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## Exclusionary Zoning of Community Facilities

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## COMMENTS

### Exclusionary Zoning of Community Facilities

Eighteen months ago Jimmy entered Duncraig Manor as a severely disturbed and uncontrollable eight-year-old. His home was in nearby Fort Bragg, where he lived with his mother and second stepfather. Their parental supervision was inadequate and the child resorted to delinquent activities. His poor school performance was inconsistent with his I.Q. of 134. Emotionally he had no control and spontaneously flew into bursts of rage. Today, after hours of intensive counseling and hard work by the members of Jimmy's Duncraig "family," he has reached an emotional maturity equivalent to his age, has improved his school performance, and has reached an adequate level of socialization skills. He has a better self-image and now can cope more adequately with situations at home and at school.

In 1974, the creation of Duncraig Manor as a home for emotionally disturbed children in a residential neighborhood was almost prohibited by the town of Southern Pines.<sup>1</sup> A two year legal battle ensued, with Duncraig Manor and its children emerging victorious. The problem is not unique. The creation of group home facilities is rapidly increasing across the nation, as is opposition<sup>2</sup> in the form of zoning ordinances, restrictive covenants,<sup>3</sup> and other barriers. This article will discuss the barriers used to exclude community facilities from residential areas and the constitutional issues that arise. Special emphasis is placed on the history of community facility exclusion in North Carolina.

Historically, handicapped persons have been institutionalized in inhumane facilities. Within the past ten years efforts for "normalization" and "deinstitutionalization" have been launched nationally to compen-

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1. *Town of Southern Pines v. Mohr*, 30 N.C. App. 342, 226 S.E.2d 865 (1976). The town sought to enjoin the operation of the group home because it was not a permitted use under the applicable zoning ordinance. *Id.* at 343, 226 S.E.2d at 865. See text accompanying notes 32-33 *infra*.

2. PRESIDENT'S COMM. ON EMPLOYMENT OF THE HANDICAPPED, SPECIAL REPORT (Letter to Harold Russell from Bernard Posner Apr. 1979) [hereinafter cited as SPECIAL REPORT]. A home for mentally retarded adults located in Knightdale, North Carolina was recently destroyed by fire. The home had been the object of much opposition and the State Bureau of Investigation suspects arson. *Raleigh News & Observer*, Aug. 29, 1980, at 14, col. 1.

3. MENTAL HEALTH LAW PROJECT, U.S. DEPT. OF HEALTH, EDUCATION, & WELFARE, COMBATTING EXCLUSIONARY ZONING: THE RIGHT OF HANDICAPPED PEOPLE TO LIVE IN THE COMMUNITY 4 (1979), [hereinafter cited as MENTAL HEALTH LAW PROJECT].

sate for years of neglect.<sup>4</sup> The concept of group homes falls within these principles and makes available to the mentally retarded patterns and conditions of everyday life which are as close as possible to the norms and patterns of the mainstream of society.<sup>5</sup> Advocates of these principles believe that handicapped persons should lead as normal a life as possible and that group homes aid them in doing so.<sup>6</sup> Many states include in their definition of handicapped citizens those persons with physical, mental, and visual disabilities.<sup>7</sup> Federal law is more specific and defines a developmental disability as one attributed to mental retardation, cerebral palsy, epilepsy, autism, or dyslexia which originated before eighteen years of age, which has continued or can be expected to continue indefinitely, and which constitutes a substantial handicap to such an individual.<sup>8</sup> A "group home" or "family care home," may be defined as "a home with supervisory personnel that provides room and board, personal care habilitation services and supervision" for unrelated handicapped persons in a family environment.<sup>9</sup> The number of residents usually range from two to nine, with

4. PRESIDENT'S COMMITTEE ON MENTAL RETARDATION, *THE MENTALLY RETARDED CITIZEN AND THE LAW* 308 (M. Kindred et al. eds. 1976). California was the first state to implement the normalization principle in 1969 by enacting the Lanterman Mental Retardation Services Act. The act created statewide regional centers which evaluated the mentally retarded and then placed them in an environment corresponding to their degree of handicap. *Id.* at 308-09. For a more detailed treatment of this subject see generally H. TURNBULL, *Group Homes and Zoning*, in *THE LAW AND THE MENTALLY HANDICAPPED IN NORTH CAROLINA* ch. 16, 1 (2d ed. 1980).

5. H. TURNBULL, *supra* note 4, citing Nirje, *The Normalization Principle and its Human Management Implications*, in *CHANGING PATTERNS IN RESIDENTIAL SERVICES FOR THE MENTALLY RETARDED* 181 (R. Kugel & W. Wolfensberger eds. 1969).

6. PRESIDENT'S COMMITTEE ON MENTAL RETARDATION, *supra* note 4, at 308.

7. See, e.g., N.C. GEN. STAT. § 168-1 (1976): "The definition of 'handicapped persons' shall include those individuals with physical, mental and visual disabilities."

8. 42 U.S.C. § 6001(7) (1976) provides:

The term 'development disability' 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 of a person found to be closely related to mental retardation because such condition results in similar impairment of general intellectual functioning or adaptive behavior to that of mentally retarded persons or requires treatment and services similar to those for such persons;

or

(iii) is attributable to dyslexia resulting from a disability described in clause (i) or (ii) of this subparagraph;

(B) originates before such person attains age eighteen;

(C) has continued or can be expected to continue indefinitely; and

(D) constitutes a substantial handicap to such person's ability to function normally in society.

On April 4, 1979, North Carolina Senate Bill 626 proposed to change North Carolina's definition of "handicapped person" to mean "a person with a temporary or permanent physical, emotional, or mental disability including but not limited to mental retardation, cerebral palsy, epilepsy, autism, hearing and sight impairments, emotional disturbances and orthopedic impairments." S. 626, 1979 North Carolina General Assembly (Apr. 4, 1979). The bill was sent to the Senate Judiciary Committee I where it received an unfavorable report.

9. S. 626, 1979 N.C. General Assembly (Apr. 4, 1979).

the maximum number being sixteen.<sup>10</sup> Facilities for such homes have traditionally been located "in high population . . . low income neighborhoods in which large houses can be converted inexpensively to community residences."<sup>11</sup>

## I. ZONING

Zoning ordinances have been the most common barrier used to exclude these facilities from residential areas. "Zoning" can be defined as the systematic regulation and control of the use and development of real property<sup>12</sup> and has long been justified as an aspect of the police power.<sup>13</sup> In 1926, the Supreme Court, in *Village of Euclid v. Ambler Realty Co.*,<sup>14</sup> extended the zoning power of municipalities to allow them to regulate municipal development. *Euclid* approves the practice of designating separate districts for industries and residences, and such zoning restrictions are permitted unless they are "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare."<sup>15</sup> Two years later in *Nectow v. Cambridge*,<sup>16</sup> however, the Court upheld a lower court decision invalidating a city zoning ordinance which prevented the use of the plaintiff's land for business purposes. The ordinance cut off the property from the land around it by requiring that it be used for residential purposes, even though the surrounding land was zoned for industrial purposes. The Court stated that the "health, safety, convenience and general welfare of the inhabitants of the part of the city affected [would] not be promoted by the disposition made by the ordinance. . . ."<sup>17</sup> Since 1928, the federal courts have basically left the development of judicial interpretation and restriction of zoning laws to the states.<sup>18</sup> Only recently, have federal courts begun to decide exclusionary zoning cases and to apply federal constitutional standards.<sup>19</sup>

10. *State Zoning Laws Regulating Group Living Facilities in the Community*, AMICUS 38-39 (Mar.-Apr. 1978).

