IN THE SUPREME COURT OF THE UNITED STATES

VILLAGE OF BELLE TERRE, et al., Appellants,	:	
v.	:	No. 73-191
BRUCE BORAAS, et al., Appellees.	:	

Washington, D. C.,

Wednesday, February 20, 1974.

The above-entitled matter was resumed for argument at 10:16 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

[Same as heretofore noted.]

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will resume arguments in Village of Belle Terre against Boraas.

Mr. Gegan, I think you have about ten minutes remaining, altogether.

ORAL ARGUMENT OF BERNARD E. GEGAN, ESQ.,

ON BEHALF OF THE APPELLANTS - [Resumed]

MR. GEGAN: Mr. Chief Justice, and may it please the Court:

Yesterday I had tried to make two basic points. First, the general proposition that the Village has a legitimate interest being zoned as a one-family community, a legitimate interest in imposing some kind of limit on the number of unrelated people who may aggregate together under the roof of one private residence.

QUESTION: But that is the two, as I understand it.

MR. GEGAN: That is the particular figure set by the Village, Your Honor. And yet, at the same time, an equally legitimate interest in not imposing the same kind of numerical limit on the occupancy of a traditional family. That's the basic principle.

But, as Mr. Justice Douglas said, our Village has a limit of two.

Additional public purposes are particularly relevant

to the number two.

The legitimate interest of the Village in equalizing the competitive position of families seeking to rent a residence, with an aggregation of unrelated individuals seeking to rent a residence. Families have usually one income, perhaps two incomes, whereas a group of unrelated individuals, each leading separate lives, can have a pooling of frar greater financial resources and could easily bid a family out of any market to occupy a residence.

The case of Dandridge v. Williams turned in part on a similar consideration. The ceiling in that case put on Aid to Families with Dependent Children was justified by a parity between what a welfare family would be earning and what a wage-earning family would be earning.

Indeed, this is an easier case than Dandridge, because in Dandridge the classification placed at a disadvantage the underprivileged group, whereas in our case the classification seeks to benefit and give a break and a parity to the entity that would otherwise be at a disadvantage, namely the family.

This seems obvious to us, yet the plaintiffs have suggested that this is not a real concern of the Village, that it's a fictitious or spurious concern. I don't know where they get their crystal ball to make such an assertion, but I'm here to tell you that the Village has a legitimate

and a real governmental concern with this problem.

We're fifteen minutes from the State University at Stony Brook, which has a potential of thousands of unrelated people. The exact figure at Stony Brook is not in the record, but it's a matter of public record, so it can be judicially noticed; over 12,000 students are at Stony Brook.

Several houses -- a few houses in the immediate neighborhood of the Dickman house have already been rented, at about $350 a month. The Dickman house, which is rented to the group of students, rents at $500 a month. The disparity is there.

And under the law of supply and demand, houses that are not presently on the rental market can come on the rental market, once it is seen that we have an abundant demand on the part of unrelated people who are willing to pay plenty to occupy a one-family residence.

The last major public purpose underlying this ordinance is the community's legitimate interest in stability. If it may reasonably be thought that groups of unrelated people tend to be more transient and provide a less stable community, then it seems to us that a one-family zone, limited primarily to families and small twosomes of unrelated people, promote this additional legitimate interest.

Indeed, on the point of stability, one need only look at the record in this case, Appendix page 11, the

plaintiffs' own allegations were that it was never planned that these students would be permanent residents. Two of them were on the lease; four of them were not on the lease. And it was contemplated that they would come and go.

The only constant thing was that the total would remain at six. So this is clearly a more transient situation than family occupancy.

The plaintiffs say that we live in a mobile society, and even families move. And they cite some figures. But those are gross figures. They don't give a breakdown, as between families, non-families, people who rent, people who own.

Your Honor, I'd like to reserve a few minutes.

Thank you.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Sager.

ORAL ARGUMENT OF LAWRENCE G. SAGER, ESQ.,

ON BEHALF OF THE APPELLEES

MR. SAGER: Mr. Chief Justice, and may it please the Court:

The Belle Terre ordinance, which is challenged here, and which was invalidated by the Second Circuit Court of Appeals below, is in many respects an extraordinary piece of municipal legislation.

