to rent, or not to rent, that is the constitutional question

BY GRANT J. GUILLOT

Introduction

Baton Rouge is often dubbed a "college town" by reason of its status as the home of the Fighting Tigers, the Southern Jaguars and various other academic institutions. Landlords in this city continue to benefit from the number of students seeking convenient and affordable housing while they attend college or graduate school. In addition, some parents purchase houses in Baton Rouge to provide housing for their children and children's friends while they are attending school. However, if they have not already, these landlords, parents and students may soon face allegations from the City of Baton Rouge/ Parish of East Baton Rouge that they are in violation of the A1 single-family zoning regulations contained in the Unified Development Code ("UDC"), Baton Rouge's comprehensive compilation of ordinances. Therefore, the constitutionality of these zoning regulations merits examination.

A "family" affair

The City-Parish issues violation letters to homeowners and renters whose properties, although satisfying the UDC's maximum-density requirement,[1] are not inhabited by what the UDC defines as a "family." According to the UDC,

> Family means an individual or two (2) or more persons who are related by blood, marriage or legal adoption living together and occupying a single housekeeping unit with single culinary facilities; or not more than two (2) persons, or not more than four (4) persons (provided the owner lives on the premises) living together by joint agreement and occupying a single housekeeping unit with single culinary facilities on a nonprofit, cost-sharing basis.[2]

In *Village of Belle Terre v. Boraas*, the United States Supreme Court upheld the constitutionality of a similar definition of "family," which was applied to a zoning ordinance that restricted land use to single-family dwellings.[3] The Court determined that the ordinance was "reasonable, not arbitrary," and that it bore "a rational relationship to a (permissible) state objective."[4] That is, the ordinance preserved the character of family neighborhoods as, "quiet place[s]...where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for the people."

However, the Court in *Moore v. City of East Cleveland* indicated that it would not give municipalities unbridled discretion in determining the definition of "family" to be applied to zoning ordinances.[6] In *Moore*, the Court struck down a city ordinance that contained a definition of "family" prohibiting a grandmother from living in the same home as her grandsons because the boys were cousins instead of brothers.[7] The Court stated, "[W]hen the government intrudes on choices concerning family living arrangements, this Court must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation."[8] Although the city claimed that the ordinance facilitated certain legitimate goals, such as preventing overcrowding and parking congestion, the Court concluded that the ordinance served those goals "marginally, at best."[9]

Big brother may be watching you – and choosing your roommates

The U.S. Supreme Court has interpreted the freedom of association, an essential component of the First Amendment,[10] to include the right to choose and maintain certain intimate human relationships.[11] Renters may question whether the UDC's definition of "family," as applied to the A1 zoning regulations, prohibits them from enjoying this right by restricting the types of relationships that qualify individuals to live together.

In addition, in *Griswold v. Connecticut*,[12] the Court addressed the implicit right to privacy embedded in the First Amendment, noting that "the First Amendment has a penumbra where privacy is protected from governmental intrusion."[13] Furthermore, the Ninth Amendment[14] has also been interpreted by the Court to provide for freedom from intrusion by government into one's private life.[15] Landlords and tenants may suspect that the City-Parish's application of the UDC's definition of "family" to its zoning regulations intrudes upon their privacy rights by (1) inquiring into their living arrangements; (2) limiting the classes of people with whom landlords may conduct business; (3) imposing on property owners the burden of asking prospective tenants whether they are related by blood, marriage or adoption; and (4) restricting an individual's choice of co-occupants based on preconceived notions of familial ties.

Giving process where process is due

The Due Process Clauses of both the Fifth[16] and Fourteenth Amendments[17] protect against the deprivation of "life, liberty, or property, without due process of law."[18]

In *Village of Euclid, Ohio v. Ambler Realty Co.*, the U.S. Supreme Court held that a municipal ordinance shall survive a due process challenge if it "bear[s] a rational relationship to the health, morals, safety, and general welfare of the community."[19] While the City-Parish may have enacted the zoning regulations with the intention of protecting the community's interests in, among other things, minimizing overcrowding and controlling traffic and noise levels, property owners and renters may question whether the regulations are narrowly tailored or rationally related to those interests. For example, the regulations suggest that no more than two unrelated individuals may live together; however, 20 related individuals could reside together and not be in violation of the regulations. It would seem that the larger number of related individuals residing together would create more issues with overcrowding, traffic, and noise problems than would three non-related individuals who live together.

