



**TOURO COLLEGE**  
JACOB D. FUCHSBERG LAW CENTER  
*Where Knowledge and Values Meet*

Digital Commons @ Touro Law  
Center

---

Scholarly Works

Faculty Scholarship

---

1996

## Fair Housing Act (Symposium: The Supreme Court and Local Government Law: The 1994-95 Term)

Leon D. Lazer

*Touro Law Center*, llazer@tourolaw.edu

Follow this and additional works at: <https://digitalcommons.tourolaw.edu/scholarlyworks>



Part of the [Housing Law Commons](#)

---

### Recommended Citation

12 TOURO L. REV. 331 (1996)

This Article is brought to you for free and open access by the Faculty Scholarship at Digital Commons @ Touro Law Center. It has been accepted for inclusion in Scholarly Works by an authorized administrator of Digital Commons @ Touro Law Center. For more information, please contact [lross@tourolaw.edu](mailto:lross@tourolaw.edu).

# FAIR HOUSING ACT

*Leon Lazer:*

At this time, I want to talk to you about the *City of Edmonds v. Oxford House, Inc.*,<sup>1</sup> which is an important case because it deals with an aspect of the Federal Fair Housing Act<sup>2</sup> and the almost mundane requirement in every zoning ordinance that there be a definition of "family."<sup>3</sup>

The definition of "family" is not a recent zoning problem.<sup>4</sup> Pretty much from the outset of zoning, it has been necessary to

---

1. 115 S. Ct. 1776 (1994). In *Edmonds*, Washington, Oxford House opened a group home for recovering alcoholics and drug addicts. *Id.* at 1779. Oxford House intended to house 10 to 12 unrelated persons in a "neighborhood zoned for single-family residences." *Id.* In defending against a violation of the zoning codes, Oxford House claimed protection under the Fair Housing Act which prohibits discrimination in renting to dwellers who are handicapped. *Id.* The parties stipulated that the Oxford House residents are handicapped for the purpose of this suit. *Id.* The Court held that the Fair Housing Act "does not exempt prescription of the family-defining, kind, i.e., provisions designed to foster the family character of a neighborhood[.]" and remanded the case to the lower court to decide the discrimination. *Id.*

2. 42 U.S.C.A. § 3607(b)(1) (1988). This section provides in pertinent part: "Nothing in this subchapter limits the applicability of any reasonable local, State or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling. Nor does any provision in this subchapter regarding familial status apply with respect to housing for older persons." *Id.*

3. *Edmonds*, 115 S. Ct. at 1778 (defining family as "persons [without regard to number] related by genetics, adoption, or marriage, or a group of five or fewer [unrelated] persons").

4. See *Boraas v. Village of Belle Terre*, 367 F. Supp. 136, 138 (E.D.N.Y. 1972) (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"), *rev'd*, 476 F.2d 806 (2d Cir. 1973), *rev'd*, 416 U.S. 1 (1974). The definition further provides that "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." *Id.* at 138; see also *Skinner v. Commissioner of Internal Revenue*, 47 B.T.A. 624, 626 (1942) (defining family of an individual to "include only his brothers and sisters (whether by the whole or half blood) spouse, ancestors, and lineal descendants"); *Palo Alto Tenant's Union v. Morgan*, 487 F.2d 883, 883-84 (9th Cir. 1973) (defining

define “family” if there were to be restrictions on who was to live in a one-family house, or what the courts and the enforcement agencies would view as one-family use of a house. The ordinary, or let us say, the usual zoning ordinance requirement, from the beginning, defined family as a number of people related by blood, marriage or adoption.<sup>5</sup> Sometimes, as in Huntington, the definition would add that a number of unrelated people could live together, generally with some numerical limit.

---

family as “one person living alone or two or more person related by blood, marriage or legal adoption, or a group not exceeding four persons living as a single housekeeping unit.”), *cert. denied*, 417 U.S. 910 (1974).

