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Exclusionary Zoning Laws: Irrationally-Based Barriers to Normalization of Mentally Retarded Citizens

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EXCLUSIONARY ZONING LAWS: IRRATIONALLY-BASED BARRIERS TO NORMALIZATION OF MENTALLY RETARDED CITIZENS

PATRICK T. BERGIN*

I. INTRODUCTION

We must act to . . . return to the community the mentally ill and mentally retarded [in order] to restore and revitalize their lives.

—President John F. Kennedy[1]

Thought to be witches, they were burned and hanged during Puritan days.[2] Thought to be mere human "waste products" by ex-

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1. President's Message to Congress on Mental Illness and Mental Retardation, U.S. CODE CONG. & ADMIN. NEWS 1466 (Feb. 5, 1963), quoted in Note, *Zoning for the Mentally Ill: A Legislative Mandate*, 16 HARV. J. ON LEGIS. 853, 853 (1979) [hereinafter *A Legislative Mandate*]. Moreover, "redirection of State resources from State mental institutions [would] achieve our goal of having community-centered mental health services readily accessible to all." Comment, *Group Homes and Deinstitutionalization: The Legislative Response to Exclusionary Zoning*, 6 VT. L. REV. 509, 509 (1981) (quoting President Kennedy) [hereinafter *Legislative Response*].

This Article focuses primarily on group homes for the mentally retarded and thus distinguishes these persons from those described as mentally ill. Mental illness can occur at any time. The term describes a person unable to cope—regardless of his or her intellect. *See generally* 1 LEGAL RIGHTS OF THE MENTALLY HANDICAPPED 17-75 (B. Ennis & P. Friedman eds. 1973). On the other hand, "[m]ental retardation is primarily an educational problem and not a disease which can be cured through drugs or treatment." Halderman v. Pennhurst State School & Hosp., 446 F. Supp. 1295, 1298 (E.D. Pa. 1977), *aff'd in part, rev'd & remanded in part*, 612 F.2d 84 (3d Cir. 1979) (en banc), *stay granted in part, denied in part*, 448 U.S. 905 (1980), *rev'd*, 451 U.S. 1 (1981). *See infra* note 5 for a discussion of the definition of mental retardation.

Issues relating to group homes for abused women and children, drug addicts, criminal offenders, and so forth are not specifically discussed. Admittedly, exclusionary zoning usually does not distinguish one group home from another.

2. Wolfensberger, *The Origin and Nature of Our Institutional Models*, in CHANGING PATTERNS IN RESIDENTIAL SERVICES FOR THE MENTALLY RETARDED 36 (R. Kugel & A. Shearer eds. 1976) [hereinafter CHANGING PATTERNS]; Mason, Menolascino & Galvin, *The Right to Treatment for Mentally Retarded Citizens: An Evolving Legal and Scientific Interface*, 10 CREIGHTON L. REV. 124, 124 n.1 (1976) [hereinafter *The Right to Treatment*].

perts in the early part of this century,[3] they were subjected to marriage restrictions, sterilization, and wholesale "warehousing."[4] And even today they are looked upon by many as "subhumans" or "vegetables"[5]—deviants ill-suited for social integration.[6] In Florida, for example, they were the subject of a legislative proposal which would have legalized their premature deaths via euthanasia.[7] "They" are the mentally retarded.

Notwithstanding such enduring prejudice, the years following the Kennedy administration witnessed a philosophical, humanistic revolution within the mental health field.[8] In addition, a landmark decision in 1972 recognized that mentally retarded persons are citizens with a constitutional right to non-institutional habilitation.[9]

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3. Wolfensberger, *The Origin and Nature of Our Institutional Models*, in CHANGING PATTERNS, *supra* note 2, at 58. For interesting discussions on historical views of the mentally retarded, see generally H. LANE, THE WILD BOY OF AVEYRON (1976); L. KANNER, A HISTORY OF THE CARE AND STUDY OF THE MENTALLY RETARDED (1964); Clarke, *The Abilities and Trainability of Imbeciles*, in MENTAL DEFICIENCY: THE CHANGING OUTLOOK 309 (A. Clarke & A. Clarke eds. 1958).

4. *See The Right to Treatment*, *supra* note 2, at 133. *See also* Buck v. Bell, 274 U.S. 200, 205-06 (1927) (concerning sterilization).

5. Various stereotypical definitions of the intellectual handicap of the retarded have helped to "set [these persons] apart from other members of society [and] convey a picture of subhuman status, prolonged dependence, and a seriously restricted ability to develop or learn." Definitional language has included such negative terminology as: custodial, idiot, imbecile, low-grade, and moron. *See The Right to Treatment*, *supra* note 2, at 124 n.1 (citing R. MASLAND, S. SARASON & T. GLADWIN, MENTAL SUBNORMALITY: BIOLOGICAL, PSYCHOLOGICAL AND CULTURAL FACTORS (1958); C. BENDA, DEVELOPMENT DISORDERS OF MENTATION AND CEREBRAL PALSIES (1952); Doll, *The Essentials of an Inclusive Concept of Mental Deficiency*, 46 AM. J. MENTAL DEFICIENCY 214 (1941).

The definition adopted by the American Association on Mental Deficiency explains that "[m]ental retardation refers to significantly subaverage intellectual functioning existing concurrently with deficits in adaptive behavior, and manifested in the developmental period." H. GROSSMAN, MANUAL OF TERMINOLOGY AND CLASSIFICATION IN MENTAL RETARDATION 5 (1973).

6. *See The Right to Treatment*, *supra* note 2, at 133.

7. *See Florida Law—Death with Dignity*, Mental Retardation News, Nov. 1973, at 23.

8. *The Right to Treatment*, *supra* note 2, at 124 ("first half . . . of the 1970's has seen an assault upon a citadel of the 19th Century thought in America: state institutions for the mentally retarded").

Beginning with President Kennedy, "our last four Presidents [have embraced a pro-normalization philosophy] wherein a significant proportion of the over 180,000 retarded individuals in public institutions will be able to return to useful lives in their communities." *See id.* at 126-27 n.2 (citing PRESIDENT'S COMMITTEE ON MENTAL RETARDATION: CENTURY OF DECISION (1976)).

9. Wyatt v. Stickney, 344 F. Supp. 387, 391 (M.D. Ala. 1972), *aff'd in part, rev'd in part sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974). *See also* Welsch v. Likins, 373 F. Supp. 487 (D. Minn. 1974), *aff'd in part, vacated and remanded in part*, 550 F.2d 1122 (8th Cir. 1977); Roos, *Mentally Retarded Citizens: Challenge for the 1970's*, 23 SYRACUSE L. REV. 1059, 1064-69 (1972).

That is, the mentally retarded are now regarded as a productive and *human* population[10]—unworthy of hellish, debilitating institutions, worthy of normalization.[11]

Basically, "normalization"[12] is habilitation of mentally retarded citizens through freedom from custodial care and assimilation into society where they may: (1) live in familial-like group homes situated in residential areas of a community, (2) work alongside "normal" citizens, (3) obtain an education in the public school system,[13] and (4) improve themselves mentally, emotionally, physically, and socially.[14] The movement toward normalization has received widespread acclaim; however, public altruism fades to individualism when implementation of this policy means having

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The Federal Developmentally Disabled Assistance and Bill of Rights Act provides in part that developmentally disabled persons—such as the mentally retarded—have a constitutional right to habilitation "in the setting that is least restrictive of the person's personal liberty." 42 U.S.C. § 6010(2) (1976). *See also* State *ex rel.* Thelen v. City of Missoula, 168 Mont. 375, 543 P.2d 173 (1975) (upheld the constitutionality of the right to habilitation within the least restrictive setting).

As distinguished from the mentally ill, who are *treated*, the mentally retarded are *habilitated*. "Habilitation" has been defined judicially as "the process by which the staff of the institution assists the resident to acquire and maintain those life skills which enable him to cope more effectively with the demand of his own person and of his environment and to raise the level of his physical, mental, and social efficiency." Wyatt v. Stickney, 344 F.Supp. 387, 395 (M.D. Ala. 1972). *See also* Wyatt v. Stickney, 325 F. Supp. 781 (M.D. Ala. 1971) (establishing the constitutional right of the mentally ill to "treatment"); *see generally* Comment, *Wyatt v. Stickney and the Right of Civilly Committed Mental Patients to Adequate Treatment*, 86 HARV. L. REV. 1282 (1973).

10. *See, e.g.*, Developmental Disabilities State Legislative Project of the American Bar Association Commission on the Mentally Disabled, *Zoning for Community Homes Serving Developmentally Disabled Persons* (1974), *reprinted in* 2 MENTAL DISABILITY L. REP. 794, 795 (1978) [hereinafter ABA Project].

11. For an early treatise espousing a view in favor of normalization, see E. GOFFMAN, ASYLUMS (1961). *See also* J. BERGMAN, COMMUNITY HOMES FOR THE RETARDED xiii (1975) (institutions are merely warehouses for human beings); W. WOLFENSBERGER, THE PRINCIPLE OF NORMALIZATION IN HUMAN SERVICES (1972); *Disabled Citizens in the Community: Zoning Obstacles and Legal Remedies*, AMICUS, Mar./Apr., 1978, at 30 (citing growing support within mental health field for normalization of mentally retarded).

For a discussion describing typically inhuman mental institutions see Thompson, *Preface to the first edition*, in BEHAVIOR MODIFICATION OF THE MENTALLY RETARDED ix-x (T. Thompson & J. Grabowski 2d ed. 1977).

12. Nirge, *The Normalization Principle*, in CHANGING PATTERNS, *supra* note 2, at 231; Glenn, *The Least Restrictive Alternative in Residential Care and the Principle of Normalization*, in THE MENTALLY RETARDED CITIZEN AND THE LAW 499 (1976) [hereinafter THE MENTALLY RETARDED CITIZEN].

13. Courts have held that the mentally retarded have a constitutional right to education in the public school system. *See, e.g.*, Mills v. Board of Educ., 348 F. Supp. 866 (D.D.C. 1972); Comment, *Toward a Legal Theory of the Right to Education of the Mentally Retarded*, 34 OHIO ST. L.J. 554 (1973).