11. Kressel, *The Community Residence Movement: Land Use Conflicts and Planning Imperatives*, 5 N.Y.U. REV. L. SOC. CHANGE 137, at 139 (1975).

12. H. TURNBULL, *supra* note 4, ch. 16, at 14 n.13.

13. MENTAL HEALTH LAW PROJECT, *supra* note 3, at 1.

14. 272 U.S. 365, 367 (1926) (owner of unimproved land within corporate limits of village brought suit on grounds that the building restrictions imposed reduced the normal value of his property and deprived "him of liberty and property without due process of law").

15. *Id.* at 395.

16. 277 U.S. 183 (1928).

17. *Id.* at 188.

18. MENTAL HEALTH LAW PROJECT, *supra* note 3, at 1.

19. *Id.*

### A. *Family Dwellings*

There are several types of zoning ordinances that exclude group homes. Some "explicitly exclude such homes from single-family areas,"<sup>20</sup> while others define a family as a "number of persons related by blood, marriage or adoption living together" and usually limit "the number of unrelated persons who can live in a single dwelling."<sup>21</sup> "A third type of ordinance allows group homes in certain districts only if they first comply with specified conditions and obtain special permits" from the local zoning board.<sup>22</sup>

Most single-family residential zones are delineated by ordinances that specifically define the term "family" in various ways. Three general restrictive types of definitions are common: "the biological family; the biological family plus a small number of unrelated members; and the single housekeeping unit," which is basically a combination of the first two.<sup>23</sup> Two excellent examples of such restrictive ordinances were discussed in *City of Des Plaines v. Trottner*<sup>24</sup> and *Palo Alto Tenants Union v. Morgan*.<sup>25</sup> In *Trottner*, the Des Plaines city ordinance defined family as "one or more persons each related to the other by blood (or adoption or marriage), together with such relatives' respective spouses, who are living together in a single dwelling and maintaining a common household."<sup>26</sup> *Palo Alto* dealt with a housekeeping unit and defined family as "one person living alone, or two or more persons related by blood, marriage, or legal adoption, or a group not exceeding four persons living as a single housekeeping unit."<sup>27</sup>

The constitutionality of these types of ordinances was addressed in *Village of Belle Terre v. Borass*,<sup>28</sup> a case involving a small village on Long Island with a land area of less than one square mile. The Court noted:

It [the village] has restricted land use to one-family dwellings excluding lodging houses, boarding houses, fraternity houses, or multiple-dwelling houses. The word "family" as used in the ordinance means . . . [o]ne or more persons related by blood, adoption, or marriage, living and cooking together 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

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20. *Id.*

21. *Id.*

22. *Id.*

23. H. TURNBULL, *supra* note 4, ch. 16, at 5.

24. 34 Ill. 2d 432, 216 N.E.2d 116 (1966).

25. 321 F. Supp. 908 (N.D. Cal. 1970).

26. 34 Ill. 2d 432, 433, 216 N.E.2d 116, 117 (1966) (*quoting* Des Plaines ordinance).

27. 321 F. Supp. 908, 909 (N.D. Cal. 1970) (*quoting* from Palo Alto, Cal. MUN. CODE § 18.04.210).

28. 416 U.S. 1 (1974).

by blood, adoption or marriage. . . .<sup>29</sup>

The Court re-examined the decision in *Euclid* and noted that the zoning ordinance had been sustained under the state's police power:

The main thrust of the case in the mind of the Court was in the exclusion of industries and apartments, and as respects that it commented on the desire to keep residential areas free of "disturbing noises"; "increased traffic"; the hazard of "moving and parked automobiles"; the "depriving children of the privilege of quiet and open spaces for play, enjoyed by those in more favored localities". The ordinance was sanctioned because the validity of the legislative classification was "fairly debatable" and therefore could not be said to be wholly arbitrary.<sup>30</sup>

The Court concluded that in *Belle Terre* it was dealing with "economic and social legislation," and thus the law should be sustained as long as it was neither unreasonable nor arbitrary, and bore "a rational relationship to a [permissible] state objective."<sup>31</sup> The Court recognized the permissible objective sought by the zoning ordinance:

A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs. This goal is a permissible one. . . . 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, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.<sup>32</sup>

The Court looked for other constitutional violations and found no traces upon which to base an equal protection analysis. The ordinance was not based on race nor aimed at transients; nor did it involve any fundamental right guaranteed by the Constitution.<sup>33</sup> Justice Marshall, however, dissented on equal protection grounds, stressing the need for the strict scrutiny test instead of the majority's rational basis test. He stated:

Zoning officials properly concern themselves with the uses of land—with, for example, the number and kind of dwellings to be constructed in a certain neighborhood or the number of persons who can reside in those dwellings. But zoning authorities cannot validly consider who those persons are, what they believe, or how they choose to live, whether they are Negro or white, Catholic or Jew, Republican or Democrat, married or unmarried.<sup>34</sup>

Many advocates of group homes feared that the consequences of

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29. *Id.* at 2.

30. *Id.* at 5.

31. *Id.* at 8.

32. *Id.* at 9.

33. *Id.* at 6-8.

34. *Id.* at 14-15.

*Belle Terre* would seriously impair the group home movement.<sup>35</sup> Although some courts did rely upon the decision in group home cases, a number of state courts have followed the lead of a New York case and have found ways to distinguish the group home situation from that in *Belle Terre*. In *City of White Plains v. Ferraioli*,<sup>36</sup> the New York Court of Appeals sustained the right of a married couple caring for ten foster children to locate in a district which the town had sought to limit to families of related individuals. The zoning ordinance 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."<sup>37</sup> The court distinguished *Belle Terre* by indicating that *Belle Terre* concerned a temporary living arrangement, unlike a group home, which operates as a permanent single housekeeping unit. The court held that by all outward appearances the group home constituted a traditional family. The New York court emphasized:

Zoning is intended to control types of housing and living and not the genetic or intimate internal family relations of human beings. . . .

. . . .

So long as the group home bears the generic character of a family unit as a relatively permanent household, and is not a framework for transients or transient living, it conforms to the purpose of the ordinance.<sup>38</sup>

Discussing state policy in relation to municipal zoning, the court stated in dicta that in some circumstances courts have found local zoning ordinances void as contrary to state policy,<sup>39</sup> but that the care of neglected children is a permanent state concern.<sup>40</sup> The court did not list these other circumstances, however, and left the issue open.<sup>41</sup> A number of courts have followed the *Ferraioli* rationale and defined group homes as "functional families" and thus within the narrowly drawn zoning ordinances.<sup>42</sup>

35. H. TURNBULL, *supra* note 4, ch. 16, at 5.

36. 34 N.Y.2d 300, 313 N.E.2d 756, 357 N.Y.S.2d 449 (1974).

37. *Id.* at 304, 313 N.E.2d at 758, 357 N.Y.S.2d at 451.

38. *Id.* at 306-07, 313 N.E.2d at 758, 357 N.Y.S.2d at 452-53.

39. *Id.* at 306, 313 N.E.2d at 759, 357 N.Y.S.2d at 453. (The court referred to the N.Y. Soc. SERV. LAW § 374-c (McKinney Supp. 1979-1980)).

40. *Id.*

41. *Id.*

42. *Hessling v. City of Broomfield*, 193 Colo. 124, 563 P.2d 12 (1977); *Group House v. Board of Zoning & Appeals*, 45 N.Y.2d 266, 380 N.E.2d 207, 408 N.Y.S.2d 377 (1978); *Little Neck Community Ass'n v. Working Org. for Retarded Citizens*, 52 A.D.2d 90, 383 N.Y.S.2d 364 (1976); *Village of Freeport v. Association for the Help of Retarded Children*, 60 A.D.2d 644, 400 N.Y.S.2d 724 (1977).

