CITY OF BATON ROUGE/
PARISH OF EAST BATON ROUGE

NUMBER 610,359 SEC. "D "

VERSUS

19TH JUDICIAL DISTRICT COURT

PARISH OF EAST BATON ROUGE

STEPHEN C. MYERS

POST TRIAL MEMORANDUM ON BEHALF OF THE CITY/PARISH

The City/Parish filed this action seeking an injunction to stop defendant Myers' further violation of the ordinance that limits the number of unrelated persons permitted to occupy a residence located in an area zoned "A1 Single Family residence."

The ordinance is found in the Uniform Development Code which has been formally adopted by the Metro Council and constitutes the parish zoning ordinance. Section 8.201of that code provides that residences located in an A1 Single Family zone may be occupied only by a single family. Chapter 2 of the UDC defines "single family" as:

> 1. An individual; or
> 2. Two 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
> 3. Not more than two persons living together by joint agreement and occupying a single housekeeping unit with single culinary facilities on a non-profit, cost sharing basis; or
> 4. Not more than four 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 non-profit, cost sharing basis.

A certified copy of the relevant parts of the UDC were introduced into evidence at trial, and a certified copy of the UDC was filed prior to this trial with the Clerk of the 19th Judicial District Court.

The evidence adduced at trial established the following facts:

1. Defendant Stephen Myers owns the residence located at 1977 Cherrydale St.

2. Mr. Myers does not occupy that residence.

3. The residence is located in an A1 Single Family zone.

4. At the time this petition was filed (March 20th, 2012), the residence was occupied by five persons who were not related by marriage, blood or legal adoption.

5. The lease through which those five persons occupied expired on May 31, 2012. (That lease is Plaintiff's exhibit #1.)

6. At the time of trial of this matter, the residence was occupied by four persons who were not related by marriage, blood or legal adoption. (That lease is Plaintiff's exhibit #2.)

Thus, City/Parish submits that the evidence has established by a preponderance that the residence was owned by defendant, was in an A1 Single Family zone, not occupied by owner, and was at all relevant times occupied by more than two unrelated persons and therefore was occupied in violation of the ordinance.

Mr. Myers has asserted that only an occupant can be in violation of the ordinance; that a non-occupying owner cannot violate the ordinance. In other words, Myers claims that leasing to more than the permissible number of occupants is not a violation of the ordinance. The City/Parish is not "prosecuting" a violation in this case; it is only seeking to stop the on-going violations and prevent future violations. An injunction is aimed at the person who is in a position to cease the action to be enjoined. The prohibited occupation could not occur without Myers' participation. Myers is certainly, and logically, the appropriate party to enjoin from violating the ordinance at 1977 Cherrydale Street and to prevent future violations.

Myers also defends on the grounds that the ordinance is unconstitutional. He claims, as set out in his Second Amended Affirmative Defenses, Answer, and Reconventional Demand in Response to the Amended Petition for Preliminary and Permanent Injunction of the City of Baton Rouge/Parish of East Baton Rouge, that the ordinance violates constitutionally guaranteed rights of freedom of association, privacy, due process, taking of property without compensation, and equal protection contained in both the federal and the state constitutions. Myers also complains that the ordinance violates the Fair Housing Act and is vague.

It should be noted that Myers has no standing, no right of action, to complain of any loss of constitutional rights on behalf of others. Myers cannot complain that his lessees might suffer a loss of due process, equal protection, etc. ("To have standing, a party must complain of a constitutional defect in the application of the statute to himself, not of a defect in its application to third parties in hypothetical situations." Fransen v. City of New Orleans, 988 S2d 225 (LA. 2008); Greater New Orleans Expressway Commissioners v. Olivier, 892 S2d 570)

Myers can only complain of a loss of his own constitutional rights, and even then only as to those rights which are in fact at issue in matter before the court. There must be a justiciable controversy. The courts are not to respond to academic or purely hypothetical issues. At trial, defense made considerable hubbub about the defendant's loss of his ability to lease to unmarried couples with various numbers of foster children, but defense offered no evidence that Myers had ever refused to rent to such lessees. The

questions raised at trial with regard to various combinations of possible lessees are completely hypothetical and cannot form the basis of a declaratory judgment that the ordinance is unconstitutional.