14. *See*, FLA. STAT. § 393.063(13), (14), (17) (1985).

mentally retarded citizens as neighbors.[15] This premise is poignantly illustrated when combative communities employ zoning laws to exclude the mentally retarded from residential districts. Once the battle-line is drawn, the opposing forces may seek a judicial ally in whose arena the conflict is reduced to homeowners' right to secured private property through appropriate land use planning *versus* the rights of a particular class of citizens to equal protection and to habilitation via the least restrictive alternative to institutionalization.

This article explores this social and legal dilemma. First, general discussions are provided as a primer on the normalization principle, group home care, and zoning laws. A subsequent section scrutinizes public perceptions—or misperceptions—of mentally retarded citizens and residential-based group homes that ultimately lead to exclusionary zoning barriers. Various methods communities employ to build these barriers are described, followed by a delineation of potential "barrier-busters." Research reveals that nebulous case law and inefficacious federal legislation necessitates state intervention to effectively stymie community efforts to exclude group homes and their mentally retarded residents. A minority of states have responded legislatively; however, their responses, in general, have been impracticable. Remedies for filling this legislative "void" are highlighted through examination of three unique views—the latter of which is endorsed. Finally, in the conclusion, a model statute *with teeth* is proposed.

II. GROUP HOME CARE—THE LEAST RESTRICTIVE ALTERNATIVE

> *A corollary of the normalization principle is that the treatment of the mentally retarded in large barrackslike institutions is inappropriate. [Rather, s]ystems which focus on community-based care . . . should replace the older model.*
>
> —Charles R. Halpern[16]

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15. For example, the President's Commission on Mental Retardation revealed that 85% of the persons surveyed admitted they would not be opposed to group home placement in their neighborhood, but 33% of the established homes encountered community opposition. *See generally* Sigelman, Spanhel & Lorenzen, *Community Reactions to Deinstitutionalization: Crime, Property Values, and Other Bugbears*, 45 J. REHABILITATION 52, 52 (1979) [hereinafter *Bugbears*].

16. Halpern, *The Right to Habilitation*, in THE MENTALLY RETARDED CITIZEN, *supra* note 12, at 387-88.

The inhumane treatment mentally retarded citizens have been traditionally subjected to has led the judiciary to formally recognize that institutionalization is not the least restrictive means to habilitation.[17] Normalization—via group home[18] living in a residential setting—has become widely accepted as the best and least restrictive alternative to warehousing of the mentally retarded.[19]

The Florida Legislature has statutorily described group homes as licensed residences which provide "a family living environment including supervision and care necessary to meet the physical, emotional, and social needs of clients."[20] On the average, six to ten members constitute the group home surrogate family, supervised by one or more trained, live-in surrogate parents.[21]

Whether group home therapy actually improves mental health is difficult to determine in quantitative terms; however, studies indicate that a properly designed normalization process does help developmentally disabled citizens, like the mentally retarded, handle life outside the home.[22] Statistics and studies aside, deinstitutionalization is undoubtedly a humanistic approach.[23]

But community fears, unfounded or not, make group home

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17. Lippincott, *"A Sanctuary for People": Strategies for Overcoming Zoning Restrictions on Community Homes for Retarded Persons*, 31 STAN. L. REV. 767, 768 (1979).

18. Classifications for community-based residences for the mentally retarded and other persons have been used interchangeably, including: (1) group home, (2) foster home, (3) family home, (4) community-residences, and (5) developmental home. *See, e.g.*, Glenn, *supra* note 12, at 507-12; ABA Project, *supra* note 10, at 795 n.8.

19. *See* Nirge, *supra* note 12, at 231-32.

20. FLA. STAT. § 393.063(13) (1985). *See also* Marx, Test & Stein, *Extrahospital Management of Severe Mental Illness: Feasibility and Effects of Social Functioning*, 29 ARCH. GEN. PSYCH. 505, 505 (1973) ("treatment and support *in the community*—precisely where the patient needs help in adjusting—appears as an appropriate direction to follow").

21. *See generally* Gailey, *Group Homes and Single Family Zoning*, 4 ZONING & PLAN. L. REP. 97, 97-98 (1981); Jansen, *The Role of the Halfway House in Community Mental Health Programs in the United Kingdom and America*, 126 AM. J. PSYCH. 1498 (1970); ABA Project, *supra* note 10, at 795.

22. A properly designed normalization process includes situating the group home *within* the community and providing adequate resources, *i.e.*, funding, staff, and so forth. *See, e.g.*, Butler & Bjaanes, *Activities and the Use of Time by Retarded Persons in Community Care Facilities*, in OBSERVING BEHAVIOR THEORY AND APPLICATION IN MENTAL RETARDATION 379 (D. Sackett ed. 1978); Linn, Caffey, Klett & Hogarty, *Hospital vs. Community (Foster) Care for Psychiatric Patients*, 34 ARCH. GEN. PSYCH. 78 (1977); Lamb & Goetzel, *Discharged Mental Patients—Are They Really in the Community?*, 24 ARCH. GEN. PSYCH. 29 (1971). For an analysis of various studies regarding mental health improvement of group home patients, see Bachrach, *A Note on Some Recent Studies of Released Mental Patients in the Community*, 133 AM. J. PSYCH. 73 (1976).

23. *Accord A Legislative Mandate*, *supra* note 1, at 857 ("psychiatrists have argued . . . a group residence is preferable over life in an institution for the simple reason that it is more humanly satisfying").

placement a difficult and controversial task. Such fears breed multi-faceted opposition—expressed particularly by members of the neighborhood in which a home is proposed to be placed. Opposition is primarily directed to the home and to the inhabitants.

III. GROUP HOME CARE AND AN AMBIVALENT SOCIETAL ATTITUDE

> *On the one hand, we want to "protect ourselves" from these individuals and thereby end our discomfort. But, on the other hand, we want to protect them and ameliorate their suffering by helping and treating them. Too often the types of custody that make us feel more comfortable are not the best . . . for these individuals.*
>
> —Judge David Bazelon[24]

Americans generally seem interested in improving the welfare of the mentally retarded,[25] but disinterested when improvement means integration of these citizens into their residential community.[26] Community opposition to such integration usually stems from "misplaced ancient fears about the retarded."[27] For example, communities fear that having retarded citizens for neighbors will increase threatening and criminal activity, but studies show that such fears are unsubstantiated.[28] Public misperception that the

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24. Although these words describe social ambivalence toward normalization of the criminally insane, they may be aptly applied to other groups of people—including the mentally retarded. *See* Bazelon, *Institutionalization, Deinstitutionalization, and the Adversary Process*, 75 COLUM. L. REV. 897, 897 (1975).

"From the early 1900's until 1960, the institutional leitmotif became 'protect society from the deviant.'" *The Right to Treatment*, *supra* note 2, at 132-33.

25. Mentally retarded persons are statutorily defined as "developmentally disabled." FLA. STAT. § 393.063(6) (1985).

26. *See, e.g.*, Bazelon, *supra* note 24, at 897 (relating integration problems to criminally insane); Note, *Zoning for Land Users and Not Land Use*, 16 STETSON L. REV. 165, 174 (1986) (group home integration "continues to be undermined by community and local government resistance") [hereinafter *Zoning for Land Users*]; *A Legislative Mandate*, *supra* note 1, at 854-56 (problems of integration result from "us vs. them" mentality).

27. Cleburne Living Center v. City of Cleburne, 726 F.2d 191 (5th Cir. 1984), *reh'g denied*, 735 F.2d 832 (5th Cir. 1984), *aff'd in part, vacated in part*, 473 U.S. 432, 450 (1985) (Justice White citing "irrational" prejudicial attitude of Cleburne residents opposing group home); Stewart, *A Growing Equal Protection Clause?*, 71 A.B.A. J. 108, 110-12 (Oct. 1985) (quoting Renea Hicks, attorney representing the group home in *Cleburne*).

28. *See, e.g.*, P. GOULD, REPORT ON THE INCIDENCE OF CLIENT CRIME WITHIN COMMUNITY BASED PROGRAMMING (1979); H. ALLEN, E. CARLSON, E. PARKS & R. SEITER, HALFWAY HOUSES 13 (1978) [hereinafter HALFWAY HOUSES]; *Bugbears*, *supra* note 15, at 53. "In the last decade or so, there has been a growing realization that the sole purpose of large institutions for the mentally retarded is in fact to protect society from the retarded." Note, *A Review of the*

mentally retarded are social deviants and carriers of disease is the primary rationale for institutionalization.[29] Ironically, residents in a recent case argued that their opposition to the group home placement was based on their concern *for* the retarded.[30] The concept of normalization recognizes the fallaciousness and injustice of these public prejudices.[31]

Community opposition is also based on fears relating to the home. For example, one argument posits that the establishment of a group home results in property value diminution and, consequently, ad valorem tax reduction.[32] Empirical studies, however, negate this argument.[33] Other concerns expressed during litigation have involved the group home's nonfamilial character which would

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Conflict Between Community-Based Group Homes for the Mentally Retarded and Restrictive Zoning, 82 W. VA. L. REV. 669, 673 (1980) [hereinafter *Homes for the Mentally Retarded*]. *See also* Stewart, *supra* note 27, at 109 (noting city of Cleburne, Texas, argued before the Fifth Circuit that proposed group home for retarded persons "might pose a threat" to citizens; however, city did not present this allegation to Supreme Court).

29. *See, e.g.*, Adams County Ass'n for Retarded Citizens, Inc. v. City of Westminster, 196 Colo. 79, 580 P.2d 1246 (1978); Little Neck Community Ass'n v. Working Org. for Retarded Children, 52 A.D.2d 90, 383 N.Y.S.2d 364 (1976); P. FRIEDMAN, THE RIGHTS OF MENTALLY RETARDED PERSONS 108 (1976) (ACLU monograph series paperback) [hereinafter ACLU Handbook]; Chandler & Ross, *Zoning Restrictions and the Right to Live in the Community*, in THE MENTALLY RETARDED CITIZEN, *supra* note 12, at 305, 315; *Bugbears*, *supra* note 15, at 53.

30. *See, e.g.*, *Cleburne*, 473 U.S. at 449 (claim that students from nearby junior high school might harass the retarded was rejected by the Supreme Court).