## B. *Special Use Permits*

Most zoning ordinances list uses that are allowed in each area. They also provide for the issuance of special permission for other uses on the showing that certain conditions have been met. An "exception" or "condition" use permit is a grant of administrative permission for uses compatible with the prescribed zone, but which may be subject to regulation for the health and welfare of the residents.<sup>43</sup> The purpose of the permit is to allow the municipal government some measure of control over the extent of uses, which although desirable to a certain extent, could be detrimental to the community.<sup>44</sup> The conditional use permit is also referred to as the "special permit," "special exception," "land-use permit," and "unclassified use permit." The basic criteria for granting or denying a special permit are generally based on either a general welfare standard or a nuisance definition.<sup>45</sup> Zoning administrative bodies generally have been allowed a great deal of discretion because of the usual generality and vagueness of permit criteria.<sup>46</sup> Decisions are made on a case-by-case basis.<sup>47</sup>

The procedure for obtaining a permit can be long and cumbersome. Generally, an application is made to either a planning administrator or a planning commission.<sup>48</sup> Residents within a certain radius of the proposed site are then given an opportunity to appear before the commission and present objections in an open public hearing.<sup>49</sup> Conditional permit applications are often denied due to the power of protesting residents. They often have misconceived fears that the handicapped or mentally retarded possess a high rate of criminality, that they are oversexed, or that they are carriers of disease. Though these contentions are unfounded scientifically and sociologically, administrative bodies are still often influenced by them and deny permit applications on the ground of the best interest of the general welfare. Appeals may be made to the city council or to the board of zoning appeals. In California, the courts will not interfere with the denial of a permit unless there is clear evidence of fraud, illegality, or abuse of discretion.<sup>50</sup>

One danger remaining after a permit is obtained is that the facility may still be sued by the community. One such case is *Shuman v. Board of Alderman*<sup>51</sup> in which the plaintiffs challenged the issuance of the

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43. PRESIDENT'S COMMITTEE ON MENTAL RETARDATION, *supra* note 4, at 314.

44. *Van Sicklen v. Browne*, 15 Cal. App. 3d 122, 126, 92 Cal. Rptr. 768, 788 (1971).

45. PRESIDENT'S COMMITTEE ON MENTAL RETARDATION, *supra* note 4, at 315.

46. *Id.*

47. H. TURNBULL, *supra* note 4, ch. 16, at 6.

48. PRESIDENT'S COMMITTEE ON MENTAL RETARDATION, *supra* note 4, at 315.

49. *Id.*

50. *Id.*, citing *Gong v. City of Fremont*, 250 Cal. App. 2d 568, 575, 58 Cal. Rptr. 664, 670 (1967).

51. 361 Mass. 758, 282 N.E.2d 653 (1972).



special permit to use a ten-bedroom single-family residence as a group home for high school students alienated from their parents. The permit had been granted subject to a number of conditions pertaining to the number and sex of the residents. The court rejected the plaintiff's argument that the house would destroy the residential character of the neighborhood and upheld the issuance of the special use permit.

## II. NUISANCE

In addition to zoning restrictions, nuisance litigation is a form of exclusion which neighbors often use in attempting to enjoin the operation of a facility. There are few cases where a nuisance claim has been raised against a group home. However, the few jurisdictions which have addressed the nuisance claim have balanced the competing interests of the safety of the community and the welfare of the individuals in need of community treatment facilities. Two cases in this area have dealt with a half-way house and a drug clinic. In *Nicholson v. Connecticut Halfway House, Inc.*,<sup>52</sup> the Connecticut Supreme Court considered a nuisance claim filed by local property owners in an attempt to enjoin the use of a proposed half-way house for fifteen male ex-convicts. The court denied relief, finding the neighbors' fears speculative and intangible. The court held: "[t]he mere depreciation of land values, caused . . . by . . . apprehensions . . . cannot sustain an injunction sought on the ground of nuisance."<sup>53</sup> Another example of the balancing the competing interests is found in *People v. HST Meth, Inc.*,<sup>54</sup> in which the state of New York attempted to close down a methadone maintenance clinic located in a middle- and upper-income residential area. The clinic's patient load of 500 exceeded the maximum number recommended by 200. The court noted that the neighborhood had been virtually terrorized by the patients, but chose not to enjoin the entire operation but "only those activities which . . . make it a nuisance."<sup>55</sup> The court recommended that the clinic reduce its case load and requested greater supervision of its patients.

When balancing the competing interests in a situation involving a group home, several arguments should be considered. Residents opposing group homes in their neighborhood often have unfounded fears. The most prominent argument perpetuates the belief that group homes decrease surrounding property values. Several studies in this area show that this is untrue. In Washington, a study of state group homes showed that the property values actually rose because of the superior

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52. 153 Conn. 507, 218 A.2d 383 (1966).

53. *Id.* at 512, 218 A.2d at 386.

54. 74 Misc. 2d 920, 346 N.Y.S.2d 146 (1973), *aff'd*, 43 A.D.2d 932, 352 N.Y.S.2d 487 (1974).

55. *Id.* at 922, 346 N.Y.S.2d at 149.

care given to the group homes.<sup>56</sup> The Green Bay, Wisconsin Planning Commission carried out a similar study and found no increase in the rate at which neighboring residences within a three-block area were sold after a group home had been located in the area.<sup>57</sup> Another argument is that the creation of group homes will increase criminal activity. A two-year follow-up of 105 group homes with nearly 2,000 developmentally disabled residents showed that fewer than one percent had ever run afoul of the law.<sup>58</sup> Many groups also believe that group homes create upheavals in neighborhood lifestyles. Several California studies disprove this theory. The California Department of Planning found that ninety-three per cent of the neighbors of foster homes for elderly people reported no traffic problems; eighty per cent, no restrictions on children's play; and seventy-five per cent, no unusual activity in the neighborhood.<sup>59</sup> The San Francisco Planning Department disclosed that there were no noise or traffic problems anywhere near foster homes, while a Fresno, California, study of twenty community homes for the mentally retarded showed that ninety-six per cent of the area's residents had no difficulties at all with their retarded neighbors.<sup>60</sup> Even though these residents' arguments against group homes are unsubstantiated, courts and city planning boards are often greatly swayed by public opinion and rule in their favor.

### III. RESTRICTIVE COVENANTS

A private means of excluding group homes from residential areas is the inclusion in deeds or wills of provisions or covenants that restrict the land to a particular use. Restrictive covenants vary greatly in form, and terms within a covenant usually are more narrowly interpreted than in a zoning ordinance, because the individual generally has more rights with regard to his own property than the state has with regard to the property of its citizens.

In *Berger v. State*,<sup>61</sup> the New Jersey Supreme Court dealt with the problem of a restrictive covenant excluding a group home in a residential neighborhood. In 1973, Mr. and Mrs. William Graessle conveyed as a gift to the New Jersey State Department of Institutions and Agencies a twelve-room ocean-front house and surrounding property to be used for the care of disadvantaged school children under the age of nine. The property would revert to the grantors if not used as specified. Four couples owning property either adjacent or in close proximity in-

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56. SPECIAL REPORT, *supra* note 2, at 2.

57. *Id.*

58. *Id.*

59. *Id.* at 2-3.

60. *Id.* at 3.