The defendant's right of action, his standing to request a declaratory judgment, is limited to the application of the ordinance to the defendant, and the only justiciable controversy involves Myers' ability to lease to more than two unrelated persons.

Nevertheless, even if one were to evaluate the ordinance in terms of the various lessee combinations alleged by defendant, the ordinance still meets constitutional requirements.

The United States Supreme Court, in Belle Terre v. Boraas, 94 S. Ct. 1536 (1974), dealing with an identical ordinance, held that the ordinance did not violate any provision of the federal constitution. That decision was re-affirmed by the Court in Moore v. City of East Cleveland, Ohio, 97 S. Ct. 1932 (1977), where the Court added that such an ordinance could not split a related family. Thus, defendant's claims that the ordinance violates the federal constitution have already been determined against the defendant.

Because the tests used to determine constitutionality under the state constitution are the same as those applied under the federal constitution, Belle Terre is also dispositive of defendant's claims with regard to constitutionality under the Louisiana constitution.

The courts review zoning ordinances deferentially. That is, great deference is given to the legislature's determination that the ordinance is adequate to meet the governmental interest involved and is rationally related to that interest. (See SDJ, Inc v. City of Houston, 837 F3d 1268 , (5th cir. 1988))_ Zoning ordinances are upheld if the zoning set out in the ordinance bears a rational relation to the governmental interest sought to be enforced by the ordinance. (SDJ,Inc., supra). The governmental interest involved in creating an A1 single family zone have been set out by the U. S. Supreme Court in Belle Terre v. Boraas, 94 S. Ct. 1536, 1541 (1974) as the creation of

> "...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. This goal is a permissible one within Sherman v. Parker, 75S. Ct. 98. 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 Court, in Belle Terre held an ordinance identical to the ordinance before the court today to be constitutional. The Court found the ordinance rationally related to the legitimate governmental interests described by the Court.

The Belle Terre court, at page 1540, went on to say:

> It [the ordinance] involves no procedural disparity inflicted on some but not on others such as was presented by Griffin v. Illinois, 76 S. Ct. 585. It involves no 'fundamental' right guaranteed by the Constitution, such as voting, Harper v. Virginia State Board, 8 S. Ct. 1163; the right of access to the courts, NAACP v. Button, 83 S. Ct. 328; or any rights of privacy, cf. Griswold v. Connecticut, 85 S. Ct. 1678.... We deal with economic and social legislation where legislatures have historically drawn lines which we respect against the charge of violation of the Equal Protection Clause if the law be 'reasonable, not arbitrary' ...and bears 'a rational relationship to a (permissible) state objective. Reed v. Reed, 92 S. Ct. 251.
>
> At page 1541, the Belle Terre Court wrote:
>
> It is said that the Belle Terre ordinance reeks with an animosity to unmarried couples who live together. There is no evidence to so support it; and the provision of the ordinance bringing within the definition of 'family' two unmarried people belies the charge.

Thus, the ordinance before the court today, being identical to the ordinance at issue in Belle Terre, has been held by the U. S. Court to be a constitutional zoning ordinance.

