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Jane E. Reiner

West Virginia University College of Law

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A REVIEW OF THE CONFLICT BETWEEN COMMUNITY-BASED GROUP HOMES FOR THE MENTALLY RETARDED AND RESTRICTIVE ZONING

In each of the fifty states there are many people who, because they are mentally retarded,¹ may require care in an environment other than their own home. The American model for such residential care has historically been the large custodial institution.² Since the middle of the nineteenth century, these large institutions have served to relieve the public of the displeasure and discomfort which many non-handicapped persons feel in the presence of the handicapped, while at the same time soothing society's conscience with the premise that the institutions were actually schools existing for the benefit of the retarded.³ More recently, however, there has been a movement away from the large institution and toward placement of retarded individuals in an environment which more closely approximates "the patterns of life and conditions of everyday living which are an integral part of normal society."⁴ Therefore, the residential model which presently enjoys the most support from members of the mental health field in the quest for "normalization" is the community-based group home.⁵

Despite the weight of authority supporting community-based

¹ "As defined by the American Association of Mental Deficiency, mental retardation refers to significantly subaverage general intellectual functioning existing concurrently with defects in adaptive behavior and manifested during the developmental period." N.C. Ass'n for Retarded Children v. State of N.C., 420 F.Supp. 451, 453 (M.D.N.C. 1976). In West Virginia, " 'Mental retardation' means significantly subaverage intellectual functioning which manifests itself in a person during his developmental period and which is characterized by his inadequacy in adaptive behavior." W. VA. CODE § 27-1-3 (1976 Replacement Vol).

² *Disabled Citizens In the Community: Zoning Obstacles and Legal Remedies*, AMICUS, March/April 1978, at 30.

³ Halpern, *Introduction*, 31 STANFORD L. REV. 545, 546 (1979).

⁴ Nirge, *The Normalization Principle*, in CHANGING PATTERNS IN RESIDENTIAL SERVICES FOR THE MENTALLY RETARDED 231 (R. KUGEL & A. SHEARER eds. 1976) [hereinafter cited as CHANGING PATTERNS].

⁵ This support results from the fact that community-based residential homes adhere most closely to the normalization principle that "disabled persons unable to live with their families should reside in homes of normal size, located in normal neighborhoods that provide opportunities for normal societal integration and interaction." Nirge, *supra* note 4, at 231.

treatment, the number of community homes currently available is inadequate to service those mentally retarded persons who are not in need of institutionalization.⁶ Of the factors contributing to this shortage, the most significant is public opposition. Opponents of community homes list concern for property values, safety, traffic and noise levels as justification for their resistance,⁷ and although the evidence demonstrates that these concerns are unfounded, the opposition remains.⁸ The primary means used to impede the development of community-based group homes is that of governmental zoning,⁹ by which a municipality can control the use and development of property within its jurisdiction.¹⁰ Such regulation is typically accomplished through the use of zoning ordinances which divide the land into different districts, permitting only certain uses within each district. Frequently, these districts divide the community into four major areas: residential, commercial, industrial, and special.

Under the typical zoning statute, a residential zone is identified according to the type of structure permitted within its territory and the use to which the structure may be put.¹¹ The two types of restrictive residential zoning ordinances which have seriously hindered the development and proper location of community-based group homes are the "single-family dwelling" ordinance and the less common "exclusionary" ordinance.¹² An exclusionary ordinance, by its language, specifically excludes indi-

⁶ Developmental Disabilities State Legislative Project of the ABA Comm'n on the Mentally Disabled, *Zoning for Community Homes* (1974) reprinted in 2 MENTAL DISABILITY L. REP. 794, 795 (1978) [hereinafter cited as ABA Project].

⁷ Lippincott, "A Sanctuary for People": *Strategies for Overcoming Zoning Restrictions on Community Homes for Retarded Persons*, 31 STANFORD L. REV. 767, 769 (1979) (citing D. LAUBER & F. BANGS, *Zoning for Family and Group Care Facilities* 8-10 (Am. Soc'y of Planning Officials Planning Advisory Serv. Rep. No. 300, 1974)).

⁸ Empirical studies indicate that fear of diminished property values is itself baseless. See ABA Project, *supra* note 6, at 796 n.10. In addition, safety fears should be of little concern since it is highly unlikely that aggressive residents would be placed in group homes without supervision. Finally, as the mentally retarded are not permitted to drive, traffic levels would not be affected by the group home.

⁹ ABA Project, *supra* note 6, at 795.

¹⁰ 1 P. ROHAN, *ZONING AND LAND USE CONTROLS*, § 1.02[1] (1978).

¹¹ *Disabled Citizens In the Community: Zoning Obstacles and Legal Remedies*, *supra* note 2, at 30.

