UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

GRANT YODER, *et al.*,	:	**Case No. 3:17-2321**
	:	
Plaintiffs,	:	**Judge Zouhary**
	:	
v.	:	**Magistrate Knepp**
	:	
CITY OF BOWLING GREEN, ***et al.,***	:	
	:	
Defendants.	:	

PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

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I. INTRODUCTION

Plaintiffs hereby move, pursuant to Federal Rule of Civil Procedure 56, for issuance of declaratory and injunctive relief enjoining the City of Bowling Green's Dwelling Prohibition, which, pursuant to impermissibly vague criteria, arbitrarily criminalizes and otherwise penalizes the habitation of certain private residences by any greater than three unrelated persons. This regulation is unconstitutional both on its face and as-applied to owners and inhabitants of homes containing greater than three bedrooms and therefore must be permanently enjoined.[1]

II. BACKGROUND

Plaintiffs initiated this civil rights action on November 5, 2017 by filing a Verified Complaint challenging, facially and as applied to them, the City of Bowling Green's Dwelling Prohibition. The next day Plaintiffs moved for a temporary restraining order and preliminary injunction. Doc. 5. In response the Court ordered the parties to "maintain the status quo," and clarified that "Defendants will take no action against Plaintiffs until further order of this court." Doc. 8. On April 23, 2018, Plaintiffs amended their Complaint to add numerous additional City of Bowling Green homeowners who are subject to the Dwelling Prohibition, including several who were previously prosecuted and fined pursuant to the regulation. Since June 19, 2018, this Court's Order has prohibited enforcement of the regulation. Doc. 25.

C. The City of Bowling Green's Prohibition on Living Together Absent a Qualifying Familial Relationship

In Bowling Green, no group or association consisting of greater than three individuals person can reside together within the same home unless the City deems the individuals to be "family," or subject to another exception, in which case there is *no limit* on the number of individuals that can occupy the home. Doc. 1, Doc. 1-1.

This prohibition is articulated in Sections 150.03, 150.19, and 150.20 of the City's zoning code. Section 150.19 and Section 150.20 limits the use of most residential houses within the City to "single-family

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[1] Plaintiffs seek summary judgment only on this claims specified within this motion. Additional claims, such as Plaintiffs' claim under the Excessive Fines Clause, Plaintiffs' request for certification to the Ohio Supreme Court, and any claims for attorneys fees and damages, are, due to their sequential nature, not presented by this Motion.

dwellings," which are in turn defined as "a building designed for occupancy by one (1) family for living purposes and including not more than two (2) lodgers or boarders." Doc. 1-1, citing Section 150.03. Amongst these terms, only "family" is defined: the City defines a "family" as "an individual or married couple and natural or adopted children thereof, or foster children placed by a duly constituted state or county agency, occupying a dwelling for purposes of habitation, and including other persons related directly to the individual or married couple by blood or marriage." Doc. 1-1, citing Sect. 150.03.

Violation of the Dwelling Prohibition results in criminal prosecution and astronomical economic penalties, usually attaching to the person who leased the home to the individuals rather than to the residents themselves, that exceed the fair market value of most City of Bowling Green homes.[2] Section 150.140(A) provides that "it shall be unlawful to . . . use any building or land in violation of any regulation . . . of this chapter. . ." Meanwhile, Section 150.999(A) insists that "any person . . . violating any regulation in . . . this chapter. . . *shall* be fined nor [sic] more than *five hundred dollars* for each offense. Each and every day during which such illegal . . .use continues, may be deemed a separate offense." And Section 150.999(B) declares that such a use can be deemed a second degree misdemeanor. Doc. 1-1. These penalties apply regardless of the homeowner's knowledge or intentions.

D. The City's Enforcement and Threats of Enforcement Against Plaintiffs

The Plaintiffs consist of tenants and homeowners subject to and threatened by the Dwelling Prohibition. The tenant-plaintiffs consist of three of four closely-connected fraternity brothers who have resided together on a 12-month lease and have been threatened by the Dwelling Prohibition. The home occupied by these tenants is now occupied by four closely-connected Bowling Green State University students who are also members of the United States Military. See Declaration of Troy Henrickson (attached). They view themselves as more closely connected than third cousins (who are exempt from the regulation), and believe that occupation of the four-bedroom home by four of them is wise because any one

[2] According to reputable resources, the median home price in the City of Bowling Green is approximately $159,000. See https://www.zillow.com/bowling-green-oh/home-values/. The fine for leasing a four bedroom home to four insufficiently related individuals over the course of a traditional twelve month lease is $182,500.

of them could be called to active military duty with little to no notice. *Id.* None of the Tenant-Plaintiffs are "directly related by blood or marriage," and none wish to become directly related by marriage to one another at this time. *Id.*; see also Doc. 19, PageID 171-172.

Each Landlord-Plaintiff owns at least one home that (a) contains greater than three bedrooms; and (b) is subject to the City's regulations limiting habitation to no more than three unrelated individuals (hereinafter "an impaired home."). Doc. 19, PageID 172-173. And each "Landlord-Plaintiff" desires to lease at least one impaired home to four or more unrelated individuals who are on the same lease. *Id.* Plaintiffs John Frobose and Anthony Wulff have each already been prosecuted for violating the Dwelling Prohibition challenged here. Doc. 12-1, PageID 126, 127. And numerous other similarly-situated city homeowners have endured recent prosecution. Doc. 12-1, PageID 124-128.

Aggressive enforcement of the Dwelling Prohibition reached a flashpoint on October 25, 2017 when the City threatened the tenant-plaintiffs and one of the Landlord-Plaintiffs with immediate prosecution and fines: the cease and desist letter of City of Bowling Green Code Enforcement Officer Jason Westgate indicates "currently four (4) people occupy this dwelling; therefore the dwelling unit is in violation. A violation of Chapter 150 of the Zoning Code of the City of Bowling Green is a minor misdemeanor and is punishable by a fine of $500.00. Each day is a separate violation." Doc. 19, PageID 177-178; see also Doc. 1, PageID 5-6; Doc. 1-1, PageID 24-31. The City further pressures landlords to (1) unlawfully evict tenants without the benefit of the eviction process mandated by the Ohio Revised Code; and (2) submit to forced warrantless searches of the home's interior, or face immediate criminal charges, indicating "If the violation is corrected by November 3, 2017 and you have allowed a walk-through inspection of the single-family dwelling, the matter will be considered resolved. <u>If not, charges will be filed at the Municipal Court</u>." *Id.* Meanwhile, the City has identified Defendant Westgate as a "person with the greatest knowledge as to how the Dwelling Prohibition is enforced," and verified that Mr. Westage's enforcement and threatened enforcement against Plaintiff Thompson was "in accordance with the policies of the City of Bowling Green." Doc. 12-1, PageID 104, 105; Doc. 19, PageID 199 (Interrogatory 18).

II. STANDARD FOR SUMMARY JUDGMENT

Pursuant to Federal Rule of Civil Procedure 56, "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "When a motion for summary judgment is properly made and supported and the nonmoving party fails to respond with a showing sufficient to establish an essential element of its case, summary judgment is appropriate." *Stansberry v. Air Wisconsin Airlines Corp*., 651 F.3d 482, 486 (6th Cir. 2011) (internal quotations omitted); *cf.* Fed. R. Civ. P. 56(e)(2) (providing that if a party "fails to properly address another party's assertion of fact" then the Court may "consider the fact undisputed for purposes of the motion"); *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986).

In support of the claims before the Court, Plaintiffs submit the following Summary judgment evidence: (1) the allegations in Plaintiffs' Complaint, as verified by Plaintiffs' Declaration(s); (2) Defendants responses to (a) the Interrogatories of Grant Yoder and (b) the Interrogatories of John Frobose and Kory Iott (Attached hereto as "Exhibit H"); (3) the City's list of "grandfathered properties" within the City, i.e. the 233 homes exempt from the Dwelling Limit; (4) the Affidavit of Robert W. Maurer and subsequent Declarations of Troy Henricksen, Kory Iott, and Robert W. Maurer (Attached hereto "Exhibits I, J, and K," respectively); and (5) evidence of the City's enforcement history. This evidence simply serves to confirm that Plaintiffs are entitled to judgment as a matter of law on the foregoing claims.

