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Massachusetts Land Court.

Department of the Trial Court, Suffolk County.

Mark ROSENBERG, individually and  
as trustee of the R & R Realty Trust,  
Lazarus Pavlidis, Anthony Dimeo, Lloyd  
Rosenthal, and Jessica Luccio, Plaintiffs

v.

CITY OF BOSTON and City of Boston  
Zoning Commission, Defendants.

No. 08 MISC 377101(CWT).

|  
May 25, 2010.

## DECISION

[CHARLES W. TROMBLY, JR.](#), Justice.

\*1 This case came before the Court on the parties' cross-motions for summary judgment. Plaintiffs Mark Rosenberg, Individually and as Trustee of the R & R Realty Trust, Lazarus Pavlidis, Anthony Dimeo, Lloyd Rosenthal, and Jessica Luccio (collectively, "Plaintiffs"),<sup>1</sup> filed a verified complaint on April 8, 2008,<sup>2</sup> seeking to annul Amendment Number 346 ("Amendment") to the Boston Zoning Code ("Code") which redefines the term "family" in Article 2, Section 2-1 and Article 2A, Section 2A-1, such that only "five or more persons who are enrolled as full-time undergraduate students at a post-secondary educational institution" are excluded for the purposes of determining who can live in a dwelling unit.

Specifically, Plaintiffs, in their Amended Verified Complaint, sought to annul the Amendment on the grounds that it (Count I) violates their rights to equal protection under the law; (Count II) violates their rights to privacy; (Count III) is impermissibly vague; (Count IV) violates their rights to freedom of association; (Count V) constitutes unlawful rent control pursuant to G.L. c. 40P; (Count VI) constitutes a regulatory taking; (Count VII and VIIIb<sup>3</sup>) violates Chapter 665 of the Acts of 1956, section 2 by not treating like-kind and classes of properties

and uses uniformly and by exceeding the authority granted to the Zoning Commission by the enabling legislation; and (Count IX) was adopted in violation of the open meeting law pursuant to G.L. c. 39, §§ 23A-23C. Plaintiffs, in the alternative, sought a declaration that they are exempt from the application of the Amendment because they maintain a "grandfathered" status (Count VIIIa).

On April 28, 2008, the Plaintiffs filed a motion for preliminary injunction and supporting documents, seeking to enjoin the City of Boston and the City of Boston Zoning Commission (collectively, "Defendants") from enforcing the Amendment, and from enforcing the Amendment as it applies to the Plaintiffs' current leases and leases commencing on or about September 1, 2008. On May 8, 2008, the Defendants filed an opposition to the motion and a hearing on the motion was held before the Court. The arguments presented were taken under advisement. On May 29, 2008, this Court (Trombly, J.) issued an order denying the Plaintiffs' motion for preliminary injunction.

On September 23, 2009, the Defendants filed a motion for summary judgment and supporting documentation. Plaintiffs filed an opposition to Defendants' motion, a cross-motion for summary judgment, and supporting documentation on November 23, 2009. The Court held a hearing on the motions on January 26, 2010 and the arguments were taken under advisement.

### *Discussion*

The Defendants move for summary judgment on each count of the Plaintiffs' Amended Verified Complaint. They state that based on the undisputed facts before the Court, the Plaintiffs are unable to prove that, in adopting the Amendment, the Defendants have (1) violated the Plaintiffs' state or federal constitutional rights (Counts I, II, IV, and VI); (2) have acted in excess of their authority (Count VII and VIIIb); or (3) have violated any statutory provision (Count V and IX). The Defendants also state that the Plaintiffs have failed to show that the Amendment is constitutionally invalid on its face (Count III), and have failed to demonstrate that they are exempt from its application in any way (Count VIIIa).

\*2 The Plaintiffs oppose the Defendants' motion for summary judgment. However, the Plaintiffs have only

moved for summary judgment in their favor on Counts I, III, IV, and V of their Amended Verified Complaint. The Plaintiffs assert that summary judgment is not appropriate for Counts II and IX as there are outstanding factual issues. As for Counts VI, VII, VIIIa, and VIIIb, the Plaintiffs do not oppose the Defendants' motion.

The Court finds that the following facts are not in dispute:

1. In December 2007, the Boston City Council passed an Order (“Order”) petitioning the Zoning Commission to adopt a recommended text amendment to the Code's definition of “family.” The proposed definition excluded a group of five or more students enrolled at or attending a post-secondary educational institution from constituting a “family.”
2. The Order recites several reasons for changing the definition, including: the current ordinance being outdated and having enforcement constrained by the consent decree in the *Sang Vo v. City of Boston*<sup>4</sup> case; protection of residential quality of life; protecting essential neighborhood characteristics; alleviating the environmental and economic consequences of overcrowded student apartments; and the insufficiency of minimum per-person square footage established in current regulations to prevent student overcrowding.
3. The Boston Redevelopment Authority (BRA) subsequently also petitioned the Zoning Commission to amend the Code's definition of “family.”
  4. The BRA's proposed language is slightly different from the language in the Order in that it specifies that this exclusion is limited to five or more persons who are enrolled as *full-time undergraduate* students at a post-secondary educational institution.
  5. In the memorandum submitted to the BRA, and then to the Zoning Commission, along with the proposed Amendment, the purposes for the Amendment are stated as: to allow the Inspection Services Department (ISD) and the Licensing Board to enforce the various statutes and codes consistently with the *Sang Vo* consent decree; to allow for the different variations of family that exist in this era; to

preserve quiet, residential areas where families can thrive; to protect students from substandard living conditions; and to enable residents to afford housing in the face of a housing market that threatens to price low and moderate income families out of the market.