It's important at the outset, I think, to recognize

what the Belle Terre ordinance is not.

It is not an ordinance of the kind which this Court validated in its sweeping decision in Euclid vs. Ambler. And it is not, in like fashion, an ordinance of the character which has received widespread acceptance as a tradition of comprehensive local zoning has taken hold in this country as a result of this Court's Euclid decision.

It is different because it in no sense purports to segregate incompatible physical uses of land, or to encourage the productive use of land. What this ordinance does in its substantial purpose, in its operative criterion, and in its effect is to exclude persons who are regarded as uncongenial from a community; and exclude them, not merely on the basis of a random criterion of uncongeniality but on the basis of a criterion of deeply personal choice; namely a person's choice of household associates.

In justification of its ordinance --

QUESTION: Well, under your view, could somebody open a rooming house and have a constitutional right, despite this zoning ordinance, to open a rooming house?

MR. SAGER: No, Your Honor, I don't think that is our view.

QUESTION: Why not? Why not, under your argument?

MR. SAGER: Under our argument, essentially, the Village has proffered two characters of legitimating interest.

On the one hand, they've proffered an interest -- and they acknowledge this candidly, Your Honor -- in social and in creating a socially homogeneous community; and on the other hand they've proffered their more orthodox interest, which they've expressed in oral argument before you.

Our argument, Your Honor, is simply, first, that the creation of socially homogeneous enclaves is not a legitimate interest of government. And, second, --

QUESTION: Well, I don't --

MR. SAGER: -- that this ordinance bears no rational relationship whatsoever to the interests which have been discussed before this Court.

Now, to get -- and I'm sorry that I deferred your question. In the situation involving a boarding house, it's entirely possible, in most communities, that there would be substantial legitimate governmental interest, justifying the prohibition of a boarding house.

This is not such a situation in the instant case.

QUESTION: As I understand, they are fencing out socially undesirable people.

MR. SAGER: That's correct, Your Honor.

QUESTION: But I understand that two socially undesirable people could --

MR. SAGER: Yes, Your Honor, this was the point made by Mr. Justice Rehnquist --

QUESTION: Pardon?

MR. SAGER: -- in argument yesterday. It's interesting to note, hoever, if you refer to the appellants' brief in this case, at page 30, the appellants give their explanation for permitting an unrelated household of two person; and that explanation makes it perfectly plain that they regard this as a grudging exception, which violates their basic policy of excluding unrelated persons.

Their rationale expressed on page 30, in essence, runs as follows:

We recognize that, says the Village, that there may be some single persons who own a house in Belle Terre by themselves, and we think it would be unjust to make them move. And we're concerned that they may be lonely, and so we permit them to have one associate.

Now, I don't criticize the policy, let me make clear, of allowing two unrelated persons; but I do want to make it perfectly plain that the Village, by its own description, of its reason for this exception to the exclusion of single families, does not purport to be saying, Yes, we in fact like single, traditional -- non-traditional household groups, but we want to regulate their size.

Rather, it says, We want to keep unrelated persons who form households of such persons out of this community, but we realize that the equities become so great in some

situations that we make an exception.

That's the Village's own characterization of that exception, Your Honor, not mine.

QUESTION: Mr. Sager, I'm not sure I track your response to Mr. Justice Stewart's question, but let me try another one that might be somewhat like it.

What about a fraternity house?

MR. SAGER: Again, Your Honor, I think that the question in each instance would be at a minimum, as in any governmental classification which deprives a given group of people of a substantial benefit: Is there a legitimate interest which substantiates or supports or justifies this classification?

I think in the case of a fraternity house, in many communities there might indeed be such legitimate interest. There might be serious concerns about the supply of parking, for example, there might be other legitimate concerns.

Where those concerns existed, our quarrel with such legislation would largely cease.

QUESTION: But why wouldn't there be serious concerns about parking here, where you have six individuals in a house and very likely each of the six might have their own car?