III. LAW AND ANALYSIS

The City of Bowling Green's relationship-based dwelling and occupancy limits (the "Dwelling Prohibition") violate the Fourteenth Amendment rights of Plaintiffs and others by imposing strict liability for criminal penalties and astronomical fines in response to vague and ill-defined status. And even if this Court were to conclude that the limits were sufficiently precise, those limits are untailored, arbitrary, and unduly oppressive: the limits discriminate against a class of citizens on the basis of their identity, i.e. a lack of strict familial relation, rather than on the basis of the City's professed interest in limiting population density or any other interest. Consequently, Plaintiffs are now entitled to judgment as a matter of law.

A. The Dwelling Prohibition is unconstitutionally vague.

The Dwelling Prohibition is impermissibly vague because it attaches severe criminal penalties to an entirely incomprehensibly-written proscription: the City's Dwelling Prohibition only applies to "single-family dwellings," which it defines as "a building designed for occupancy by one (1) family for living purposes *and including not more than two* lodgers or boarders." Section 150.03. Meanwhile, it is unclear whether certain homeowners' houses are grandfathered in, and if so, how.

"Under the tenets of due process, an ordinance is unconstitutionally vague under a void-for-vagueness analysis when it does not clearly define what acts are prohibited under it." *Norwood v. Horney,* 110 Ohio St.3d 353, 2006-Ohio-3799. "First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to police [officers], judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Norwood v. Horney,* 2006-Ohio-3799, at ¶ 83, citing *Grayned v. Rockford*, 408 U.S. 104, 108–109 (1972). Accordingly, "Due process demands that the state provide meaningful standards in its laws. A law must give fair notice to the citizenry of the conduct proscribed and the penalty to be affixed if that law is breached. *Id.,* at ¶81. "Implicitly, the law must also convey an understandable standard *capable of enforcement in the courts*, for judicial review is a necessary constitutional counterpoise to the broad legislative prerogative to promulgate codes of conduct." *Id.*

i. Stringent scrutiny of the Dwelling Prohibition's vagueness is warranted.

There is no basis for applying less scrutiny simply because the challenged enactment may be a zoning regulation rather than a classic felony-criminal sanction. Earlier this year in *Sessions v. Dimaya,* the Supreme Court reemphasized the need for strict scrutiny of enactments that may impose something other

than high-level criminal punishment. 138 S. Ct. 1204, 1223–31 (2018). Justice Gorsuch's expansive concurrence on the subject provides useful guidance:

> Courts refused to apply vague laws in criminal cases involving relatively modest penalties. They applied the doctrine in civil cases too. As one court put it, "all laws" "ought to be expressed in such a manner as that its meaning may be unambiguous, and in such language as may be readily understood by those upon whom it is to operate." * * * [I]n the criminal context this Court has generally insisted that the law must afford "ordinary people ... fair notice of the conduct it punishes." <u>And I cannot see how the Due Process Clause might often require any less than that in the civil context either.</u>
>
> ***
>
> In fact, if the severity of the consequences counts when deciding the standard of review, shouldn't we also take account of the fact that today's civil laws regularly impose penalties far more severe than those found in many criminal statutes? Some of these penalties are routinely imposed and are routinely graver than those associated with misdemeanor crimes—and often harsher than the punishment for felonies.

Sessions v. Dimaya, 138 S. Ct. 1204, 1226–31 (2018)(holding "How . . . is anyone supposed to locate 'the ordinary case' and say whether it includes a substantial risk of physical force? The truth is, no one knows. The law's silence leaves judges to their intuitions and the people to their fate. In my judgment, the Constitution demands more.").

On these fronts, the Supreme Court's reasoning echoes Ohio's already-established stringent application of vagueness scrutiny in response to infringement on Ohioans' private property rights. If the enactment "threatens to inhibit the exercise of constitutionally protected rights," such as property rights in Ohio, *a more stringent vagueness test is to be applied*. *Norwood,* supra., at ¶84. In *Norwood,* the Ohio Supreme Court determined the term "deteriorating" to be impermissibly vague. The Court emphasized that "the term appears in the Norwood Code but is not defined," that "it offers so little guidance in application that it is almost barren of any practical meaning," and that it invited speculation. *Id.,* at ¶95, 97. The Court thus concluded that "[i]n essence, 'deteriorating area' is a standardless standard. Rather than affording fair notice to the property owner, the Norwood Code merely recites a host of subjective factors that invite ad hoc and selective enforcement." *Id.,* at ¶ 99.

And lower courts in Northwest Ohio have recently invalidated several zoning regulations similar to the City's Dwelling Prohibition on the basis of vagueness. In *Viviano v. Sandusky,* the Sixth District

invalidated as vague a City of Sandusky prohibition on anything other than a "one-family dwellings" that defined "dwelling as a "building designed or occupied exclusively for non-transient residential use (including one-family, two-family, and multifamily buildings)." 2013-Ohio-2813, at ¶ 4. In holding this definition to be unconstitutionally vague the Sixth District explained as follows:

> To not run afoul of the second prong under *Grayned,* the ordinance must preclude arbitrary, capricious, or discriminatory enforcement. An ordinance cannot leave what constitutes a violation open to interpretation by relying on the enforcing body to use "common sense." Such an assessment is "exactly the kind of unfettered discretion that the vagueness doctrine prohibits." The concern here centers on the term "non-transient" as used in the Zoning Ordinances and notices. It is undefined within the ordinance and does not lend itself to a plain and unambiguous meaning. Absent a time scale, the term is rendered entirely subjective and incapable of providing guidance to either the citizen or the enforcing party.

Viviano, supra., at ¶ 18-20. Likewise, in *City of Toledo v. Ross,* the Court of Appeals invalidated as vague the City of Toledo's definition of "group rental house," which was also devised to limit occupancy of a home by unrelated persons. *City of Toledo v. Ross*, No. L-00-1337, 2001 WL 1001257, at 1–5 (Ohio Ct. App. Aug. 31, 2001) In finding the definition impermissibly vague, the Court explained as follows:

> The Toledo Municipal Code does not define any of these terms. * * * Clearly, terms that require such subjective interpretation to determine their meaning are vague. It would be impossible for a person of common intelligence to be able to determine what conduct is prohibited, insofar as every person's interpretation of the meaning of "transient, limited, or seasonal" could vary so greatly. Moreover, because of the vague terms used, TMC 1103.64 allows for arbitrary and discriminatory application and enforcement of TMC 1167.01(28). Accordingly, we find that the language in TMC 1103.64, specifically, "common living arrangement or basis for the establishment of the housekeeping unit is of transient, limited or seasonal duration," does not provide fair notice to those who must obey the standards of conduct specified therein and does not provide constitutionally adequate guidelines for those charged with enforcing it. We therefore find that TMC 1167.01(28) and TMC 1103.64 are unconstitutionally vague, violate the Due Process Clauses of the United States and Ohio Constitutions, and are thereby rendered void.