6. The Zoning Commission held a public meeting on March 12, 2008 to consider the proposed Amendment to change the definition of “family” in Article 2, Section 2-1 and Article 2A, Section 2A-1 of the Code, at which time the Zoning Commission received public comment in favor of, and against, the Amendment.
7. Prior to this meeting, the Zoning Commission received many letters in support of the Amendment from elected officials, area residents, university administrators, law enforcement officials, real estate companies, and landlords.
  - \*3 8. At the Zoning Commission meeting, the Commissioners received evidence that:
    - a. 30,000 students lived off-campus in Boston during the 2007-2008 academic year;
    - b. that undergraduate students comprise a disproportionate percentage of the overall population of some neighborhoods;
    - c. that many of these undergraduates are first time renters and are living without parental or institutional supervision for the first time;
    - d. that large groups of undergraduates create undue noise, parking, and trash impacts on neighborhoods;
    - e. that the business model of renting real estate to large groups of undergraduate students is pricing other residents out of the housing market; and
    - f. that undergraduate students are likely to be subjected to substandard rental accommodations.
9. The Amendment was approved by the Zoning Commission at the end of the March 12, 2008 meeting.

10. The Amendment went into effect on March 13, 2008, after it was signed by the Mayor of Boston.
11. Plaintiff Jessica Luccio is, or was, a full-time undergraduate student attending a post-secondary educational institution. Ms. Luccio was able to ascertain that she is, or was, a full-time undergraduate student attending a post-secondary educational institution. She was also able to determine that the individuals with whom she had entered into a lease for the 2008-2009 school year were full-time undergraduate students.
12. Plaintiffs Mark Rosenberg, individually and as trustee of the R & R Realty Trust, Lazarus Pavlidis, Anthony Dimeo, and Lloyd Rosenthal (collectively, "Landlord Plaintiffs") each own property in the City of Boston.
13. Each Landlord Plaintiff rented his units to five or more full-time undergraduate students for a one-year term beginning September 1, 2007 and for a one-year term beginning September 1, 2008.
14. Each Landlord Plaintiff purchased real estate located in the City of Boston in order to pursue a specific business model comprised of leasing apartment units to students attending nearby colleges and universities.
15. As of May 13, 2008, each landlord Plaintiff had ascertained that each of the tenants in units identified in Plaintiffs' Amended Verified Complaint were or would be enrolled as full-time undergraduate students at a postsecondary educational institution for the period of September 1, 2007 through August 31, 2009.
16. The Boston Zoning Code is enforced by the City of Boston Inspectional Services Department ("ISD"), overseen by Commissioner William J. Good, III.
17. ISD has the authority to ask landlords if they are renting residential units to five or more persons enrolled as full-time undergraduate students at post-secondary educational institutions, to request leases or other documents that might indicate such occupancy, and to ask people who apparently reside in a dwelling unit if they are full-time undergraduate students enrolled at post-secondary educational institutions but, absent a court order, ISD cannot compel a response.
- \*4 18. ISD also has the authority to request permission from residents to inspect the interior of a dwelling unit to determine compliance with the building code, sanitary code, and the zoning code. However, a resident is not required to consent, and ISD cannot make a search without consent or a court-issued warrant.
19. The penalty for a violation of the Amendment is the same for a violation of any other provision of the Code; that is, notice of the violation issued by the Commissioner of ISD that the City can enforce through a civil enforcement action.
20. As of September 23, 2009, ISD had not yet enforced the Amendment against any of the landlord Plaintiffs but has identified 24 Gerald Road, a property owned by Plaintiff Dimeo, as potentially being in violation of the Amendment.
21. ISD and Plaintiff Dimeo have communicated through written correspondence regarding ISD's request for a site visit and production of rental documents but, as of the date of the summary judgment hearing, no further action had been taken.
22. Potential tenants have the capacity to identify if they are full-time undergraduate students enrolled at a post-secondary educational institution.
23. Prior to February 22, 1991, the Code excluded all groups of five or more unrelated people from the definition of "family." "Family" was defined as "one or more persons occupying a dwelling unit and living as a single, non-profit housekeeping unit, provided that a group of five or more persons who are not within the second degree of kinship shall not be deemed to constitute a family."
24. In February 1991, the definition of "family" was amended so that group residences are

considered a “family.” This change did not alter the fact that all other groups of five or more persons not within the second degree of kinship are not a “family.”

### *Summary Judgment Standard of Review*

Summary judgment is granted where there are no issues of material fact and when the moving party is entitled to judgment as a matter of law. *Mass. R. Civ. P. 56(c)*; *Cassesso v. Comm'r of Corr.*, 390 Mass. 419, 422 (1983); *Cnty. Nat'l Bank v. Dawes*, 369 Mass. 550, 553 (1976). The moving party bears the burden of demonstrating affirmatively the absence of a triable issue, and its entitlement to judgment as a matter of law. *Pederson v. Time, Inc.*, 404 Mass. 14, 16-17 (1989). In viewing the record before it, the court reviews “the evidence in the light most favorable to the nonmoving party.” *Donaldson v. Farrakhan*, 436 Mass. 94, 96 (2002).