MR. SAGER: In this instance, Your Honor, there are several very important reasons I think for believing that this ordinance does not rationally advance. First, this

ordinance does not advance any such concern, and secondly, that the Village has no such concern.

If I can start with the second half of that argument, this Village has 220 homes, distributed over an area of more than a square mile. The present density of population in the Village of Belle Terre is 1.1 persons per acre. An extraordinary low density.

Parking, by the Village ordinance, which we cite to this Court -- I believe at page 53 of our brief -- parking by virtue of the Village ordinance is prevented on any street of the Village at this time. There are no cars parked on the streets of the Village for these 220 homes and 700 people; there are four municipal parking lots provided. There is absolutely no showing that this Village has or has ever had any concern with a parking problem of any kind.

Nor is there any reason to believe that were we confronted with a village which had a parking concern, that this ordinance would in any way rationally advance that interest.

The parking argument, among other things, is tied, of course, to the argument which Mr. Gegan made yesterday concerning the density of population.

And I'd like to examine that argument briefly for a moment.

QUESTION: Well, how about the parking argument -- or

is this going to be an --

MR. SAGER: I think -- well, let me say that I think that if there is a relationship between parking and the relationship of the people who live in the house, it must turn on one of two suppositions, neither of which, I think, is accurate.

Either that more people will live in Belle Terre if this ordinance is invalidated, or if this ordinance did not exist, or that more people who drive cars will live in Belle Terre.

I don't think either supposition can be sustained.

On the first question, of whether more people will live in the Village, let me make perfectly plain what this ordinance permits and what it prohibits.

It permits any number of persons related by blood or adoption or marriage to live in a household unit. They may be related by any remote degree of consanguinity, as in their own brief the appellants admit they may be brothers, sisters, cousins, grandfathers, or uncles.

Moreover, under this ordinance, they may have living in their household any number of household servants whatsoever. They may have, in other words, more household servants than may live in an unrelated household independently in the Village.

So an extraordinarily large number of people may

live in a house of any size in the Village of Belle Terre if they bear the magical relationship of familial tie.

If they do not, three persons violate this ordinance. Three spinsters, as was suggested yesterday; three schoolteachers; or, as the Court of Appeals below noted, three judges violate this ordinance.

QUESTION: Mr. Sager, I'd like to understand at the outset whether you are attacking the concept of single-family residential zoning wherever it may be. I would suppose that most cities in the United States have single-family residential zones. Are you saying that all of those are invalid?

MR. SAGER: Not at all, Your Honor. If by single-family zone, --

QUESTION: Well, what is --

MR. SAGER: -- what one means is detached residential dwellings on individual parcels of land, nothing in the attack which we have successfully mounted below on this ordinance, and press here, nothing whatsoever speaks to the invalidity of detached single-family dwellings. We challenge merely the notion that a community can say who will occupy those houses. And, moreover, that they can select a criterion of household association in so saying. That's solely the attack we make on this ordinance. And we don't intend, and I don't believe our attack has, any

implications which speak to the invalidity of single-family dwellings in residential communities.

QUESTION: But you do say that the Village cannot define the families, that you can define them any way you want so long as you live in a detached house?

Isn't that correct?

MR. SAGER: That is correct.

QUESTION: And so, to that extent, it is a general attack of the kind that's suggested --

MR. SAGER: If by --

QUESTION: -- in the question of my brother Powell.

MR. SAGER: -- single-family zone one means to characterize the household unit in terms of the kind, the quality of the relationship which exists between those people, and particularly to draw on a delicate choice like that, of living or not living with one to whom one is related by familial ties, to that extent necessarily we attack the single-family residence zone, only if that's what one means by that.

QUESTION: And you say that the Village, in this case at least, has no constitutional power to define the family, the way, at least the way they did.

MR. SAGER: I think that's right.

QUESTION: And could not confine it to, what I think what sociologists now call a nuclear family. Is that

it?

MR. SAGER: Yes. Although I -- just to be perfectly accurate about what this ordinance does, Your Honor, it is not restricted to what I think sociologists would characterize as a nuclear family, because the familial bond which satisfies this test can be a good deal more remote than the nuclear family. It can be, for example, a remote cousin, uncle, grandfather.