Id., at 4-5. *Moreover*, the Ohio Supreme Court has already ruled that precision is required when land use regulations infringe upon associations and interrelationships: in this context, *doubt should be construed so as to permit the occupation of homes by unrelated individuals*. In *Saunders v. Clark Cty. Zoning Dep't,* the Court construed "single housekeeping unit" so as to permit "a group home for delinquent boys unrelated by affinity and consanguinity" as permissible in an "R-1 suburban residence district" 66 Ohio St. 2d 259, 259–65 (1981). In so doing, the Court cautioned that "Zoning resolutions are in derogation of the common law

and deprive a property owner of certain uses of his land to which he would otherwise be lawfully entitled. Therefore, such resolutions are ordinarily construed in favor of the property owner. Restrictions on the use of real property by ordinance, resolution or statute must be strictly construed, and the scope of the restrictions cannot be extended to include limitations not clearly prescribed." *Id.* The Court further cautioned that "In our view, any resolution seeking to define this term 'family' narrowly would unconstitutionally intrude upon an individual's right to choose the family living arrangement best suited to him and his loved ones," and "we now interpret the term 'family' broadly in order to permit appellees to operate a foster home in an "R-1 suburban residence district. Such a broad definition of "family" is mandated by . . . fundamental principles of zoning law, and immutable constitutional principles guaranteeing the right of every American to live with his family free from official harassment." *Id.*

Here, the City's Dwelling Prohibition imposes significant criminal liability. Second, it imposes astronomical fines that impose greater harm than short incarceration - - up to $500 per day, or $182,500 per non-compliant 12 month lease. See Doc. 1-1, PageID 22. Third, the dwelling limits impose strict liability, rendering the homeowner liable for these immense penalties irrespective of whether he maintained actual knowledge of the violation, reckless disregard, or an intention to commit the offense. Thus, heightened scrutiny must be applied to the City's zoning code because it infringes upon protected property rights and imposes severe criminal and economic penalties.

ii. The Dwelling Prohibition is impermissibly vague.

In light of the foregoing precedent, the City's imposition of the Dwelling Prohibition through its mysterious definition of a "single-family home" is impermissibly vague: whether or not one is subject to the Dwelling Prohibition is dependent upon vague text and even more vague exemption policies. *First*, whether a home is "designed for occupancy by one family" is, without guidance, an inherently arbitrary inquiry. Does one need to channel the subjection mental intentions of the person who paid for, designed, or built the home? Or is this an object standard? If the latter, what factors are determinative? The home's features?

The neighborhood or location? Who has lived there in the past? Where does this leave duplexes and apartments?

Second, the City provides no meaningful guidance or criteria for determining whether or not a home is "*designed for*" occupancy by one family. The phrase "designed for" is undefined and otherwise unexplained by the City's Code. See Doc. 1-1, PageID 16-22. The City is unable to provide any evidence demonstrating criteria it uses when determining whether a building "is designed for occupancy by one family for living purposes and including not more than two lodgers or boarders," as that phrased is used by the City in regulating Plaintiffs and others. Doc. 19, PageID 195 (Int. 4). Moreover, the City is unable to cite to where a resident, homeowner, or investor could locate the criteria or definitions it uses in enforcing the Dwelling Prohibition. Doc. 19, PageID 196 (Int. 5).

Instead, the City simply dismissively claims that "'Designed for' is the dictionary definition and also according to plans ordinarily submitted for approval in an R-1 and R-2 zoned area, which are usually denoted as single family residences." *Id*. This of course, is both incomplete and tautological: (1) most Bowling Green homes were built prior to 1975 zoning approval process; and (2) such a label in the zoning approval process fails to reveal an intention that only families can reside within the home. When given a second chance to clarity which "dictionary definition" it relies upon, the City provides the following definition of "designed for": "to create, fashion, execute, or construct according to plan." See Frobose Int. 13. Of course, this definition, found nowhere in the text and supplied solely as a litigation position, only reinforces the open-ended vagueness of the standard: essentially the City is contending that the subjective intentions of the person who created, fashioned, or constructed the home determine whether or not four or more unrelated individuals can dwell together within that home. Yet the City neither tallies and retains records of such subjective intentions nor enforces the Dwelling Prohibition in this manner: in fact, upon inquiry, the City is unable to identify how the term "single-family dwelling" guides its enforcement practices at all. Doc. 19 (Response to Interrogatory No. 9). And when asked for an example of a residential house that is *not* "designed for occupancy by one family for living purposes…," the City is unable to provide such an

example. *Id*., at Int. 6. Finally, were the "designed for" inquiry subjective, then many homes that the City currently regulates should not be regulated: Plaintiff Robert Maurer personally "designed" the 46 houses that he built between 1998 and 2002 comprising the Brentwood Estates and Burrwood neighborhoods in Bowling Green, and he specifically designed these houses with rental to unrelated university students in mind, rather than families. See Attached Declaration of Robert Maurer.

Third, there is no clear understanding - - on the part of the City or the homeowners - - as to which homes are subject to the Dwelling Prohibition and which are not, i.e. "grandfathered" for the purposes of the Dwelling Prohibition: in response to this litigation, the City prepared and shared a never-before-seen list of 233 "grandfathered" properties. See Doc. 19, PageID 199-200 (Int. 20), PageID 203-210 ("grandfathered list"). Neither this list nor the criteria for qualifying a home to be on the list are codified. Instead, "any question about whether an individual property is a permitted non-conforming use under the ordinance in question *can be answered on an individual basis*." Doc. 19, PageID 200 (Int. 21). And the City rejects any notion that it ought to take "steps to make citizens, residents, and homeowners aware of the law" prior to prosecution and/or fines. Doc. 19, PageID 200 (Int. 22).

The result is mystery as to both the meaning of the law and when it applies. The affidavit of Robert Maurer, establishes that over 20 City of Bowling Green homes that he owns and/or manages that were previously recognized as "grandfathered" by city officials do not appear on the list of exempt homes the City compiled in response to this litigation. Doc. 19, PageID 212. This is to say nothing of homes owned or managed *by others.* In response, the City simply has no explanation as to why over 26 or Mr. Maurer's homes that homeowners know to be grandfathered do not appear on its list of "grandfathered" homes. (Frobose Int. 8)("The City did not inspect the properties in Interrogatory No. 8 and has no knowledge that non-conforming uses existed at the time of the adoption of the zoning code") *Id.*

Mr. Maurer, who has over 50 years of experience in the Bowling Green real estate market and participated in the original drafting of the ordinance in 1975, observes that the City's list appears to actually begin with what the City knew about particular homes in 2013 rather than 1975. *Id.* Mr. Maurer's affidavit

testimony further establishes that the City has never maintained a list of grandfathered homes prior to this litigation: "Affiant has never been able to obtain an accurate list of the City of Bowling Green's 'grandfathered' homes in the past, as it was never available . . . the City of Bowling Green has never had a comprehensive list of 'grandfathered' properties." Doc. 19, PageID 212-213. Meanwhile, the City maintains no evidence as to the use of homes in 1974, unless such evidence is non-public. And the City's avowed knowledge about a home dating back to 1975, which is neither rigorously-examined nor complete, is an insufficiently precise basis upon which to determine whether the Dwelling Prohibition applies. In sum, there are no written criteria or standards for an ordinary person, a city official, or even an expert to determine whether a home is subject to the Dwelling Limits.

Fourth, the Dwelling Prohibition is triggered only when a home "designed for occupancy by one family" is occupied by greater than three unrelated "lodgers" or "boarders." However, neither the term "lodger" nor "boarder" is defined. At first blush: whatever a "boarder" or "lodger" may be, the City is adamant that *it is not the same as a "tenant."* See Doc. 19, PageID 201 (Int. 29). And Ohio Landlord-Tenant law, encapsulated in Chapter 53 of the Revised Code, defines and uses only "tenant": "'tenant' means a person entitled under a rental agreement to the use and occupancy of residential premises to the exclusion of others." R.C. 5321.01(A).

In deliberately avoiding the term "tenant," and instead regulating upon the basis of the number of "lodgers" or "boarders," the City focuses on an occupant who has no lease agreement with the landlord but nevertheless resides within the home and perhaps even without the homeowners' knowledge. Such surreptitious occupancy is a surprisingly common occurrence in Bowling Green, perhaps due to the Dwelling Limits themselves. See Declaration of Kory Iott, ¶11-12 ("It is exceptionally difficult if not impossible, due to Ohio law and practical considerations, for a landlord to control the number of unrelated individuals residing at a rental home he or she owns on any particular evening, week, or month . . . I have, upon occasion, discovered evidence of individuals who were not my tenants and did not have my permission to do so dwelling within my rental homes without my knowledge."). This contributes to the vagueness of the law:

it is not four unrelated *tenants* that are prohibited from living together; thus one possible reading of the Dwelling Limits is that they are *not* triggered when four unrelated individuals who each maintain a lease agreement with the landlord reside together (unless "boarder" or "lodger" includes "tenant"). However, the City enforces the law otherwise.