This land is your land, this land is the government's land

The U.S. Supreme Court has opined that "a use restriction on real property may constitute a 'taking' [in violation of the Fifth Amendment[20]] if not reasonably necessary to the effectuation of a substantial public purpose,"[21] depending on (1) "the economic impact of the regulation on the claimant," (2) "the extent to which the regulation has interfered with distinct investment-backed expectations," and (3) "the character of the governmental action."[22] Lessors may contend that the zoning regulations imposed by the City-Parish violate the Takings Cause[23] by denying a property owner economically viable use of his land – the ability to lease the property to more than a set number of unrelated individuals – thereby depleting him of a revenue stream without providing him with just compensation. Furthermore, landlords may assert that the zoning regulations are not reasonably necessary to effectuate a substantial governmental purpose because, as explained above, the City-Parish's goals may not necessarily be achieved by restricting the number of unrelated individuals who may live together.

No foster children allowed?

Landlords and tenants may also question whether the zoning regulations violate the Equal Protection Clause of the Fourteenth Amendment[24] by placing greater restrictions on lessors and lessees than they do on property owners who choose not to rent their homes. Additionally, the zoning regulations seemingly prohibit foster children (who are not related to their prospective foster parents by blood, marriage or adoption) from being able to live together while allowing an unlimited number of very distant relatives via blood, marriage or adoption to reside together. Certainly, there can be no justification for the City-Parish affording certain rights to children who reside with their biological parents and then denying those rights to foster children.

Clearly crafted or contradictorily composed?

Finally, property owners and lessees may struggle with determining the exact conduct prohibited by the regulations, thus leading to a potential claim of violation of the void-for-vagueness doctrine.[25] While the first clause of the UDC's definition of "family" suggests that an unlimited number of individuals related by blood, marriage or adoption may reside together, the second clause indicates that no more than two persons (or four persons if the owner resides on the property) may live on the property in accordance with a joint agreement.[26] The clauses appear to contradict one another, leading one to question whether the clauses can be read together to form an unequivocal statement of law.

For example, if an owner chooses to allow two of his children and two of their friends to live on his property, uncertainty would arise as to whether a violation of the zoning regulations has occurred. On one hand, the residents would arguably not be in violation of the first clause because two persons who are related by blood would be residing on the premises. On the other hand, assuming the owner does not live on the property, more than two unrelated persons would be residing on the property possibly in violation of the second clause. Even if the owner did reside on the property with his two children and their two friends, the occupants would arguably still be in violation of the second clause because "more than (4) persons (provided the owner lives on the premises) [would be] living together."[27]

Conclusion

Courts historically have been hesitant to interfere with a municipality's enactment and enforcement of zoning regulations, finding "regulation of land use [to be] perhaps the quintessential state activity"[28] and "the most essential function performed by local government."[29] However, as evidenced by its decision in *Moore*,[30] the United States Supreme Court will intervene when it determines that a municipality's zoning regulations do not pass constitutional muster. One may find that the City-Parish's application of the UDC's definition of "family" to its A1 single-family district zoning provisions, at best, results in a set of contradictory regulations that leave property owners and tenants having to guess whether certain living arrangements are prohibited. As landlords, parents and students in Baton Rouge continue to utilize houses in A1 single-family residential districts for rental purposes, they may soon find themselves receiving violation letters from the City-Parish. Only time will tell whether the courts will more closely examine this issue and consider whether the City-Parish has exceeded its police power in applying the UDC's definition of "family" to the UDC zoning regulations. Until then, landlords and tenants beware – the City-Parish may be watching.