¹² *Id.* at 30, 31.

viduals with certain identifiable characteristics.¹³ An example of this type of ordinance is one which allows certain types of clinics but prohibits others in residential districts:

Clinics—clinics for human care, homes for the aged, sanatoriums, but *not* including those for the care of epileptics, drugs addicts, the feeble-minded or insane, or for contagious diseases.¹⁴

Although this type of zoning restriction is rare, it does exist and presents a very real and serious barrier to community-based group homes.

The more prevalent obstacle to group home development, however, is the single-family dwelling ordinance which is designed "to limit certain residential areas to structures containing only single families as opposed to multiple families, fraternities, and other groups of individuals."¹⁵ Most often, landowners argue that since group homes house a number of unrelated people, they violate single-family dwelling ordinances.¹⁶

Although the power to zone is generally authorized by state constitutions, the majority of zoning ordinances are drafted on the local rather than state level,¹⁷ and among localities this practice has led to a wide variety of statutory language defining family.¹⁸

¹³ *Id.* at 31.

¹⁴ R. Hopperton, *Zoning for Community Homes: A Handbook for Local Legislative Change*, 3 (Ohio State University Law Reform Project 1975).

¹⁵ *Disabled Citizens In the Community: Zoning Obstacles and Legal Remedies*, *supra* note 2, at 31.

¹⁶ *Comment, Exclusionary Zoning And Its Effects On Group Homes In Areas Zoned For Single-Family Dwellings*, 24 U. Kan. L. Rev. 677, 677 (1976). See e.g., *Oliver v. Zoning Comm'n*, 31 Conn. Supp. 197, 326 A.2d 841 (1974); *City of White Plains v. Ferraioli*, 34 N.Y.2d 300, 313 N.E.2d 756, 357 N.Y.S.2d 449 (1974); *Little Neck Community Ass'n v. Working Org. for Retarded Children*, 52 A.D.2d 90, 383 N.Y.S.2d 364 (1976); *Village of Freeport v. Ass'n for the Help of Retarded Children*, 94 Misc. 2d 1048, 406 N.Y.S.2d 221 (1977).

¹⁷ "While zoning authority in the broad sense is founded on the police power, it is generally held that municipalities and counties have no inherent power to zone except as such power has been delegated to them by the state legislature. This authorization is generally found in enabling statutes, municipal charters or in the state constitutions." 1 P. ROHAN, *ZONING AND LAND USE CONTROLS*, § 1.02[4] (1978).

¹⁸ *Comment, Exclusionary Zoning And Its Effects On Group Homes In Areas Zoned For Single-Family Dwellings*, *supra* note 16, at 685 (citing *Comment, The Legal Family—A Definitional Analysis*, 13 J. FAM. LAW 781, 798 (1973-1974)).

For instance, some single-family dwelling ordinances are vague and broadly define family to require only that the occupants constitute a "single-family housekeeping unit."¹⁹ At the same time, other statutes are very specific, defining family to require that the occupants be related by blood, marriage, or adoption, or, that if the occupants are unrelated they are limited to a specific number.²⁰ While such zoning ordinances often complicate and slow the establishment of community-based residential homes for the mentally retarded, they need not pose a total bar. There are several methods available for overcoming their barriers. One method is to challenge the restrictive ordinances on due process and equal protection grounds.²¹ Another method involves litigation to qualify the group home as a "single-family residence" within the ordinance's definition of family. The final method is to persuade state legislatures to invoke statutes curtailing the municipalities' power to ban residential locations of group homes.²²

I. RESIDENTIAL TREATMENT OF THE MENTALLY RETARDED

In the middle of the nineteenth century, small institutions for a number of deviant groups developed throughout the United States, based on the theory that deviant persons had to be housed together in order to provide them with expert attention. The primary purpose of these institutions was to make the deviant less deviant, and in the case of the mentally retarded, the principal goal was to furnish the education and treatment necessary for them to learn the skills required to function at least minimally in society. More precisely, the goal was to provide education which would transform the poorly socialized, sometime speechless, and uncontrolled child into one who could stand and walk normally, speak, eat in an acceptable manner, and engage in some kind of meaningful work. When the child had acquired these skills, he or she would be returned to his or her own home. Thus, although these early institutions were designed around the family plan and

¹⁹ Comment, *Exclusionary Zoning And Its Effects on Group Homes In Areas Zoned For Single-Family Dwellings*, *supra* note 16, at 685.

²⁰ *Id.*

²¹ *Id.* at 677 (citing Friedman, *Analysis of the Principle Issues and Strategies in Zoning Exclusion Cases*, in 2 *LEGAL RIGHTS OF THE MENTALLY HANDICAPPED* 1093, 1098 (B. ENNIS & P. FRIEDMAN eds. 1973)).