Fifth, even the City's definition of "family" a central term in its regulatory scheme has shifted over the years: the City alleged a violation of the Dwelling Prohibition at one of the Plaintiffs' homes through asserting "cousins were not considered family as defined in the City Code," but now concedes that a highly attenuated blood relationship - - third cousins - - is sufficient for the purposes of the Dwelling Prohibition, and adds that homeowners and residents simply cannot "rely upon an employee of the City" with respect to the Dwelling Prohibition. See Frobose Int. 11, 12. One must ask why the City's own employees seem to consistently misunderstand the Dwelling Prohibition.

Sixth, given all of this, how would a judge instruct a jury on what finding to make as to what a home is "designed for," much less who is a "lodger," "boarder," or "family" or whose property is "grandfathered in?" That a judge and jury would need to essentially create an element of a criminal offense out of thin air suggests that the ordinance is impermissibly vague.

Finally, the arbitrariness and imprecision of this standard-less standard is on full display through the facts that incited this litigation: this litigation began with the City claiming that a large four-bedroom two-bathroom house with ample yard, garage space, and parking for four automobiles is not "designed for" four individuals, unless those four individuals are related by blood. Doc. 1-1, PageID 24-32. That home is located in an area *full of students* and just *blocks away* from Bowling Green State University both at the time it was built and presently, suggesting that the home may well have been designed to house unrelated persons. *Id.* The property even consists of a separate garden-level dwelling with its own entrance, bedroom, full bathroom and kitchen facilities. *Id.* The homeowner consistently believed that the home was exempt from the Dwelling Prohibition, until receiving the City's threat to immediate enforce the Dwelling Limits against him and the inhabitants of the home. *Id.*

Consequently, the definition of "single-family dwelling," hinging on what a building is supposedly "designed for," is as impermissibly vague as phrases such as "deteriorating" or "transient" - - it impermissible invites "subjective interpretation" to the point that different judges, juries, and enforcement agents could (and have) reached different results as to whether a large home near a university was "designed for" a single family, particularly when that family consists of third cousins and likely even more attenuated relationships. Accordingly, the Dwelling Prohibition must be deemed impermissibly vague or broadly construed in the favor of property owner. In light of the evidence, there is no issue of material fact, and Plaintiffs are entitled to judgment as a matter of law on their vagueness claim.

B. If not vague, the Dwelling Prohibition violates the Ohio Constitution.

> *"Attempts to limit occupancy to related persons have not been successful. The state courts have recognized a valid community interest in preserving the stable character of residential neighborhoods which justifies a prohibition against transient occupancy. Nevertheless, in well-reasoned opinions, the courts of Illinois, New York, New Jersey, California, Connecticut, Wisconsin, and other jurisdictions, have permitted unrelated persons to occupy single-family residences notwithstanding an ordinance prohibiting, either expressly or implicitly, such occupancy."*
>
> -*Moore v. City of E. Cleveland, Ohio,* (1977)(J. Stevens, Concurring)

The Dwelling Prohibition is not tailored to any legitimate governmental purpose and is impermissibly arbitrary: through the limit the City claims to be effectuating a governmental interest in limiting population density, but the prohibition does so *by targeting disfavored relationships between those living together in any particular home*. To be sure, the United States Supreme Court has indicated that some regulations resembling the City's Dwelling Prohibition may not violate the *federal* Equal Protection Clause. But the Ohio Constitution is *more protective* of private property rights than its federal counterpart, the Ohio Supreme Court insists upon *more exacting* Equal Protection analysis, and Ohio precedents demand that Ohio join the growing chorus of states that have already invalidated regulations that claim to address *density* but instead target the *identity* of a home's inhabitants.

i. The Ohio Constitution is more protective of the rights at issue here.

The Ohio Constitution may be applied without adherence or deference to federal constitutional precedent -- the United States Constitution provides a floor, not a ceiling, for individual rights enjoyed by

state citizens. *Arnold v. Cleveland*, 67 Ohio St.3d 35 (1993), citing, *e.g., City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 293 (1982) (" * * * [A] state court is entirely free to read its own State's constitution more broadly than this Court reads the Federal Constitution, or to reject the mode of analysis used by this Court in favor of a different analysis of its corresponding constitutional guarantee."); *California v. Greenwood*, 486 U.S. 35, 43 (1988) ("Individual States may surely construe their own constitutions as imposing more stringent constraints on police conduct than does the Federal Constitution."). Put another way, "states may not deny individuals or groups the minimum level of protections mandated by the federal Constitution. *However, there is no prohibition against granting individuals or groups greater or broader protections*." *Arnold,* supra. Consequently, this Court is in no manner bound by *federal* precedent such as *Village of Belle Terre* when protecting rights under the Ohio Constitution.[3]

This is particularly true within the context of private property rights. Section 1, Article 1 of the Ohio Constitution provides "All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and seeking and obtaining happiness and safety." And Section 19, Article I states "Private property shall ever be held inviolate, but subservient to the public welfare." In aggregating this provision with Section 1, Article I, "Ohio has always considered the right of property to be a *fundamental right*. There can be no doubt that the bundle of venerable rights associated with property is strongly protected in the Ohio Constitution and must be trod upon lightly, no matter how great the weight of other forces." *Norwood v. Horney,* 110 Ohio St.3d 353, at 361-62 (2006) (internal citations omitted).

In Ohio, these "venerable rights associated with property" are not confined to the mere ownership of property: "[t]he rights related to property, i.e., to *acquire, use, enjoy,* and dispose of property, are among the most revered in our law and traditions." *Id.* In sum, "the free use of property is guaranteed by Section 19,

[3] See *Vill. of Belle Terre v. Boraas,* 416 U.S. 1 (1974). In many ways, the City's regulations more closely resemble those later invalidated by the Supreme Court in *Moore v. City of E. Cleveland, Ohio*, 431 U.S. 494, 507 (1977)("the ordinance unconstitutionally abridges the "freedom of personal choice in matters of . . . family life (that) is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment.").

Article I of the Ohio Constitution." *State v. Cline,* 125 N.E.2d 222, 69 Ohio Law Abs. 305. More specifically, homeowners "have a *constitutionally protected property interest in running their residential leasing businesses free from unreasonable and arbitrary interference* from the government . . ." *Mariemont Apartment Association v. Village of Mariemont,* 2007-Ohio-173, at ¶40-42.

On Equal Protection, Article I, Section 2 of the Ohio Constitution provides that "[a]ll political power is inherent in the people. Government is instituted for their equal protection and benefit * * *." In *State v. Mole*, the Ohio Supreme Court indicated that the Ohio Constitution's equal protection guarantees can be applied to provide greater protection than their federal counterparts: "Although this court previously recognized that the Equal Protection Clauses of the United States Constitution and the Ohio Constitution are substantively equivalent and that the same review is required, <u>we also have made clear that the Ohio Constitution is a document of independent force</u>." *State v. Mole*, 2016-Ohio-5124, ¶¶ 14, citing *Arnold v. Cleveland,* 67 Ohio St.3d 35, 42 (1993). Nowhere is this "independent force" of Ohio's equal protection clause more relevant than with *protection of private property rights*, since those rights are "<u>fundamental rights</u>" in Ohio but not so pursuant to federal constitutional precedent.

ii. The City's regulations are subject to a high degree of scrutiny.