QUESTION: Well, tribal. They can't define it in tribal terms.

MR. SAGER: Tribal terms may be more accurate, Your Honor.

QUESTION: Well, your clients do not form a family, do they?

QUESTION: By your definition they do, don't they?

MR. SAGER: They do not -- I think we'd have to ask whose definition was being drawn on, Your Honor. By sociologists' definitions, I'm not sure; by the Village of Belle Terre's, certainly not. By mine, they certainly formed a single housekeeping unit. As a practical matter, their dinner was --

QUESTION: My question was: is it family -- f-a-m-i-l-y.

MR. SAGER: They are not what I would call a family, Your Honor.

QUESTION: So they wouldn't qualify under the regular ordinance if they are restricted to single-family dwellings.

MR. SAGER: Well, many of those --

QUESTION: Isn't that right?

MR. SAGER: It depends very much on how those ordinances are read. Ordinances --

QUESTION: But the ordinance says no more than one family may live in any dwelling in this Village.

MR. SAGER: Many State courts confronted with ordinances like that have said that groups like these students may live in such a -- in such a community. It depends --

QUESTION: You mean it's a family?

MR. SAGER: Many State courts have held so, Your Honor.

QUESTION: Many?

MR. SAGER: A substantial number.

QUESTION: Over two?

MR. SAGER: Over two. I can't give you the exact number.

[Laughter.]

QUESTION: What's the limit on the numbers. We have six in this case, haven't we?

MR. SAGER: Yes.

QUESTION: Well, what about twelve? Would you make the same arguments with respect to twelve?

MR. SAGER: I wouldn't -- I would not quarrel, and the appellees would not quarrel, Your Honor, with any ordinance that imposed reasonable occupancy standards, in terms of numbers, on household residencies, and did so not merely to people who are unrelated by blood, adoption or marriage, but across the board.

Many communities in the United States, for example, have addressed the problem, which we don't believe the Village possesses or was addressing here, of density by stipulating density of occupancy on the basis either of the square feet of dwellings or on the basis of the number of bedrooms in a household unit.

Such a neutral standard, which spoke not to the kind of person who lived in the community but to the extent to which they adequately use or surcharged the residential facilities in that community, we would and could have no quarrel with.

QUESTION: Then, I take it your answer is that if the house is large enough, you'd be making these same arguments with a community group of twelve?

MR. SAGER: Except, Your Honor, I think if this Village or another community wanted to, it could also regulate the size of its houses. I mean, if the community

has at its disposal simple constitutional and socially unobjectionable ways of securing the end of regulating density.

QUESTION: Well, the Village might find it very socially objectionable to penalize an impoverished large family by saying that you couldn't have more than one child to a room, or something like that.

The Village might find that intolerable as a matter of social policy.

MR. SAGER: I think they might, Your Honor.

QUESTION: So don't -- I think you're quite wrong in indicating this would be very easy for them to do as an alternative.

MR. SAGER: I think -- I think, Your HOnor, that if density were a serious concern of the community, it could certainly impose standards which would secure a maximum density in the community in this way. It could permit very large structures for families or other groups in so doing.

Let me say that, and make perfectly clear, because I think the argument of the appellants here has been a little misleading, this ordinance has been justified below and justified in the brief by the appellants here on two very different kinds of grounds. And it's critical, I think, to separate out those grounds, and to delineate the two different positions that, as appellees, we take to each of

those grounds.

On the one hand, the Village has candidly acknowledged that it intended, as it clearly must have when it passed this ordinance, to project into law the social preferences of the residences of the Village of Belle Terre for a socially homogeneous community, for a community in which neighboring households would be comprised exclusively of traditional families.

And, on the other hand, the community has argued that very much more orthodox interests, such as density of population, transiency of population, and rental level, support this ordinance.

Now, as to the former, we claim, and I believe that this is the crux of the case, that it is simply not a legitimate interest of government to divide the society into socially homogeneous residential enclaves.