In weighing the merits of a summary judgment motion, the court must address two questions: (1) whether the factual disputes are genuine; and (2) whether a fact genuinely in dispute is material. *Town of Norwood v. Adams-Russell Co., Inc.*, 401 Mass. 677, 683 (1988) (citing *Anderson v. Liberty*, 477 U.S. 242, 247-48 (1986)). “As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law properly preclude the entry of summary judgment.” *Anderson*, 477 U.S. at 248, cited in *Carey v. New England Organ Bank*, 446 Mass. 270, 278 (2006); *Molly A. v. Comm'r of the Dept. of Mental Retardation*, 69 Mass.App.Ct. 267, 268 n. 5 (2007). In order to determine if a dispute about a material fact is genuine, the court must decide whether “the evidence is such that a reasonable [fact finder] could return a verdict for the non-moving party.” *Anderson*, 477 U.S. at 248.

\*5 With respect to any claim on which the party moving for summary judgment does not have the burden of proof at trial, it may demonstrate the absence of a triable issue either by submitting affirmative evidence that negates an essential element of the opponent's case, or “by demonstrating that proof of that element is unlikely to be forthcoming at trial.” *Flesner v. Technical Comm'n's Corp.*, 410 Mass. 805, 809 (1991). The party opposing summary judgment “cannot rest on his or her pleadings and mere assertions of disputed facts to defeat the motion for summary judgment.” *LaLonde v. Eissner*, 405 Mass.

207, 209 (1976). However, where appropriate, summary judgment may enter against the moving party. *Mass. R. Civ. P. 56(c)*.

### *Equal Protection*

Plaintiffs argue that the Landlord Plaintiffs are treated differently than those landlords who own smaller apartments because they cannot rent at the same “density,” and that Plaintiff Luccio, as a 23-year-old full-time undergraduate student, is treated differently than all other 23-year-olds. They argue that, although the classifications do not create *suspect classes*, the ordinance is not rationally related to a legitimate governmental purpose.

The Defendants argue that the Landlord Plaintiffs have not produced evidence of specific instances where similarly situated people were treated differently; claiming that their cited precedent only relates to landlords who own smaller units and, therefore, are not similarly situated “in all respects”, as required. The Defendants further argue that although Plaintiff Luccio, as a full-time undergraduate student, is treated differently than all other individuals, full-time undergraduate students are not a suspect class and, therefore, the disparate treatment does not violate the federal or state constitution because it is rationally related to the legitimate public purposes described in the Order and BRA Memorandum.

Under the Massachusetts Declaration of Rights, the application of “rational basis” review is determined in the same manner as under the United States Constitution. Therefore, in the case at bar, the analysis of the equal protection issue under both constitutions is identical. *Commonwealth v. Franklin Fruit Co.*, 388 Mass. 228, 235 (1983). Where dissimilar treatment does not involve a suspect class or a fundamental right, an ordinance will be upheld as long as it is *rationally related* to a legitimate government interest. *Dickerson v. Attorney Gen.*, 396 Mass. 740, 743 (1986); see *Village of Belle Terre v. Boraas*, 416 U.S. 1, 7 (1974). In Massachusetts, the suspect classes are sex, race, color, creed, and national origin. *Powers v. Wilkinson*, 399 Mass. 650, 657 n. 11 (1987). Undergraduate students do not constitute a suspect class. *Bloomsburg Landlords Association, Inc. v. Town of Bloomsburg*, 912 F.Supp. 790 (M.D.Pa.1995).

Landlords do not constitute a suspect class. *Schnuck v. Santa Monica*, 935 F.2d 171, 176 (1991).

\*6 Under the rational basis standard, the “zoning ordinance is valid unless the relationship between the classification and the purpose behind it is so weak the classification must be viewed as arbitrary and capricious.” *Ames Rental Prop. Ass'n v. City of Ames*, 736 N.W.2d 255, 259 (Iowa 2007). That is, the burden is on the challenger to demonstrate that there is no reasonably conceivable set of facts that would show that the zoning ordinance is rationally related to a legitimate public purpose. *Dickerson*, 396 Mass. at 743; *FCC v. Beach Communications*, 508 U.S. 307, 313 (1993). The police power extends beyond the conventional elimination of “filth, stench, and unhealthy places” and may include laying out “zones where family values, youth values, and the blessings of quiet seclusion and clear air make the area a sanctuary for people.” *Village of Belle Terre*, 416 U.S. at 9.

If the challenger does not belong to a class, he can assert that as a “class-of-one” he is being treated unequally. In this type of case, the challenger must identify and relate specific instances where persons, situated similarly in all relevant aspects, were treated differently. *Buchanan v. Maine*, 469 F.3d 158, 178 (1st Cir.2006).

A ‘class of one’ equal protection claim will survive a motion for summary judgment where the plaintiff adduces sufficient evidence from which a reasonable jury could conclude that, ‘compared with others similarly situated, [plaintiff] was selectively treated ... based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, *or* malicious or bad faith intent to injure [the plaintiff].’

*Buchanan* 417 F. Supp 2d 24, 37 (D.Me.2006) (quoting *Tapalian v. Tusino*, 377 F.3d 1, 5 (1st Cir.2004)), *aff'd*, 469 F.3d 158 (1st Cir.2006).

Both the Landlord Plaintiffs and Plaintiff Luccio belong to classes of people: landlords in Boston and full-time undergraduate students, respectively. They are not “classes-of-one” and have not identified or related any specific instances where persons, similarly situated in all relevant respects, were treated differently. In order to show this, the Plaintiffs would have had to show evidence that there are some landlords who are allowed, as of right,

to rent to five or more full-time undergraduate students or that there are five or more full-time undergraduate students who are allowed to live together, as of right. Because the Plaintiffs do not appear to be arguing that they are a “class-of-one,” or, alternatively, have failed to provide evidence to sustain such a claim, they will be considered as part of a class; that is, the class of landlords and the class of full-time students. Neither of these classes are *suspect* classes because they are not based on sex, race, color, creed, or national origin. Therefore, the law is to be analyzed under “rational basis” review.