When disparate treatment burdens a fundamental right, strict scrutiny applies. *Miller v. City of Cincinnati,* 622 F.3d 524, 538 (6th Cir.2010). Pursuant thereto, a state action is permissible only if it is narrowly tailored to a compelling governmental interest. *Cf. Does v. Munoz,* 507 F.3d 961, 964 (6th Cir.2007). Even under a lower standard of scrutiny, the classification at issue may not be arbitrary: "the attempted classification 'must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis.' *State v. Mole*, 2016-Ohio-5124, ¶¶ 12-29. And "[d]iscrimination[s] of an unusual character especially suggest[s] careful consideration to determine whether they are obnoxious to the constitutional provision." *Id.* Otherwise put, "classifications must have a reasonable basis and may not 'subject individuals to an arbitrary exercise of power." *Id.*, citing *Conley v. Shearer,* 64 Ohio St.3d 284, 288 (1992).

Thus, in Ohio, when criminalization is based solely on the status of the classified group without any relationship to a legitimate state interest, the classification may be found to be unconstitutionally *arbitrary*. *Mole,* at ¶ 61. In sum, "[a] statutory classification violates equal protection if it treats similarly situated individuals differently based upon an illogical and arbitrary basis." *Mariemont Apartment Association v. Village of Mariemont,* 2007-Ohio-173, at ¶28, citing *Adamsky v. Buckeye Local School Dist.,* 73 Ohio St.3d 360, at 362, 1995-Ohio-298.

In addition to this standard, the Ohio Supreme Court in *Pizza* clarified that a regulation infringing upon private property rights must be "necessary" to *substantially* advance the state's interest and bear a *substantial* relationship to those interests, and cannot be "arbitrary" or "unduly oppressive":

> Private property rights may be limited through the state's exercise of its police power when restrictions are <u>necessary</u> for the public welfare. Just as private property rights are not absolute, however, neither is the state's ability to restrict those rights. Before the police power can be exercised to limit an owner's control of private property, it must appear that the interests of the general public require its exercise and <u>the means of restriction must not be unduly oppressive upon individuals</u>. Further, the free use of property guaranteed by the Ohio Constitution can be invaded by an exercise of the police power only "<u>when the restriction thereof bears a substantial relationship</u> to the public health, morals and safety."

State ex rel. Pizza v. Rezcallah, 1998-Ohio-313, 84 Ohio St. 3d 116, 131–32. Distillation of these governing precedents thus reveals that a regulation of property violates the Ohio Constitution's guarantees of Due Process and Equal Protection when it is "arbitrary," "unduly oppressive upon individuals," not "necessary for the public welfare," or fails to *substantially* advance a legitimate interest *through a substantial relationship to it*. See *Direct Plumbing Supply v. City of Dayton*, 138 Ohio St. 540 (1941); *Olds v. Klotz*, 131 Ohio St. 447, 451 (1936); *City of Cincinnati v. Correll*, 141 Ohio St. 535, 539 (1943). Pursuant to these standards, the Ohio Supreme Court recently applied exacting scrutiny to invalidate an Ottawa Hills zoning restriction, due to its "<u>disparate treatment</u>" of homeowners. *Boice v. Ottawa Hills,* 2013-Ohio-4769, ¶17-19 (observing that "there was disparate treatment of the residents in the village when it came to permitting houses to be built on lots smaller than 35,000 square feet," that the land use at issue involved a *de minimus* difference, and that other similarly situated houses were "grandfathered in."). Thus, *pursuant to the Ohio Constitution, this Court must carefully scrutinize the City's disparate treatment of Plaintiffs' property rights*

iii. The Dwelling Prohibition fails equal protection and due process scrutiny.

The City's Dwelling Prohibition is arbitrary. It treats similarly situated homeowners differently without justification, unduly oppresses innocent owners, is under-inclusive, over-inclusive, and insufficiently tailored to either the City's newly-avowed interest in targeting young adults or - - more dispositive - - the City's textually-avowed interest in limiting population density. Accordingly, it must be enjoined.

a. Many states have persuasively invalidated materially identical Dwelling Prohibitions.

The Supreme Court has acknowledged the great weight of authority invalidating these types of regulations. See *Moore v. City of E. Cleveland, Ohio,* 431 U.S. 494, 513–21, 97 S. Ct. 1932, 1943–46 (1977)("attempts to limit occupancy to related persons have not been successful . . . in well-reasoned opinions, the courts of Illinois, New York, New Jersey, California, Connecticut, Wisconsin, and other jurisdictions, have permitted unrelated persons to occupy single-family residences notwithstanding an ordinance prohibiting, either expressly or implicitly, such occupancy."). And the Ohio Supreme Court has recently affirmed "[w]e can and should borrow from well-reasoned and persuasive precedent from other states." *State v. Mole,* supra, at ¶21-22. These well-reasoned cases from other states create a clear path for this Court to follow *sub judice.*

Subsequent to the Supreme Court's decision in *Village of Belle Terre*, numerous states have concluded that analogous prohibitions arbitrarily violate *state* constitutional limits akin to those here. "Courts, including state courts of last resort, around the country have relied on state constitutions to invalidate such prohibitions. Most of these acknowledged the existence of *Village of Belle Terre*, but found it irrelevant to state constitutional interpretation or otherwise inapposite." *Distefano v. Haxton*, No. C.A. NO. WC 92-0589, 1994 WL 931006, at 14 (R.I. Super. Dec. 12, 1994). "Indeed, one State Supreme Court wondered even within six years after the decision in *Belle Terre* as to whether the opinion 'still does declare federal law ...'". *Distefano* , supra., citing *City of Santa Barbara v. Adamson*, 610 P.2d 436, 440, n. 3 (Cal. 1980).

In *Charter Township of Delta v. Dinolfo,* the supreme court of Michigan held that the dwelling limit at issue violated the state constitutional guarantee of due process. 419 Mich. 253 (1984). The ordinance at issue stated that single family residences could only be occupied by an individual, or a group of two or more persons related by blood, marriage, or adoption, and not more than one other unrelated person. *Id.* at 833. The court agreed that preservation of the residential nature of a neighborhood is a proper subject for legislative protection; however, it found that there was no rational relationship between that goal and the means chosen to address it. It held that the classification created by the ordinance was not reasonably related to the achievement of the stated goals, and was arbitrary and capricious, thereby depriving six unrelated persons who wished to live with a biological family of the use of their property without due process of law. *Id.* at 840-41.

The New York Supreme Court likewise explained that a "four unrelated persons limit" violated the Due Process and Equal Protection clauses of its state constitution. *Baer v. Town of Brookhaven*, 73 N.Y.2d 942, 942–44 (1989). The *Baer* court relied on the New York Supreme Court's prior decision in *McMinn v. Town of Oyster Bay*, which astutely explained why relationships between the household's individuals is an arbitrary basis upon which to regulate population density:

> Manifestly, restricting occupancy of single-family housing based generally on the biological or legal relationships between its inhabitants bears no reasonable relationship to the goals of reducing parking and traffic problems, controlling population density and preventing noise and disturbance. Their achievement depends not upon the biological or legal relations between the occupants of a house but generally upon the size of the dwelling and the lot and the number of its occupants. Thus, the definition of family employed here is both fatally overinclusive . . . in failing to prohibit occupancy of a two-bedroom home by 10 or 12 persons who are related in only the most distant manner and who might well be expected to present serious overcrowding and traffic problems.

