional family definition, and that definition was not specifically challenged in the case.

Three other later U.S. Supreme Court decisions, Village of Belle Terre v. Boraas, Moore v. City of East Cleveland, and City of Cleburne v. Cleburne Living Center, largely mark out localities’ room for maneuver in this area. In Village of Belle Terre, a group of six college students living together challenged the locality’s definition of family that excluded them on several constitutional grounds, including equal protection, freedom of association and privacy. The majority upheld the ordinance against all of these challenges applying deferential “rational basis review.” Famously, the majority stated that the zoning power was sufficient to provide for “A quiet place where yards are wide, people few, and motor vehicles restricted... The police power is not confined to elimination of filth, stench and unhealthy places.” A strong dissent argued that students should be protected by the First Amendment’s guarantee of freedom of association.

In Moore, a city’s unusual definition of family limiting occupancy to family members with specified degrees of consanguinity had the effect of preventing a grandmother from living with two of her grandsons who had different mothers. While there was no single majority opinion, five members of the Supreme Court agreed that this definition violated the due process clause of the Fourteenth Amendment to the U.S. Constitution because it “cut so deeply into family.”

In City of Cleburne, a local ordinance imposed a special use permit requirement on homes for the “mentally retarded,” but not on similar types of semi-institutional residences, such as fraternity houses and nursing homes. Applying a heightened rational basis review standard, the U.S. Supreme Court found that the ordinance violated the equal protection clause.

The upshot is that on the federal constitutional level, as long as a locality’s definition does not interfere with extended family living together or facially discriminate against a group home for persons with disabilities, they are probably valid.

Federal statutory law in the form of the federal Fair Housing Act has been more restrictive than federal constitutional law. The federal Fair Housing Act (FHA) prohibits a wide range of housing discrimination, preempting local zoning law and thereby limiting localities’ discretion. The FHA protects certain classes of people, including families (as defined by the statute) and “handicapped” people (i.e. persons with disabilities) from a wide range of discriminatory acts in housing including in zoning.
The FHA has numerous consequences for localities’ definitions of family. First, the FHA definition of “familial status” includes a wider range of legal status relationships than some localities’ Legal Status definitions of family. “Familial status” is defined broadly and includes a pregnant woman (whether married or not), foster children, and even a household in the process of adoption. Second, the FHA may require a locality to allow persons with disabilities living together, for example in a group home, to live in a single family zone. A “disability” is defined broadly and includes persons with HIV or AIDS. This issue comes up when definitions of family exclude group homes or other housing for persons with disabilities from single family neighborhoods. The FHA not only prohibits discrimination against persons with disabilities but also requires localities to provide “reasonable accommodation” in its housing decisions, including zoning, to afford persons with disabilities an equal opportunity to use a dwelling. This is a heavily-litigated, complex, and still evolving field beyond the scope of this article. It is worth noting, however, that some courts have held that requiring a special use permit only for homes serving persons with disabilities violates the FHA. Relatedly, the FHA exempts from its coverage “reasonable” governmental occupancy standards regarding the maximum number of occupants permitted to occupy a dwelling. In City of Edmonds v. Oxford House, Inc., the U.S. Supreme Court held that a zoning definition identified in this article as Legal Status or Specified Number of Unrelated Persons did not qualify for this exemption.

General State Law Limits

States can be more protective of certain rights or groups of people than the federal government, either in their own state constitutions or their statutes. Accordingly, some State constitutional law and statutory law has been more restrictive of single family definitions than federal law.

State constitutional challenges have been brought using similar legal claims as in federal constitutional cases with the addition of privilege and immunities clause challenges. As of 2007, a few states (California, Michigan, New Jersey, and New York) have found that restrictive definitions of family violate their state constitutions, nearly 20 states have interpreted their state constitutions in accord with Belle Terre, and the rest of the states’ supreme courts have not yet decided this issue.