31. *See generally* ACLU Handbook, *supra* note 29, at 108 ("unsupported by evidence"); Lippincott, *supra* note 17, at 769 ("[E]vidence reveals that . . . fears [of safety, property values and increased noise level] are unjustified."); Kressel, *The Community Residence Movement: Land Use Conflicts and Planning Imperatives*, 5 N.Y.U. REV. L. & SOC. CHANGE 137, 146 (1975); Tuoni, *Deinstitutionalization and Community Resistance by Zoning Restrictions*, 66 MASS. L. REV. 125, 135 (1981) ("fear of community exposure to social deviancy in general" is unfounded).

32. FLORIDA DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES, *Guidelines for Zoning and Special Community Housing* 11 (Pamphlet 10-1 July 1, 1983).

33. *See, e.g.*, Society for Good Will to Retarded Children, Inc. v. Cuomo, 572 F. Supp. 1300, 1340-41 (E.D.N.Y. 1983), *vacated on other grounds*, 737 F.2d 1239 (2d Cir. 1984) (opposition based on property value diminution is factually unsubstantiated); Tuoni, *supra* note 31, at 135 (unfounded community concern over property value loss based on beliefs that traffic and noise will increase, crime and deviancy will result, and familial character of neighborhood will change). For discussions concerning group homes and property value diminution, see HALFWAY HOUSES, *supra* note 28, at 13; ABA Project, *supra* note 10, at 796 n.10 (citing numerous studies which failed to reveal evidence that group homes cause property value diminution); *Developments in the Law—Zoning*, 91 HARV. L. REV. 1427, 1460-62 (1978); Comment, *Exclusion of Community Facilities for Offenders and Mentally Disabled Persons: Questions of Zoning, Home Rule, Nuisance and Constitutional Law*, 25 DE PAUL L. REV. 918, 920 n.3 (1976); GREEN BAY PLANNING COMM'N, *The Social Impact of Group Homes: A Study of Small Residential Service Programs in Residential Areas* (1973).

impair the community's familial character,[34] overcrowding in the home,[35] traffic congestion,[36] incompetent supervision of the home's residents,[37] location of the home on a 500-year flood plain,[38] and oversaturation of group homes in the neighborhood.[39]

For most folks living in residential districts, the potentially detrimental effects of having a group home on the block can be curtailed by one means only—exclusionary zoning.

IV. ZONING IN GENERAL

[T]he bulk of land use controls, through local zoning, [transpired] with the coming of this country's urban age after the turn of the century.

—D. Callies & R. Freilich[40]

[Today, zoning] is the most prevalent land use control in the United States.

—ABA Project[41]

In a nutshell, zoning is legislative regulation of land use and development.[42] Although its roots go back several centuries to the

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34. *See, e.g.*, Hessling v. City of Broomfield, 563 P.2d 12 (Colo. 1977); *Adams*, 580 P.2d at 1250 (rejecting non-familial claim, citing Berger v. State, 71 N.J. 206, 364 A.2d 993 (1976), wherein the state supreme court opined group homes are "consonant with, not destructive of, the residential nature of the community"); *Bugbears*, *supra* note 15, at 53.

35. *See, e.g.*, *Cleburne*, 726 F.2d at 200-01.

36. Gailey, *Group Homes and Single Family Zoning*, 4 ZONING & PLAN. L. REP. 97, 98 (1981) ("fears are unwarranted"); Lippincott, *supra* note 17, at 769 ("fears are unjustified").

37. For a list of reports which refute the claim that group homes are improperly maintained, see Lauber, *Toward a Sound Zoning Treatment of Group Homes for the Developmentally Disabled*, at 60-62 (Apr. 15, 1985) (unpublished manuscript), *cited in Zoning for Land Users*, *supra* note 26, at 178 n.48.

38. *See Cleburne*, 473 U.S. at 436 n.3 and at 449 (Supreme Court rejected argument on basis that city's zoning ordinance allows nursing homes, hospitals, and apartment buildings to be built on same flood plain).

39. Oversaturation—sometimes referred to as "ghetto-ization"—is usually the result of community resistance itself. That is, group homes are relegated to areas of the city where the population is of a transient and lower-income character, less likely to oppose the placement in an organized and powerful manner. *See* Tuoni, *supra* note 31, at 135 n.95 (citing various authorities); *see also infra* note 89 and accompanying text.

40. D. CALLIES & R. FREILICH, CASES AND MATERIALS ON LAND USE 2 (1986).

41. ABA Project, *supra* note 10, at 795.

42. *Id.* ("Zoning is a type of land use control deriving from public legislative bodies. . . ."); R. WRIGHT & S. WRIGHT, LAND USE 175 (2d ed. 1985) (intention of zoning laws is "to describe a form of economic segregation"); Friedman, *Analysis of the Principal Issues and Strategies in Zoning Exclusion Cases*, in 2 LEGAL RIGHTS OF THE MENTALLY HANDI-

days of Elizabethan England where it was used to alleviate "urban congestion and untrammeled growth,"[43] zoning is a "relatively recent phenomenon" in the United States.[44] The city of New York is credited with enacting the first comprehensive zoning law in the United States.[45] A decade later, in 1926, the Supreme Court first declared zoning legislation to be a constitutionally permissible exercise of a state's limited police power.[46] Specifically, the Court upheld a municipal ordinance which segregated commercial activity from residential communities.[47]

This decision was qualified a few years later in the 1928 case of *Nectow v. City of Cambridge*.[48] *Nectow* explained that zoning laws must "bear a substantial relation to the public health, safety, morals, or general welfare."[49] Today, most state legislatures derive their authority to enact zoning laws from their respective constitutions; such authority, however, is generally delegated to local governments via home rule legislation or enabling acts.[50]

Since *Nectow*, the Supreme Court has been reluctant to review cases involving zoning and land use control.[51] For example, the

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CAPPED 1093, 1095 (B. Ennis & P. Friedman eds. 1973) ("Zoning is basically a systematic regulation of the use and development of real property.") [hereinafter *Principal Issues and Strategies*].

43. D. CALLIES & R. FREILICH, *supra* note 40, at 2.

44. R. WRIGHT & M. GITELMAN, LAND USE: CASES AND MATERIALS 632 (3d ed. 1982). For an innovative and interesting argument calling for eradication of zoning laws, see *infra* notes 145-49 and accompanying text.

45. B. POOLEY, PLANNING AND ZONING IN THE UNITED STATES 42 (1982). For further discussion on historical aspects of zoning laws in the United States, see generally *id.* at 40-50.

46. Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926). *But see* B. POOLEY, *supra* note 45, at 42 ("comprehensive zoning was upheld judicially as early as 1920") (citing Lincoln Trust Co. v. Williams Bldg. Corp., 229 N.Y. 313, 128 N.E. 209 (1920)). For a general discussion concerning this constitutional power of the states, see 1 R. ANDERSON, AMERICAN LAW OF ZONING §§ 2.01 and .03 (3d ed. 1986).

47. The Supreme Court also rejected the claim that an ordinance restricting building specifications constituted a taking, notwithstanding resultant property value diminution. *See Village of Euclid*, 272 U.S. at 367.

According to one source, ordinances normally segregate the municipality into residential, commercial or business, industrial, and special districts. *See* 6 P. ROHAN, ZONING AND LAND USE CONTROLS § 1.02[1], 1-6 (1986). "One of the increasingly common zoning districts in modern zoning ordinances is the agricultural zone." D. CALLIES & R. FREILICH, *supra* note 40, at 72 n.8. For further discussion on all these types of zoning, *see generally* 1 R. ANDERSON, *supra* note 46, at § 9.

48. 277 U.S. 183 (1928).

49. *Id.* at 188.

50. Comment, *The Legal Family—A Definitional Analysis*, 13 J. FAM. L. 781, 798 (1973-74) (legislation at the state and local level results in extensive zoning ordinance deviation). *See, e.g.*, R.I. GEN. LAWS ch. 45-24.4-2 (West Supp. 1986) (Rhode Island Special Development District Enabling Act).

51. "The U.S. Supreme Court set guidelines in the 1920s and for forty years declined to

Court refused to hear twenty-one zoning and local planning cases over a period of six terms.[52] Since 1974,[53] the Court has reviewed cases dealing with "unlawful delegation of power to zone, restrictions on billboards, free speech based zoning, taking issues, historic preservation, zoning and due process, standing, and civil rights."[54] Meanwhile, lower courts have ruled on issues relating to the propriety and constitutionality of zoning laws.[55]

The recent emergence of the normalization principle has added a new and controversial dimension to land use regulation.[56] Specifically, failure to resolve society's ambivalent attitude concerning community-based care for the mentally retarded has resulted in a political and legal quagmire. This area of law is in a constant state of transition[57] as legislatures and courts deal with community opposition toward all attempts to void exclusionary zoning of group homes.[58]

V. EXCLUSIONARY ZONING—A MEANS TO A SELFISH END

The activities of local communities in the last few years demonstrate beyond question that many, for whatever reasons, will do whatever they can by means of exclusionary zoning laws and practices to frustrate efforts to establish community homes.

—ABA Project[59]

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address zoning issues." *See* D. HAGMAN & J. JUERGENSMEYER, URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW 40 (1986). Not until 1974 did the Supreme Court review a zoning case. *See* Village of Belle Terre v. Boraas, 416 U.S. 1 (1974).

52. R. WRIGHT & M. GITELMAN, *supra* note 44, at 657 n.1 (terms of 1949-50 through 1954-55 inclusive).

53. *See Village of Belle Terre*, 416 U.S. at 1.

54. D. HAGMAN & J. JEURGENSMEYER, *supra* note 51, at 40.

55. See list of cases cited in Comment, *Exclusionary Zoning and Its Effects on Group Homes in Areas Zoned for Single-Family Dwellings*, 24 U. KAN. L. REV. 677, 682 nn.48-49 (1976).

56. "Because the concept of group home living is a relatively recent phenomenon, most zoning ordinances fail to mention them at all." *Zoning for Land Users*, *supra* note 26, at 181 (citing Lauber, *supra* note 37, at 33).

57. *See, e.g., Legislative Response*, *supra* note 1, at 511 ("Supreme Court has not been very clear about its acceptance of the constitutional arguments [concerning group home zoning laws]").

58. *See infra* note 59 and accompanying text.

59. ABA Project, *supra* note 10, at 795-96. *Cf. A Legislative Mandate*, *supra* note 1, at 861 ("local lawmakers . . . generally have acted to exclude the mentally ill from their particular jurisdictions, in accordance with the desires of their limited and insular constituencies").