66 N.Y.2d 544, 546–54 (1985). On that basis, the Court found no "reasonable relation between the end sought to be achieved by the regulation and the means used to achieve that end" *Id.* In sum, "zoning is intended to control types of housing and living and not the genetic or intimate internal family relations of human beings . . . This ordinance, by limiting occupancy of single-family homes to persons related by blood, marriage or adoption or to only two unrelated persons of a certain age, excludes many households who pose no threat to the goal of preserving the character of the traditional single-family neighborhood, . . . and thus

fails the rational relationship test." *Id.* "Because the ordinance here similarly restricts the size of a functionally equivalent family but not the size of a traditional family, it violates our State Constitution." *Baer,* supra, at 944. Similarly, the New Jersey Supreme Court reasoned as follows:

> Recognizing that the municipality's goal of preserving stable, single-family residential areas was entirely proper, we nevertheless held that the ordinance was violative of our state constitution because "the means chosen [did] not bear a substantial relationship to the effectuation of that goal." We observed: The fatal flaw in attempting to maintain a stable residential neighborhood through the use of criteria based upon biological or legal relationships is that such classifications operate to prohibit a plethora of uses which pose no threat to the accomplishment of the end sought to be achieved. Moreover, such a classification system legitimizes many uses which defeat that goal. Plainfield's ordinance, for example, would prohibit a group of five unrelated "widows, widowers, older spinsters or bachelors-or even of judges" from residing in a single unit within the municipality. We noted that municipalities could appropriately deal with overcrowding or congestion by ordinance provisions that limit occupancy "*in reasonable relation to available sleeping and bathroom facilities or requiring a minimum amount of habitable floor area per occupant.*" Declining to follow the United States Supreme Court's decision in *Village of Belle Terre v. Boraas,* 416 *U.S.* 1 (1974), which upheld a comparable ordinance, we concluded that "[r]estrictions based upon legal or biological relationships such as Plainfield's impact only remotely upon [overcrowding and congestion] and hence cannot withstand judicial scrutiny."
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> It also bears repetition that noise and other socially disruptive behavior are best regulated outside the framework of municipal zoning. As we observed in *State v. Baker,* "Other legitimate municipal concerns can be dealt with similarly. Traffic congestion can appropriately be remedied by reasonable, evenhanded limitations upon the number of cars which may be maintained at a given residence. Moreover, area-related occupancy restrictions will, by decreasing density, tend by themselves to reduce traffic problems. Disruptive behavior-which, of course, is not limited to unrelated households-may properly be controlled through the use of the general police power." As we stated in *Kirsch v. Borough of Manasquan,* "Ordinarily obnoxious personal behavior can best be dealt with officially by vigorous and persistent enforcement of general police power ordinances and criminal statutes * * *. Zoning ordinances are not intended and cannot be expected to cure or prevent most anti-social conduct in dwelling situations."

Borough of Glassboro v. Vallorosi, 117 N.J. 421, 421–33 (1990), quoting *Kirsch Holding Co. v. Borough of Manasquan, supra,* 59 N.J. at 254 (invalidating ordinances in two shore communities that restrictively defined "family" and prohibited seasonal rentals by unrelated persons, explaining that the challenged ordinances "preclude so many harmless dwelling uses * * * that they must be held to be so sweepingly excessive, and therefore legally unreasonable, that they must fall in their entirety.").

In Rhode Island, the Court succinctly explained the issue and applicable rule of law now before this court: "The issue in this matter, however, is whether Narragansett may seek to curb or eliminate behavior it

considers offensive by limiting not the number of persons who may occupy a particular dwelling but by delineating the type of relationship that must exist among the occupants of a unit in order for them to lawfully reside within it," and "[t]his Court declares that the prohibition in the Narragansett Zoning Ordinance forbidding occupancy of otherwise suitable residential units by more than three persons not related by blood, marriage, or adoption is violative of the mandates of the due process and equal protection clauses of Article 1, Section 2 of the Rhode Island Constitution. The prohibition bears no reasonable relationship to the stated goals of the town regarding public safety, noise abatement, parking or density." *Distefano v. Haxton*, No. C.A. NO. WC 92-0589, 1994 WL 931006, at 15 (R.I. Super. Dec. 12, 1994). The Court provided compelling reasoning in support of its result:

> How can this ordinance be anything but arbitrary and capricious as the Town of Narragansett seeks to regulate not the use to which parcels of land are put but the behavior of occupants of residential dwellings by defining the nature of the relationship among people occupying single units . . . There is nothing on the record to suggest - nor does common sense or any legislative facts that can be judicially noticed lead to the conclusion - that Narragansett will be a safer, quieter community with less violations of the public peace if only persons related by blood, marriage or adoption can occupy apartments and houses situated in residential zones. There is nothing on this record to suggest that teenagers living with their parents will play their Metallica or their Beethoven at lower decibel levels in the wee hours of the morning than would four unrelated monks (or nuns) - or unrelated widows (or widowers) or four unrelated Navy lieutenants. It is a strange - and unconstitutional - ordinance indeed that would permit the Hatfields and the McCoys to live in a residential zone while barring four scholars from the University of Rhode Island from sharing an apartment on the same street. Certainly a rational-basis analysis requires a modicum of logic to inhere within the ordinance, but this ordinance is based upon a flawed premise. The legislation operates on the assumption that if some unrelated individuals sharing an apartment or house - be they students or otherwise are rowdy and disorderly, then all unrelated persons necessarily act in that fashion and must be barred from residential zones.

Distefano, supra, at 13-14. Other courts have reached a similar result. See *Santa Barbara v. Adamson,* 27 Cal.3d 123, 164 Cal.Rptr. 539, 610 P.2d 436 (1980) (invalidating ordinance defining family as related persons or not more than five unrelated persons); *Kirsch v. Prince George's Co., Maryland,* 331 Md. 89, 626 A.2d 372 (1993) (invalidating ordinance imposing special restrictions on properties occupied by three to five unrelated persons on state and equal protection grounds).

In summary, other states with constitutions that are no more protective of private property rights than the Ohio Constitution have concluded that classifications focused on the relationship between a home's

inhabitants are (1) not reasonably related to the achievement of state interests or goals such as reducing parking and traffic problems, controlling population density, overcrowding and congestion, or preventing noise and disturbance (2) arbitrary and capricious; (3) overinclusive; (4) an inappropriate objective of zoning law; (5) exclusionary of many households who pose no threat; (6) inferior to regulations that directly target socially disruptive or obnoxious behavior; and (7) inappropriately presumptuous concerning the behavior of certain age groups or living arrangements. These precedents dictate that Plaintiffs are entitled to judgment as a matter of law in their challenge to Bowling Green's materially identical limits.

b. The Dwelling Prohibition is arbitrary, untailored, unnecessary, and unduly oppressive.

The City's Ordinance(s) codifying the Dwelling Prohibition expressly claims its interest to be as follows: "to create living areas of moderate population density for single-family dwellings." Doc 1-1, citing Section 150.19(A) and 150.20(A). However, the prohibition is unconstitutionally arbitrary and untailored because to this goal or others because the limits are indirect, over-inclusive, under-inclusive and unequal.

i. The City's limits are arbitrarily over-inclusive.

First, rather than regulating a *land use,* the ordinance instead regulates *the identity of who* can use the land for otherwise legal and acceptable purposes. However, "[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare ... desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest." *Department of Agriculture v. Moreno,* 413 U.S. 528, 534 (1973); see also *Cleburne v. Cleburne Living Center, Inc.,* 473 U.S. 432, 448 (1985) (recognizing that classifications predicated on discriminatory animus can never be legitimate because the Government has no legitimate interest in exploiting "mere negative attitudes, or fear" toward a disfavored group); *Romer v. Evans,* 517 U.S. 620, 634–35 (1996); *Trump v. Hawaii,* 138 S. Ct. 2392, 2441–42775 (2018)(enactments impermissible when "the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected" is present). Here, the City has emphasized that the Dwelling Prohibition exists to target those between 18 and 24 years of age. The City was required to produce "each and every reason and all evidence demonstrating how the Dwelling Prohibition *directly* accomplishes the

City's interests," and "each and every reason, and all evidence in support of any such reason, why the cohabitant of greater than three *unrelated* roommates poses a greater threat to the City's interests . . . than the cohabitation of greater than three *related* roommates." See Frobose Int. 14, 16, 18. The City's only response is as follows: "Dwellings that are leased or rented to those in the 18-24 year old age group are concentrated in areas around Bowling Green State University and in the South of the City and in those areas of the City exterior code violations are more prevalent, disorderly conduct incidents are much greater than in other areas, nuisance parties are much greater than in other areas, and housing values are the lowest in the City," and therefore "legitimate concerns of the City are addressed by the occupancy limitations in the zoning code . . . and the City has the right to pass and enforce zoning regulations." *Id.*