²² *Disabled Citizens In the Community: Zoning Obstacles and Legal Remedies*, *supra*, note 2, at 31.

located in the very heart of the community, they were seen as temporary boarding schools and not as permanent homes.²³

Although many of the residents of these early institutions vastly improved under the care and education given them, the public came to view the institutions as failures because they did not "cure" the mentally retarded. As a result of this perceived failure, the primary goal of the institution changed from one of schooling to one of mere care and protection. Hence, the word *school* disappeared from the names of institutions and was replaced by the word *asylum*.²⁴

While the primary goal of protection emphasized loving care, it in fact gave rise to isolation, expansion, and economization—conditions which hurt rather than helped the retarded. In an effort to spare the retarded the ridicule of society and the stresses of community life, institutions were moved from the centers of communities to locations which were isolated and remote. Educational activities disappeared, and instead, emphasis was placed on the work of the residents. At first, work was emphasized for its value to the individual and was designed to alleviate boredom and promote physical development and intellectual growth. The concept of value to the resident, however, soon gave way to utilitarian practices, and the economic value of the work to the institution was emphasized as a means of decreasing the financial burden which the retarded imposed upon society. Adding to the overall detrimental conditions of the "protective" institution was the reasoning that the goal of protective care would be simplified if large numbers of residents were grouped together. Eventually the small family-style institution was replaced by a large impersonal one, some housing thousands of residents. Loving care gave way to facilities that were understaffed, stripped of all luxuries and comforts, and offering only the most minimal and inexpensive services.²⁵

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. At best these

²³ Wolfensberger, *The Origin and Nature of Our Institutional Models*, in *Changing Patterns*, *supra* note 4, at 48-49.

²⁴ *Id.* at 51-52.

²⁵ *Id.* at 52-54.

institutions provide low-level custodial care, and at worst they are simply warehouses for human beings.²⁶ Under the guidance of professionals in the field of mental health, there has been a growing effort to provide residential services which integrate the mentally retarded individual into the mainstream of society through the process of normalization.²⁷ For optimal success, the process of normalization requires making "available to all mentally retarded people patterns of life and conditions of everyday living which are as close as possible to the regular circumstances and ways of life and society."²⁸ Out of this process of normalization has developed the concept of community-based group homes for the mentally retarded.

Community-based group homes afford the retarded person an opportunity to reach his or her maximum human potential and to become a contributing, productive member of society.²⁹ They also enable the individual to participate in generic services, to receive training for employment, and in many cases to become part of the taxpaying public rather than an enormous strain on the public treasury.³⁰ Since most residents for group homes are selected from the varied populations of the large institutions, it is impossible to precisely characterize their potential intelligence or work skills. In West Virginia³¹ and other states with low rates of institutionalization, residents are likely to be more severely retarded, while in states like New York or California, where the rate of institutionalization is high, residents will probably be less retarded. In either situation, however, it is unlikely that residents who are aggressive or dangerous would be placed in a group home without adequate supervision.

²⁶ J. BERGMAN, *COMMUNITY HOMES FOR THE RETARDED*, at xiii (1975).

²⁷ *Disabled Citizens In the Community: Zoning Obstacles And Legal Remedies*, *supra* note 2, at 30.

²⁸ Nirge, *supra* note 4, at 231.

²⁹ ABA Project, *supra* note 6, at 1.

³⁰ *Id.*

³¹ From 1968 to 1971, West Virginia had the second lowest rate of admission to institutions for the mentally retarded. Butterfield, *Some Basic Changes in Residential Facilities*, in *Changing Patterns*, *supra* note 4, at 30.

II. OVERCOMING THE BARRIER OF ZONING

A. Constitutional Attacks

In *Village of Euclid v. Ambler Realty Co.*,³² the Supreme Court upheld the constitutionality of zoning ordinances, stating that such ordinances are presumed valid so long as they reasonably relate to public health, safety, morals or general welfare. The Court further emphasized that "if the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control."³³ Nonetheless, while zoning laws may be justified as a legislative exercise of the state's police power,³⁴ this power is not unlimited, and "legislatures may not, under the guise of the police power, impose restrictions that are unnecessary and unreasonable upon the use of private property or the pursuit of useful activities."³⁵ Thus, the actual scope of the zoning power remains somewhat open-ended.

In 1974, the Supreme Court defined that scope rather broadly³⁶ by upholding a single-family residential zoning provision which defined family as:

One or more persons related by blood, adoption, or marriage, living and cooking together or as a single-housekeeping unit exclusive of household servants. A number of persons but not exceeding two (2) living and cooking together as a single-housekeeping unit though not related by blood, adoption, or marriage shall be deemed to constitute a family.³⁷

The plaintiff-home-owners had leased their Belle Terre home to six unrelated college students who shared expenses and used a common cooking facility. Shortly after the homeowners were served with an "Order to Remedy Violations,"³⁸ they and three of the students brought an action for injunctive relief against the en-

³² 272 U.S. 365 (1926).