In City of White Plains v. Ferraioli, the New York State Court of Appeals departed from Belle Terre when it found that a foster family could not be excluded from a single family zone because it had relative permanence and was a household that in every way but a biological sense was a single family. This case lends support to “functional family” definitions. In a later case, McMinn v. Town of Oyster Bay, that court based its rejection of Belle Terre explicitly in the New York state constitution when it voided a local ordinance’s definition of family as a deprivation of property without due process. In Santa Barbara v. Adamson, California’s Supreme Court found that the right to privacy that had been added to California’s Constitution by a popular initiative required voiding a local zoning code that prohibited more than five unrelated people from living together in a single family zone. In State v. Baker, New Jersey’s Supreme Court held that a city’s numerical limit on unrelated persons who could constitute a family violated the state’s constitution’s due process and privacy guarantees because it did not bear a “real and substantial” relation to the stated municipal goals. The court endorsed maximum residential occupancy codes and a functional definition of family as less restrictive alternatives to the city’s definition. Finally, Michigan’s Supreme Court voided a definition of family as a violation of the State Constitution’s due process clause in Charter Township of Delta v. DiNolfo. While these limits and rationales provide some guidance as to what other state supreme courts may decide, the specific language of a state constitution and previous case law interpreting it are likely to be important.

Localities’ land use authority is delegated from the state. Where delegated by state statute, the state can add affirmative obligations or restrict the scope of authority and discretion previously delegated to the locality. In addition, usually a statewide law that conflicts with a locality’s ordinance will preempt it. Moreover, state courts will interpret the meaning and scope of the delegated
authority, sometimes finding that localities have acted *ultra vires*. In each of these ways a locality's definition of family could be explicitly (or effectively) revised or undermined.

Some state legislatures have imposed a variety of statutory limits on definitions of family, usually geared to protecting non-traditional couples and families from discrimination or to promote other state policy goals, e.g. increasing the supply of affordable housing. Some states' fair housing laws protect classes of persons beyond those covered by federal FHA. For example, if "marital status" is protected, then localities cannot exclude unmarried couples from single family zones. Some states include sexual orientation and gender identity as protected classes. Several states require localities to treat some congregate households (e.g. small group homes with six or fewer residents) as a "single family" for purposes of their single family zoning ordinances. Some states revise single family zones by promoting the development of secondary units (or accessory dwelling units) in these zones by limiting localities' discretion to deny them permits.

**Legal Limits Associated with Particular Definitions**

The *Legal Status and Legal Status Plus* definitions of family have been the subject of most litigation because they are usually the most restrictive and therefore are more likely to implicate the rights of unrelated persons. As discussed above, while many courts have upheld these definitions, they have been successfully challenged or revised on state constitutional and statutory grounds.

The most recent challenge to these types of definitions come from same sex couples who seek the legal benefits of the institution of marriage and of classification as a "family." While the U.S. Supreme Court has not held that the federal Constitution requires States to allow same sex marriage, it has upheld States' rights to recognize them. And, under *United States v. Windsor,* the federal government now recognizes same sex marriages in States which allow them for purposes of federal benefits linked to marriage. Same sex marriage is gaining legal recognition by both constitutional amendment and by legal challenges to state constitutions and statutes that prohibit it. While the future of that movement is uncertain, it appears to be gaining momentum.

**Legal Status or Specified Number of Unrelated Persons Combination:** These definitions are subject to challenges to their definitions of family by Legal Status. Depending upon the composition of an extended family, this kind of ordinance could be invalidated under *Moore v. East Cleveland.* In addition, these definitions have been challenged based upon the numerical limitations on the "unrelated" families. One of the governmental interests typically stated is controlling density and its related impacts. However, because the traditional family is not subject to any numerical limits, some courts have found these limitations arbitrary and therefore unconstitutional under the rational basis test. Other courts have upheld them, often focusing on the value of preserving the traditional family unit or the other stated purposes of the single family zone. Even cases which refuse to enforce a particular numerical limitation on the number of unrelated persons who may constitute a family do not bar a locality from numerically limiting the occupancy of a dwelling unit for health and safety reasons if the limitation is reasonable.

Courts have generally embraced the *Functional Family* concept. However, certain definitions have been successfully challenged as unconstitutionally vague, so the definition needs to be reasonably clear. Generally, the challenges to these definitions are not facial challenges, but rather concern whether a particular household meets an ordinance's functional family definition as applied.