61. 71 N.J. 206, 364 A.2d 993 (1976).

stituted the action to enjoin the use of the proposed facility. They based their claim on the contention that the intended use of the property would violate the negative reciprocal covenants contained in deeds of record establishing a neighborhood scheme of single-family residences. They also claimed that such use would violate the town zoning ordinance restricting the area to single-family dwellings. The restrictive covenant involved derived from a land company which originally owned the premises. At the time of the conveyance, the company included restrictions in each deed limiting the permissible structures on the premises to dwelling houses with private garages and prohibiting any manufacturing and any dangerous, noxious or offensive use. The court examined the covenant closely and concluded that three types of restrictions were imposed: (1) it prohibited the use of the property for certain non-residential purposes; (2) except for a private garage, no building could be erected that was not a dwelling house; (3) finally, the number of buildings (dwelling houses) that could be built on each lot was limited. The court further stated that the covenant did not restrict the usage of the buildings to one-family residences and that multi-family occupancy would not violate the covenant.<sup>62</sup> In addressing the "single family" issue, the court stated that there was nothing to suggest that the relationship of the persons within a dwelling was of any concern to the common grantor, and it could be concluded that the "predominant interest was to preserve a family style of living. . . ."<sup>63</sup> The court ruled that the home need not cease operation. The New Jersey court also held that the state was immune from the zoning ordinance and that the zoning ordinance violated due process by being unreasonably restrictive in delineating permissible occupants.

#### IV. SOVEREIGN IMMUNITY

The last issue in *Berger*, state government interests versus local government interests, provides discussion for an argument often used to allow group homes in residential areas. When group homes are either owned by the state or operated under contract with the state government, courts have held that the homes are immune from the application of local ordinances.<sup>64</sup> The doctrine simply means that the state, as sovereign, is superior to the control of local government. It can take the form of either sovereign immunity from municipal zoning regulation or the form of the state's eminent domain power to condemn land for its own use independently of zoning regulation. The courts usually

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62. *Id.* at 210, 364 A.2d at 997.

63. *Id.* at 211, 364 A.2d at 998.

64. *Brownfield v. State*, No. 77-12-2995 (Ohio Ct. P. Summit City, June 12, 1978) (as cited in MENTAL HEALTH LAW PROJECT, *supra* note 3, at 23).

consider two important factors. First, they consider the intent of the legislature to override local control. Second, they examine the importance of the state interest involved. Many courts analyze whether the land is for a proprietary or a governmental function. If the function is one which is historically performed by government, then immunity applies. The group homes must align themselves in some way with the sovereign—through state funding, regulation, control, or even use of state owned vehicles<sup>65</sup>—in order to be considered the state's agent. North Carolina is the exception in this case. North Carolina General Statutes section 160A-392<sup>66</sup> and North Carolina General Statutes section 153A-347,<sup>67</sup> which authorize city and county zoning, specify that the state and its agencies are subject to local zoning ordinances and cannot claim sovereign immunity.

## V. CONSTITUTIONAL ISSUES

### A. *Equal Protection*

The exclusion of group homes in residential areas raises constitutional questions. The issues involved are usually equal protection, due process, the right to travel, and the right to privacy. "Traditionally, zoning classifications have been regarded as economic in nature" and have fallen within the more lax standard of due process.<sup>68</sup> In *Village of Euclid v. Ambler Realty Co.*,<sup>69</sup> the Supreme Court declared zoning to be immune from constitutional attack unless it was proved that it was "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare."<sup>70</sup> Because of the social implications created by exclusion, many legal scholars are requesting that a more stringent equal protection test be applied. If the strict scrutiny test for equal protection is applied, it must be shown that either a fundamental right or a suspect classification is involved. The Court has recognized three criteria in determining the existence of a suspect classification: (1) "immutable characteristic determined solely by the incident of birth,"<sup>71</sup> (2) "history of purposeful unequal treat-

65. *Town of Southern Pines v. Mohr*, 30 N.C. App. 342, 226 S.E.2d 865 (1976).

66. N.C. GEN. STAT. §§ 160A-381 to -392 (1976) specifically deals with the granting of zoning powers to cities and towns. Section 160A-392 states: "All of the provisions of this Part are hereby made applicable to the erection, construction, and use of buildings by the State of North Carolina and its political subdivisions."

67. N.C. GEN. STAT. § 153A-347 (1978) subjects State buildings and those of its political subdivisions to the county zoning powers.

68. Note, *Excluding the Commune from Suburbia: The Use of Zoning for Social Control*, 23 HASTINGS L.J. 1459, 1474 (1972).

69. 272 U.S. 365 (1926).

70. *Id.* at 395.

71. *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973).

ment" and disabilities,<sup>72</sup> and (3) "position of political powerlessness."<sup>73</sup> When these criteria are applied to individuals residing in group homes, the outcome looks favorable. Most developmentally disabled persons possess a characteristic immutable from birth and also face unequal treatment due to their positions of powerlessness. Arguably, there is the possibility that a classification which seeks to exclude developmentally disabled persons from community facilities could be suspect under federal equal protection standards.

Problems arise when dealing with a classification concerning the mentally ill. Most specialists consider mental illness to be transient—a condition which will disappear after it "serves its purpose."<sup>74</sup> Thus, the characteristic is not immutable and not subject to strict scrutiny. It is understandable that a community would have a compelling interest in keeping certain kinds of people off its streets, but there would be no compelling interest in excluding developmentally disabled persons who pose no threat to themselves or society.

Since the Supreme Court's decision in *Arlington Heights v. Metropolitan Housing Development Corp. (MHDC)*,<sup>75</sup> it is necessary to prove actual intent to discriminate. The case dealt with the town's denial of a rezoning request allegedly based on racial discrimination and thus violating the fourteenth amendment of the Constitution. *MHDC* had applied for a change in the zoning classification of a fifteen-acre parcel from single-family to multiple-family so as to allow for the development of townhouse units for low and moderate income tenants. The plaintiffs alleged that denial of zoning approval was racially discriminatory and violated the fourteenth amendment.<sup>76</sup> The Court held that "[p]roof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause."<sup>77</sup> The Court suggested six subjects of inquiry to prove discriminatory intent: (1) the sequence of events leading up to the challenged decision,<sup>78</sup> (2) departures from normal procedure,<sup>79</sup> (3) discriminatory comments by public officials,<sup>80</sup> (4) "[t]he historical background of the decision,"<sup>81</sup> (5) substantive departures,<sup>82</sup> and (6) the legislative or administrative history.<sup>83</sup> In light of

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72. *San Antonio Ind. School Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973).

73. *Id.*

74. 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, 935 (1976).

75. 429 U.S. 252 (1976).

76. *Id.* at 254.

77. *Id.* at 265.

78. *Id.* at 267.

79. *Id.*

80. *Id.* at 268.

81. *Id.* at 267.

82. *Id.*

this decision, to make a successful equal protection argument, one must prove the actual intent to discriminate on the basis of handicap.