QUESTION: Mr. Sager, how do you define socially homogeneous families?

MR. SAGER: Socially homogeneous families?

QUESTION: Yes. You keep referring to the purpose of the ordinance being to create a community of 220 houses all containing socially homogeneous families; how would you define such a family?

MR. SAGER: Your Honor, --

QUESTION: No restrictions on what types of families

may enter this community, are there?

MR. SAGER: There are no restrictions on what kinds of families may enter this community, --

QUESTION: How can you say they are socially homogeneous, then?

MR. SAGER: I don't think I can, Your Honor. The Village clearly, by its own statements, hopes that the kinds of people who share these ties of blood, marriage, or adoption, will in some way comprise households which are more congenial to the present residents of the Village.

QUESTION: Isn't the difference really what you consider family and what I consider family, and what we were talking about a minute ago; isn't that what it is?

MR. SAGER: I'm not sure, Your Honor, because I think the question may be -- one may have to ask a question which precedes the discussion of what a family is: namely, whether communities should be allowed to divide themselves into enclvaes for families, however divided, into enclaves for single people -- .

Since the establishment of comprehensive municipal land-use regulation in this country, there have been a variety of attempted which sound of the quality of the Belle Terre ordinance. As we suggest in our brief, communities have attempted to exclude the physically or psychologically infirm; communities have attempted to exclude

the old; communities have attempted to exclude the young; communities have attempted to exclude families with children; communities have attempted to exclude families without children. And the Village of Belle Terre and some other communities have attempted to exclude those people who form a household, whose ties do not enjoy the familial blood, marriage or adoption ties.

QUESTION: Well, those are quite different cases, very interesting cases, but quite different ones, the ones you just talked about; Belle Terre hasn't presumed to exclude children or old people or young people.

MR. SAGER: Just unrelated people.

QUESTION: Or people of any particular race or anything else. This is quite a different case, is it not?

MR. SAGER: I think, Your Honor, it is not a very different case from the ones I've set out.

QUESTION: Are you suggesting that government has no interest in the preservation of the nuclear family?

MR. SAGER: I think, Your HOnor, as this Court has made clear, as recently as its decision in Weber vs. Aetna, the government clearly does have a legitimate interest in the preservation of the nuclear family.

QUESTION: Certainly. That's what all the laws, the civil laws about marriage and divorce and child dependency and all of domestic relation law is all about.

MR. SAGER: Absolutely.

QUESTION: For centuries it's been considered a legitimate interest of government, has it not?

MR. SAGER: It has, Your Honor. I think the question is whether the Village's ordinance in any way speaks to the preservation of the nuclear family.

All that the Village has argued that this does, vis-a-vis the nuclear family, is to provide the nuclear family with residential neighborhood -- neighbors who are similar to it in being nuclear families.

How this speaks to the preservation of the institution of the family is not something which --

QUESTION: Well, the argument is --

MR. SAGER: -- is indefensible.

QUESTION: -- that you will price families out of the market in Belle Terre. You're familiar with your brother's argument. You can't disregard it.

MR. SAGER: No, I -- and we certainly don't, Your Honor.

As regards the argument which has been advanced by the Village, in terms of pricing the families out of the market, there are several propositions which I'd like to make very clear, because I think the Village has failed entirely to demonstrate either that this possibility exists in Belle Terre or that this ordinance in any way would address such a

possibility.

Let me make clear the state of the record on this matter.

First of all, there's no indication whatsoever that in this small, middle-class suburban community that there are any substantial number of rental units available at all. In their canvass of the Belle Terre community, in their one affidavit speaking to this question, the Village was able to come up with only two other houses available for rental, other than the Dickman house, which was the original subject of this litigation below.

So this is a Village which, in all probability, does not today and will not in the future have any substantial number of rental units available at all.

QUESTION: But, of course, that itself is a matter of supply and demand, isn't it? If, in fact, you succeeded in invalidating the ordinance, and owners find that they can get two or three times as much as they now could by renting to groups of six students, maybe there will be a lot more rentals available.