As discussed, zoning laws differentiate and segregate land uses. One area of a community may be zoned specifically for commercial use; another may be zoned for industrial use.[60] Property zoned for single-family dwellings has historically been the most protected—that is, protected from residentially uncharacteristic uses.[61] The present inadequate number of residential-zoned group homes is attributed primarily to this protectionist attitude of many Americans.[62] Most states have yet to statutorily block local efforts to build barriers to group home placement.[63] Moreover, the judicial response has been "mixed."[64]

A. Barrier Builder—By Express Provision

The most unsophisticated barrier consists of a zoning provision which *expressly* excludes group homes from residential areas of a community.[65] For example, a Boston, Massachusetts zoning law specifically prohibits establishment of halfway houses for mentally disabled persons in most residential districts.[66]

A similar exclusionary tactic is executed via express private agreement. For example, property deeds may contain a restrictive covenant which limits land use and alienation.[67] Moreover, when a restrictive covenant is recorded for inclusion in deeds to individual lots comprising a tract, one lot owner can judicially enforce the provisions of the covenant against all other lot owners under the

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60. Thus, "exclusionary zoning" is redundant terminology— since zoning laws are "[b]y their very nature . . . exclusionary." *See* R. WRIGHT & S. WRIGHT, *supra* note 42, at 175.

61. *Id.* at 176. The unprecedented holding in the 1926 Supreme Court case, *Village of Euclid*, exemplified such protectionism by allowing exclusion of "parasite" apartments from single-family residential districts. *Id.* (citing *Village of Euclid*, 272 U.S. at 394).

62. ABA Project, *supra* note 10, at 795 ("lack of . . . facilities is [significantly] attributable to . . . local zoning regulations . . . exclud[ing them] from residential areas").

63. *See generally* Lippincott, *supra* note 17, at 770; ABA Project, *supra* note 10, at 797, 800-02 (providing chart of 16 state zoning statutory laws regulating community facilities for developmentally disabled persons).

64. 2 R. ANDERSON, AMERICAN LAW OF ZONING § 9.35 (3d ed. 1986) ("Group homes for mentally handicapped persons have encountered mixed judicial response."); MENTAL DISABILITY LAW: A PRIMER 32 (J. Parry ed. 1984) ("zoning suits to block the entrance of mentally disabled persons into the community have had mixed success") [hereinafter DISABILITY LAW: A PRIMER]; Lippincott, *supra* note 17, at 778 ("uncertainty of success"); Comment, *Exclusion of the Mentally Handicapped: Housing the Non-Traditional Family*, 7 U.C. DAVIS L. REV. 150 (1974).

65. *See generally* ACLU Handbook, *supra* note 29, at 108-09; ABA Project, *supra* note 10, at 796 (citing R. HOPPERTON, ZONING FOR COMMUNITY HOMES: A HANDBOOK FOR LOCAL LEGISLATIVE CHANGE (Ohio State University Law Reform Project) (1975)).

66. *A Legislative Mandate*, *supra* note 1, at 871 (citing Boston Zoning Code, Use Item No. 23).

67. Chandler & Ross, *supra* note 29, at 340.

theory of "equitable servitude."[68] Some courts have validated this form of "private zoning"[69] as a means to exclude group homes;[70] others have not.[71]

B. Barrier Builder—By Narrowly Defining "Family"

A more typical exclusionary tactic entails a narrow definition of "family." For example, a zoning law may restrict a residential area to single-family dwellings—the character of which is arguably incompatible with the allegedly nonfamilial character of group homes.

In *Village of Belle Terre v. Boraas*,[72] the Supreme Court upheld a zoning ordinance excluding from a "very small village" *any* household group composed of more than two persons unrelated by blood, marriage, or adoption.[73] Three years later, the Supreme Court in *Moore v. East Cleveland*[74] invalidated an ordinance that excluded unrelated household groups as well as distantly related groups.[75] According to one commentator, "[a]ll the reasons ad-

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68. "Equitable servitude" has been used interchangeably with "reciprocal negative easement," "negative easement," "equities," and "mutual, reciprocal, equitable easements of the nature of servitudes." *Id.* at 340-41.

For a brief discussion on the constitutional ramifications of restrictive covenants used to exclude group homes, see generally *id.* at 340-43. For an extensive discussion, see Note, *Property—Restrictive Covenants—Definition of Family in Action to Enforce Restrictive Covenants*, 26 WAYNE L. REV. 1145 (1980).

69. Chandler & Ross, *supra* note 29, at 340.

70. *See, e.g.*, Omega Corp. of Chesterfield v. Malloy, 319 S.E.2d 728 (Va. 1984), *cert. denied*, 469 U.S. 1192 (1985); Seaton v. Clifford, 24 Cal. App. 3d 46, 100 Cal. Rptr. 779 (1972) (group home for mentally retarded violated restrictive covenant); Simons v. Work of God Corp., 36 Ill. App. 2d 199, 183 N.E.2d 729 (1962) (five unrelated adults living together violated restrictive covenant).

71. *See, e.g.*, Crane Neck Ass'n v. New York City Long Island County Services Group, 61 N.Y.2d 154, 460 N.E.2d 1336, 472 N.Y.S.2d 901 (N.Y. App. Div.), *cert. denied*, 469 U.S. 804 (1984); McMillan v. Iserman, 327 N.W.2d 559 (Mich. App. 1982); Boston Edison Protective Ass'n v. Paulist Fathers, 306 Mich. 253, 10 N.W.2d 847 (1943) (group of priests living together did not violate restrictive covenant).

72. 416 U.S. 1 (1974).

73. *See id.* at 2. *See also* Palm Beach Hosp., Inc. v. City of West Palm Beach, No. 75-192-CIV-CF (S.D. Fla. 1977), discussed in 2 MENTAL DISABILITY L. REP. 18 (upholding exclusion of group home for 10 retarded males from single-family district). For a scholarly article discussing the ramifications of the *Boraas* decision from the perspective of a critical legal studies adherent see Michelman, *Political Markets and Community Self-Determination: Competing Judicial Models of Local Government Legitimacy*, 53 IND. L.J. 145 (1977-78).

74. 431 U.S. 494 (1977).

75. For example, pursuant to the complex East Cleveland ordinance, a grandmother and one or more grandchildren (who were one another's siblings) comprised a permissible "family." But, the household is an impermissible one if any of the siblings are first cousins. Notably, a violation of this ordinance was a criminal offense. *See generally id.* at 496 and n.2,

vanced by the [Court] majority . . . for distinguishing between the East Cleveland and Belle Terre ordinances are deeply unsatisfying."[76] Not surprisingly, the meaning of "family" is still a debatable issue[77]—as exemplified by a more recent case.

In a 1987 Florida case, a coalition of neighbors sued the Leon County Board of Commissioners over a zoning change that permits the construction of two group homes for mentally retarded citizens in their rural subdivision, Clifford Hills. According to the attorney representing the Clifford Hills residents:

> [Clifford Hills] is a community that's been in existence close to 100 years. It's single family in character. To allow high density family houses—as the group homes that the Leon Association for Retarded Citizens would build—would be unequivocally in violation of the adopted comprehensive plan which calls for low density residential housing, as the Clifford Hills community.[78]

The group homes will shelter nineteen retarded adults—a number which exceeds Clifford Hills' definition of "single family." Leon County Circuit Court Judge Charles Miner rejected the homeowners' argument.[79]

C. Barrier Builder—Group Homes Conditionally Permitted

Where group homes are not *expressly permitted* in residential areas,[80] zoning laws may *conditionally* or *specially* permit their placement.[81] That is, placement of a group home in a residential

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500, 504. *See also id.* at 508 (Brennan, J., concurring).

76. Michelman, *supra* note 73, at 191.

77. *But see Zoning for Land Users*, *supra* note 26, at 190 ("modern definition of 'family' includes persons related by blood or marriage, or a specified, restricted number of unrelated persons living together. . . .") (citing 2 RATHKOPF, THE LAW OF ZONING AND PLANNING §§ 17A.01-.05 (4th ed. 1986)).

78. Laufenberg, *Judge gives group permission to build group homes for retarded*, Florida Flambeau, May 19, 1987, at 1, col. 2 (quoting Tallahassee attorney, Fred Flowers). Specifically, the homes would shelter "19 moderately to severely retarded men and women aged 22 to 48." *Id.* Ferrell v. Leon County Bd. of Comm'rs, No. 87-526, slip op. (Leon County Ct. May 18, 1987) (order granting summary judgment).

79. *Id.* The case is on appeal. Telephone interview with Fred Flowers, attorney for Clifford Hills residents (Jan. 11, 1988). *See also* Omega Corp. of Chesterfield v. Mallory, 228 Va. 12, 319 S.E.2d 728 (1984), *cert. denied*, 469 U.S. 1192 (1985) (single-family dwelling in restrictive covenant did not exclude group home for mentally retarded).

80. A "permitted use" is the right to use land in a particular zone as expressly authorized by the ordinance. *See generally* M. MESHENBERG, THE LANGUAGE OF ZONING: A GLOSSARY OF WORDS AND PHRASES 25 (American Society of Planning Officials, Planning Advisory Service, Rep. No. 322, Nov. 1976).

81. "Conditionally permitted use" and "specially permitted use" are used interchangea-

area of a community may be permitted *only* if certain conditions are met—conditions usually "tied to a vague 'general welfare' standard or, alternatively, to a 'nuisance' standard."[82] Discretion to authorize such placement usually rests with a local zoning board, city council, planning commission, or other local governmental administrative entity.[83] Requiring approval of a special permit is an oft-used exclusionary technique.[84] It allows the decision making entity sufficient leverage to discourage seekers of a permit by subjecting them to dilatory "red tape" and to reject special permits on an ad hoc basis—particularly when the appeal concerns a matter not politically popular.[85] One source explains that courts are reluctant to review a decision by one of these entities without clear evidence demonstrating an abuse of discretion.[86]

D. Barrier Builder—Group Home Defined as Commercial Enterprise

In some municipalities, group homes that are state-subsidized or licensed are classified as business or commercial enterprises. Consequently, group home placement is logically destined for commercial or business districts, or districts zoned for hospitals and nursing homes.[87] This excludes group homes from residential areas, the

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bly. Similarly used terms include "conditional use," "special use," "special use permit," and "special exception." *See* Depue v. City of Clinton, 160 N.W.2d 860, 863 (Iowa 1968); Tullo v. Township of Millburn, 54 N.J. Super. 483, 490, 149 A.2d 620, 624-25 (1959); D. MANDELKER & R. CUNNINGHAM, PLANNING AND CONTROL OF LAND DEVELOPMENT 659-60 (1979).