5. *See, e.g.*, *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974) (upholding zoning ordinance which defined family as “[o]ne or more persons related by blood, adoption or marriage, living and cooking together as a single housekeeping unit [or] 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 . . . .”); *Holy Name Hosp. v. Montroy*, 379 A.2d 299 (N.J. Super. Ct. App. Div. 1977) (holding unconstitutional a zoning ordinance “restricting residential occupancy solely on the basis of relationship by blood, marriage, or adoption”); *Dinan v. Board of Zoning Appeals*, 595 A.2d 864 (Conn. Sup. Ct. 1991) (holding unconstitutional a zoning ordinance defining family as “persons related by blood, marriage, or adoption”); *People v. Renaissance Project, Inc.*, 78 Misc. 2d 607, 359 N.Y.S.2d 375 (Sup. Ct. N.Y. County 1973) (invalidating a zoning ordinance defining family as “individuals related by blood, marriage or adoption.”), *rev’d*, 36 N.Y.2d 65, 324 N.E.2d 355, 364 N.Y.S.2d 885 (1975); *Elliot v. City of Athens*, 960 F.2d 975 (11th Cir.), *cert. denied*, 506 U.S. 940 (1992). Family is defined as:

One (1) or more persons occupying a single dwelling unit, provided that unless all members are related by blood, marriage or adoption, no such family shall contain over four (4) persons. Domestic servants employed on the premises may be housed on the premises without being counted as a separate family or families. In addition, a related family may have up to two unrelated individuals living with them. The term family does not include any organization or institutional group.

*Id.* at 976; *Village of Asharoken*, N.Y. Code § 125-2 (1989). This section provides in pertinent part:

Family - Any number of individuals related by blood, marriage or adoption or not more than four (4) individuals who are not so related living and cooking together as a single nonprofit housekeeping unit. A “family” shall also be deemed to include employees of such individuals living and working on the premises.

*Id.*

For example, in Huntington, as I last recall, the statute limits the unrelated occupants to five, and it refers to unrelated people living, eating and cooking together as a single housekeeping unit.<sup>6</sup> The purpose of the numerical cap is to prevent boarding or rooming houses in one-family zones.<sup>7</sup>

In 1974, the issue of the definition of family reached the Supreme Court in the case of *Village of Belle Terre v. Boraas*,<sup>8</sup> with a famous decision by Justice Douglas.<sup>9</sup> Involved in that case was occupancy of a single-family house in the Village of Belle Terre by a number of people attending the State University at Stony Brook.<sup>10</sup> The village ordinance provided that "family" meant people related by blood, marriage or adoption, or two unrelated people.<sup>11</sup> The reference to two unrelated people drew

---

6. Huntington, N.Y. Code § 198-2 (1978). This section provides in pertinent part: "[f]amily - any number of individuals related by blood, marriage or adoption, or not more than five (5) individuals who are not so related, living, sleeping, cooking and eating together as a single nonprofit housekeeping unit." *Id.*

7. Palo Alto Tenants Union v. Morgan, 321 F. Supp. 908 (N.D. Cal. 1970), *aff'd*, 487 F.2d 883 (9th Cir.), *cert. denied*, 417 U.S. 910 (1974). This case involved the constitutionality of the zoning of certain neighborhoods in the city of Palo Alto with the designation of "R-1" or "single family residential." *Id.* at 909. The court in upholding the constitutional validity of such zoning recognized the rationale behind limiting the size of unrelated inhabitants in these zones:

[L]arge groups of unrelated persons living together in an R-1 dwelling tend to have a greater impact on the neighborhood than do traditional families. Noise, traffic problems, and overloaded parking facilities may tend to result when one-family homes become communal dwellings. This justification for the ordinances cannot be said to be irrational.

*Id.*

8. 416 U.S. 1.

9. *Id.* at 2.

10. *Id.* at 2-3.