### B. *Due Process*

Exclusion ordinances may also be challenged on due process grounds. In *Moore v. City of East Cleveland*,<sup>84</sup> the Supreme Court considered whether East Cleveland's housing ordinance, recognizing as a "family" only a few categories of related individuals, violated the due process clause of the fourteenth amendment. The ordinance defined family as "a number of individuals related to the nominal head of the household or to the spouse of the nominal head of the household living as a single housekeeping unit in a single dwelling unit. . . ."<sup>85</sup> The ordinance set up further limitations. Mrs. Moore's household consisted of herself, her son, and two grandsons (first cousins).<sup>86</sup> She violated that portion of the ordinance which provided that "a family may include not more than one dependent married or unmarried child of the nominal head of the household or of the spouse of the nominal head of the household and the spouse and dependent children of such dependent child."<sup>87</sup> The city argued that *Belle Terre* required them to sustain the ordinance.<sup>88</sup> The Court, however, found that the ordinance's restrictions had but a tenuous relation to the city's stated objectives of preventing overcrowding, minimizing traffic and parking congestion, and avoiding undue financial burden on the city's school system.<sup>89</sup> The Court distinguished the East Cleveland ordinance from the one in *Belle Terre*: the East Cleveland ordinance not only affected unrelated individuals, but also regulated "the occupancy of its housing by slicing deeply into the family itself."<sup>90</sup> The Court held that East Cleveland's ordinance violated the due process clause of the Constitution by "standardizing its children—and its adults—by forcing all to live in certain narrowly defined family patterns."<sup>91</sup>

### C. *Right to Travel*

The right to travel provides another constitutional challenge. The right to travel is a fundamental right guaranteed by the Constitution.<sup>92</sup>

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83. *Id.* at 268.

84. 431 U.S. 494 (1977).

85. *Id.* at 496 n.2.

86. *Id.* at 496.

87. *Id.* at 496 n.2.

88. *Id.* at 498.

89. *Id.* at 499-500.

90. *Id.* at 498.

91. *Id.* at 506.

92. *Dunn v. Blumstein*, 405 U.S. 330, 338 (1972); *Shapiro v. Thompson*, 394 U.S. 618, 638 (1969); *Kent v. Dulles*, 357 U.S. 116, 125 (1958).

Supreme Court cases involving this right have traditionally "involved regulations which operated to withhold a benefit from persons who had recently moved from one place to another, while conferring the benefit on long-time residents."<sup>93</sup> It can be argued that exclusion on the basis of handicap or disability "deprives an individual of the right to live in the community of their choice—a right which should be encompassed by the constitutional right to travel."<sup>94</sup>

In order for group homes to be included within the right to travel, the traditional viewpoint<sup>95</sup> would have to be expanded in two respects. First, a right of intrastate travel would need to be established because most residents of rehabilitation facilities travel from a state institution to a community facility within the same state. Second, a right not to be excluded from rehabilitation facilities must be incorporated within the scope of the right to travel. The former expansion is consistent with existing notions of due process, while the latter is questionable and may be difficult to achieve.

The right to intrastate travel has never been specifically ruled on by the United States Supreme Court, but it has been implied in dicta.<sup>96</sup> The Second Circuit, in *King v. New Rochelle Municipal Housing Authority*,<sup>97</sup> declared a right to intrastate travel: "It would be meaningless to describe the right to travel between states as a fundamental precept of personal liberty and not to acknowledge a correlative constitutional right to travel within a state."<sup>98</sup> Traditionally, five sources of the right to travel have been suggested: the commerce clause,<sup>99</sup> article IV, section 2 privileges and immunities,<sup>100</sup> fourteenth amendment privileges and immunities,<sup>101</sup> national citizenship,<sup>102</sup> and fifth amendment due process.<sup>103</sup> In identifying the source of intrastate travel it would be futile to turn to the commerce clause, privilege and immunities clauses, or national citizenship, because these clauses are concerned mainly with national rights and interstate movement. If, however, the right to travel were based on due process fundamental rights embodied in the fifth and fourteenth amendments, the rationale for interstate travel would apply with equal force to intrastate travel.<sup>104</sup>

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93. Comment, *supra* note 74, at 938-39.

94. *Id.*

95. *Id.* The traditional viewpoint is that the right to travel allows persons to move from one place to another and not withhold or deprive them of rights or benefits conferred on residents.

96. *Kent v. Dulles*, 357 U.S. at 126.

97. 442 F.2d 646 (2d Cir. 1971).

98. *Id.* at 648.

99. U.S. CONST. art. I § 8, cl.3.

100. *Id.* at art. IV, § 2, cl.1.

101. U.S. CONST. amend. XIV, § 1, cl.2.

102. *Id.* at cl.1.

103. U.S. CONST. amend. V.

104. Comment, *supra* note 74, at 940.

The next issue to be dealt with is the scope of the intrastate travel right. The right to travel encompasses protection from interference while in transit as well as disadvantages imposed on newcomers to an area.<sup>105</sup> A Rhode Island federal district court interpreted the right to include "migration with the intent to settle and abide."<sup>106</sup> "A right to settle and abide would imply that if a municipality prohibited a class of citizens from moving within its boundaries and living there, it would infringe on the right to travel."<sup>107</sup>

#### D. *Right to Privacy*

The right to privacy is also a basis for a constitutional challenge. Privacy has been deemed by the Supreme Court to be a fundamental right.<sup>108</sup> A case involving both the right to privacy and the right to travel is *Stoner v. Miller*.<sup>109</sup> In *Stoner*, the plaintiffs questioned the constitutionality of a hotel and boarding house ordinance issued by the City of Long Beach, New York. The challenged sections of the ordinance relate to the registration of the mentally ill:

Those patients requiring continuous medical or psychiatric services shall not be registered; that such services shall not be provided by the proprietor; that in the event such services are required, they shall be purchased by the resident; that an interview with the prospective residents is required to determine if the facility can meet their needs; that certain personal records shall be maintained for any person registered and remaining in excess of fifteen days.<sup>110</sup>

The Court declared the ordinance an unconstitutional restriction on a citizen's right to travel.<sup>111</sup> The Court further held that the ordinance invaded one's right to privacy by requiring that hotel staffs maintain records of residents who intend to remain registered in excess of fifteen days.<sup>112</sup>

### VI. NORTH CAROLINA

In North Carolina many communities have attempted to reject group homes—mainly through zoning ordinances,<sup>113</sup> special use permits,<sup>114</sup>

105. *Id.* n. 128.

106. *Cole v. Housing Authority*, 435 F.2d 807, 811 (1st Cir. 1970).

107. Comment, *supra* note 74, at 941.

108. *Griswold v. Connecticut*, 381 U.S. 479, 483, 485 (1965).

109. 377 F. Supp. 177 (E.D.N.Y. 1974).

110. *Id.* at 178.

111. *Id.* at 180.

112. *Id.*

113. *Town of Southern Pines v. Mohr*, 30 N.C. App. 342, 226 S.E.2d 865 (1976) (Southern Pines); *Osborne v. Boyce*, No. 78CVS75 (Super. Ct. Davie Co., Sept. 14, 1978) (as cited in H. TURNBULL, *supra* note 4, ch. 16, at 7 (Davie County)); *Timmerman v. Holy Trinity Church*, No. 78CVS1657 (Super. Ct. Gaston Co., Oct. 12, 1978) (as cited in H. TURNBULL, *supra* note 4, ch. 16,



or restrictive covenants.<sup>115</sup> Before considering North Carolina case law it is necessary to examine the statutes of North Carolina concerning group homes. North Carolina General Statutes section 168 concerns the rights of handicapped persons in the state.<sup>116</sup> The guaranteed right to housing in section 168-9 illustrates the state's commitment to avoid institutional care.<sup>117</sup> The statute states that each handicapped citizen shall have the right to reside in residential communities and no one, including the State or its subdivisions, shall have the authority to prevent any handicapped citizen from living in these areas.<sup>118</sup> This section, however, appears to conflict with North Carolina General Statutes section 168-3 which deals with the right of the handicapped to use public conveyances and accommodations.<sup>119</sup> The latter portion of section 168-3 states that the handicapped are entitled to accommodations in lodging places, but stipulates that it is on a conditional basis and subject to the limitations established by law.<sup>120</sup> Thus, this condition would substantiate North Carolina General Statutes section 160A-392,<sup>121</sup> and 153A-347,<sup>122</sup> which subject the state and its agencies to local zoning ordinances.<sup>123</sup> There are other indications of state policy. The North

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at 6 (Gaston County)); Interview with Al Singer, Attorney for the Governor's Advocacy Council for Persons with Disabilities in Raleigh (Nov. 2, 1979) (Chatham County & Wilson, N.C.).