82. ACLU Handbook, *supra* note 29, at 109. *See also Tullo*, 54 N.J. Super. at 490-91, 149 A.2d at 624-25; D. HAGMAN, URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW 103 (1975).

83. *See generally* ACLU Handbook, *supra* note 29, at 109; MESHENBERG, *supra* note 80, at 32.

84. Gailey, *supra* note 36, at 98 ("communities often use restrictive . . . ordinances . . . to exclude group homes from residential areas").

85. MESHENBERG, *supra* note 80, at 32 (allows case-by-case rejection); Comment, *Can the Mentally Retarded Enjoy "Yards That Are Wide?"* 28 WAYNE L. REV. 1349, 1379 (1982) (discusses use of dilatory tactics) [hereinafter *Yards That Are Wide*]. *See also Zoning for Land Users*, *supra* note 26, at 186 (requiring approval of special permit can be a purposefully burdensome task) (citing Lauber, *supra* note 37, at 41-42).

86. ACLU Handbook, *supra* note 29, at 109. The decisionmaking entity is supposed to provide written findings of fact for potential court review. *See* 6 P. ROHAN, *supra* note 47, at § 44.02[2][d], 44-32. One source notes that the decisionmakers usually fail to provide the writing. *See Zoning for Land Users*, *supra* note 26, at 186 (citing Lauber, *supra* note 37, at 36 n.131).

87. *See, e.g.*, Seaton v. Clifford, 24 Cal. App. 3d 46, 52, 100 Cal. Rptr. 779, 782 (1972); Browndale Int'l, Ltd. v. Board of Adjustment, 60 Wis. 2d 182, 208 N.W.2d 121, 131 (1973), *cert. denied*, 416 U.S. 936 (1974). *See also* TENN. CODE ANN. § 13-24-104 (1981) (community-operated residence may be subjected to exclusionary law); ACLU Handbook, *supra* note 29,

location of which is most critical to a successful normalization process.[88] Moreover, zoning laws which restrict group homes to specific nonresidential areas often result in the creation of "group home ghettos," a unique and degrading form of institutionalization that impedes the habilitation process of mentally retarded citizens.[89]

VI. EXCLUSIONARY ZONING AND REMEDIAL MEASURES

There lurks in many a lawyer a sneaking suspicion that the substance and procedure of zoning as practice in most of our suburbs today is a violation of somebody's constitutional rights.

—Richard F. Babcock[90]

A previous section revealed community resistance to placement of group homes in residential areas has been based, in part, on concerns over property values, increased crime, alteration of the neighborhood's character, and exposure to social deviance. Communities occasionally resist "by lobbying against changes in, or seeking administrative interpretations of, zoning ordinances."[91] But their vehement efforts to exclude are limited; zoning laws must bear a *rational* relation to state objectives[92] and a *substantial* relation to the public health, safety, morals, or general welfare.[93] Moreover, manipulation of delegated police power invalidates zoning laws unnecessarily or unreasonably restricting land use.[94]

A. Barrier Buster—The "Superior Sovereign" Theory[95]

An argument based on state governmental or "superior sover-

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at 109; *Principal Issues and Strategies*, *supra* note 42, at 1095; ABA Project, *supra* note 10, at 796; Chandler & Ross, *supra* note 29, at 313-14. *But see* Kastendike v. Baltimore Ass'n for Retarded Children, 267 Md. 389, 401-03, 297 A.2d 745, 751-52 (1972).

88. ABA Project, *supra* note 10, at 796.

89. *Id.* ("ghettoizing leads to the creation of a new form of institutionalization—large numbers of community homes in certain areas of a city so that the homes become the dominant feature of a residential neighborhood"—all of which "undercut[s] the very purposes behind 'normalization' "). *See also supra* note 39 and accompanying text.

90. R. BABCOCK, THE ZONING GAME 92 (1966).

91. DISABILITY LAW: A PRIMER, *supra* note 64, at 31.

92. *See generally Village of Euclid*, 272 U.S. at 365.

93. *See generally Nectow*, 277 U.S. at 188.

94. *See* Washington *ex rel.* Seattle Title Trust Co. v. Roberge, 278 U.S. 116, 121 (1928) ("unnecessary and unreasonable" restrictions on land use will not be tolerated).

95. "Superior sovereign" was coined in City of Temple Terrace v. Hillsborough Ass'n for Retarded Citizens, 322 So. 2d 571 (Fla. 2d DCA 1975), *aff'd*, 332 So. 2d 610 (Fla. 1976).

eign" immunity has been instrumental in breaking down the exclusionary barriers via judicial mandate. The success of this argument has depended on such factors as whether the group home is operated—directly or indirectly—by the state,[96] whether the home is subsidized by the state,[97] and whether the home is licensed by the state.[98] Usually, a significant degree of state control over the home is required before a governmental immunity argument becomes viable.[99] Before granting immunity courts will consider legislative intent,[100] question whether the group home will serve a governmental rather than a proprietary purpose,[101] and weigh state and local interests.[102]

B. Barrier Buster—Overriding State Policy

Advocates of the normalization process have attacked exclusionary zoning laws with a means similar to the superior sovereign theory—through judicial enforcement of "overriding state policies."[103] This doctrine is particularly instrumental when a state has legislatively expressed an *intent* to provide "truly meaningful treatment

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96. For example, the state may operate the home directly through one of its agencies or indirectly by contracting with a nongovernmental entity. *See* Gailey, *supra* note 36, at 99. *See also* FLA. STAT. § 393.066(1) (1985):

> The Department of Health and Rehabilitative Services shall plan, develop, organize, and implement its programs of services and treatment for the retarded . . . along district lines. The goal of such programs shall be to allow clients to live as independently as possible in their own homes or communities and to achieve productive lives as close to normal as possible.

See also id. § 393.066(3) ("all services needed shall be purchased instead of provided directly by the department, when such arrangement is more cost-efficient. . . ."); *id.* § 393.066(5) ("department shall utilize the services of private businesses, not-for-profit organizations, and units of local government whenever such services are more cost-efficient").

97. *See* Gailey, *supra* note 36, at 99; *see also* FLA. STAT. § 393.15(3) (1985) (Group-Living Home Trust Fund established for subsidizing residential facilities for mentally retarded).

98. Gailey, *supra* note 36, at 99; *see also* FLA. STAT. § 393.067 (1985) (requirement of state licensure of residential facilities for the mentally retarded).

99. Gailey, *supra* note 36, at 99. *But see* Township of Washington v. Central Bergen Comm. Mental Health Center, Inc., 156 N.J. Super. 388, 383 A.2d 1194 (1978) (contract with state to provide transitional services not sufficiently significant to warrant immunity from exclusionary zoning).

100. *See, e.g.*, People v. St. Agatha Home for Children, 47 N.Y.2d 46, 416 N.Y.S.2d 577, 389 N.E.2d 1098, *cert. denied*, 444 U.S. 869 (1979) (home for children immune from local exclusionary zoning ordinance).

101. *See, e.g.*, Conners v. N.Y. State Ass'n of Retarded Children, Inc., 82 Misc. 2d 861, 370 N.Y.S.2d 474 (1975).

102. *See, e.g.*, Berger v. State, 71 N.J. 206, 219, 364 A.2d 993, 999-1000 (1976); *City of Temple Terrace*, 332 So. 2d at 610.

103. Gailey, *supra* note 36, at 99, 100 (discussing group homes permitted on basis of overriding state policy).

and habilitation" to the mentally retarded and to "protect the integrity of their legal and human rights."[104] For example, the Florida Legislature expressed its intent through the "Bill of Rights of Retarded Persons" in section 393.13, Florida Statutes:

> [(2)] (b) The Legislature further finds and declares that the design and delivery of treatment and services to the mentally retarded should be directed by the principles of normalization and therefore should:
>
> 1. Abate the use of large institutions.
>
> 2. Continue the development of community-based services which provide reasonable alternatives to institutionalization in settings that are least restrictive to the client.
>
> . . . .
>
> [(d)] 3. To divert those individuals from institutional commitment who, by virtue of professional diagnosis and evaluation, can be placed in less costly, more effective community environments and programs.
>
> . . . .
>
> 7. To fully effectuate the normalization principle through the establishment of community services for the mentally retarded person as a viable and practical alternative to institutional care. . . .[105]

Notwithstanding unequivocally expressed legislative intent, many courts have refused to invalidate zoning laws that subject group home placement in residential areas to reasonable conditions.[106]

C. *Barrier Buster—Violation of Equal Protection Clause*

The equal protection clause of the fourteenth amendment is a recognized means of attacking violations of mentally retarded citizens' fundamental right to habilitation in residential-based group homes.[107] The leading Supreme Court decision interpreting that right is *City of Cleburne v. Cleburne Living Center, Inc.*[108]

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104. FLA. STAT. § 393.13(1) (1985) ("The Bill of Rights of Retarded Persons").

105. *Id.* § 393.13(2). *See also* FLA. STAT. § 187.201(6)(b)(3)-(8) (1985) (State Comprehensive Plan's goals regarding normalization through group home placement).

106. For a discussion of zoning laws and cases where courts have refused to invalidate, see Gailey, *supra* note 36, at 100.

107. *See generally* Stewart, *supra* note 27, at 108; *The Right to Treatment*, *supra* note 2, at 158.