MR. SAGER: Your Honor, there's no indication in the record, and I think it's no intuitive justification for the proposition that six students occupying a house are going to be willing or able to spend any more than the middle-class families that live in Belle Terre today.

QUESTION: Well, but the question is whether the Belle Terre Village board could reasonably have thought that might be the case.

MR. SAGER: Your Honor, if there was a shred of evidence --

QUESTION: Like three judges or five judges, they might not pay more, either; hunh?

MR. SAGER: Three judges or five judges might, Your HOnor, although it's significant to note that by the Village's own definition of its perception of the problem, it was the student population that it was concerned with, and not a set of wage-earners that it was concerned with in this instance.

Your Honor, Mr. Justice Rehnquist, in response to your question, I think that if it were the case, that the Village could have shown itself to have in any sense perceived, examined, analyzed the existence of a problem, namely, that there was an inadequate supply in the Village or in the region of which it's a part of single-family homes for single families, in that situation and in the situation where there was some coordinated effort on the part of the Village and other communities to adjust to this need, I would say that this was entirely the kind of governmental judgment which could be made.

There is, however, in the record absolutely no

indication that the Village had this in mind when it passed the ordinance, that it examined the situation, or that it set out to adjust this need.

QUESTION: That isn't the test, as I understand it, under economic equal protection. The test is whether the legislative body, under any hypothesis, could have rationally conceived this to be the case.

I don't believe, at least as I read the cases, they have to come into court and prove that they in fact considered it, or that they did research and here's what they come up with.

QUESTION: We don't have -- it would overrule Euclid v. Ambler, couldn't it?

MR. SAGER: I don't --

QUESTION: And the whole doctine of the presumption of validity of zoning laws. There is a presumption of their validity, isn't there?

MR. SAGER: There is a strong presumption, and a justifiable presumption --

QUESTION: Right.

MR. SAGER: -- of their validity, Your Honor.

I do not believe that to hold that in this case would in any sense threaten that presumption, because again I want to make very clear that you have here a situation where an ordinance, by its operative criterion, addresses itself to

the kind of person who lives in a community, and where the Village, by its own admission, has as a primary interest the exclusion of uncongenial households. In this situation, it seems to --

QUESTION: Well, that may be one way of putting it, but wouldn't you make the same argument if they just came at it by way of the density?

MR. SAGER: No. Then I think one could address density very much more on the merits, if one had an ordinance which was -- which, by its terms, was rationally adopted to addressing the density problem. I think one would have a totally different case here.

What I think we have here is a case that is very much like this Court's decision in Department of Agriculture vs. Marino, and very much like this Court's decision in its -- in the recent Le Fleur case, in particular Mr. Justice Powell's concurring opinion in the Le Fleur case, in this important respect:

You have here an obvious -- and also I should say this Court's decision, I think, in Eisenstadt vs. Baird -- you have here a case where the obvious primary and dominant motivation of the community was one which is either patently invalid or highly suspect.

And you have here what I think we must agree are really, to use Mr. Justice Powell's term, after the fact

rationalizations for this ordinance.

Now, if this Court adopts literally the language of McGowan, or the Lindsley case, long before McGowan, in addressing these after-the-fact rationalizations, then what really happens is that an ordinance motivated, and admittedly motivated, by what I think this Court must conclude is a legitimate -- is an illegitimate interest of government, will necessarily pass constitutional muster --

QUESTION: How is this an illegitimate interest?

MR. SAGER: The illegitimate interest is that in creating a socially homogeneous community, by --

QUESTION: Well, there's no restriction on good families or bad families, or law-abiding families, or criminal families, or poor families or rich families; there's nothing -- I didn't understand your brother even implicitly to concede that that was the motivation behind this ordinance. And, demonstrably, it isn't.

Nothing about the families having to be compatible, or homogenous or all upper middle-class or all lower middle-class or anything else.

MR. SAGER: No, but what they must be, Your Honor, is, in every case, families. On page 25 --

QUESTION: That's right.

MR. SAGER: -- of the appellants brief, they lead out, in describing the motivation of this ordinance, with the

conclusion that what is involved here is a social preference in favor of promoting and supporting family organization through residential proximity.