The Court finds that the Amendment to the Code is rationally related to a legitimate public purpose and, therefore, does not violate the Equal Protection Clause of the United States Constitution or the Constitution of the Commonwealth of Massachusetts. As noted above, protecting residential character and similar amenities and protecting against unhealthy or unsafe conditions are legitimate public purposes. The purposes behind the Amendment cited by the City Council and the Boston Redevelopment Authority include protecting students from unsafe conditions that may be created by overcrowding and the preservation of neighborhoods as places for families to prosper, including promoting affordability and increasing neighborhood stability. The evidence provided at the Zoning Commission meeting is sufficient to provide a “reasonably conceivable state of facts” demonstrating that the burdens students place on neighborhoods are greater than for other similarly sized groups of tenants who are not undergraduate students. The summary judgment record contains dozens of letters from residents of neighborhoods where undergraduate students comprise a greater than optimal percentage of the population, supporting the allegations of the burdens that these tenants place on the neighbors and neighborhoods. *See* Defs. Ex. H, I.

\*7 Although the Plaintiffs' arguments that the Amendment is both *over* and *under* inclusive highlight *potential* difficulties in the application of the Amendment in certain circumstances, it is well recognized that a law does not have to be perfectly tailored to meet its goals as long as the dividing line was created rationally. The Defendants have demonstrated that the dividing line of four full-time undergraduate students as the maximum allowed under the Code was established based on figures presented to the Zoning Commission showing that the monthly rent from four full-time undergraduate students,

at \$750.00 per student, is approximately equivalent to the median monthly payment for a home in Boston. The Defendants state that the purpose of setting the line here is to reduce the pressure on families who are being priced out of these neighborhoods by making more rental properties financially accessible and reducing the incentive for acquiring investment properties.

Although the evidence presented to the Zoning Commission included opposition, as well as anecdotal and unsupported opinion, the Plaintiffs cannot meet their burden of demonstrating that there is *no* set of reasonably conceivable facts that support the rational connection between the legitimate public purpose of protecting residential areas and the Amendment. The “reasonably conceivable set of facts” is not required to be on the record before the Zoning Commission. If the Court can conceive of such a set of facts, the Amendment is not unconstitutional for violation of equal protection; the Court has conceived of such a set of facts.

For the above reasons, the Court **GRANTS** summary judgment to the Defendants on Count I.

### ***Fundamental Right to Privacy***

Count II of the Plaintiffs' Amended Verified Complaint states that the Amendment violates the Plaintiffs' right to privacy because the enforcement of the ordinance will require an invasive inquiry into the student status of tenants and an invasive inquiry into the business records of landlords to determine the student status of tenants. The Defendants argue that these are speculative arguments and cannot be brought at this time because the Amendment has not been enforced with respect to these Plaintiffs.

To show a violation of the right to privacy<sup>5</sup> the Plaintiff must show that the complained of action is governmental action. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982); *Commonwealth v. Considine*, 448 Mass. 295, 300 (2007). The Plaintiffs must also show an actual intrusion into a constitutionally protected place or interest; that is, there must be an actual case or controversy. See *Utility Contractors Ass'n of New England, Inc. v. Dep't of Pub. Works*, 29 Mass.App.Ct. 726, 730 (1991).

The Court finds that, on its face, the Amendment to the Code does not require that tenants or landlords submit to an invasion of their private homes or business records. The ISD has the authority to enforce the Amendment but it does not have the authority to compel responses to inquiries without an order of the court. The requirement necessitating an order of the court to compel responses is a protection from the government invading privacy.

\*8 The Plaintiffs assert that enforcement actions have begun and, therefore, there are facts that have not yet been developed which would make summary judgment inappropriate at this point in time. However, the Court does not find that any of the facts that the Plaintiffs anticipate developing will be material to the question of whether or not the Amendment is unconstitutional on its face. The facts that the Plaintiffs apparently anticipate developing would likely be material to a question of whether the City has engaged in any violation of Plaintiffs' privacy in applying the Code to *unique* situations. This is a different question than the constitutional validity of the Amendment *on its face*.

For the above reasons, the Court **GRANTS** summary judgment to the Defendants on Count II.

### ***Vagueness***

The Plaintiffs argue that the term “full-time undergraduate students” is not adequately defined in the Zoning Ordinance and this omission causes the Code to fail to adequately notify those who may be affected by the law. The Defendants argue that the student tenants themselves know if they have “full-time” status, that the Landlord Plaintiffs demonstrated that they knew whether or not their tenants had “full-time” status, and that there is no room for arbitrary enforcement of the Amendment.

It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. 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 policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application.

*Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972).

The Court finds that the Amendment is not impermissibly vague for not defining the term “full-time.” While it is true that not every college or university will define “full-time” status in exactly the same way, each college or university will, in fact, have a definition of what constitutes “full-time” status, as opposed to “part-time.” Each student, and each prospective tenant, will be able to identify whether or not they do, in fact, meet these criteria. While the landlords themselves may be prevented by federal statute from gaining this information directly from the college or university, they can still protect themselves from unwittingly renting their properties illegally through lease arrangements with their tenants.