108. 473 U.S. 432 (1985). For detailed discussions concerning the ramifications of *Cleburne*, see Connor, *Zoning Discrimination Affecting Retarded Persons*, 29 J. URBAN &

In *Cleburne*, two Cleburne, Texas agencies refused to issue a special use permit for construction of a one-story group home for thirteen mildly to moderately retarded adults. A special use permit was required after the city determined that the home was definitionally synonymous with a "hospital for the feeble-minded." Under the city's zoning law the home could not be placed in an "Apartment House District" without such permit.[109] Refusal to issue the permit was based upon: (1) the negative attitude of neighbors within 200 feet of the proposed location, (2) potential harassment by students attending a nearby junior high school, (3) the proposed location on a 500-year flood plain, (4) fears of local elderly persons, (5) overcrowding within the home, (6) concern that deviant actions by the group home residents could have potentially disastrous legal ramifications, and (7) dissatisfaction with the presentation of the request.[110]

On appeal, Cleburne Living Center claimed the city's refusal violated rights of mentally retarded citizens to due process and equal protection. The federal district court disagreed. Subjecting the zoning law to minimum scrutiny, the court opined that the zoning ordinance and its application were constitutional and bore a rational relation to the city's legitimate interest in protecting its citizens.[111]

Reversing the district court, the United States Court of Appeals for the Fifth Circuit concluded that the mentally retarded are a quasi-suspect class. Therefore, alleged injustices warrant intermediate judicial scrutiny. The court invalidated the ordinance as unconstitutional on its face and as applied.[112]

The Supreme Court disagreed with the Fifth Circuit's opinion

CONTEMP. L. 67 (1985); *The Supreme Court—Leading Cases*, 99 HARV. L. REV. 120, 161 (1985) [hereinafter *Leading Cases*]; Note, *Constitutional Law: Activating the Middle Tier After Plyler v. Doe: Cleburne Living Center v. City of Cleburne*, 38 OKLA. L. REV. 145 (1985).

109. The two entities which denied the permit included the city council and the city's Planning and Zoning Commission. The parties requesting the special use permit included Jan Hannah and Cleburne Living Center, Inc. *See Cleburne*, 473 U.S. at 435-37 and n.4. The zoning ordinance provided that "[h]ospitals, sanitariums, nursing homes or homes for convalescents or aged, other than for the insane or feeble-minded or alcoholics or drug addicts" were uses permitted in an Apartment House District. *Id.* at 436 n.3 (quoting CLEBURNE, TEX., CODE OF ORDINANCES, Zoning Ordinance § 8 (June 8, 1965)). Moreover, "[h]ospitals for the insane or feeble-minded, or . . . penal or correctional institutions" to be operated in the city require a special use permit. *Id.* (quoting CLEBURNE, TEX., CODE OF ORDINANCES, Zoning Ordinance § 16 (June 8, 1965)).

110. *Cleburne*, 726 F.2d 191, 194 (5th Cir. 1984).

111. *Cleburne*, 473 U.S. at 437.

112. *Cleburne*, 726 F.2d at 200.

that mentally retarded citizens are a quasi-suspect class. Instead, the Court opined that the mentally retarded are *not* sufficiently victimized by discriminatory practices to deserve heightened review by the courts.[113] Nevertheless, the Court, employing minimum scrutiny, determined the ordinance was invalid as applied. That is, *all* seven reasons the city provided for refusing to issue the special use permit failed the rational relation test.[114]

The Court's decision in *Cleburne* "created uncertainty" regarding the standard of review to be afforded cases in which the issue concerns abrogation of constitutional rights of mentally retarded persons.[115] Application of a zoning ordinance was held to be subject to minimum scrutiny; however, invalidation of the ordinance seemed to be based on the level of scrutiny normally employed when the rights are those of a suspect classification.[116] Historically, legislation affecting persons classified as neither suspect[117] nor quasi-suspect[118] was presumed valid, unless minimum scrutiny revealed the legislation was an irrationally-related means to a legitimate end.[119] That is, use of minimum scrutiny "amounted to virtu-

113. *Cleburne*, 473 U.S. at 442-47.

114. Thus, the Court never reached the issue concerning the constitutionality of the ordinance itself. *See id.* at 447, 473.

115. *See, e.g.*, 1986 ZONING AND PLANNING LAW HANDBOOK 44-45 (J. Gailey ed.) ("the U.S. Supreme Court created uncertainty regarding the standard of review to be used in cases challenging legislation that affects mentally retarded persons").

116. *Id.* at 45.

117. Legislation which is allegedly discriminatory against classes of persons designated as suspect warrants judicial review using strict scrutiny. *See, e.g.*, McLaughlin v. Florida, 379 U.S. 184 (1964) (race held to be a suspect classification). Abrogation of fundamental rights also warrants implementation of strict scrutiny. *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618 (1969) (right to travel held to be a fundamental right). Legislation affecting "suspect" rights has, in most cases, been invalidated. *See generally Leading Cases*, *supra* note 108, at 161-62 and nn.1-2 (citing Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972)).

118. Classifications designated as quasi-suspect have yielded decisions using an intermediate level of scrutiny. *See, e.g.*, Trimble v. Gordon, 430 U.S. 762 (1977) (illegitimacy held to be quasi-suspect); Craig v. Boren, 429 U.S. 190 (1976) (gender held to be quasi-suspect), *reh'g denied*, 429 U.S. 1124 (1977). No test under intermediate judicial review has been consistently applied by the Supreme Court. *See Leading Cases*, *supra* note 108, at 161-62 n.2 (citing TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 16-30 (1978); Note, *Refining the Methods of Middle-Tier Scrutiny: A New Proposal for Equal Protection*, 61 TEX. L. REV. 1501, 1504-14 (1983)). Intermediate scrutiny has sometimes meant judicial probing into the legitimacy of the legislation at issue and whether it is a "substantially related" means to an important governmental end. *See, e.g.*, Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982). *See also Cleburne*, 473 U.S. at 441 ("gender classification fails unless it is substantially related to a sufficiently important governmental interest").

119. *See Leading Cases*, *supra* note 108, at 161 n.1 (citing Gunther, *supra* note 117, at 8).

ally no scrutiny at all."[120] *Cleburne* could thus be interpreted as providing teeth with which the mentally retarded can overcome a rational relation test.[121]

VII. THE FEDERAL RESPONSE—LEGISLATION AS A MEANS TO DEINSTITUTIONALIZATION

Broadly speaking, federal lawmakers have been the champions of deinstitutionalization . . . .

—A Legislative Mandate[122]

Federal lawmakers were quick to respond to President Kennedy's plea for humanistic care of the mentally disabled through deinstitutionalization.[123] In 1963, the United States Congress passed unprecedented legislation known as the Mental Retardation Facilities and Community Mental Health Centers Construction Act (Act).[124] The Act provided individual states with financial assistance in establishing *community* mental health facilities.[125] Moreover, the Act "discourage[d] inappropriate placement of persons in [institutional] inpatient facilities."[126] In the interest of normalization, each facility was directed to develop a "program of transitional halfway house services."[127] In 1975, the Act was amended with a provision calling for the "prevent[ion] or reduc[tion of] inappropriate institutional[ization]" via "home-based care . . . ."[128]

The Congregate Housing Services Act of 1978 was passed to "promote and encourage maximum independence within a home

120. Stewart, *supra* note 27, at 112. " '[C]onventional application of the rational basis test would have sustained' the city's ordinance and action." *Id.* (quoting Herman Schwartz, law professor at American University).

121. "[*Cleburne* means] the retarded can win under the rational basis test." *See* Stewart, *supra* note 27, at 110 (quoting Renea Hicks, attorney for Cleburne Living Center). "[The decision creates] rational basis with teeth." *Id.* at 112 (quoting Victor Rosenblum, law professor at Northwestern University).

122. *A Legislative Mandate*, *supra* note 1, at 861.

123. *See supra* note 1 and accompanying text.

124. Pub. L. No. 88-164, 77 Stat. 282 (1963). For a detailed analysis of the Act, see F. CHU & S. TROTTER, THE MADNESS ESTABLISHMENT: THE NADER REPORT (1974).

125. Pub. L. No. 88-164, § 101, 77 Stat. 282, 286, 290 (1963).

126. S. REP. No. 94-198, 94th Cong., 1st Sess. (1975), *reprinted in* U.S. CODE CONG. & ADMIN. NEWS 469, 540 (1975).

127. 42 U.S.C.A. § 2689(b)(1)(B)(iv) (1970) (repealed Aug. 13, 1981).

128. Social Service Amendments of 1974, Pub. L. No. 93-647, 88 Stat. 2337 (codified at 42 U.S.C.A. § 1397(4) (1975)).

environment for such residents [including the mentally disabled] capable of self-care with appropriate supportive congregate services."[129] The disabled will consequently retain "their dignity and independence" while "costly and unnecessary institutionalization" will be avoided.[130]

Notably, the humanistic movement suffered a serious setback by a recent Supreme Court interpretation of additional congressional legislation promoting the welfare of the mentally retarded. In *Pennhurst State School and Hosp. v. Halderman*,[131] the Court rejected a lower court's order to close an institution and normalize mentally retarded patients. Writing for the majority, Justice Rehnquist emphasized that section 504 of the Rehabilitation Act of 1973[132] and the Developmentally Disabled Assistance and Bill of Rights Act of 1975[133] merely "encourage"—and do not mandate—state deinstitutionalization programs.[134] Accordingly, states are not obligated to further the goals of such congressional enactments, even though federal funds have been provided.[135]

Ironically, one year prior to *Pennhurst*, the *Harvard Journal on Legislation* published an article in which the author noted that a "state plan 'to eliminate inappropriate placement in institutions of persons with mental health problems [and] to insure the availability of noninstitutional services' is a pre-requisite to the receipt of health care revenue sharing monies in general."[136] *Pennhurst* hampers this reality.[137] With one fell swoop, the Supreme Court turned

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129. Pub. L. No. 95-557, 92 Stat. 2104 (codified at 42 U.S.C.A. § 8003 (1978)).

130. 42 U.S.C.A. § 8001. This Act provides for service contracting between the U.S. Department of Housing and Urban Development and appropriate state agencies. *Id.* § 8003.

131. 451 U.S. 1 (1981). Specifically, the United States District Court issued the closing and normalization order. *See* Halderman v. Pennhurst State School & Hosp., 446 F. Supp. 1295 (E.D. Pa. 1977). On appeal, the United States Court of Appeals for the Third Circuit reversed the closing order. 612 F.2d 84, 116 (3d Cir. 1979). The Supreme Court reversed the normalization order. *Halderman*, 451 U.S. 1 (1981).

132. Pub. L. No. 93-112, 87 Stat. 393, *as amended by* Pub. L. No. 95-602, 92 Stat. 2982 (codified at 29 U.S.C.A § 793, 794 (1976 & Supp. III 1979)) ("No [mentally impaired] individual . . . shall, solely by reason of his handicap . . . be subjected to discrimination under any program or activity receiving Federal financial assistance").