In 1977, the U.S. Supreme Court, in Moore v. City of East Cleveland, 97 S. Ct. 1932, re-affirmed its holding in Belle Terre, and added that such an ordinance could not "split" a family whose members were related by blood in order to maintain a maximum number of occupants Nevertheless, defendant maintains that the ordinance is unconstitutional because its definition of "family" is old fashioned and outmoded. Whether that is true or not is a matter of opinion. There are those (including the Metro Council) who are of the opinion that a "family," regardless of the various living arrangements presently practiced by some people, nevertheless requires a relationship by blood, marriage or legal adoption. Obviously, as pointed out by Professor Berkowitz, there are many who are of the opinion that a family consists of a group of any number and of any gender who are of the opinion that they constitute a family without benefit of marriage, blood, or adoption. The definition of family proposed by Professor Berkowitz would not meet the "rationally related" requirement because that definition would place no limit on the number of occupants permissible, which would not accomplish the governmental interest of minimizing the number of people residing in a single family zone. In Professor Berkowitz' own words, her definition of family would be "unenforceable" as written.

Myers complains that the definition of family in the ordinance is out dated because it requires a relationship by blood, marriage or legal adoption. Myers, thru Berkowitz, claims that the definition should match the now common relationship, that is, any number and any gender combination where the "members" are of the opinion that they are a family. But this overlooks the fact that the ordinance actually defines family four different ways. A family is a "traditional" family, one person, or two unrelated persons, or four unrelated persons if the owner is one of the four. Each one of these is a "family" and only the first

requires marriage, adoption, custody. The others do not even require a relationship as required by Berkowitz. So, in fact, the ordinance recognizes the various relationships touted by Berkowitz but merely places an upper limit on the members who can occupy at the same time.

The decision what definition of family is to be adopted is a question for the legislature. As long as the definition adopted by the legislative body does not violate a constitutional provision and is rationally related to the legitimate governmental interest involved, the courts are required to uphold the ordinance, even where the court is convinced that another definition would be better. The courts have long held that a zoning ordinance enjoys a presumption of validity, and so long as the ordinance does not infringe upon constitutional rights, the courts cannot substitute their judgment for that of the legislature. (See, for example, Village of Euclid v. Ambler Realty, 272 U.S. 365; Mestre v City of Atlanta, 255 Fed 2d 401, 5th Cir. 1958).

In other words, the courts are not to legislate. (See Winkle Terra Cotta Co. V. Butler, 117 S2d 134 (La. 1928); Veillon v. Lafleur's Estate, 110 So. 326 (La 1926).

The defendant's concern with the definition of family is mis-placed. The title "Single Family" is only convenient, it is not restrictive. That is, the ordinance is intended to create a zone, an area, where there is a limitation upon the number of residents. It is not intended to literally limit to related single families. Thus the ordinance permits occupation by unrelated persons, but only to a limited extent. It is not permissible to limit the number of related family members. (See Moore, supra.) The ordinance is the only way to achieve the goals described by the Court in Belle Terre. The zone actually is a "limited occupancy" zone, and should be so called. In fact, were the zone to be called a "limited occupancy" zone rather than a "single family" zone, Mr. Myers' arguments would disappear. No definition of family other than that set out in the ordinance will accomplish the goals of minimizing population in an A1 zone while preventing the splitting of a related family as prohibited by Moore v East Cleveland.

There are several zones within which multifamily use is permissible and in which Myers could purchase property and rent without violating the City/Parish ordinance. These areas include, but are not limited to areas zoned A3, C1, LC1, and LC2.

It is submitted that far from attempting to exercise rights, the defendant is simply exploiting those features of single family zones that make those zones desirable. City/Parish respectfully submits that Myers has failed to carry his burden of proving any infirmity in the ordinance, and the injunction requested should issue.

Respectfully submitted
BY ATTORNEYS:

Mary E. Roper
Parish Attorney

FRANK GREMILLION
Snr. Special Assistant Parish Attorney
Bar Roll No.
MAIMUNA D. MAGEE
Special Assistant Parish Attorney
Bar Roll No. 26010
222 St. Louis Street
Room 902
Baton Rouge, LA 70802
(225) 389-3114

Certificate

I certify that a copy of this Memorandum has been provided to counsel for defendant by e-mail and by placing a copy in regular mail, this 12th day of February, 2013.

Maimuna D. Magee