**Legal Status and Functional Family Combination** definitions are subject to the issues raised above about legal status definitions and functional definitions. And, they have one additional potential legal issue. The imposition of a SUP requirement of the functional definition on group homes for persons with disabilities can be challenged as a violating the locality's duty to provide reasonable accommodation under the FHA.
What Options do Localities Have and How Should They Consider Them?

Based upon the issues raised in this article, a locality may want to reassess its current definition of family. Following are some suggestions to aid such review.

Clarify Your Community Character Goals

Every locality should clarify its community character goals in light of its current situation. Its definition of family may have been enacted many decades ago. A locality may have tried to define or market itself by an identity linked to community character. Or the definition may have been enacted in response to a perceived or real disruption of single family neighborhoods by certain kinds of households. Given the demographic changes, it is likely that localities that employ a Legal Status and Legal Status Plus definition currently have high rates of non-compliance which are likely to increase.

Local demographic surveys and community workshops may be useful to promote thoughtful reassessment. Public recognition of demographic and cultural changes may foster different community preferences on the issue of what constitutes a family and an opportunity to realign the definition of family in the locality’s zoning ordinance with current demographic and social realities.

This reassessment should include considering whether unstated biases drove the selection of the current definition, as well as an analysis of efficacy, comparing the stated reasons for its current definition with its actual effects. If the locality assumes that the community character is created by the households’ interactions with each other, there may be too few of the actual preferred types of families to effectuate the locality’s goals. Finally, from an efficiency point of view, it may be an inefficient use of land to reserve large proportions of residential land zoned single family for a shrinking part of the population.

Consider How to Achieve Your Community Character Goals

The locality should consider all of the available policy options to achieve its community character goals. As contemporary planning theories suggest, this includes questioning assumptions about limited uses and low density. This analysis might benefit from studies of relevantly similar communities that have adopted some smart growth reforms, e.g. mixed use neighborhoods.

Different definitions affect the exclusion or inclusion of various types of households. Naming a zone acts as a signal to attract the households who want to live in a neighborhood with the kind of social life suggested by the zone’s moniker and meaning. The locality should identify the types of households that are the focus of concern (e.g. student housing, fraternities and sororities, group homes, etc.), and develop strategies for incorporating them into the community including specifying in which zones they can live. Of course, the locality should consider the legal consequences of any definition of family it considers.

And, localities should be aware of the limits of the efficacy of family definitions in promoting the desired community character. The solution may be to rely less on the definition of family in its zoning ordinance to achieve these goals, but instead supplement whatever definition of family it employs with other policies and programs to promote the desired community values. A good place to raise children will include public safety (fire and policing policies), good public schools, parks, community-building activities (e.g. neighborhood organization and planning groups), and affordability. These goals are achievable by other planning and fiscal policies.

The cost of enforcement may be an important consideration. However, it is important to recognize that there may be high enforcement costs for any definition of family because residents under suspicion may take a variety of relatively simple steps to evade a complete and accurate accounting of current residents that raise the costs of enforcement.

Based upon its reconsideration, some jurisdictions may want to retain (or may want to adopt) a Legal Status or a Legal Status Plus definition of family. Even in a state where Belle Terre controls, there may be state statutes that circumscribe the locality’s meaning of family. Therefore, this selection should be made with the recognition of the locality’s actual scope of control, i.e. as the legal
definition of marriage changes or if a state adopts legislation defining a group home as single family, then the actual scope of the locality's definition automatically changes.

Functional family definitions are more consistent with typical policy and legal justifications for zoning, viz. to regulate land use impacts of uses, not the identity of users. Depending upon the specific definition, these definitions generally allow a broader range of households in single family zones. Still, the functional definition of single family use can and should promote the locality's desired neighborhood character. Despite being more accommodating to diverse household types, this definition does not have to allow any group of people to share a dwelling in a single family neighborhood. For example, it can exclude students or other groups living together merely for economic reasons or for convenience as well as commercial uses. It could also exclude fraternities and sororities provided they were defined as such.

Legal Status Family as Use as of Right and Functional Families with Special Use Permit definitions can accommodate a wider range of non-traditional households while the locality retains more control. The cost of this control comes in additional costs in the Planning Department and in administrative review of SUP applications.