It's --

QUESTION: It isn't -- excuse me.

MR. SAGER: Excuse me, Your Honor.

QUESTION: Well -- never mind.

MR. SAGER: I just wanted to go on to say that is, I think, significant to note, and I have not yet said it, that the District Court found as a matter of fact that this ordinance was not rationally related to any of these orthodox interests, be they density, transiency, or rent level.

And the Court of Appeals concurred in that judgment.

There is a substantial analytical disparity between the position of the District Judge and the majority below, but the one thing they have in common was a complete and comfortable rejection of the view that these more orthodox interests of government could be the basis for justifying this ordinance.

Their discrepancy was in the District Judge's perception that the interest in having families and in having family organization was the justifiable interest, and the Court of Appeals concluding that that had no place in a unit or subdivision of government.

And that, I think, is the crux of this case.

I think it's critical to examine the more orthodox or traditional interests which are proffered, but critical to examine them only to realize that they are indeed after-the-fact rationalizations of an ordinance which should rise or fall on very different constitutional grounds, I think.

I think, with the aid of your questioning, I've addressed two of the governmental interests which the Village has advanced, namely density, where I've tried to show that the community has no density problem. It's a fully developed community. It could regulate overcrowding of its facilities comfortably, if it wished. And it presently enjoys or suffers a density of population of 1.1 persons per acre.

There's no demonstration whatsoever that in 1971, when this ordinance was adopted, as late as 1971, there was any reason that this community did or could have feared a sudden influx or change in the density of population. And, more importantly, even if it could, I hope that I have demonstrated that it's an -- this is an utterly hopelessly crude and arbitrary way of achieving it.

The one fact which I did not mention in this connection is that Census data indicates that far from the intuitive proposition that somehow families are self-regulating in unrelated households or not, that the average size of families is considerably larger than the average size

of unrelated households. And that you would --

QUESTION: In this community?

MR. SAGER: Throughout the country.

QUESTION: Well, we're not --

MR. SAGER: The Census data, Your Honor, is --

QUESTION: We're concerned with this community.

MR. SAGER: -- not broken down by communities that we have; however, it is broken down by kind of community, and it's very plain that these figures hold for suburban communities on the urban fringe, like Xelle Terre, as well as for the city and as well as for the rural areas.

QUESTION: Suppose the City Council in, or the Zoning Board, governments, in laying out their plan for this kind of a city, said: Our objective is to try to maintain not more than an average of three per household acre, and that while we may not be able to achieve it perfectly, that's our objection. That being articulated, you say that their density now is 1.5 --

MR. SAGER: 1.1.

QUESTION: 1.1 per acre. So they've come well under the three that I postulate.

Then you say that's not a legitimate governmental interest to say that one way to keep that in control is to eliminate boarding houses, fraternity houses, and households of unrelated people more than two?

MR. SAGER: I think that it -- that it may be very sensible to limit a certain patent high-density uses under certain circumstances, where reasonable densities are at stake.

The actual numbers involved, I think I'd have to consider much more closely.

I don't think, however, that, unlike the boarding house and the fraternity house, that in any way one rationally addresses density of population by speaking to the familial tie that exists between the residents of a household, in letting in any number of household servants on the one hand, any number of people related by this tie on the other hand, and then choosing a number like two on the other hand.

I think it's also important to note that the number two not merely is unusually low in this regard, and therefore makes the ordinance, in some sense, less rational; it seems to me it supports strongly the view that this ordinance was not designed, in any sense, to regulate density of population.

The choice of the number two I've already described to you.

QUESTION: If the number were five, would you still be here?

MR. SAGER: I think I would, Your HOnor, yes.

QUESTION: What provision, specifically, of the Constitution are you relying on?

MR. SAGER: We're relying, Your Honor, primarily on the first section of the Fourteenth amendment. Let me make --

QUESTION: Due process clause.

MR. SAGER: Well, the due process and equal protection clauses.

QUESTION: All right.