11. *Id.* at 2. The ordinance provides in pertinent part:

One or more persons related by blood, adoption or marriage, living and cooking together as a single housekeeping unit . . . [and] 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.

some comment from Justice Douglas to the effect that in upholding the ordinance, the Court was not impeding unmarried couples from living together.<sup>12</sup>

Ultimately, the *Belle Terre* holding precluded a federal constitutional attack on blood, marriage and adoption definitions because the Supreme Court upheld as constitutional that kind of a family definition. The attacks then proceeded in the state courts under the state constitutional provisions.<sup>13</sup> In New York, in *McMinn v. Town of Oyster Bay*,<sup>14</sup> I wrote the opinion which struck down the blood, marriage and adoption definition as in violation of the due process clause of the state constitution. The Court of Appeals affirmed in an opinion written by Judge

---

VILLAGE OF BELLE TERRE, N.Y., BUILDING ZONE ORDINANCE art. I, § D-1.35a (1970).

12. *Id.* at 8-9. In his majority opinion in *Belle Terre*, Justice Douglas stated the following in terms of the ordinance and its impact on unmarried persons:

It is said, however, that if two unmarried people can constitute a "family," there is no reason why three or four may not. But every line drawn by a legislature leaves out that [which] might well have been included. That exercise of discretion, however, is a legislative, not judicial, function. It is said that the Belle Terre ordinance reeks with an animosity to unmarried couples who live together. There is no evidence [t]o support it; and the provision of the ordinance bringing within the definition of "family" two unmarried people belies the charge.

*Id.*

13. N.Y. CONST. art. I, § 6. Article I, § 6 provides in pertinent part: "No person shall be deprived of life, liberty or *property* without due process of law." *Id.* (emphasis added). See *Santa Barbara v. Adamson*, 610 P.2d 436 (Cal. 1980) (holding that the city ordinance's definition of family violated the state constitution). See also *City of Des Plaines v. Trottner*, 216 N.E.2d 116 (Ill. Sup. Ct. 1966) (holding that the General Assembly went beyond their powers in their definition of the "family").

14. 105 A.D.2d 46, 482 N.Y.S.2d 773 (2d Dep't 1984), *aff'd*, 66 N.Y.2d 544, 488 N.E.2d 1240, 498 N.Y.S.2d 128 (1985). In *McMinn*, the plaintiffs rented their house to "four unrelated young men." *Id.* at 46, 482 N.Y.S.2d at 775. The Town brought criminal charges against the plaintiffs for violating the Oyster Bay zoning ordinance which prohibits "renting to more than one family." *Id.* Plaintiffs sought judgment declaring that their equal protection and due process rights were violated. *Id.* at 48, 482 N.Y.S.2d at 775. The Second Department held that the zoning restriction violated due process under the New York State Constitution. *Id.* at 47, 482 N.Y.S.2d at 775.

Simons.<sup>15</sup> In *Baer v. Town of Brookhaven*,<sup>16</sup> involving a similar definition in the Brookhaven ordinance,<sup>17</sup> the ordinance was struck down as violating the state constitutional due process provision.<sup>18</sup>

The City of Edmonds is in the State of Washington. Its code contained a provision which defined "family" as persons who are related by genetics or marriage or adoption, or not more than five unrelated people.<sup>19</sup> *City of Edmonds v. Oxford House* involved a group house that had been established in a single-family zone and that housed approximately twelve occupants who were either recovering alcoholics or recovering drug addicts.<sup>20</sup> It was sort of

---

15. 66 N.Y.2d 544, 488 N.E.2d 1240, 498 N.Y.S.2d 128 (1985). The court held that:

in view of our holding that the definition of family in article 1, s 1 of the Building Zone Ordinance of the Town of Oyster Bay is facially unconstitutional under the due process clause of the New York State Constitution (art. 1, s 6), the order of the Appellate Division should be affirmed, with costs.

*Id.* at 551-52, 488 N.E.2d at 1244, 498 N.Y.S.2d at 132.

16. 73 N.Y.2d 942, 537 N.E.2d 619, 540 N.Y.S.2d 234 (1989). A group of five unrelated elderly women sharing a house in the Town of Brookhaven challenged the zoning regulation that limited to four the number of unrelated persons living together. *Id.* at 943, 537 N.E.2d 619 at 619, 540 N.Y.S.2d at 234. The court held that the ordinance violated the New York State Due Process Clause because it "restrict[ed] the size of a functionally equivalent family but not the size of a traditional family . . . ." *Id.* at 943, 537 N.E.2d at 916, 540 N.Y.S.2d at 234.