The Court finds that the Amendment does not give unrestrained discretion to those charged with enforcement of the Code. The Plaintiffs argue that the use of the phrase “or some alternatively named equivalent” allows the ISD to choose to enforce the restriction on people who are not full-time undergraduate students by making a policy decision as to what the “equivalent” may be. The Plaintiffs argue that this would be problematic because those people may not be able to self-identify and would be unable to steer clear of unlawful conduct. The Court finds that the reasonable interpretation of this language is simply to account for the fact that different colleges and universities may use some other combination of words other than “full-time” to describe the status of students affected by the restriction.

\*9 Given the strong presumption of validity given to zoning ordinances and for the reasons stated above,

the Court **GRANTS** summary judgment in favor of the Defendants on Count III.

### *Freedom of Association*

In Count IV of their Amended Verified Complaint, the Plaintiffs assert that the Amendment violates Plaintiff Luccio's freedom of association because it determines the number and type of persons with whom she can legally reside, which includes preventing her from living with four or more relatives who are also full-time undergraduate students. The Landlord Plaintiffs also assert that the Amendment violates the freedom of association of their current and future tenants. The Defendants argue, first, that the Landlord Plaintiffs do not have standing to litigate the potential *future* constitutional rights of unidentified third parties<sup>6</sup> and, second, that the right to freedom of association protects Plaintiff Luccio's right to engage in private intimate associations rather than the right to choose living companions who are not related to her.

The decisions of the United States Supreme Court with respect to freedom of association fall into two categories: 1) the protection of the freedom to enter into and maintain certain intimate human relationships; and 2) the right to associate with others for the purpose of engaging in those activities protected by the First Amendment. *Roberts v. United States Jaycees*, 468 U.S. 609, 617-18 (1984). The types of affiliations that are protected center on family and include marriage, childbirth, education of children, and cohabitating with relatives. *Id.* at 619.

In *Moore v. City of East Cleveland*, 431 U.S. 494 (1977), the Supreme Court struck down an ordinance that had an overly restrictive definition of family which prevented a grandmother from residing with two of her grandsons who were cousins rather than brothers. The Court stated, “Of course, the family is not beyond regulation. But when the government intrudes on choices concerning family living arrangements, this Court must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation.” *Id.* at 499 (citation omitted). In that case, the Court found that the governmental interest to be served was to limit overcrowding, especially with parking in neighborhoods, and that the ordinance did not serve those interests. In contrast, the United States Supreme

Court upheld an ordinance which limited the occupancy of single-family dwellings to related people living as a single housekeeping unit, or not more than two unrelated people. *Village of Belle Terre*, 416 U.S. at 2. The limitation in this case was acceptable because it only applied to *unrelated* people and did not involve any fundamental right guaranteed by the Constitution of the United States. *Id.* at 8.

The question before the Court on Count IV is whether the Amendment precludes five or more *related* full-time undergraduate students enrolled at post-secondary institutions from living together and, if so, whether that intrusion into a family's choice of living arrangements advances the targeted government interest and whether that government interest is important enough to justify the intrusion.

\*10 The Court must construe the zoning ordinance according to the principles of statutory construction to determine the intent of the drafters. *Framingham Clinic v. Zoning Bd. of Appeals of Framingham*, 382 Mass. 283, 290 (1981). “The object of all statutory construction is to ascertain the true intent of the Legislature from the words used.” *Champigny v. Commonwealth*, 422 Mass. 249, 251 (1996). The Court must first examine the plain language of the ordinance. If the meaning of the words used is clear and unambiguous, the ordinance will be construed according to that plain meaning, unless such a construction would lead to an absurd or unworkable result. *Commonwealth v. Millican*, 449 Mass. 298, 301 (2007). Only if the plain language is unclear is it permissible for the Court to examine extrinsic evidence such as the legislative history. *Barclay v. De Veau*, 384 Mass. 676, 680 (1981). Additionally, statutes and ordinances are construed to avoid an unconstitutional result if the language is “fairly susceptible” to a construction that is constitutional. *Adamowicz v. Ipswich*, 395 Mass. 757, 760, 763 (1985).

The Amendment inserts a new definition of the term “family” into Section 2-1 and Section 2A-1. It states:

one person or two or more persons related by blood, marriage, adoption, or other analogous family union occupying a dwelling unit and living together as a single, non-profit housekeeping unit, provided that a group of five or more

persons who are enrolled as full-time undergraduate students at a post-secondary educational institution shall not be deemed to constitute a family. A group residence, limited, as defined in clause (22B) of this Section 201 shall be deemed a family.

Defs. Ex. E.

The Court finds that the plain language of the first part of this definition does not limit the number of “related” people living together with respect to the Code. The Court finds the use of the term “analogous family union” to be a “catch-all” for any other type of relation, including people who are *unrelated* but are maintaining a “single non-profit housekeeping unit.” In this sense the Amendment greatly expands the definition of family from the previous definition which *excluded* any group of five or more persons not in the second degree of kinship. Defs. Ex. F, G. The Court finds that the second part of the first sentence then excludes from all those who are considered families “a group of five or more persons who are enrolled as full-time undergraduate students at a post-secondary educational institution.” The plain language of this clause is clear and unambiguous. The use of the term “persons” refers to everyone who was identified in the first clause; that is, anyone who is living as part of a group as a single non-profit housekeeping unit. This term does not, in its plain and common meaning, exclude related persons. Therefore, the plain meaning of the exception to the classification of “family” also excludes five or more *related* full-time undergraduate students.