133. 42 U.S.C. §§ 6010(1)-(2) (1982) (providing substantive rights to "appropriate treatment, services, and rehabilitation . . . in the setting that is least restrictive of the [mentally disabled's] personal liberty").

134. *Halderman*, 451 U.S. at 20.

135. *Id.* at 20-21.

136. *A Legislative Mandate*, *supra* note 1, at 865 (quoting 42 U.S.C.A. § 246(d)(2)(D)(i)(1) (1978 Supp.)).

137. Another commentator, however, notes that "[r]eform on the federal level is not feasible, since zoning is primarily regulated by state and local governmental bodies under police provisions of state constitutions." Lippincott, *supra* note 17, at 779 n.63.

the backbone of important legislation to mush and rendered potentially instrumental leverage useless. Not to be outdone by the *Pennhurst* decision, the United States Congress dealt the progress of the deinstitutionalization movement one more blow. In 1981, Congress repealed the Act.

VIII. STATE LEGISLATION WITH TEETH—IN PURSUIT OF HUMANISM

> *One thing has become abundantly clear: local decision-making on the location of community homes allows for and potentially encourages exclusionary and undesirable results.*
>
> —ABA Project[138]

The progress of group home placement and, ultimately, of the entire normalization process, has been hindered by the burdensome time and expense necessary to challenge exclusionary zoning laws,[139] an inconsistent judicial response,[140] and an insufficient federal remedy.[141] These factors have prompted an overwhelming number of authorities to argue that a successful normalization process necessitates the aid of state legislation.[142] To go a step further, what is needed is state legislation *with teeth.*

A minority of states have accordingly enacted laws that abridge the power to exclude.[143] The intent expressed by Florida legislators concerning the promotion of normalization of retarded citizens and their right to habilitation via the least restrictive alternative—that is, in community-based group homes—is indeed a commendable

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138. ABA Project, *supra* note 10, at 796.

139. Lippincott, *supra* note 17, at 778 ("vast expense of time, money, and energy involved in case-by-case litigation discourage development"); Kressel, *supra* note 31, at 145-47.

140. *See supra* note 64 and accompanying text.

141. *See supra* notes 122-37 and accompanying text.

142. *See, e.g.*, Gailey, *supra* note 36, at 98; Lippincott, *supra* note 17, at 778; *Legislative Response*, *supra* note 1, at 537; Comment, *Zoning and Community Group Homes for the Mentally Retarded—Boon or Bust?*, 7 OHIO N.U.L. REV. 64, 75 (1980); *Homes for the Mentally Retarded*, *supra* note 28, at 686; *A Legislative Mandate*, *supra* note 1, at 895.

143. *See, e.g.*, ARIZ. REV. STAT. ANN. §§ 36-581 to 36-582 (West 1986); CAL. WELF. & INST. CODE §§ 5115-17 (West 1984); MD. HEALTH-GEN. CODE ANN. §§ 7-101 to 7-605 (1982 & Supp. 1986); OHIO REV. CODE ANN. ch. 5123 (Anderson 1981 & Supp. 1986); S.C. CODE § 44-21-525 (1986); TENN. CODE ANN. § 13-24-102 (1980 & Supp. 1986); VA. CODE § 15.1-486.2 (1981 & Supp. 1987); WIS. STAT. ANN. § 59.97(15) (West Supp. 1986). *See also* ABA Project, *supra* note 10, at 3-8 (providing detailed substantive discussion regarding these and some other state statutes).

example. The statutory language leaves little room for doubt that the state's policy is not conducive to zoning laws which exclude group homes for the mentally retarded.[144] Nonetheless, so long as Florida's and other states' legislation remains toothless, municipal zoning laws will continue to use every tactical means to reach an exclusionary end.

A. *Suggested Reform—"No Zoning is the Best Zoning"*[145]

Suggested legislative reform is without consensual resolve. For example, one view advocates eradicating *all* zoning laws; they are "neither necessary nor desirable."[146] The validity of this view is bolstered by the extraordinary "inaction" of one particularly notable American municipality. Houston, the nation's fifth largest city with a population of over 1.5 million, has never adopted a zoning ordinance.[147] "Market forces operate there efficiently and effectively and accomplish that which zoning is supposed to but has been proven incapable of doing."[148] According to one advocate of this view, land use and development is principally controlled by market forces of a normal economy, through the use of restrictive covenants and other "legal agreements," and through local adoption of a few insignificant land use regulations.[149]

B. *Suggested Reform—Total Usurpation of Local Control*

The "appropriate remedy" according to another view is complete circumvention of the "zoning structure."[150] That is, legislation should exempt group residences from local zoning laws *altogether*; placement of these homes should be pursuant to a state comprehensive plan implemented by a state agency.[151] This would allevi-

144. FLA. STAT. § 187.201 (5)(b)(1) (1985).

145. This phrase is the title of an article by Bernard Siegan, Distinguished Professor of Law, University of San Diego, who supports this view. *See* Siegan, *No Zoning is the Best Zoning*, in NO LAND IS AN ISLAND 157 (1975).

146. *Id.*

147. *Id.* Moreover, four other large Texas municipalities are without zoning laws: Pasadena (pop. 100,000), Wichita Falls (pop. 100,000), Laredo (pop. 70,000), and Baytown (pop. 45,000). *Id.* at 157-59.

148. *Id.* at 157.

149. For further discussion concerning this view, see *id.* at 157-67.

150. *A Legislative Mandate*, *supra* note 1, at 895.

151. "Assigning ultimate authority and responsibility for a state-level problem to a state-level agency could correct the incongruity." *Id.* at 895-98. *Cf.* R. ANDERSON & B. ROSWIG, PLANNING, ZONING & SUBDIVISION: A SUMMARY OF STATUTORY LAW IN THE UNITED STATES (1966) (exemption of public land uses from local zoning not a unique concept).

ate state-wide "confusion and imbalance" by providing uniform standards and procedures for establishing and operating group homes.[152]

C. *Suggested Reform—Compromise*

A politically feasible approach, however, should entail compromising elements. First, legislatures should unequivocally and statutorily express state-wide policy not subject to local zoning impediments. For example, a Tennessee statute provides that eight or fewer unrelated mentally retarded citizens residing in a community-based group home constitute a single family, and that the statute "*takes precedence over any provision in any zoning law or ordinance . . . to the contrary.*"[153]

Second, in order to help quell local opposition to such preemptory measures, municipalities should be permitted to retain some autonomy in the matter. For example, if a state legislature determines that six or fewer unrelated persons constitute a single family, a residential district should be allowed to exclude groups of seven or more unrelated persons. Most important, a definition of "single-family" should be construed narrowly but fairly. A definition of "six or fewer unrelated persons" seems reasonable and unintimidating; "sixteen or fewer" does not.

Finally, citizen education and participation in the normalization process are the most essential elements of successful state reform.[154] As one commentator aptly points out, "[p]hysical inclusion in a community is not enough; social inclusion, a willingness among community members to allow a decrease in their social distance from the mentally [disabled] living among them, is necessary for true integration."[155] Public education and participation should abate ancient and irrational fears about the mentally retarded and, ultimately, dissipate opposition to integration. Surprisingly, a survey of state statutes, law review articles, and treatises reveals that this common sense notion is rarely discussed.[156]

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152. Haar, *Regionalism and Realism in Land-Use Planning*, 105 U. PENN. L. REV. 515, 516 (1957) ("[alleviate an existing] lack of correspondence between the political boundary [of the decisionmaking government] and the functional problem").

153. TENN. CODE ANN. §§ 13-24-102 to 13-24-103 (1980) (emphasis added).

154. Chandler & Ross, *supra* note 29, at 340. "Public awareness of the problems and needs of the mentally retarded remains the major barrier to normalization." *Id.*

155. *A Legislative Mandate*, *supra* note 1, at 899. The writer was specifically referring to mentally ill persons; nonetheless, the premise is equally valid in reference to the retarded.

156. *But see generally* Chandler & Ross, *supra* note 29, at 339-40; Deutch, *Reaction Comment*, in THE MENTALLY RETARDED CITIZEN, *supra* note 12, at 343.

Education should begin in the schools and continue into adulthood through development and initiation of workshops, a publication distribution system, and media presentations and guest speaker programs at civic meetings.[157] Participation should begin in the early stages of reform. For example, lay representatives of municipalities could form a commission to study and make recommendations to the legislature concerning appropriate reform measures.[158] Moreover, "[i]n instances in which residential facilities for the mentally handicapped have been organized into nonprofit corporations, neighboring residents should be included on the corporate board of directors."[159] And appropriate state agencies should always maintain an open door policy to constructive criticism and suggestion.[160]

IX. CONCLUSION

Society has come a long way since the days when mentally retarded persons were burned as witches. Indeed, President Kennedy's call for normalization through deinstitutionalization and ultimate integration of these citizens into the community is evolving into a reality. But the reality is impeded when "stable" but ignorant citizens blockade the entrances to their communities and thus deny fellow citizens their constitutional right to habilitation through the least restrictive means. The following model statute is a suggested framework for reform.[161]

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157. For example, each school could receive an information package containing slide shows and activity books which would provide "hands-on" learning.

158. *Accord* Chandler & Ross, *supra* note 29, at 340 ("Residents of municipalities should be consulted for their opinions prior to the adoption of licensing regulations.").

159. *Id.*

160. *Id.* at 339. ("Channels should be created through which the constructive suggestions of local residents concerning the operation of family care homes may be communicated to licensing and placement agencies.").

161. Parts of this model statute are directly drawn from, or based on, the provisions and recommendations of the following sources: ARIZ. REV. STAT. ANN. §§ 36-581 to -582 (West 1986); CAL. WELF. & INST. CODE §§ 5115-17 (West 1984); FLA. STAT. § 187.201(6) (1986) (state comprehensive plan); FLA. STAT. ch. 393 (1986) (developmental disability plan); MD. HEALTH-GEN. CODE ANN. §§ 7-101 to 7-605 (1982 & Supp. 1986); OHIO REV. CODE ANN. ch. 5123 (Anderson 1981 & Supp. 1986); S.C. CODE § 44-21-525 (1986); TENN. CODE ANN. § 13-24-102 (1980 & Supp. 1986); VA. CODE § 15.1-486.2 (1981 & Supp. 1987); WIS. STAT. ANN. § 59.97(15) (West Supp. 1986); ABA Project, *supra* note 10, at 806-10 (proposed model statute); Chandler & Ross, *supra* note 29, at 305; R. HOPPERTON, *supra* note 65; H. GROSSMAN, MANUAL OF TERMINOLOGY AND CLASSIFICATION IN MENTAL RETARDATION 5 (1973); D. LAUBER & F. BANGS, ZONING FOR FAMILY AND GROUP CARE FACILITIES (American Society of Planning Officials, Planning Advisory Service Report No. 300) (Mar. 1974); *Yards That Are Wide*, *supra* note 85.