³³ *Id.* at 388.

³⁴ The police power is the exercise of the sovereign right of a government to promote order, safety, health, morals and the general welfare of society within constitutional limits. 5 P. ROHAN, ZONING AND LAND USE CONTROLS § 34.01[1] (1978).

³⁵ *Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116, 121 (1928).

³⁶ *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974).

³⁷ *Village of Belle Terre, N.Y., Building Zone Ordinance art. I., § D-1.35a* (1971).

³⁸ 476 F.2d at 809, *rev'd*, 416 U.S. 1 (1974).

forcement of the ordinance and declaratory judgment that the ordinance was unconstitutional.

The district court, however, upheld the validity of the ordinance and denied the motion for an injunction. Concluding that the regulation could not be upheld on traditional grounds, the court instead found that it did represent "a lawful exercise of a 'legally protectable affirmative interest' in the family made up of married parents and children."³⁹ The plaintiffs appealed, arguing that the ordinance violated equal protection and also rights of association, travel, and privacy.

Using the "sliding scale" equal protection test,⁴⁰ the U.S. Court of Appeals for the Second Circuit declared the ordinance unconstitutional, as "its discriminatory classification was not supported by any basis that was consistent with permissible zoning objectives."⁴¹ However on appeal to the supreme Court, the constitutionality of the ordinance was affirmed using the "two-tiered" test⁴² for equal protection review. Writing for the majority, Justice Douglas held that the ordinance did not violate any fundamental constitutional rights⁴³ and that it bore a rational relationship to a permissible state objective:

A quiet place where yards are wide, people few, and motor vehicles restricted are [sic] legitimate guidelines in a land-use project addressed to family needs . . . The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values,

³⁹ *Id.* 810.

⁴⁰ "Under this approach, the test for application of the Equal Protection Clause is whether the legislative classification is *in fact* substantially related to the object of the statute." *Id.* at 814.

⁴¹ *Id.* at 818.

⁴² This is the traditional method of equal protection analysis. "First, under the 'minimum scrutiny' or 'rational relationship' test, the ordinance will be upheld if the plaintiff is unable to demonstrate that there is no rational relationship between the ends sought and the classification utilized in the ordinance. However, if the classification is deemed to be inherently 'suspect' or if it restricts the exercise of a 'fundamental right,' the second tier of the test requires that the state demonstrate a compelling interest in the establishment and maintenance of such a classification." Comment, *Recent Development, Village of Belle Terre v. Boraas*, 19 VILL. L. REV. 819, 820-821 (1974).

⁴³ Specifically, the Court held that the ordinance did not violate the rights of voting, association, access to the courts, privacy, or travel. *Village of Belle Terre v. Boraas*, 416 U.S. 1, 7 (1974).

and the blessings of quiet seclusion and clean air make the area a sanctuary for people."⁴⁴

Although the *Belle Terre* decision protects single-family ordinances from charges that they violate constitutional principles *per se*,⁴⁵ zoning regulations directed at a class of mentally retarded persons, create constitutional problems broader than those resolved in *Belle Terre*.⁴⁶ The primary difference between a situation involving unrelated college students and a situation involving a proposed group home for the mentally retarded must be stressed: the presence of state action. In *Belle Terre* the state's interest was passive as it took no action in promoting non-single family dwellings. However, a state's interest in a group home for the mentally retarded is active because of its affirmative obligation to provide the institutionalized person with treatment in the least restrictive environment.⁴⁷ Such treatment requires that the burden on the mentally handicapped person's liberty be no greater than is necessary to achieve commitment or treatment objectives.⁴⁸ Numerous federal court decisions have applied this concept to civil commitment of the mentally ill,⁴⁹ and its application has also been extended to the mentally retarded.⁵⁰ When total deprivation of liberty is unnecessary to protect either society or the retarded themselves, the most appropriate placement is often the community-based group home. If this placement is unavailable because of restrictive zoning ordinances, then the retarded are being denied their right to treatment and training in the least restrictive setting.⁵¹

Although the Court in *Belle Terre* concluded that the single-family ordinance involved did not violate any of the students' fun-

⁴⁴ *Id.* at 9.

⁴⁵ *Zoning For Community Residences*, 2 MENTAL DISABILITY L. REP. 315, 318 (1977).

⁴⁶ *Disabled Citizens In the Community: Zoning Obstacles and Legal Remedies*, *supra* note 2, at 31.

⁴⁷ *Id.* at 31-32.

⁴⁸ *Zoning For Community Residences*, *supra* note 45, at 318.