Conclusion

There are many good policy and legal reasons to reassess a locality's definition of family. Localities have options, albeit complex and possibly controversial. A decision to revise a current definition of family may be controversial in distinct ways in different communities; it is likely to be as much a political question as a policy or legal one.86

NOTES

1. Note, "Burning the House to Roast the Pig": Unrelated Individuals and Single Family Zoning's Blood Relation Criteria, 58 Cornell L. Rev. 138, 161 (1972) ("...the single family zoning ordinance is the most formidable obstacle limiting access of unrelated persons to suburbia").

2. The single kitchen rule does not always control over the other elements. Stafford v Sands Point, 102 NYS2d 910 (1951).

3. This element is less common now with the recognition that even in the nuclear family the husband and wife can be equal in status, or when a brother and sister live together there is no clear "head of household." See, e.g. Brady v Superior Court of San Mateo County, 200 Cal App 2d 69 (1962); but see Graybill v Scott Tp. Zoning Hearing Bd., 1977 WL 368 (1977).

4. This element helps distinguish this use as residential in contrast to commercial. See, e.g. Appeal of Miller, 511 Pa. 631 (1986); Brownville International, Ltd. v. Board of Adjustment, 60 Wis.2d 182 (1973), cert den 416 U.S. 936.

5. This element is intended to exclude uses such as bed and breakfast, a rooming and boarding house, seasonal use, or a hotel or motel as "non-residential uses" or "commercial uses." But this element may conflict with owners' property rights. See e.g. In re Toor, 59 A. 3d 722 (Vt. 2012) (short-term rental of single-family home does not constitute change of use requiring zoning permit).


7. Some also include "limiting rent structure," see Adam Lubow, "...Not Related By Blood, Marriage, or Adoption:" A History of the Definition of "Family" in Zoning Law (Hereinafter "Lubow, Definition of Family"), 16 WTR J. Affordable Housing & Community Dev. L. 144, 151 (2007).

8. Legal Status and Legal Status Plus definitions, as defined infra, do not limit density because they do not include numerical limits on the numbers of family members who meet the definition.

9. See, e.g. Madison, Wis., Minimum Housing and Property Maintenance Code § 27.06 (requiring 150 square feet for the first occupant and at least 100 additional square feet for each additional occupant); International Property Maintenance Code, §404 "Occupancy Limitations" (2012). For examples and analysis of residential occupancy codes using a "number of persons per bedroom" standard, see Tim Iglesias, Beyond Two-Person-Per-Bedroom: Revitalizing Application of
the Federal Fair Housing Act to Private Residential Occupancy Standards, 28 GEORGIA STATE UNIVERSITY LAW REVIEW 619 (2012).


11. Miller v. Board of Public Works of City of Los Angeles, 195 Cal. 477, 492 – 93 (1925) (“...[A] single family home [is] more desirable for the promotion and perpetuation of family life than an apartment, hotel, or flat. * * * The establishment of such districts is for the general welfare because it tends to promote and perpetuate the American home. * * * The character and quality of manhood and womanhood are in a large measure the result of the home environment.”)

12. This view could be criticized as attempted “social engineering,” but since all zoning has socio-economic effects, it is inevitably subject to such attacks. Still, as discussed infra, these views probably put too much emphasis on the definition of family in the pursuit of neighborhood character goals.

13. The deinstitutionalization of many persons with mental disabilities beginning in the 1970’s intensified these concerns.


16. For a local variation which combines a variety of definitions, see City of Ann Arbor (MI) ordinance discussed in Stegeman v City of Ann Arbor, 213 Mich App 487 (1995).

17. Kirsch Holding Co. v. Borough of Manasquan, 59 N.J. 241 (1971) (defining family as “[o]ne or more persons related by blood or marriage occupying a dwelling unit and living as a single, non-profit housekeeping unit”).

18. City of White Plains v. Ferraioli, 34 N.Y.2d 300 (1974) (defining family as: “one or more persons limited to the spouse, parents, grandparents, grandchildren, sons, daughters, brothers, or sisters of the owner or the tenant or of the owner’s or tenant’s spouse living together as a single housekeeping unit with kitchen facilities.”)