A MODEL STATUTE

STATE COMPREHENSIVE MENTALLY RETARDED CITIZENS REFORM ACT[162]

Section 1. Title

This act shall be known and may be cited as the "State Comprehensive Mentally Retarded Citizens Reform Act of 1988."

Section 2. Legislative Findings and Intent

[State] shall cultivate good health for, and improve the quality of life of, all its mentally retarded citizens, and ensure that necessary health care services are available to all—including community-based habilitation programs on a state-wide basis.

The legislature finds that most existing state habilitation programs do not sufficiently and efficiently provide a means for successful normalization of mentally retarded citizens. The present procedure—usually debilitating and costly institutionalization—precludes proper and necessary mental, physical, and social development of these individuals. Consequently, a restructuring of the system entails state-wide, mandatory deinstitutionalization of those qualified to enter the mainstream of society.

The legislature hereby declares that successful community integration of qualified mentally retarded citizens shall involve placement of "family" group homes in residential districts. Group home living will enable these individuals to achieve their independence and maximum potential productivity.

Furthermore, private businesses, nonprofit organizations, local governmental units, and other qualified entities shall be licensed and permitted to develop and establish community-based group homes in lieu of [designated state agency] when such services are

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162. Some state statutes include the mentally retarded with other similarly handicapped persons in a more expansive definition of "developmentally disabled persons." Thus, this suggested model for reform could just as well apply to other persons. Indeed, a more expansive definition which includes persons similarly handicapped could conceivably increase lobbying power. Consider the following possibility:

"Developmentally disabled" means a disability of a person which:

(a)(i) is attributable to mental retardation, cerebral palsy, epilepsy, or autism;

(ii) is attributable to any other condition found to be closely related to the disabilities described in (a) above; or

(iii) is attributable to dyslexia resulting from a disability described in (i) and (ii) above.

(b) This term does not refer to the mentally ill or anyone in a rehabilitation program such as those designed for juveniles, parolees, or drug or alcohol abusers.

See generally cites in *supra* note 161.

provided in a more cost-efficient manner.

This Act preempts all zoning laws; consequently, group homes placed in residential areas of a community shall be exempt from all restrictions.

The legislature recognizes citizen education and participation as important elements in the normalization process. Physical inclusion of mentally retarded citizens in a community is insufficient without social inclusion and a willingness among community members to close the gap that exists between themselves and their fellow citizens who are mentally retarded. Therefore, public education and participation to abate ancient and irrational fears about the mentally retarded are encouraged.

Finally, this Act refers only to the mentally retarded and does not refer to the mentally ill or anyone in a rehabilitation program—such as those programs designed for juveniles, parolees, or drug or alcohol abusers.

Section 3. Definitions

(1) "Department" means [designated state agency].

(2) "Dispersal" means limiting the number of group homes to be established within a designated area.

(3) "Family group home" means a state-licensed residential facility which provides a family living environment for, and 24-hour supervision and care of, mentally retarded citizens.

(4) "Family group home placement program" means a least restrictive alternative to institutionalization necessary to meet the mental, physical, and social needs of the mentally retarded.

(5) "Ghetto-ization" means creation of a new form of institutionalization; large numbers of community homes are placed in certain areas of a city so that the homes become the dominant feature of the residence, thereby undercutting the very purposes behind normalization.

(6) "Habilitation" means the process by which the mentally retarded are assisted in acquiring and maintaining necessary life skills which will enable them to cope more effectively with the demands of their environments and conditions and to raise the level of mental, physical, and social efficiency.

(7) "Multi-family group home" means a state-licensed residential facility in which seven to sixteen mentally retarded citizens and

three or more staff personnel live.

(8) "Normalization" means deinstitutionalizing the mentally retarded and providing such persons with a life that is as close as possible to the norm and patterns of mainstream society.

(9) "Permitted use" means a use by right which is authorized in all residential zones.

(10) "Retardation" means significantly subaverage intellectual functioning existing concurrently with deficits in adaptive behavior, and manifested in the developmental period.

(11) "Screening" means conducting background checks on all group home staff personnel and volunteers [volunteering twenty hours or more weekly].

(12) "Single-family group home" means a state-licensed residential facility in which six or fewer mentally retarded citizens and two or three staff personnel live.

(13) "Staff personnel" means those qualified to provide the type and level of supervision and care intended by this Act to the mentally retarded in the community-based group home environment. Volunteers do not fall within this definition. All staff personnel shall be screened before being permitted to work.

(14) "State comprehensive plan" means the plan which shall provide long-range, state-wide policy guidance for the implementation of the intent and goals of this Act. The state comprehensive plan shall be devised by the Department and shall preempt any conflicting policy.

Section 4. State comprehensive plan and report to the legislature

(1) The Department shall devise a state comprehensive plan in accordance with and in furtherance of the intent and goals of this Act.

(2) The Department shall report to the legislature and present its final draft of the state comprehensive plan to the legislature for approval within one year of the effective date of this Act.

Section 5. Family group homes permitted use in residential zones

(1) A single-family group home is a residential use of land for the purposes of zoning laws and shall be a permitted use in all residential districts of a community.

(2) A multi-family group home is a residential use of land for the purposes of zoning laws and shall be a permitted use in all residential districts except those zoned for single-family dwellings unless otherwise permitted by the appropriate local governmental entity.

(3) Any zoning law that delays or obstructs the placement of group homes is void as against public policy and against the intent and goals of this Act. Dilatory or obstructive zoning provisions prohibited by this Act include, but are not limited to:

(a) requirement of conditional or special use permits, exceptions, or variances;

(b) use and enforcement of restrictive covenants, and

(c) other similar procedural requisites.

Section 6. Dispersal within a community

(1) To prevent "ghetto-ization" of community homes and to preserve the character of a residential area, group home dispersal shall take into account:

(a) existing residential population density;

(b) the number, occupancy, and location of other group homes serving other retarded and developmentally disabled citizens as well as those serving persons undergoing rehabilitation, such as juveniles, parolees, or drug or alcohol abusers;

(c) floor and lot area.

(2) The Department shall delineate guidelines based upon the above factors and incorporate its recommendations in the state comprehensive plan for legislative approval.

Section 7. Screening of staff personnel and volunteers

(1) The Department shall devise appropriate screening procedures to verify that the following minimum standards are met:

(a) The Department shall establish minimum moral standards which all group home staff personnel and volunteers [volunteering twenty hours or more weekly] must meet in order to be eligible to provide services to the mentally retarded.

(b) The Department shall establish minimum standards delineating education and training group home staff personnel must have received in order to be eligible to provide services to the mentally retarded.

(2) The Department shall incorporate its recommendations in the state comprehensive plan for legislative approval.

Section 8. Adequate supervision and facilities

(1) To ensure adequate safety and care of mentally retarded citizens living in community-based group homes, 24-hour supervision shall be provided by at least two staff personnel.

(2) To ensure adequate safety and care of mentally retarded citizens, the group home shall meet applicable local standards pertaining to building, housing, health, fire, and safety. These standards shall not be unlike those applicable to other single- or multi-family dwellings in the district.

Section 9. Licensing of group homes

(1) All group homes for mentally retarded citizens shall be licensed by the Department in compliance with established standards.

(2) An application shall be made to and on a form furnished by the Department. The form shall be accompanied by the appropriate license fee not to exceed one hundred dollars.

(3) The applicant shall supply all other requested information which the Department deems necessary to carry out the provisions of this Act.

(4) Within five days after filing an application with the Department, the applicant shall file a copy with the governmental entity having jurisdiction over the zoning of the land on which the group home is to be located. The applicant shall file with such governmental entity copies of any amendments to the original application within five days after filing the amendment with the Department.

(5) License renewal shall occur on a yearly basis beginning one year from the date of initial issuance. At that time and at any other time the Department deems necessary the Department shall review all information it deems necessary for determining whether to renew a license.

Section 10. Complaints concerning group home placement, operation; potential ramifications of valid complaint

(1) The Department shall investigate group homes in response to complaints within ten working days of receipt of a complaint. However, the Department shall make an immediate investigation when warranted under the circumstances.

(2) The Department shall furnish a form through which a petitioner may seek denial, suspension, or revocation of licensure or

license renewal of a group home. The following persons may petition:

(a) any governmental entity having jurisdiction over the zoning of the land on which the group home is located or is proposed to be located;

(b) any resident of the residential zoning district in which the group home is located or is proposed to be located;

(c) any member of the staff, group home volunteer, or person related to a mentally retarded resident of the group home.

(3) The group home in question shall be provided with copies of all petitions and, upon request by the Department, shall respond in writing to questions or allegations within thirty days of receipt the petition.

Section 11. Failure of group home to meet established standards

Failure to meet minimum standards established by the Department shall result in license denial, suspension or revocation, or administrative fine.

Section 12. Public education and participation

(1) One layperson from each state municipality shall collaborate with the Department in formulating a state comprehensive plan.

(2) The municipal representatives and the Department shall devise a scheme to increase public awareness through education and participation.

(3) The scheme shall be included in the state comprehensive plan for legislative approval.

Section 13. Continued monitoring of group homes

(1) The Department shall thoroughly inspect all group homes for the mentally retarded at least once a year. The inspection shall entail on-the-premises inspection of the home and interview with the staff personnel.

(2) The Department shall monitor group homes at least once every six months. Monitoring shall be conducted through the use of questionnaires supplied by the Department.

(3) Parents and guardians of the mentally retarded residents of a group home, the Department and members of recognized advocacy groups shall be permitted to inspect group homes at reasonable times.

Section 14. Severability

If any section, subsection, paragraph, sentence, or any other part of this Act is judicially held to be unconstitutional or void, any other section, subsection, paragraph, sentence, or any other part of this Act shall remain effective.