⁴⁹ See, e.g., *Wyatt v. Alderholt*, 503 F.2d 1305 (5th Cir. 1974); *Welsch v. Likings*, 373 F. Supp. 487 (D. Minn. 1974); *Dixon v. Attorney General of Commonwealth of Pa.*, 325 F. Supp. 966 (M.D. Pa. 1971).

⁵⁰ See, e.g., *Halderman v. Pennhurst State School and Hospital*, 446 F. Supp. 1295 (E.D. Pa. 1977) and *Gray v. Louisiana*, 473 F. Supp. 1209 (E.D. La. 1976).

⁵¹ *Zoning For Community Residences*, *supra* note 45, at 319.

damental constitutional rights,⁵² a different conclusion may result when the mentally retarded are affected. In *Stoner v. Miller*,⁵³ for example, a federal district court declared that a local zoning ordinance which prohibited people on medication from living in hotels was unconstitutional because it violated the rights of the mentally ill to travel⁵⁴ and to be treated in the least restrictive environment.⁵⁵ The right to travel is not restricted to interstate movement, but also includes the right to migrate between counties within a state.⁵⁶ If group homes are restricted from residential districts, many mentally retarded persons would be forced to remain in a large institution, or to enter a group home in an unsatisfactory location, or to attempt independent living without important support services.⁵⁷ "The right to travel, therefore, is clearly and extensively infringed when the exclusion deprives the individual of the only appropriate type of community residence available to him."⁵⁸

In addition to recognizing that restrictive zoning ordinances violate the the retarded individual's right to travel and to be treated in the least restrictive environment, courts might also be persuaded to recognize that such ordinances also violate the retarded person's right to due process. In 1976, certain New Jersey ordinances restricting an area to single-family dwellings were declared to violate due process protections in the case of *Berger v. State of New Jersey*.⁵⁹ Homeowners in the zoned district had resisted the establishment of a group home for multi-handicapped preschool children arguing that the structure was, in essence, an institution established in a residential area, and that the residents did not constitute a family as defined by the ordinance. The court, however, declared that the home conformed to the neighborhood scheme of residential living and that the definition of family contained in the ordinance was overly restrictive:

When the Mantoloking ordinance defining 'family' as those

⁵² *Supra* note 43.

⁵³ 377 F. Supp. 177 (E.D.N.Y. 1974).

⁵⁴ In *Belle Terre*, the Court specifically found that the fundamental right to travel had not been violated by the zoning ordinance, *supra* note 43.

⁵⁵ *Stoner v. Miller*, 377 F. Supp. 177, 177 (E.D.N.Y. 1974).

⁵⁶ See *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974).

⁵⁷ *Zoning For Community Residences*, *supra* note 45, at 318.

⁵⁸ *Id.*

⁵⁹ 71 N.J. 206, 364 A.2d 993 (1976).

persons related by blood, marriage or adoption is measured against the demands of due process, it is clear that the regulation must fall. It so narrowly delimits the persons who may occupy a single-family dwelling as to prohibit numerous potential occupants who pose no threat to the style of living sought to be preserved. As such, we cannot conclude that the definition of 'family' is reasonable.⁶⁰

Certainly group homes for the mentally retarded are no more a threat to family living than a group home for multi-handicapped preschool children. "Residential facilities, based on the principles of normalization and integration of the mentally retarded into society, emulate a family atmosphere and lifestyle, and reflect family values."⁶¹ Premised on the idea of the "normal family", group homes for the mentally retarded are modeled on the style of family living which single-family zoning ordinances are designed to protect. Therefore, a zoning ordinance which defines family in such a manner as to exclude group homes from residential areas would be overly broad in application to the mentally retarded and should be found to violate due process requirements.

Finally, and most important, it is necessary to remember that for most individuals, such as the college students in *Belle Terre*, alternative living conditions are available, hence single-family zoning is to them merely an inconvenience. However, for the mentally retarded in need of a group home there is no alternative. Group homes are not merely a convenience; they are a psychological and physical necessity to many of the retarded. Therefore, it might be argued that restrictive zoning ordinances violate due process where the effect is to prevent needy individuals from receiving the advantages of community-based facilities.⁶²

B. *Re-Interpretation of Family*

When confronted by the barrier of a single-family dwelling ordinance, some organizations have successfully argued that a community home for the mentally retarded does constitute a "sin-

⁶⁰ *Id.* at 224, 364 A.2d 993.

⁶¹ Comment, *Zoning The Mentally Retarded Into Single-Family Residential Areas: A Grape of Wrath or the Fermentation of Wisdom*, 1979 ARIZ. ST. L.J. 385, 391.