\*11 While the plain language of the statute does appear to exclude five or more related students from the definition of family, the legislative history indicates that this was not the City's intent. In Massachusetts, as noted earlier, the Court can only turn to legislative history to support an interpretation if the language of the provision is unclear or if the clear language leads to an absurd or unworkable result; the Court may not resort to extrinsic evidence to vary the plain meaning of a provision. *Department of Community Affairs v. Massachusetts State College Building Authority*, 378 Mass. 418, 427 (1979). The plain meaning described above is clear, yet it must state an unworkable result because the result may make the Amendment unconstitutional.

The legislative history of the Amendment clearly indicates that related students were *not* intended to be excluded from the definition of family. The City Council states, in the Order, “[t]he proposed definition restores the definition of family and limits the number of *unrelated* students ... that can live together.” Defs. Ex. A (emphasis added). Furthermore, the BRA memorandum supporting the Amendment states, “[t]he purpose of keeping the general exclusion in regards to only full-time undergraduate students and *continuing to allow no more than four such unrelated students to constitute a family* is to preserve and maintain quiet, residential areas where families can thrive.” Defs. Ex. C (emphasis added). Resorting to the legislative history to assist the interpretation of this statute results in a finding that the Amendment is not unconstitutional because it *does not prevent* unrelated people from living together and, therefore, does not hinder the tenants' freedom of association.

For the above reasons, the Court **GRANTS** summary judgment in favor of the Defendants on Count IV.

#### *Rent Control Law*

The Plaintiffs assert in Count V that, by allowing the Amendment to the Code, the City of Boston is trying to control rents in violation of G.L. c. 40P, the Massachusetts Rent Control Prohibition Act. The Defendants counter that the Plaintiffs misunderstand the rent control law and that all zoning regulations have some impact on rental rates.

General Laws, chapter 40P establishes “a uniform statewide policy that broadly prohibits any regulatory scheme based upon or implementing rent control.” G.L. c. 40P, § 2. For the purposes of the law, “rent control” means:

- (a) any regulation that in any way *requires below-market* rents for residential properties; and
- (b) any regulation that is part of a regulatory scheme of rent control as defined in clause (a), including the regulation of occupancy, services, evictions, condominium conversion and the removal of properties from such rent control scheme; except that

(c) this definition does not include the regulation of, or agreements affecting, publicly owned housing, publicly subsidized housing, federally assisted housing, or mobile homes.

\*12 G.L. c. 40P, § 3 (emphasis added). The prohibition is simply that, “[n]o city or town may enact, maintain or enforce rent control of any kind ...” G.L. c. 40P, § 4.

The Court finds that the Amendment does not violate the Massachusetts Rent Control Prohibition Act. The question turns on whether the Amendment, by restricting the occupancy level of full-time undergraduate students to four, “requires below-market rents” or is part of a regulatory scheme that “requires below-market rents.” The Court found that there was no dispute as to the fact that the Zoning Commission received evidence that the practice of renting to large groups of undergraduate students is pricing other residents out of the housing market. The Court also found that one of the purposes behind the Amendment is to alleviate the economic consequences of overcrowded student apartments and to enable residents to afford housing in the face of a market that threatens to price low and moderate income families out of the City. However, the fact that the Landlord Plaintiffs were charging rents well *above* the market rate, and the fact that the Amendment was adopted to alleviate that price pressure, *does not* mean that the Amendment *requires* the landlord Plaintiffs to charge a *below-market* rent. The Amendment may change the market for large apartments, and may very well lower the monthly rent that the landlord Plaintiffs can realistically charge and still expect to obtain tenants, but it is unlikely that the rents will go below the market rate and there is nothing in the Amendment establishing any kind of *requirement* as to the rent charged. Part (b) of the definition of “rent control” is oddly worded but the Court understands it to mean that individual regulations that regulate occupancy, services, evictions, etc. that are part of a larger scheme which, as a whole, requires landlords to charge below-market rate rents are not permitted. The Court does not read this section to state that all occupancy regulations violate the rent control prohibition act.

For the above reasons, the Court **GRANTS** summary judgment in favor of the Defendants.

### *Regulatory Taking*

In their Amended Verified Complaint, Plaintiffs claim that enforcement of the Amendment would interfere with their distinct investment-backed expectations for their properties, thus constituting a regulatory taking and violating their right to substantive due process. The Defendants argue that, because the Landlord Plaintiffs are still free to rent their units to various combinations of tenants, they have not lost all of the economically beneficial use of their properties. Instead, the Defendants argue, the Landlord Plaintiffs actually have greater rental opportunities because the previous definition of “family” prohibited any group of five or more persons not within the second degree of kinship from living together.

A “total regulatory taking” is one in which a land use regulation denies a plaintiff “all economically beneficial use of her property ... except to the extent that background principles of nuisance and property law independently restrict the owner's intended use of the property.” *Gove v. Zoning Board of Appeals of Chatham*, 444 Mass. 754, 762 (2005) (quoting *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1026-32 (1992)).

\*13 The majority of regulatory takings, however, do not fall into the category of “total regulatory taking” and instead require the court to engage in an “ad hoc, factual inquir[y]” as set forth in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978). In *Penn Central*, the Court identified several factors that have significance in evaluating whether a regulatory taking has occurred. The relevant factors include “the economic impact of the regulation on the claimant,” “the extent to which the regulation has interfered with distinct investment-backed expectations,” and the “character of the governmental action.” *Id.* at 124; see *Gove*, 444 Mass. at 764.