17. *Id.* The Brookhaven Town Code defines the term "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 four*, living and cooking together as a single housekeeping unit though not related by blood, adoption or marriage, shall be deemed to constitute a family.

*Id.* (emphasis added).

18. *Id.* The court held that the ordinance violated the New York State Due Process Clause because it "restrict[ed] the size of a functionally equivalent family but not the size of a traditional family . . . ." *Id.*

19. EDMONDS, WASH., COMM. DEV. CODE § 21.30.010 (1991). Section 21.30.010 defines family as "an individual or two or more persons related by genetics, adoption, or marriage, or a group of five or fewer persons who are not related by genetics, adoption or marriage."

20. *Edmonds*, 115 S. Ct. at 1779.

a halfway house.<sup>21</sup> The City brought an action to remove these occupants on the ground that they did not constitute a family.<sup>22</sup> The response from Oxford House was a counterclaim alleging that the City was discriminating against handicapped persons in contravention of the Fair Housing Act.<sup>23</sup> The Fair Housing Act prohibits discrimination in housing based on race, gender, national origin, religion, and, since 1988, based on "handicap."<sup>24</sup>

Both sides agreed that the persons who were in residence were handicapped so that the meaning of "handicap" was not in issue.<sup>25</sup> The Fair Housing Act has an exemption provision which provides that none of the prohibitions in the Act apply to a restriction on maximum occupancy of a dwelling.<sup>26</sup> This would exempt from the reach of the Fair Housing Act a local ordinance or, for that matter, a state law that limited the number of people who could live in a house. That kind of law or ordinance generally is health-related and generally relates to floor space or how many people can live in a sleeping room. For example, the City of Edmonds ordinance had a provision that tied the living space to the number of occupants and also placed a limit on how small a room could be.<sup>27</sup>

---

21. A "halfway house" is "[a] facility for rehabilitation of persons who are prisoners, former prisoners, or juvenile offenders, in a controlled environment with supervision, treatment or counseling provided on-site for an interim basis after referral from a public agency or institutional facility." *Bannum, Inc. v. City of St. Charles, Mo.*, 2 F.3d 267, 269 (8th Cir. 1993).

22. *Edmonds*, 115 S.Ct. at 1779.

23. *Id.* ("Oxford House counterclaimed under the FHA, charging the City with failure to make a 'reasonable accommodation' permitting maintenance of the group home in a single-family zone.").

24. Section 3604(f)(1)(A) declares it unlawful "to discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap of . . . that buyer or a renter." 42 U.S.C.A. § 3604(f)(1)(A) (1988).

25. *Edmonds*, 115 S. Ct. at 1779.

26. *Id.* at 1780. The Fair Housing Act allows for as an exemption a "reasonable . . . restriction regarding the maximum number of occupants permitted to occupy a dwelling." 42 U.S. 3607(b)(1) (1988).

27. 115 S. Ct. at 1782. The court cited to Edmonds Community Development Code § 19.10.00, which provides in pertinent part:

The City argued that the Fair Housing Act did not apply in its case because the family composition rule that permitted no more than five unrelated people to live together in a house constituted a maximum occupancy definition that fell within the exemption in the Act.<sup>28</sup> Therefore, the entire family composition definition was exempted from the Act. The Supreme Court, Justice Ginsburg writing, rejected the City's position after reviewing the history of such ordinances and noting that maximum occupancy types of restrictions were traditionally separate from zoning restrictions involving the definition of family.<sup>29</sup>

Justice Ginsburg declared that the sole question was whether the City's family composition rule qualified as a restriction regarding the maximum number of occupants permitted to occupy a dwelling within the meaning of the exception.<sup>30</sup> Ultimately, in ruling in favor of Oxford House against the City of Edmonds, Justice Ginsburg declared in a somewhat sarcastic tone, "it is curious reasoning indeed that converts a family values preserver

---

Floor Area. Every dwelling unit shall have at least one room which shall have not less than 120 square feet of floor area. Other habitable rooms, except kitchens, shall have an area of not less than 70 square feet. Where more than two persons occupy a room used for sleeping purposes, the required floor area shall be increased at the rate of 50 square feet for each occupant in excess of two.