⁶² *Disabled Citizens In the Community: Zoning Obstacles and Legal Remedies*, *supra* note 2, at 33.

gle-family use".⁶³ The success of this argument, however, is varied and depends primarily on the statutory language of the particular ordinance in question.⁶⁴

In *Oliver v. Zoning Commission*,⁶⁵ the Connecticut Supreme Court was confronted with a single-family dwelling ordinance which defined family in terms of single-housekeeping units.⁶⁶ The court determined that a group home composed of eight or nine retarded adults living together under the supervision of two houseparents constituted a single-family use under the ordinance. In reaching this decision, the court reasoned that the term "single-housekeeping unit" did not turn on the mutual relationships between the occupants of the dwelling, but rather on the use to which the structure was put.⁶⁷ Since the ordinance did not limit the family unit in terms of number or relationship, the group home met the single-housekeeping requirement.

In 1974, in *City of White Plains v. Ferraioli*,⁶⁸ the New York Court of Appeals ruled that a group home comprised of a married couple, their two children and ten foster children constituted a single-family within the meaning of an ordinance which defined family as:

One or more persons limited to the spouse, parents, grandparents, grandchildren, sons, daughters, brothers, or sisters of the owner or the tenant or of the owner's spouse or tenant's spouse living together as a single housekeeping unit with kitchen facilities.⁶⁹

⁶³ See, e.g., *Hessling v. City of Broomfield*, 563 P.2d 12 (Colo. 1977); *Oliver v. Zoning Com'n*, 31 Conn. Supp. 197, 326 A.2d 841 (1974); *Little Neck Community Ass'n v. Working Org. for Retarded Children*, 52 A.D.2d 90, 383 N.Y.S.2d 364 (1976); *Village of Freeport v. Ass'n for the Help of Retarded Children*, 94 Misc. 2d 1048, 406 N.Y.S.2d 221 (1977).

⁶⁴ See *Browndale Int'l Ltd. v. Board of Adjustment*, 60 Wisc. 2d 182, 208 N.W.2d 121 (1973); *Palm Beach Hosp., Inc., v. West Palm Beach*, 2 MENTAL DISABILITY L. REP. 18 (S.D. Fla. 1977).

⁶⁵ 31 Conn. Supp. 197, 326 A.2d 841 (1974).

⁶⁶ The zoning regulation defined family as: "One or more persons occupying the premises as a single housekeeping unit, as distinguished from a group occupying a boarding house, lodging house, club, fraternity, or hotel." 31 Conn. Supp. at 205, 326 A.2d at 845, (citing *Chester, Conn., Zoning Ordinance art. II*g).

⁶⁷ *Id.*

⁶⁸ 34 N.Y.2d 300, 313 N.E.2d 756, 357 N.Y.S.2d 449 (1974).

⁶⁹ *Id.* at 302, 313 N.E.2d at 758, 357 N.Y.S.2d at 451.

In reaching its decision, the court relied heavily on the fact that the group home was operated as a single-housekeeping unit that appeared to be "a relatively normal, stable, and permanent family unit . . . no less qualified to occupy the Ferraioli house than . . . any of the neighboring families."⁷⁰ The court distinguished the case from *Belle Terre*, stating that the group home is not a temporary living arrangement as was the situation in *Belle Terre*. The purpose of the group home is to "emulate the traditional family,"⁷¹ and to allow the members to remain and develop ties within the community. Group homes in single-family zones do not conflict with the character of the neighborhood; rather they are deliberately designed to conform with it.⁷² This reasoning is equally applicable to group homes for the mentally retarded. As the New York Supreme Court noted in the case of *Little Neck Community Associations v. Working Organizations for Retarded Citizens*.⁷³

We are not persuaded that the proposed group home will, in and of itself, alter the quality of life or the character of the neighborhood which a single-family residential zone is specifically designed to protect and enhance . . . It will provide retarded children with a stable environment in a setting in which they will have a real opportunity to develop to their full potential.⁷⁴

In *Incorporated Village of Freeport v. Association for the Help of Retarded Children*,⁷⁵ the Association had purchased a home to provide a community residence for eight mentally retarded women. The home was located in a residential district zoned for single-family dwellings only. The ordinance defined family as "one or more persons related by blood, marriage, or adoption, living and cooking . . . as a single housekeeping unit."⁷⁶ The New York Supreme Court upheld the location of the home, finding that "such a 'community residence' bears the generic character of a family unit as a relatively stable and permanent household and is consonant with the lifestyle intended for a fam-

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ 52 A.D.2d 90, 383 N.Y.S.2d 364 (1976).

⁷⁴ *Id.* at 94, 383 N.Y.S.2d at 367.

⁷⁵ 94 Misc. 2d 1048, 406 N.Y.S.2d 221 (1977).