The Plaintiffs brought this Count in their Amended Verified Complaint but they have not opposed the Defendants' motion for summary judgment on it, nor have they brought a cross-motion for summary judgment in their own favor. The Defendants have successfully demonstrated that the Plaintiffs' investment backed expectations have not changed for the worse because the definition of “family” prior to the adoption of the Amendment excluded the ability of the Landlord

Plaintiffs to rent to any group of five or more unrelated people. While the extent of the economic impact on the Landlord Plaintiffs is a question of fact, the Plaintiffs have the burden of proof to show a deprivation that takes most of the economically beneficial use of the property. The Plaintiffs have not advanced any facts, disputed or otherwise, that would show that their deprivation rises to this level.

The Court finds that, in the instant action, the undisputed facts do not indicate that enforcement of the Amendment constitutes a total regulatory taking as it does not in any way deprive Plaintiffs of all viable economic use of their properties because the Landlord Plaintiffs can still rent their units. The Court also finds that the Amendment does not rise to the level of a regulatory taking under the *Penn Central* inquiry. While the Amendment may decrease the amount of rent that Plaintiffs are ultimately able to collect because a large group of students may have more income available from which to pay rent, Plaintiffs' investment backed expectations are not unreasonably interfered with. The Court has found that the Landlord Plaintiffs purchased their properties with the intent of engaging in the specific business model of renting to students. However, renting to other groups will similarly provide monthly income from the properties. Additionally, the Code prior to the adoption of the Amendment excluded from the definition of “family” five or more unrelated individuals living together. Plaintiffs' could not have legally had any expectation of renting their property in this manner and, therefore, their investment backed expectations have not changed at all.

The Court **GRANTS** summary judgment in favor of the Defendants on Count VI.

### *Boston Zoning Enabling Act*

\*14 The Plaintiffs have asserted three arguments in their Amended Verified Complaint that the Amendment violates the Boston Zoning Enabling Act, Ma. St.1956, c. 665 (Enabling Act): (1) that the Enabling Act does not grant the Zoning Commission authority to regulate the occupancy of a dwelling unit; (2) that the Enabling Act does not permit zoning regulations with an economic purpose; and (3) that the Amendment does not treat all property owners uniformly, as required by the Enabling

Act. The Defendants argue that the Plaintiffs cannot meet their burden of proof.

In challenging the Enabling Act, a challenger must “prove by a preponderance of the evidence that the zoning regulation is arbitrary and unreasonable, or substantially unrelated to the public health, safety, morals, or general welfare.” *Johnson v. Town of Edgartown*, 425 Mass. 117, 121 (1997).

The Plaintiffs have not produced *any* evidence demonstrating that the Amendment is arbitrary and unreasonable nor *any* evidence that it is substantially unrelated to the police power vested in the Commission, with respect to regulating occupancy, regulating for an economic purpose, and regarding the uniform treatment of properties.

Because the Plaintiffs have not met their burden of proof, and because the Defendants have produced convincing arguments as to why the Zoning Commission did not exceed their authority, the Court **GRANTS** summary judgment in favor of the Defendants on Counts VII and VIIIb.

#### ***Grandfathered Status***

The Plaintiffs assert in Count VIIIa of their Amended Verified Complaint that their properties are entitled to protections afforded by the Boston Zoning Code, Article 4, Section 4-2, a “grandfathering” provision, and seek declaratory judgment, pursuant to G.L. c. 231A, that the properties are exempt from the application of the Amendment. The Defendants argue that the Plaintiffs' actions in renting to five or more unrelated full-time students prior to March 13, 2008 were not “as of right” and cannot be “grandfathered.”

In general, to establish a legally preexisting nonconforming use, one must show that the property in question was actually being used in the same way that they are trying to protect, and that that particular use was allowed as a matter of right under the prior zoning bylaws. *Barron Chevrolet, Inc. v. Town of Danvers*, 419 Mass. 404, 408 (1995).

The Court has found that the Plaintiffs did in fact rent to five or more full-time undergraduate students from

at least September 1, 2007 through August 31, 2009. However, the Court has also found that it is undisputed that the Code definition of “family” in existence prior to the adoption of the Amendment also excluded groups of five or more unrelated people from the definition of “family.” Therefore, the Plaintiffs' use of their properties was not “as of right” but was, in fact, *contrary* to the Code then in effect.

Furthermore, the Court agrees with the Defendants' analysis of the consent decree entered in *Sang Vo v. City of Boston*, 2005 WL 3627054 (D.Mass.2005). The consent decree allowed more than four *unrelated* people living together to be included in the definition of “family”. However, that definition is under G.L. c. 140, § 22, the “Lodging House Statute”, and explicitly does *not* change the definition of “family” under the Zoning Code. Therefore, the *Sang Vo* consent decree did not legalize the Landlord Plaintiffs' use of their properties such that it established “grandfathered” status.

\*15 For the above reasons the Court **GRANTS** summary judgment in favor of the Defendants on Count VIIIa.

#### ***Open Meeting Law***

In Count IX of the Amended Verified Complaint, the Plaintiffs allege that the vote taken to approve the Amendment was conducted in violation of the open meeting law, G.L. c. 39, §§ 23A-23C. The Defendants counter that Count IX is barred because the Superior Court has exclusive jurisdiction with the Supreme Judicial Court and because the complaint was not timely.