MR. SAGER: The reason I am so guarded in that statement is, in addressing, as Your Honor knows, in addressing the issue of whether this is a legitimate governmental interest, we make substantial reference and rely heavily on the rights of privacy and the right of travel. And while this Court has indicated a strong tendency to found those very explicit, now explicitly recognized and well-articulated rights in the Fourteenth Amendment, I think that this Court has avoided ever firmly concluding the debate as to precisely where the right of travel and right of privacy derive their force from in the Constitution.

And I certainly would be hesitant to be any more explicit than this Court has been on that subject.

QUESTION: And of course the courts have said that the right of interstate travel is not derived from the Fourteenth Amendment. Haven't the courts said that?

MR. SAGER: I don't think it has --

QUESTION: I wrote that in Guest v. United States.

MR. SAGER: I think, however, in Shapiro vs. Thompson, this Court specifically eschewed finding a specific location for the right of travel at all.

My time is up. Thank you very much.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Sager.

Do you have anything further? You have five minutes left, Mr. Gegan.

REBUTTAL ARGUMENT OF BERNARD E. GEGAN, ESQ.,

ON BEHALF OF THE APPELLANTS

MR. GEGAN: Yes, Mr. Chief Justice.

Well, certainly we don't believe that this zoning law, which is the most local of matters, interferes with the right to travel.

QUESTION: On that argument, I suppose, any law would interfere with the right to travel; you'd say it impairs my right to travel to this place, because they have a law here that I don't like.

MR. GEGAN: Anything would, Your HOnor.

QUESTION: Isn't that correct?

MR. GEGAN: I only pose to note that there's no allegation in this case by the plaintiffs that they engaged in interstate travel, to get where they are.

The Census data, which seeks to indicate that families are, on the average, larger than unrelated households, is -- could be misleading. The Bureau of the Census, which,

incidentally, defines family in terms of blood, marriage and adoption, defines household to include single people living alone.

So, of course, the average household, being weighted with single people, will be low; will be low, so it's not fair to compare it with families, which begin with two.

I again wish to say that, to the extent that the one-family zoning ordinance embodies both the physical benefits and the social well-being of family organization, I'll stand by that principle and don't consider it an illegitimate purpose.

It is not the same as saying that this is some kind of a morals law to keep out undesirables.

The recent Wisconsin District Court case, furnished in the appellants -- in the appellees green supplemental brief. Two families occupying a one-family residence. They would -- and following the Belle Terre case, the District Judge said: they can't be kept out under the zoning law.

Well, if that's not the end of one-family zoning, I don't know what is. And it certainly has nothing to do with keeping out undesirables.

And my last point is, that while some families may be larger, some families may even have a servant, whereas a group of three spinsters may be small, Euclid v. Ambler itself said that uses, whether it's a boarding house, a

fraternity house, or private residence occupied by a group of individuals, uses tend to fade into each other by imperceptible gradations. And that does not put the stamp of invalidity on a zoning ordinance which seeks to draw some reasonable line, based on the average family.

QUESTION: If you could draw up an ordinance and prevent fraternity houses and boarding houses, you wouldn't have any trouble, would you? You could do that.

MR. GEGAN: We would risk the possibility that the court might interpret six students living in a private residence as not being a fraternity house. This seeks to dot the I and cross the T, so to speak.

QUESTION: Well, I think you'd be in much better shape.

Do you admit that this is aimed at those students?

MR. GEGAN: The primary source of the influx into Belle Terre, should it ever happen, I anticipate would be students. But the ordinance itself covers any -- as I say, two families that moved in --

QUESTION: Who else around there would invade your privacy other than students?

MR. GEGAN: All right. The practical source of unrelated individuals in the case of Belle Terre is students. But the ordinance is not limited to students, it's not that kind of --

QUESTION: There's nothing in your ordinance that prevents two students from coming in and renting a house.

MR. GEGAN: Exactly so, Your Honor.

And I would only conclude by saying that zoning has traditionally been considered a matter of local responsibility, and this Court has wisely refrained from becoming a national board of standards and appeals to hear applications of variances from zoning.

I thank the Court.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 10:56 o'clock, a.m., the case in the above-entitled matter was submitted.]