⁷⁶ *Id.* at 1049, 406 N.Y.S.2d 222.

ily-oriented neighborhood, and thus conforms to the purpose of the village zoning ordinance."⁷⁷

While the above cases would indicate that an organization desiring to establish a group home for the mentally retarded would have little difficulty persuading a given court to recognize the home as a family within the definition of the ordinance, other courts have not been so easily persuaded. In 1977, a federal district court in Florida refused to permit a group home for the mentally retarded to operate with a "single-family use" area in West Palm Beach.⁷⁸ The group home housed ten retarded males, under the supervision of two sets of houseparents. The city zoning ordinance prohibited more than five unrelated persons from residing together in a single-family dwelling. The plaintiffs sued to enjoin the application of the zoning ordinance to the group home, arguing that the ordinance, on its face and as applied to the home, was violative of the equal protection clause of the Fourteenth Amendment.

The court rejected the plaintiff's argument, by relying on the *Belle Terre* standard and concluding that the ordinance was constitutional since it was rationally related to the legitimate state objective of developing a family-oriented atmosphere in various sections of a district. The court also ruled that the zoning ordinance was not imposed on the plaintiffs in an unconstitutional manner since it was not designed to discriminate against retarded persons living in a group home, but instead, was designed to exclude on the basis of size, groups of unrelated persons. Finally, the court ruled that the City Commission had not acted arbitrarily and in contravention of the equal protection clause by specifying the number of unrelated persons who could live together. Such discretion, the court noted, resides in the City Commission, and "any line drawn by a legislative body leaves some out that might well have been included."⁷⁹

C. *The Legislative Approach*

Although zoning ordinances which limit or forbid the devel-

⁷⁷ *Id.*

⁷⁸ *Palm Beach Hosp., Inc., v. West Palm Beach*, 2 Mental Disability L. Rep. 18 (S.D. Fla. 1977).

⁷⁹ *Id.*

opment of group homes in residential areas have been successfully contested through litigation, the uncertainty and the vast expense of time and money involved in case by case litigation have discouraged the development of community homes.⁸⁰ Furthermore, 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."⁸¹

As long as local government agencies retain the authority, through zoning, to admit or exclude community-based group homes, there will be little incentive to admit them. Rather, there will be a strong incentive to exclude them, because, under present conditions, if one community acts progressively and admits a group home, there is a strong possibility that it will become a magnet for a large number of such homes.⁸² This happens because developers have nowhere else to go to establish the much needed homes. The result is an overpopulation of group homes in one area so that the homes become the dominant feature in the neighborhood, undercutting the very notion of normalization, and leading to negative reactions on the part of other residents in the area.⁸³ Other local government agencies, once they perceive this type of result, will strengthen their resolve to exclude group homes and progress will halt.⁸⁴ Thus, if the concept of normalization and group homes is to succeed, it may require state legislation which is not subject to the veto of political subdivisions.⁸⁵ A state zoning statute, which supersedes a local zoning regulation, is paramount and controlling. When such an ordinance is enacted, local zoning regulations may not contravene it, and in the event of conflict between the two, the local regulation yields to that of the state.⁸⁶ Uniform state requirements would open up desirable neighborhoods to the development of group homes and eliminate problems of overconcentration in one area.⁸⁷

⁸⁰ Lippincott, "A Sanctuary for People": *Strategies for Overcoming Zoning Restrictions on Community Homes for Retarded Persons*, *supra* note 7, at 778.

⁸¹ ABA Project, *supra* note 6, at 795-96.

⁸² *Id.* at 796.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.* at 796-97.

⁸⁶ *Id.* at 797.

⁸⁷ *Id.*

The concept of state legislation limiting local zoning authority is not novel, and sixteen states have in fact already enacted such statutes.⁸⁸ Although not identical, each of these statutes have some common provisions. All identify the type of community home afforded protection, ranging from any type of residence in Rhode Island, to private or public group homes in Maryland. All specify the type of residents to be served by the home, with the most common being developmentally disabled persons.⁸⁹ All but one of the states specify the number of residents permitted within the home, ranging from a high of sixteen or more in Wisconsin, to a low of six or fewer in Rhode Island and Vermont. Most of the states require that the homes be licensed by the state and eight specify dispersal requirements to prevent overconcentration. Finally, all the states identify the zones where group homes will be permitted.⁹⁰

III. ZONING IN WEST VIRGINIA

In 1980, West Virginia became the seventeenth state to enact legislation limiting local discretion to exclude group homes.⁹¹ The bill provides that a group residential facility occupied by eight or fewer developmentally disabled persons⁹² and not more than three supervisors shall be permitted use in all zones or districts *except* those limited to single-family or duplex-family residences.⁹³ The bill further provides that no such facility, its owners or operators, shall be required to obtain a conditional use permit, special use permit, special exception or variance,⁹⁴ *unless* the facility is at-

⁸⁸ The states are: Arizona, California, Colorado, Maryland, Michigan, Minnesota, Montana, New Jersey, New Mexico, Ohio, Rhode Island, South Carolina, Tennessee, Vermont, Virginia, and Wisconsin. *Id.* at 800-801.