114. 30 N.C. App. 342 (Southern Pines, N.C.); *Osborne v. Boyce*, No. 78CVS75 (Super Ct. Davie Co.) (Davie County).

115. *J.T. Hobby & Sons, Inc. v. Family Homes*, 46 N.C. App. 741, 266 S.E.2d 32 (1980) (Wake County).

116. N.C. GEN. STAT. § 168-1 (1976): "The State shall encourage and enable handicapped persons to participate fully in the social and economic life of the State and to engage in remunerative employment. . . ."

117. N.C. GEN. STAT. § 168-9 (1976):

Each handicapped citizen shall have the same right as any other citizen to live and reside in residential communities, homes, and group homes, and no person or group of persons, including governmental bodies or political subdivisions of the State, shall be permitted, or have the authority to prevent any handicapped citizen, on the basis of his or her handicap, from living and residing in residential communities, homes, and group homes on the same basis and conditions as any other citizen. . . .

118. *Id.*

119. N.C. GEN. STAT. § 168-3 (1976):

The handicapped and physically disabled are entitled to accommodations, advantages, facilities, and privileges of all common carriers, airplanes, motor vehicles, railroad trains, motor buses, streetcars, boats, or any other public conveyances or modes of transportation; hotels, lodging places, places of public accommodation, amusement or resort to which the general public is invited, subject only to the conditions and limitations established by law and applicable alike to all persons.

120. *Id.*

121. N.C. GEN. STAT. § 160A-392 (1976): "All of the provisions of this Part are hereby made applicable to the erection, construction, and use of buildings by the State of North Carolina and its political subdivisions." (Refers to municipal zoning powers).

122. N.C. GEN. STAT. § 153-347 (1978): "Each provision of this Part is applicable to the erection, construction, and use of buildings by the State of North Carolina and its political subdivisions." (Refers to county zoning powers).

123. N.C. GEN. STAT. §§ 160A-381 to -392 (1976) specifically deals with the granting of zoning powers to cities and towns. Section 160A-392 states: "All of the provisions of this Part are

Carolina State Building Code treats group homes of fewer than ten residents as a residential occupancy rather than as an institution subject to more stringent licensing standards.<sup>124</sup> Furthermore, an Attorney General's Opinion<sup>125</sup> states that group homes are not treatment facilities (institutions), at least for the purposes of the Patients' Rights Act.<sup>126</sup>

Judicial interpretation of the statute has been minimal. Until recently, the North Carolina Court of Appeals had considered only one case dealing with the exclusion of group homes—*Town of Southern Pines v. Mohr*.<sup>127</sup> Southern Pines is a small winter resort town with a concentration of golf courses, horse training facilities, and horse farms. Mrs. Constance Baker, a co-defendant, leased her large estate, Duncraig Manor, to the Southeastern Regional Mental Health Center. The property was to be used as a school and clinic for the teaching and treatment of children with emotional and mental problems.<sup>128</sup> The conflict arose over section 9.1 of the Southern Pines zoning ordinance.<sup>129</sup> The area was zoned RA—a residential-agricultural district. The agricultural inclusion is due to several small house farms operated in the area. It is a middle-to-upper class housing district with many large and stately old homes. Duncraig Manor is slightly isolated from other homes in the area due to its large acreage and its being set back from the highway and hidden by an abundance of pine trees. Permitted uses under section 9.1 included single family residences, defined as any number of individuals living together as a single housekeeping unit; golf courses, hospitals, nursing homes, day nurseries, public and

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hereby made applicable to the erection, construction, and use of buildings by the State of North Carolina and its political subdivisions."

N.C. GEN. STAT. § 153A-347 (1978) subjects State buildings and those of its political subdivisions to the county zoning powers.

124. NORTH CAROLINA DEP'T OF HUMAN RESOURCES, DIVISION OF MENTAL HEALTH, MENTAL RETARDATION, AND SUBSTANCE ABUSE SERVICES, PROCEDURE MANUAL FOR GROUP HOMES FOR DEVELOPMENTALLY DISABLED ADULTS appendix A, at 1 (1979) (quoting N.C. STATE BUILDING CODE § 409.1(e)).

125. 44 N.C. Op. Att'y Gen. 343, 345 (1975).

126. N.C. GEN. STAT. § 122-55.1 (1974 & Supp. 1977) states:

"It is the policy of North Carolina to insure to each adult patient of a treatment facility basic human rights. These rights include the right to dignity, privacy, and humane care. It is further the policy of the State that each treatment facility shall insure to each patient the right to live as normally as possible while receiving care and treatment."

127. 30 N.C. App. 342, 226 S.E.2d 865 (1976).

128. *Id.*

129. Permitted uses under the ordinance include: single family residences, any form of equestrian use, agricultural or horticultural, church, golf courses (exclusive of miniature golf courses), country clubs, fire and police stations, recreational facilities and single family homes with live-in help. The ordinance also includes the following conditional uses: hospitals, nursing homes, sanatoriums, riding stables and horse farms, race tracks and fox hunting jumps, day nurseries, public buildings, public and private schools, radio and television transmitting stations and radio and television studios." SOUTHERN PINES, N.C., ZONING ORDINANCE § 9.1 (1975).

private schools, and public buildings.<sup>130</sup> The home started operation in early 1974, and in March, the City notified the defendant that they had ten days to make a request to the Town Planning Board to consider a recommendation for an amendment to the zoning regulation to include Duncraig Manor as a permitted use. This period was extended and on May 1, 1974, the defendant's attorney appeared before the Planning Board and requested the amendment. The Board voted unanimously to recommend to the Town Council not to amend the zoning ordinance.<sup>131</sup> Their reasons were as follows: (1) there was an overwhelming objection to the change by property owners in the area;<sup>132</sup> (2) the zoning amendment would not be in keeping with the long established character of the neighborhood; and (3) the defendants established the center without first obtaining approval from proper town authorities and continued to operate after being advised and notified of the zoning ordinance violation.<sup>133</sup> The Town Council sustained the recommendation on May 14, 1974. The Town requested that the defendants vacate, and on Mrs. Baker's request the Town Council met in a special session on May 21, 1974, in order to hear a request for an extension to vacate. The Council rejected the request on the basis that it was not made in good faith and requested the premises be vacated on May 31, 1974. On June 4, 1974, the Town allegedly received a letter from Dr. Eugene Douglas, Area Director of the Southeastern Regional Mental Health Center, advising the town that the Center would cease operations. In accordance with this, the Council extended the time to vacate to August 27, 1974. On June 25, 1974, Dr. Douglas rescinded his previous letter. Consequently, the Town rescinded the extension and on July 22, 1974, the Building Inspector notified the defendants to cease operation. If occupation was continued, each day would constitute a separate offense for which the defendants would be subject to criminal prosecution, and if convicted could be subject to either a fine of fifty dollars a day or imprisonment.

Before examining the court's opinion, some further explanation of Duncraig Manor and the services it provides is necessary. Duncraig Manor provides a home for as many as nine children ranging between the ages of six to seventeen. Counselors are careful to balance the age ranges. The environment is very structured and at no time are the children allowed to freely roam the neighborhood. The children attend local public schools which work closely with the center and its counsel-

130. Brief for Appellee at 4-5, *Town of Southern Pines v. Mohr*, 30 N.C. App. 342, 226 S.E.2d 865 (1976).

131. *Id.* at 6.