19. See Moore v. East Cleveland, 431 U.S. 494 (1977) (voiding an ordinance that limited occupancy to specific family relationships and prohibited a grandmother from living with her two grandsons).

20. Town of North Hempstead v. Griffin, 337 N.Y.S.2d 318 (1972) (defining “family” as “one or more persons related by blood, marriage, or legal adoption residing or cooking or warming food as a single housekeeping unit; with whom there may not be more than two (2) boarders, roomers or lodgers in a common household. A boarder, roomer or logger residing within the family household is a person who does or does not pay a consideration therefore to such family for such residence.”)

21. Village of Belle Terre v. Boraas, 416 U.S. 1 (1974) (defining 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.” This second kind of family definition allowed for an unmarried couple.


27. See, e.g. Syrionoudis v. Ellsworth Twp. Zoning Bd. of Appeals, 185 Ohio App. 3d 204 (7th Dist. Ma-
honning County 2009), appeal not allowed, 124 Ohio St. 3d 1509 (2010) (group home not included).


29. Ames (Iowa) ordinance defines functional families, in part, as people who share “a strong bond or a commitment to a single purpose...Share a single household budget; Prepare food and eat together regularly; [and] Share in the work to maintain the premises.” cited in Merritam, Ozzie and Harriet Don’t Live Here Anymore, supra note 28 at 6.


31. For an excellent history of definitions of family see Lubow, Definition of Family, supra note 7. Lubow notes the dual definition of “family” in 1857 edition of Bouvier’s Law Dictionary, “In a limited sense it signifies the father, mother, and children. In a more extensive sense it comprehends all the individuals who live under the authority of another, and includes the servants of the family.”), id. at 145 – 150; See Frank S. Alexander, The Housing of America’s Families: Control, Exclusion, and Privilege, 54 Emory L.J. 1231, 1232 (2005) (arguing that “Our housing laws have been used, directly and indirectly, consciously and unconsciously, as vehicles for the definition and control of families, of what relationships count in determining what constitutes a family.”)


38. Cumulatively, these demographic changes raise a host of planning issues outside the scope of this article, e.g. policies allowing accessory dwelling units in single family neighborhoods.


40. See, e.g. Learn about New Urbanism on the Congress for New Urbanism website at: https://www.cnu.org/intro_to_new_urbanism (last visited April 21, 2014).

41. Relatedly, scholars who have tested empirically whether the values and associations with homeownership actually produce what is expected are finding mixed results. See, e.g. Stephanie M. Stern, Reassessing the Citizen Virtues of Homeownership, 111 Columbia Law Review 890 (2011).
42. In addition, the single family housing structure has been criticized as unnecessarily increasing housing costs and an inefficient use of land.

43. This section draws substantially from cases cited in the following sources: James L. Rigelhaupt, Jr., "What constitutes a ‘family’ with meaning of zoning regulation or restrictive covenant, 71 A.L.R. 3d 693; Patricia E. Salkin, Sect. 9:30 “Family Defined; unrelated persons,” American Law of Zoning 5th ed. (May 2013).

44. Some localities established “single family zones” but did not define “family” in the planning code or zoning ordinance. See cases cited in Rigelhaupt, "What constitutes a ‘family’ with meaning of zoning regulation or restrictive covenant, 71 A.L.R. 3d, §§4 – 6. This is poor planning practice because it is likely to foment confusion and resulting administration costs without achieving the locality’s policy goal, and it the most legally vulnerable strategy. If litigated, the locality is allowing the court to decide the meaning of family for it.


46. Association for Educational Development v Hayward 533 SW2d 579 (1976, Mo).

47. People v Multari, 517 NYS2d 374 (1987), app den 523 NYS2d 504.


49. Euclid’s ordinance defined family as “Any number of individuals living and cooking together as a single housekeeping unit.”


53. A recent Ninth Circuit case, Fair Housing Council of San Fernando Valley v. Roommate.com, LLC, 666 F.3d 1216 (9th Cir. 2012), arguably conflicts with Belle Terre without discussing it directly. In this fair housing case against an internet-based roommate matching service, the Ninth Circuit held that the federal Fair Housing Act (see infra) does not apply to roommates because they have a constitutionally protected right of intimate association. If applied to zoning, this opinion would appear to undercut Belle Terre’s broad endorsement of single family zoning by subjecting the family definition to a stricter standard of scrutiny than the “rational basis test.” However, it is not clear that Roommate.com will be widely followed or applied in this way. See Tim Iglesias, Does Fair Housing Law Apply to “Shared Living Situations”? Or, the Trouble with Roommates, 22 Journal of Affordable Housing and Community Development Law 111 (2014).