⁸⁹ Under the Federal definition of developmental disability found in 42 U.S.C. § 6001 (7) (1975), an individual who is mentally retarded would be considered developmentally disabled.

⁹⁰ ABA Project, *supra* note 6, at 797.

⁹¹ Committee Substitute For S.B. No. 425, effective June 2, 1980 (to be codified in W. Va. Code §§ 8-24-50b and 27-17-(1-4) [hereinafter referred to as Committee Substitute].

⁹² Although the West Virginia definition of "developmental disability," which will be codified in W. Va. Code § 27-17-1, is not identical to the Federal definition, it too includes the term *mental retardation*.

⁹³ Committee Substitute, *supra* note 91, at § S8-24-50b.

⁹⁴ The terms *conditional use permit*, *special use permit*, and *special exception* indicate that a land use is authorized in a zoning district only if specific require-

tempting to locate in an area zoned for a single-family or duplex-family use.⁹⁵ Exclusion of group residential facilities by private agreement is also prohibited.⁹⁶ As a means of protecting the health and safety of the residents of group homes, each facility must obtain a license from the director of health and comply with the state fire code and the regulations of the state fire commissioner.⁹⁷ Finally, the bill is designed to prevent overconcentration of group facilities in one area. This is accomplished by limiting to one, the number of such facilities that can locate in a municipal block. If the home is not located in a municipality, then it must be twelve-hundred feet from any other group facility.⁹⁸

While the bill is certainly a step in the right direction, it is only a beginning. Unlike the ABA's Model Statute,⁹⁹ the West Virginia bill does not declare group residential facilities to be a permitted use within single-family zones. There are some instances, where the purposes of normalization would not be served by locating a home in a single-family area,¹⁰⁰ however, these areas usually provide the ideal setting for achievement of the normalization goals. Since the West Virginia bill precludes the automatic location of group homes in single-family or duplex-family zones and hence severely restricts the normalization process of West Virginia's mentally retarded, West Virginia developers must either locate the home in a less than ideal area, or attempt, through litigation, to locate in single-family zones.¹⁰¹ However, in light of the criticism which the bill has received, it is doubtful that it would have passed the legislature in a form declaring group homes

ments or standards are met and if approval is given by the local zoning appeals board. *Variances* are usually granted only to relieve a particular hardship arising from application of a zoning ordinance. ABA Project, *supra* note 6, at 796.

⁹⁵ Committee Substitute, *supra* note 91, at § S8-24-50b.

⁹⁶ *Id.* at § S27-17-4.

⁹⁷ *Id.* at § S27-17-1.

⁹⁸ *Id.* at § S27-17-2.

⁹⁹ ABA Project, *supra* note 6, at 806-810.

¹⁰⁰ Developers of group homes must take in consideration such factors as: shopping facilities, transportation routes, educational facilities, etc., when choosing a proper location for a group home. In some instances, these considerations may indicate that single-family areas are not appropriate.

¹⁰¹ Although developers could, theoretically, obtain a conditional use permit, special use permit, special exception, or variance in order to establish a group home in a single-family area, litigation will probably be necessary in at least some instances to gain such admission.

to be a permitted use in all residential zones.¹⁰² Perhaps, after group homes are established and gain acceptance in the presently permitted areas, residents of single-family zones will be more amenable to the presence of group homes, and an amendment could be passed declaring group homes to be a permitted use in *all* residential areas, including single-family.

CONCLUSION

The mentally retarded have long been forgotten members of society. They have been shut off from the public and subjected to dehumanizing conditions. No longer can this treatment be allowed to continue. Those of the retarded for whom institutionalization is not necessary should and must be permitted to reside in community-based group homes which will afford them the opportunity to live their lives as fully as possible.

Unfortunately, not all of the so-called normal members of society are willing to accommodate the development of group homes. Many laud the concept, until an organization attempts to develop one in their neighborhood; then it presents a less enticing arrangement. Public opposition, however, must not be permitted to defeat the nation-wide establishment of group homes. When necessary, state legislators must lead the way by enacting state zoning ordinances which will limit the effect of local resistance and facilitate the concept of normalization for the mentally retarded.

Jane E. Reiner

¹⁰² In fact, the bill as originally submitted, declared group homes to be a permitted use in all residential districts. However, many communities expressed concern, and perhaps provided the impetus for the committee substitute. Reactions to the bill as finally passed, while more favorable than to the original bill, remain less than enthusiastic.