132. Local horse farmers led the major objections to the center.

133. Brief for Appellant at 6, *Town of Southern Pines v. Mohr*, 30 N.C. App. 342, 226 S.E.2d 865 (1976).

ors. Those children who are severely disturbed are tutored privately in the home. Family group meetings are held daily in order to "hash out" behavioral and discipline problems at school and at home. When problems do occur, children are removed from the group for specified periods, "time outs," and lose privileges or are isolated in their rooms. The children come from varied backgrounds. Some come from "off the streets" and deplorable family situations, while others are from upper-middle class homes. All have the same basic problem: they have never learned to cope with life. Many don't know how to accept the consequences of their actions. Some retaliate with emotional outbursts and rage; others withdraw into themselves. The process of rehabilitation takes months and often the results are not favorable. However, there are cases where Duncraig Manor has worked wonders and given these children a chance in life.

The Moore County Superior Court granted summary judgment for the defendant home on June 26, 1975. The plaintiff appealed to the North Carolina Court of Appeals, which affirmed the lower court. The appellate court stated that the Center fell within the permitted uses of section 9.1 of the Southern Pines zoning ordinance as a public building. The court stated that the Center was a local mental health clinic, administered, supervised, controlled, and funded by the Department of Human Resources; it was subject to the State Personnel Act; used state vehicles; and operated under statutory authority that created a system of regional and local mental health centers as a government function.<sup>134</sup> According to the court, the defendants were performing a governmental function. Furthermore, the court noted that the facility could be considered a sanatorium, a permitted use under the zoning ordinance, by defining sanatoriums as "an establishment for the treatment of the sick especially if suffering from chronic disease (as alcoholism, tuberculosis, nervous or mental disease) requiring protracted care."<sup>135</sup>

Since the Duncraig case, section 9.1 of the Southern Pines zoning ordinance has been amended.<sup>136</sup> The area is still zoned residential-agricultural. However, public buildings and sanatoriums have been changed from a permitted use to a conditional use. Included in conditional uses are family care homes and group care homes. In order for

134. 30 N.C. App. at 345, 226 S.E.2d at 867.

135. *Id.*

136. SOUTHERN PINES, N.C., ZONING ORDINANCE § 9.1 (1975) (amended Dec. 9, 1975). The ordinance was amended to include under permitted uses only single family residences, single family homes with live-in help quarters, and relative quarters, accessory buildings, any form of equestrian use, agricultural or horticultural, churches, horse farms and riding stables, horse racing tracks and fox hunting jumps. The remainder of the earlier permitted uses, including public buildings, family care home, and group care homes were classified as conditional uses and required a permit from the Town Council.

these facilities to locate in a RA area, they now have to obtain a conditional use permit from the Town Council. Though the ordinance has been changed, the situation has improved to such a degree that the Town has granted a conditional use permit to a group home for the mentally retarded within the last year.

Duncraig paved the way for other group homes within the state. *Osborne v. Boyce*<sup>137</sup> reached a similar result for a group home that housed six mentally retarded adults and two houseparents. The house was to be operated by a nonprofit corporation that had been approved by the Department of Human Resources and would be regulated, controlled, and funded by the state. The zoning ordinance permitted "public buildings and facilities" in the central business district, and the court held that the proposed home was "a public facility . . . inasmuch as the operation is the performance of a public (as opposed to private) program carried out by the State through the financing, control, and regulation of the program of the petitioner non-profit corporation."<sup>138</sup> In *Timmerman v. Holy Trinity Lutheran Church*,<sup>139</sup> the Gaston County Superior Court permitted a family-model group home housing five mentally retarded adults and a resident supervisor. The home was established by a non-profit charitable corporation in a home owned by the defendant church. The court said that the home would qualify either as a philanthropic and charitable institution or as a single-family dwelling, both permitted uses under the Gastonia zoning ordinance in the multi-family residential area where the home was to be located. The court emphasized that funding of the home would come indirectly from the state and that the home would operate as a single housekeeping unit.<sup>140</sup>

Zoning conflicts have arisen in Hickory, Mocksville, Lincolnton, Raleigh, Wilson, Aberdeen, Reidsville, and Henderson.<sup>141</sup> In October, 1979, the Chatham County Superior Court considered a group home case.<sup>142</sup> The zoning ordinance in question involved a single family stipulation having restrictive covenants attached. There was a great deal of public protest by professionals living in the area. The court however, denied a preliminary injunction proposed by the neighbors of the group home. In Wilson, a group home case is pending. The city

137. No. 78CVS75 (Super. Ct. Davie Co., Sept. 14, 1978) (as cited in H. TURNBULL, *supra* note 4 ch. 16, at 7).

138. *Id.*

139. No. 78CVS1657 (Super. Ct. Gaston Co., Oct. 12, 1978) (as cited in H. TURNBULL, *supra* note 4 ch. 16, at 7).

140. *Id.*

141. Al Singer, Community Living Arrangements Fact Sheet (Apr. 4, 1979) (fact sheet accompanying Senate Bill 626 and distributed to North Carolina legislators).

142. Interview with Al Singer, Attorney for the Governor's Advocacy Council for Persons with Disabilities, in Raleigh, N.C. (Nov. 2, 1979).

recently passed a new zoning ordinance which would exclude group homes from both single, and multi-family zoned areas. A motion for declaratory relief will soon be filed by the home proponents. Problems are also beginning to arise in Anson County.<sup>143</sup> As recently as August, 1980, controversy arose over a proposed home for mentally retarded adults in Knightdale. In the spring of 1979 fifty residents of the area filed suit against the home owner, Family Homes of Wake County. In June, 1980, the residents obtained a temporary restraining order prohibiting completion and occupancy of the home. The residents stated that the home site was not suitable for the mentally retarded and that property values would decline.<sup>144</sup> The lawsuit was dropped in late August, 1980 because of its high cost. Later, the house was partially destroyed by fire on Tuesday, August 26, 1980, and completely destroyed in a second fire on Thursday, August 28, 1980. The State Bureau of Investigation suspects an arsonist and is offering a reward of \$10,000 for information.<sup>145</sup>

In the spring of 1980, briefs were filed with the North Carolina Court of Appeals to hear a group home case in Raleigh. In *Hobby & Son, Inc. v. Family Homes of Wake County, Inc.*<sup>146</sup> the defendant operates four group homes in Raleigh and purchased land in Scarsdale Subdivision for a fifth home. The plaintiffs are property owners within the subdivision and allege that operation of the home would violate restrictive covenants of the subdivision which provide: "No lot shall be used except for residential purposes . . . [and] one detached single family dwelling. . . ."<sup>147</sup> The plaintiffs did not allege a violation of a zoning restriction because the City of Raleigh Zoning Code, section 24-29, permits family care homes in all residential districts provided certain requirements concerning density, off-street parking, and over-concentration are met. The Wake County Superior Court granted summary judgment for the plaintiff. The Group Homes of Wake County appealed and the court of appeals affirmed the lower court decision in May, 1980.

The court stated that the issue was "whether the operation of a 'family care home' complies with the restriction that the lot on which the home is located be restricted to residential purposes, and whether any building located thereon meets the definition of a single family dwelling."<sup>148</sup> The court reviewed the definition of a family care home and the requirements for operation. They stated that the defendant, on

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143. *Id.*

144. Raleigh News & Observer, Aug. 29, 1980, at 14, col.1.

145. *Id.*

146. 46 N.C. App. 741, 266 S.E.2d 32 (1980).