Indeed, such ordinances are typically targeted at obstructing disfavored individuals and groups rather than legitimate governmental interests: "These codes are relevant to fair housing law as they can be used to discriminate not only based on familial status and disability but also as a proxy for racial/ethnic and national origin discrimination." See *Guide to Local Occupancy Codes in Northeast Ohio* (2013), by Krissie Wells and Madhavi Seth, Housing Research & Advocacy Center (Attached hereto as an Exhibit), pp. 1; see also Ellen Prader, "Restricting Occupancy, Hurting Families," Planners Network (1999)("Property owners and municipalities have long used overly restrictive occupancy codes explicitly to keep out unwanted populations…."). "Occupancy codes are often justified on protection of public health and safety. However, there is little empirical research on such benefits, and [experts] have demonstrated that the codes have an economic, political, social, and racialized history in the United States, enforcing white, northern European upper class ideals about living and sleeping arrangements over those of other groups." *Id.,* at p. 2.

Second, the number of innocuous household arrangements forbidden by the Dwelling Prohibition is endless. A four-bedroom home cannot be leased to four elderly widows. Nor four nuns. Nor four Mormon missionaries. Nor four medical residents or travel nurses working at Wood County Hospital. Nor four judges or law students. The City concedes as much. Doc. 19, PageID 201 (Int. 25). Even two engaged-to-be-married couples would be prohibited from occupying a four, five, or six-bedroom home. Indeed, the

arbitrariness of the law is demonstrated by the fact that, pursuant to the City's definition of family, if one of these couples were to rush their wedding date, then all of the current tenants could remain in the home. Likewise, if two of the four Plaintiff-Tenants in this case were to marry, the same group of individuals could continue dwelling together, despite no other changes. The City concedes that four otherwise-unrelated tenants could avoid the Dwelling Prohibition if two of the tenants would marry one another. Doc. 19, PageID 199 (Int. 16). However, the population density of the home would remain the same irrespective of whether such an intimate and important decision is made.

Third, the City prohibits arrangements that have no greater impact on density even if the arrangements are the functional equivalent of a family. For instance, the tenants at 229 E. Merry are military members and fraternity brothers who share common areas, meals, bills, household chores, grocery shopping, and yard work. They view themselves as more closely aligned than cousins. See Declaration of Henrickson.

Thus, the ordinance targets *identity* rather than *density*, and does so without regard for societal disruption. But unrelated individuals do not create any more density than related individuals. Four people are four people, irrespective of their connection to one another. And social engineering must not take place through the zoning process - - a process reserved to regulate land use rather than interpersonal relations.

ii. The City's limits are arbitrarily unequal and under-inclusive.

If population density or congestion is the goal, the Dwelling Prohibition is arbitrary in scope.

First, families are exempt. There is nothing preventing ten or more family members from occupying a single-family home so long as they are remotely related, even though four unrelated scholars cannot lawfully occupy that same home. Greater than four young adults remotely related by blood (who may or may not be BGSU students) could reside in one home, even if they are unruly, abuse drugs and alcohol, blare loud music, and own cars for which there is insufficient parking. This is true even if those young adults are even interrelated in a manner so attenuated such that they are merely third cousins.

Second, many Bowling Green rental homes - - over 230 in this small town - - are *entirely exempt* from the limits as "grandfathered." The City has no explanation as to why homes that are not grandfathered

are "factually distinguishable" or "more injurious to the City's interests in limiting population density" than occupancy by four or more individuals of any of the 233 grandfathered houses. Doc. 19, PageID 198 (Int. 14, 15). Indeed, many of the "un-grandfathered" homes are larger than those "grandfathered". On this front, the Supreme Court has explained that "the very existence of the 'escape hatch' of the variance procedure only heightens the irrationality of the restrictive definition, since application of the ordinance then depends upon which family units the zoning authorities permit to reside together and whom the prosecuting authorities choose to prosecute." *Moore v. City of E. Cleveland, Ohio,* 431 U.S. 494, 512 (1977). The Ohio Supreme Court's decision in *Boice* teaches the same lesson: there, the homeowner was permitted to build on a lot deemed by zoning regulations to be "too small" because others had previously enjoyed the same right on identical or smaller lots but were "grandfathered in." *Boice v. Ottawa Hills,* 2013-Ohio-4769, ¶17-19.

Third, the City arbitrarily exempts apartments. The City's only explanation as to why it prohibits four unrelated persons from residing in an enormous house while permitting them to dwell together in tiny apartments is the following: "The City does not regulate the occupancy of apartments." (Frobose Int. 9). But there's nothing unique to houses inherent in the City's professed governmental interests. And as to why it is "reasonable" to limit those huge homes - - often with over five bedrooms over 2,500 square feet - - the City has no answer whatsoever. (Frobose Int. 10).

Fourth, the City's regulations permit guests to spend all day at a regulated home and romantic partners to sleep over at the regulated home on a nightly basis without triggering the limit, so long as they maintain a nominal permanent address elsewhere. Yet this is phenomena differs little from "dwelling."

Finally, the City wholly permits a plethora of uses within R-2 Single-Family Residential Districts that dramatically expand population density beyond the occupation of a four-bedroom house by four unrelated adults. For instance, the City permits "adult family homes," "group homes," and "community residences." See Section 150.19(B). Also permitted are "Day-Care Homes" and Bed and Breakfasts. See 150.19(C); 150.20(C). The City permits such "adult family homes" to "accommodate …<u>five unrelated adults</u>" and "group homes" to "accommodate from six to <u>sixteen unrelated adults</u>." *Id.*

Given the foregoing massive exceptions, the City's Dwelling Prohibition is arbitrarily under-inclusive. One Ohio court, in a recent high-profile property rights case, invalidated a materially similar regulation of homes due to its arbitrary under-inclusiveness. In *Mack v. City of Toledo,* the Lucas County Court of Common Pleas scrutinized, pursuant to the Ohio Constitution, "the relationship between the Lead Ordinance's classifications (Ordinance applies *only* to owners of pre-1978 rental properties having one, two, three, or four units) and the Ordinance's ostensible purposes ("to help prevent poisoning of its residents and to prevent potential human exposure to lead hazards"). Lucas County Case No. CI17-4676, p. 43. The Court reasoned that, "the Lead Ordinance applies to and burdens only owners of rental properties having four or less units, naturally giving the owners of larger rental properties a competitive advantage that has no fair and substantial relation to the object of the legislation, so that all persons similarly circumstances are treated alike." *Id.*, citing *Mole*, supra. The court also explained that "[t]he Lead Ordinance does not contain any finding that rental properties owned by the unregulated owners pose no risk," and "limiting the Lead Ordinance's application to rental properties comprised of four or less units, while leaving the Toledo families who live in pre-1978 rental properties having more than four units, large apartment buildings, or apartment complexes at risk of lead exposure, is not rationally, fairly, or substantially related to a legitimate governmental purpose or interest." *Id.,* at p. 47. The City's Dwelling Limits, with all of their arbitrary exemptions for various properties, are materially identical to that which the Court invalidated in *Mack.*

iii. <u>The City's limits are not the tailored means of advancing governmental interests.</u>

There are far more related and tailored means of advancing the City's (constantly shifting) interests, such as providing a minimum number of bedrooms, parking spaces, or square footage per resident.