55. 42 U.S.C. §§ 3610 et seq.

56. Defining “familial status” as “one or more individuals (who have not attained the age of 18 years) being domiciled with...a parent or another person having legal custody...or the designee of such parent or other person having such custody...any person who is pregnant or is in the process of securing legal custody of a minor,” 42 U.S.C. § 3602(k). While the FHA protects against housing discrimination based upon "sex," courts have generally not interpreted this class to include sexual orientation. However, HUD has adopted a regulation which applies only to HUD-assisted or HUD-insured housing, defining “family,” without regard to actual or perceived sexual orientation, gender identity, or marital status, to include single persons or groups of persons residing together, including those who are elderly, disabled, and with or without children. www.gpo.gov/fdsys/pkg/FR-2012-02-03/pdf/2012-2343.pdf (last visited April 21, 2014).

57. Defining “handicap” status as a person with “a physical or mental impairment which substantially limits one or more of such a persons major life activities,” a person with “a record of having such an impairment,” or a person “being regarded as having such an impairment.” 42 U.S.C. § 3602(h).


59. Bangerter v. Orem City Corporation, 46 F.3d 1491 (10th Cir. 1995).


69. "The State has a clear interest ... in preserving the integrity of the biological or legal family. The promotion of this legitimate government purpose justifies the exclusion of a blood related family from the density requirements of the ordinance which applies to an unrelated household." Hence the classification was not invidious or arbitrary and, thus, was constitutional. Town of Durham v. White Enterprises, Inc., 115 N.H. 645 (1975).


72. At the time of writing, same sex marriage is allowed in 19 states and the District of Columbia (for a good website to keep track of same sex marriage, see Freedom to Marry at www.freedomtowmarry.org or the Human Rights Campaign at http://www.hrc.org/).


74. See Vitauts M. Galbis, Validity of ordinance restricting number of unrelated persons who can live together in a residential zone, 12 ALR4th 238.

75. See e.g., McMinn v. Town of Oyster Bay, 482 N.Y.S.2d 773 (2d Dep't 1984), order aff'd, 498 N.Y.S.2d 128, 488 N.E.2d 1240 (1985) ("Ordinances that tie the definition of family unit solely to blood, marriage or adoption serve no density function because there are no corresponding limitations on the size of traditional families and it is not necessarily true that unrelated group residing as a single housekeeping unit generate more traffic, parking and noise problems than groups of related persons").


80. Bangert v. Orem City Corporation, 46 F.3d 1491 (10th Cir. 1995).

81. The percentage of nuclear families is declining. If the percentage of land zoned for single family housing remains constant, there is an increased likelihood of disjunction between zoning definitions and the actual occupancy in these zones.

83. This article assumes a locality wants to continue to have some form of single family zoning primarily to promote a certain community character in the residential zones. Some commentators propose eliminating single family zoning altogether and replacing it with a combination of numerical occupancy standards, limitations on the numbers of cars registered to a single address, property maintenance codes, criminal codes and owner-occupancy requirements. Rigel Oliveri, Single Family Zoning, Intimate Association, and the Right to Choose Household Companions, ___ Fla. L. Rev. ___ (forthcoming 2014). In the author’s view, these policies do not offer a substantial likelihood that any discernible “community character” could be established and sustained.

84. See chart, supra.

85. For fraternities and sororities, see Patricia E. Salkin and Amy Lavine, Zoning for Off-Campus Fraternity and Sorority Houses, Zoning and Planning Law Report (December 2010).

86. For example, consider a jurisdiction that currently has a restrictive definition of family. Given the changing demographics, there is a relatively high statistical probability that there are high levels of violation. But is it actually being enforced regularly? It is not a good practice to leave law on the books that city is not committed to enforcing, but also may be politically challenging to change it proactively to reflect the current facts on the ground.