147. *Id.* at 741, 266 S.E.2d at 33.

148. *Id.* at 742, 266 S.E.2d at 33.

making application for operation of the home, chose to categorize the property as institutional rather than residential. As a result, the strict rule of construction as to restrictions should not be applied in such a way as to defeat the plain and obvious purposes of a restriction.<sup>149</sup> The court went further and stated that the criteria for a single-family residence as defined by the North Carolina Supreme Court was not met.<sup>150</sup>

The North Carolina Supreme Court has defined "family" as being: "(1) those who live in the same household, subject to the general management and control of the head thereof; (2) [dependent] . . . upon such supervising, controlling and managing head; . . . (3) [wherein there is rendered] mutual gratuitous services with no intention on one hand of paying for such service and no expectation on the other of receiving reward of compensation."<sup>151</sup>

The occupants of the home did not satisfy the stated requirements in that none of the services appears to be gratuitous.<sup>152</sup> The court stated that the employees were paid for their services, and the residents pay for part of their room and board, while the State subsidizes the remaining costs.

The court rejected the defendant's argument that they have preserved the single family residential character of the subdivision by not altering the dwelling. The court stated: "Perhaps no architectural change has been made, but we are aware that 'a house is not a home' in every situation. Here the house is an institution."<sup>153</sup>

A public policy argument, which cited North Carolina General Statutes section 168-9, was also rejected by the court.<sup>154</sup> The court concluded by stating that the statute did not apply and that the residents were not being denied their facility because of their handicap, but because the operation of the home was a commercial venture that violated a restrictive covenant.<sup>155</sup>

On two occasions North Carolina has tried to legislate acceptance of group homes in residential areas. In 1975, the North Carolina General Assembly considered a House bill entitled "Zoning Family Care Homes." The House passed the bill, but when it was returned by the

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149. *Id.* at 743, 266 S.E.2d at 34.

150. *Id.* at 743-45, 266 S.E.2d 266 at 34-35.

151. *Id.* at 743, 266 S.E.2d at 34.

152. *Id.* at 744, 266 S.E.2d at 34.

153. *Id.*

154. N.C. GEN. STAT. § 168-9 (1976):

Each handicapped citizen shall have the same right as any other citizen to live and reside in residential communities, homes, and group homes, and no other person or group of persons, including governmental bodies or political subdivisions of the State, shall be permitted, or have the authority, to prevent any handicapped citizen, on the basis of his or her handicap, from living and residing in residential communities, homes, and group homes on the same basis and conditions as any other citizen.

155. 46 N.C. App. 741, 745, 226 S.E.2d 32, 35 (1980).

Senate with an amendment, the House did not concur and the bill failed. In 1979, Senators Creech and Mathis introduced Senate Bill 626, Community Living Arrangements. The bill stated that community living arrangements, defined as a home providing care and rehabilitation to six or fewer handicapped persons in a family-like setting, are residential uses of property and are permissible in all residential zoning districts of North Carolina. It protected the character of residential neighborhoods by requiring that strict state and local standards be met and by prohibiting the establishment of more than one home in a one-fourth mile radius. The bill also declared void private actions by landowners to prohibit community living arrangements. The bill was sent to a judiciary committee and during consideration it was pointed out that North Carolina would receive 5.5 million dollars in grants from the Department of Housing and Urban Development to build twenty-six group homes through the state in twenty-six different counties. The bill's purpose was to clarify existing laws and to avoid bunching of the homes. Opposition to the bill came from the League of Municipalities. Spokesman Frank Gray argued that opposition was not based on the principle of the homes but was based on the fact that the bill would constitute a state mandate of zoning. The bill was then put in a subcommittee where it received an unfavorable report. The subcommittee explained that they felt this was a local, as opposed to a statewide, issue.

## VII. CONCLUSION

Although North Carolina has not yet accepted legislation in this area, some fifteen states have statutes which prohibit the exclusion of group homes in residential neighborhoods.<sup>156</sup> North Carolina advocates of group homes have not given up in the face of adversity, and there are cases pending which have federal court potential. Efforts will continue for state-wide legislation. Perhaps that which is needed most, but which cannot be legislated, is a change in society's attitude towards those individuals who are developmentally disabled. These people are entitled to the same rights that so called "normal" persons enjoy. They ask no more than to be able to live as a family group in a nice neigh-

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156. ARIZ. REV. STAT. ANN. §§ 36-581 to -582 (West Supp. 1979-1980); CAL. WELF. & INST. CODE §§ 5115-5116 (West 1972 & Supp. 1980); COLO. REV. STAT. § 30-28-115 (1973 & Supp. 1979); MD. ANN. CODE art. 59A, § 20C (1979); MICH. COMP. LAWS ANN. § 125.216a(1), (2) (West Supp. 1979); MINN. STAT. ANN. §§ 252.28, 462.357(7)-(8) (West Supp. 1980); N.J. STAT. ANN. §§ 30:4C-2(m), 30:4C-26(d) (West Supp. 1980); N.M. STAT. ANN. § 3-21-1(c) (1978); OHIO REV. CODE ANN. § 5123.18 (Page Supp. 1979); R.I. GEN. LAWS § 45-24.22 (Supp. 1979); S.C. CODE § 44-21.510 to -620 (1976 & Supp. 1979); TENN. CODE ANN. § 13-24-102 (1980); VT. STAT. ANN. tit. 24, § 4409(d) (Supp. 1980); VA. CODE § 15.1-486.2 (Supp. 1980); WIS. STAT. ANN. § 59.97(15) (West Supp. 1979).



borhood. They are simply human beings with rights which need to be recognized and protected.

BECKY S. JENKINS

### Postscript

On January 27, 1981, just prior to the final printing of this volume, the North Carolina Supreme Court in *Hobby & Son, Inc. v. Family Homes of Wake County, Inc.* ruled that group homes may be established within residential areas.<sup>157</sup> Specifically, the court allowed a home for mentally retarded adults to operate in a Raleigh residential subdivision.<sup>158</sup> This decision overruled two lower court decisions which had classified the group home as an "institution."<sup>159</sup> This classification precluded operation of the home in its existing location because the deed contained a covenant restricting use of the lot to "residential" purposes.

The majority, in a four-to-two decision led by Justice Britt, stated: "In virtually all respects, other than the mental capacity of those who live on the premises, the house operates much like a typical suburban household."<sup>160</sup> The dissent, written by Justice Huskins and joined by Chief Justice Branch, argued that the majority went beyond "the parameters of sound legal reasoning to help these unfortunate wards of the State" and that a different result would have been obtained if the home had been operated by some benevolent social order for the destitute or as a half-way house for ex-convicts.<sup>161</sup>

Although the dissent purportedly endorsed the rights of handicapped persons, it appears to regard more highly the rights of individual land owners. What the dissent has failed to recognize, however, is the necessity of balancing the interests of private land owners against society's interest in providing care for the developmentally disabled. The majority recognizes the necessity for balancing these interests and arrives at a result that is beneficial to the group home movement and the individual land owners. Hopefully, this decision will do much to change the public's attitudes toward the developmentally disabled and the group home movement.

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157. No. 80-72 (N.C. Sup. Ct., Jan. 27, 1981).

158. *Id.*

159. See notes & text accompanying notes 146-55 *supra*.

160. *Hobby & Sons, Inc. v. Family Homes of Wake County, Inc.*, No. 80-72, slip op. at 12 (N.C. Sup. Ct., Jan. 27, 1981).

161. *Id.* at 1 (Huskins, J., dissenting).