**General Laws c 39, § 23B** requires that all governmental body meetings shall be open to the public and that no quorum of a governmental body shall meet in private to deliberate on or decide any matter. However, “executive sessions” may be held when certain sensitive topics are to be discussed, such as: the character, reputation, or employment of an individual; negotiations in collective bargaining or real estate transactions; discussion of trade secrets or litigation related matters; and discussion of security issues and issues of criminal conduct. Executive sessions may only be held after an open session for which notice has been given, after a recorded roll call vote of the members indicates that a majority have voted to enter an executive session, and after the presiding member has

stated the purpose of the executive session and has stated whether the body will reconvene publicly after the private session.

This section also gives any Justice of the Supreme Judicial Court and any Justice of a Superior Court sitting in the county where the governmental body acts, upon proof of a violation, the authority to order the governmental body to comply with the law in the future. Such an order may also be sought by three or more registered voters. The statute further provides that an order may only invalidate an action taken at a meeting where there was a violation if the complaint is filed within twenty-one days of the date when the action is made public. G.L. c 39, § 23A defines “made public” as, “when the records of an executive session have been approved by the members of the respective governmental body attending such session for release to the public and notice of such approval has been entered in the records of such body.”

The Defendants move for summary judgment on Count IX, arguing that the Land Court does not have jurisdiction to issue such an order because the statute clearly states that *only* the Superior Court or a Justice of the Supreme Judicial Court may do so. The Defendants point out that this Count was not filed until May 8, 2008, more than twenty-one days after the vote was taken and the Amendment approved by the Mayor. The Plaintiffs, in response, argue that the Defendants agreed to the jurisdiction of the Land Court when they argued the Motion for Preliminary Injunction and, furthermore, that a Justice of the Land Court may be designated as a Justice of the Superior Court in certain circumstances. They also contend that the date at which the complaint would be time-barred is not identifiable in the present circumstance because the Defendants never produced documentation as to when the action was made public. The Plaintiffs have not moved for summary judgment in their favor on Count IX, arguing instead that there are genuine issues of material fact that need to be resolved on the issue.

\*16 Based on the summary judgment record, it is unclear whether the vote taken on the Amendment was taken at a public or private meeting. It seems clear that the Zoning Commission closed the public hearing on the matter at 12:30 PM on March 12, 2008 and then conducted several public hearings and “business meetings” *on other issues*. Defs. Ex. D. It also appears, or is at least alleged by Plaintiffs, that while still in a “business meeting”,

the Zoning Commission deliberated on the Amendment. Defs. Ex. D. The text of the Zoning Commission meeting minutes from March 12, 2008 indicate that deliberation concluded and that the Commissioners were prepared to vote. The minutes further indicate that the Commission thought the vote should be open to the public, but that no one was waiting outside to hear the vote. The minutes *do not* indicate that the Commissioners, through a roll call vote, closed the “business meeting” and re-opened a public meeting. In addition, to further complicate matters, the minutes incorrectly identify the motion as “a motion to approve Text Amendment Application No. 388 and Map Amendment Application No. 550,”<sup>7</sup> Thus, there is no correct record of a vote taken on “Text Amendment Application No. 390.”, the correct number.

The Plaintiffs submitted affidavits from several residents in attendance stating that Commissioner Fondren asserted that a vote would not be taken until a *future* business meeting and that the date of that meeting would be announced at a later time. However, the minutes reflect otherwise, specifically noting that Commissioner Fondren stated that the matter would be discussed at “the next business meeting to be held *immediately* following the hearing.”

It is clear there was a misunderstanding between the parties as to what actually happened, but it is equally clear that no one was prejudiced, in any event, because all persons seeking to testify at the hearing, or to file or introduce written materials, both for and against the proposed amendment, were able to do so. Nevertheless, this Court need not involve itself in the dispute because, simply stated, the Land Court does not have jurisdiction to decide cases involving alleged violations of the Open Meeting Law. Such claims are within the exclusive jurisdiction of the Supreme Judicial Court and the Superior Court in the area in which the claimed violation took place. For the above reasons, the Court **DENIES** summary judgment for the Defendants on Count IX and hereby dismisses that Count.

### *Conclusion*

As a result of the foregoing, I **ALLOW** Defendants' Motion for Summary Judgment as to Counts I, II, III, IV, V, VI, VII, VIIIa and VIIIb, and **DENY** Defendants' Motion for Summary Judgment as to Count IX. I also

**DENY** Plaintiffs' Motion for Summary Judgment as to Counts I, III, IV and V.

**All Citations**

Judgment to enter accordingly, upholding the validity of the Amendment. Not Reported in N.E.2d, 2010 WL 2090956

**Footnotes**

- 1 The aforementioned Plaintiffs are four landlords and one tenant affected by Amendment Number 346 to the Boston Zoning Code.
- 2 Plaintiffs filed an Amended Verified Complaint on May 13, 2008, adding two additional counts.
- 3 The Plaintiffs' Amended Verified Complaint includes two counts titled "Count VIII." To distinguish, the Court refers to the first occurring Count VIII as "Count VIIIa" and the second occurring Count VIII as "Count VIIIb."
- 4 [2005 WL 3627054 \(D.Mass.2005\)](#).
- 5 The Court understands the Plaintiffs' claim in this count to be more akin to a Fourth Amendment claim; that is, that the enforcement of the Code will cause an unreasonable search or seizure.
- 6 The Court does not address this question because Plaintiff Luccio's standing is sufficient to discuss the relevant issues.
- 7 Text Amendment Application No. 388 and Map Amendment Application No. 550 are the amendments that were voted on just prior to the discussion on Text Amendment Application No. 390.

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