EDMONDS, WASH., COMM. DEV. CODE § 19.10.000 (adopting Uniform Housing Code § 503(b) (1988)).

28. *Edmonds*, 115 S. Ct. at 1782.

29. *Id.* at 1780. Justice Ginsburg noted the Court's recognition of the distinction between maximum occupancy restrictions and land use restrictions in *Moore v. City of East Cleveland*, 431 U.S. 494 (1977). In *Moore*, the Court struck down as unconstitutional, an East Cleveland's housing ordinance, whose constrictive definition of "family" made it a crime for a grandmother to live with her grandchild. *Id.* Justice Ginsburg also noted the differing purposes of each restriction. *Id.* Maximum occupancy restrictions serve "to protect health and safety by preventing dwelling overcrowding." *Edmonds*, 115 S. Ct. at 1780. They "ordinarily apply uniformly to all residents of all dwelling units." *Id.* In contrast, land use restrictions serve to "prevent problems caused by the 'pig in the parlor instead of the barnyard.'" *Id.* (citing *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926)).

30. *Id.* at 1780. Ginsburg stated that "[t]his case presents the question whether a provision in petitioner City of Edmonds' Zoning Code qualifies for § 3607(b)(1)'s complete exemption from the scrutiny." *Id.* at 1778.



into a maximum occupancy restriction once a town adds to a related persons restriction.”<sup>31</sup> Under the City’s argument, pointed out by Justice Ginsburg, all a municipality has to do to get out from under the Fair Housing Act is add to whatever the family composition description might be the words “and also two unrelated persons.” That would then implicate the exemption.<sup>32</sup>

In his dissent, Justice Thomas, joined by Justices Kennedy and Scalia, wrote “[t]o my mind, the rule that no house . . . shall have no more than five occupants [is a] restriction regarding the maximum number of occupants . . . .”<sup>33</sup> The case does involve the qualification, of course, but the Fair Housing Act exemption, sweeps broadly and exempts any restriction.<sup>34</sup> Justice Thomas used the German Autobahn<sup>35</sup> as one of his examples to illustrate his point.<sup>36</sup> The Autobahn does not restrict the speed of cars, but it does cap the speed of trucks.<sup>37</sup> If one asked a German whether the Autobahn has any speed restrictions, the answer would be “yes.”<sup>38</sup> Justice Thomas thus implied that the answer to the question “does the City of Edmonds have a maximum occupancy restriction?” would also be “yes.”<sup>39</sup>

Justice Thomas went on to observe that Justice Ginsburg had used terms that were unheard of in land use jurisprudence.<sup>40</sup> He concluded that the “sole . . . question is whether [this] zoning code imposes ‘any restrictions regarding the maximum number of

---

31. *Id.* at 1783.

32. *Id.*

33. *Id.* at 1784.

34. *Id.* (Thomas, J., dissenting).

35. The Autobahn is a German Expressway notorious for the unrestricted high speeds at which cars are permitted to travel. WEBSTER’S NINTH NEW COLLEGIATE DICTIONARY 117 (1991).

36. *Edmonds*, 115 S. Ct. at 1784 (Thomas, J., dissenting).

37. *Id.* (Thomas, J., dissenting).

38. *Id.* (Thomas, J., dissenting).

39. *Id.* (Thomas, J., dissenting).

40. *Id.* at 1788 (Thomas, J., dissenting). These terms included “family character,” “composition of households,” “total number of occupants,” and “living quarters.” *Id.* (Thomas, J., dissenting).

occupants permitted to occupy a dwelling.' Because I believe it does, I respectfully dissent."<sup>41</sup>

*City of Edmonds* is thus a case that sustains the Fair Housing Act provision against discrimination and defeats an effort to use the exemption contained in the Act as a means of escape from the provision prohibiting discrimination against handicapped persons.

---

41. *Id.* (Thomas, J., dissenting) (quoting Fair Housing Act § 3607(b)(1) (1988)).