Indeed, the City of Bowling Green appears to maintain Ohio's only (or, at minimum, one of the only) regulations limiting dwelling on the basis of the number of number of unrelated inhabitants irrespective of the size of the home. A 2013 study conducted by the The Housing Research & Advocacy Center concluded as follows:

> All jurisdictions in Northeast Ohio with their own occupancy codes base their limits on the number of residents on the size, in square feet, of the premises. Most codes with occupancy requirements

> specify a minimum 'habitable floor area' for each occupant in a dwelling unit, requiring a specific amount of 'total habitable floor area' measured in square feet, for one occupant, and then additional amounts for each additional occupant . . . Locally, 42 governments in Cuyahoga County have local occupancy codes that restrict the number of occupants per floor space, compared to 8 in Lake County, 8 in Lorain County, 3 in Ashtabula County, and 3 in Medina County.

See *Guide to Local Occupancy Codes in Northeast Ohio* (2013), by Krissie Wells and Madhavi Seth, Housing Research & Advocacy Center (Attached hereto as an Exhibit), pp. 4-5. Even the U.S. Department of Housing and Urban Development has analyzed this issue and determined that Dwelling Limits such as the one here are overly restrictive and not narrowly-tailored, finding that "an occupancy policy of two persons in a bedroom, as a general rule, is reasonable under the Fair Housing Act," while a later finding emphasized that "occupancy codes should be evaluated based on the size, in square feet, of a dwelling." *Id.,* at p. 3. And indeed, the City concedes that, *already,* "The Wood County health code sets forth limitations on the square footage per person of a dwelling's living space, sleeping space, toilet facilities." Frobose Int. 17. Thus the City's interests are already advanced by *county* regulations.

The evidentiary record displays that the City maintains no justification for this: the City has offered no evidence or explanation as to (1) why the Dwelling Prohibition is a narrowly tailored means of serving a compelling governmental interest; (2) why it could not achieve its governmental interests, whatever they might be, by directly regulating disruptive conduct, pegging occupancy limits to the square footage of the property or structure or the availability of parking or number of bedrooms; or (3) how any governmental interest is furthered by regulating the interrelationships of those occupying homes within the City. Doc. 19, PageID 199-201(Int. 19, 24, 26, 28). Instead, the City simply cites the virtues of the following societal goods: "the sanctity of family life . . . the City's ordinances promote family values and family needs, as well as public health, safety, morals, comfort, and general welfare, the interests of conserving the values of property, facilitating the provision of public utilities, schools, and other public requirements, and the lessening or avoiding congestion on public streets and highways." Doc. 19, PageID 201 (Int. 27); see also Frobose Int. 14. Simply reciting positive societal aims or outcomes (in the eyes of some) is not the same as providing analysis or evidence in support of why the Dwelling Prohibition is a coherent and tailored *means*

of *substantially advancing* those goals. And no such evidence or reasoning could exist here: the City's restriction focuses on social engineering instead of population density. However, as one previous court to have considered the issue explained, "municipalities could appropriately deal with overcrowding or congestion by ordinance provisions that limit occupancy *in reasonable relation to available sleeping and bathroom facilities or requiring a minimum amount of habitable floor area per occupant* . . . It also bears repetition that noise and other socially disruptive behavior are best regulated outside the framework of municipal zoning. . . Other legitimate municipal concerns can be dealt with similarly . . . Disruptive behavior-which, of course, is not limited to unrelated households-may properly be controlled through the use of the general police power." *Borough of Glassboro v. Vallorosi*, 117 N.J. 421, 421–33 (1990).

iv. The City's limits are unduly oppressive.

By regulating the number of "boarders" and "lodgers" rather than "tenants," the City imposes strict criminal liability upon landlords - - and civil liability at up to $500 per day - - upon landlords who may be entirely innocent. R.C. 5321.01(A) defines a "tenant" as "a person entitled under a rental agreement to the use and occupancy of residential premises to the exclusion of others." Whatever a "boarder" or "lodger" is, it's different than a "tenant," according to the City: it includes individuals who may reside within the home - - no matter how briefly - - who have *not* signed a lease with the landlord. See Doc. 19, PageID 201 (Int. 29). This would include a tenant's boyfriend or girlfriend who slowly transitions into sleeping over at the home every night or almost every night. It includes an itinerant friend, perhaps struggling through a divorce or unemployment, sleeping on the couch for a month while getting his or her life back in order. And detecting who is always residing at the home is difficult, as it is not uncommon for folks to surreptitiously dwell within a home. See Declarations of Kory Iott and Troy Henrickson. *In short*, the Dwelling Limits include no requisite intent to violate the law, knowledge, or recklessness on the part of the landlord.

However, the Ohio Constitution requires that an "innocent owner" cannot be punished in such a manner. The Ohio Supreme Court recently affirmed that this principled is firmly grounded in the state and federal constitutions:

> [I][t would be difficult to reject the constitutional claim of * * * an owner who proved not only that he was uninvolved in and unaware of the wrongful activity, but also that he had done all that reasonably could be expected to prevent the proscribed use of his property.' Where there is 'no intentional wrongdoing, no departure from any prescribed or known standard of action, and no reckless conduct' and where the owner was not entirely 'free to act or not, as it chose" because of legal and practical considerations, such as requirements of eviction law and the limits on self-help potentials in evicting a criminal trespasser, infliction of a penalty is 'so plainly arbitrary and oppressive as to be nothing short of a taking of [his/her] property without due process of law.'
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> ***
>
> Where an owner is subject to closure of property against all purposes for a year solely on the basis of the illegal acts of a third party over whom the owner has no legal means of control, the closure order is unduly oppressive. * * * Therefore, the mandatory closure-order provision of R.C. 3767.06(A) is an improper exercise of police power under Section 19, Article I of the Ohio Constitution when it is imposed and enforced against a property owner who lacks any culpability in the creation or perpetuation of a nuisance on the property.

State ex rel. Pizza v. Rezcallah, 1998-Ohio-313, 84 Ohio St. 3d 116, 132 ("we now hold that the mandatory closure-order provision in R.C. 3767.06(A), closing the property against any use, including maintenance by the owner or any other legal use, bears no substantial relationship to the public health, morals, and safety. The closure provisions also fail for being unduly oppressive against an individual owner. Where an owner is subject to closure of property against all purposes for a year solely on the basis of the illegal acts of a third party over whom the owner has no legal means of control, the closure order is unduly oppressive."). This is especially true here, where R.C. 5321 limits the landlord's capacity to police the tenants and the home - - particularly its interior and the relationships of the tenants to one another.

In addition to all of the foregoing, there is *no limiting principle* governing the extent of the City's power if the Dwelling Prohibition were upheld: the City would remain free to limit the occupancy of four-bedroom homes to just *one* individual, or to just *two.*

In sum, Plaintiffs are entitled to judgment as a matter of law because the Dwelling Prohibition is an arbitrary means of effectuating the City's professed interest in population density that is neither direct nor coherent, much less a narrowly tailored. Meanwhile, the prohibition disparately impacts Plaintiffs' *de minimus* uses of their property: the habitation of a home by the same number of occupants as there are bedrooms, i.e. a four-bedroom house by four individuals. And the sky will not fall if the City's Dwelling

Prohibition is invalidated: the City is free to directly address externalities related to noise, traffic, health, and safety through regulations directly targeting those issues as they arise.

IV. CONCLUSION

For the foregoing reasons, Plaintiffs are entitled judgment as a matter of law on their vagueness claim because the criteria for limiting the occupancy of a home to a number of unrelated individuals less than the number of bedrooms within the home, i.e. that a home be 'designed for occupancy by one family,' is impermissibly vague. And Plaintiffs are entitled to judgment as a matter of law on their due process and equal protection claims because limiting the occupancy of a home to a number of unrelated individuals less than the number of bedrooms within the home is arbitrary, unduly oppressive, and untailored to any legitimate government interest, particularly when similarly situated homes and homeowners are not subject to the same limits. Accordingly, this Court should prohibit Defendants from enforcing Section 150.03, in conjunction with Sections 150.19 and 150.20 so as to prohibit the otherwise-legally-compliant occupation of private residential homes.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing will be served upon all counsel of record via the Court's electronic filing system on the date of filing.

/s/ Maurice A. Thompson