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STRATEGIES IN ZONING AND COMMUNITY LIVING ARRANGEMENTS FOR RETARDED CITIZENS: *PARENS PATRIAE MEETS POLICE POWER*

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I. INTRODUCTION

A. *Normalization for the Mentally Retarded and the Community Living Arrangement*

IT HAS BEEN ESTIMATED that at any given time two million Americans function at a level designated "retarded."¹ Recently, it has been recognized that these retarded persons are individuals who can learn and grow, like the rest of the human population, and are not victims of a static condition.² This "discovery" of the ability of retarded persons to develop has led mental retardation professionals and members of the legal community to question the social utility of the large institution in the promotion of that development.³

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1. P. FREIDMAN, *THE RIGHTS OF MENTALLY RETARDED PERSONS* 15 (1976). "Retardation is wholly distinct from mental illness. . . . Mental retardation is primarily an educational problem and not a disease which can be cured through drugs or treatment." *Halderman v. Pennhurst State School & Hosp.*, 446 F. Supp. 1295, 1298 (E.D. Pa. 1977), *aff'd in part, rev'd and remanded in part*, 612 F.2d 84 (3d Cir. 1979) (en banc), *petition for cert. filed*, 48 U.S.L.W. 3614 (U.S. Mar. 25, 1980) (No. 79-1404). Mentally retarded people are handicapped in that they are "unable to function at the same educational and behavioral levels as the rest of society." *Id.* at 1313. See Mason & Menaloscino, *The Right to Treatment for the Mentally Retarded: An Evolving Legal and Scientific Interface*, 10 CREIGHTON L. REV. 124, 124 n.1 (1977).

Generally, retardation is defined as a disability which arises during the developmental years and is classified according to intelligence quotient (I.Q.) levels spanning four degrees—mild, moderate, severe, and profound. Thus, 89% of the retarded population are designated mildly retarded (I.Q. 52-67); 6% moderately retarded (I.Q. 36-51); and the remaining 5% either severely (I.Q. 20-35) or profoundly (I.Q. under 20) retarded. *Id.*; 446 F. Supp. at 1298-99.

Paul Friedman, Director of the Mental Health Law Project, explains that

[a] person is mentally retarded when "we" say he is. Mental retardation is not a fact, but a label or classification applied to a very diverse group of people—often for purposes of segregating or restricting them, although sometimes for purposes of providing services not available to all in the community.

P. FRIEDMAN, *supra*, at 14.

2. See generally Mason & Menaloscino, *supra* note 1. Previous misperceptions were manifest in characterizations of retarded persons as eternal children, sexual deviants, or blessed individuals. Wolfensburger, *The Origin and Nature of Our Institutional Models*, in *CHANGING PATTERNS IN RESIDENTIAL SERVICES TO MENTALLY RETARDED CITIZENS* 59 (R. Kugel & W. Wolfensburger eds. 1976).

3. See Wolfensburger, *supra* note 2, at 81-82; Mason & Menaloscino, *supra* note 1, at 125-26.

The development of a retarded individual is fostered by a process called "habilitation."⁴ Many mental retardation professionals now believe that habilitation is maximized by normalization of the person's surroundings, *i.e.*, by treating him or her as much like a nonhandicapped person as possible.⁵ Normalization, of necessity, requires the rejection of the impersonal and isolated large institution in favor of smaller, community-based living arrangements.⁶ Essentially, the theory is that a person is best taught how to live in the community by living there, rather than attempting to learn to live in the community by living in an institution.

When retarded individuals are habilitated in the community, they are generally housed in a community living arrangement (CLA or group home). A community living arrangement is comprised of a small number of persons living in a house or apartment under the supervision of one or more houseparents.⁷ The clients of the CLA live together as a unit, often working in either sheltered workshops or at jobs in the community during the day.⁸ Every attempt is made to appear as much like an average family as possible.⁹ In a CLA, the

4. "'Habilitation' is the term of art used to refer to that education, training, and care required by retarded individuals to reach their maximum development." Halderman v. Pennhurst State School & Hosp., 446 F. Supp. 1295, 1298 (E.D. Pa. 1977), *aff'd in part, rev'd and remanded in part*, 612 F.2d 84 (3d Cir. 1979) (en banc), *petition for cert. filed*, 48 U.S.L.W. 3614 (U.S. Mar. 25, 1980) (No. 79-1404).

5. See, e.g., Glenn, *The Least Restrictive Alternative in Residential Care and the Principle of Normalization*, in THE MENTALLY RETARDED CITIZEN AND THE LAW 499 (1976); Nirje, *The Normalization Principle and Its Human Management Implications*, in CHANGING PATTERNS IN RESIDENTIAL SERVICES TO MENTALLY RETARDED CITIZENS 179 (R. Kugel & W. Wolfensburger eds. 1976).

6. Chandler & Ross, *Zoning Restrictions and the Right to Live in the Community*, in THE MENTALLY RETARDED CITIZEN AND THE LAW 305, 308 (1976). One expert in this field, Gunnar Dybwad, has observed that

the normalization principle [can be refined] into the essential components of integration, dispersal, specialization and continuity. Integration is the absorption of the retarded into the community; dispersal is the uniform distribution of residential facilities throughout the community; specialization is the limitation on the types of residents served in a certain facility and the services offered to the resident; and continuity enables the handicapped individual to receive a broad range of specialized services and available care.

Id. But see Halderman v. Pennhurst State School & Hosp., 612 F.2d 84 (3d Cir. 1979) (en banc), *petition for cert. filed*, 48 U.S.L.W. 3614 (U.S. Mar. 25, 1980) (No. 79-1404) (stating that some individuals may be harmed by movement from the institution).

7. *Legal Issues in Mental Health Care: Proposals for Change, Zoning for Community Residences*, 2 MENTAL DISABILITY L. REP. 315, 316 (1977) [hereinafter cited as *Zoning for Community Residences*]. Because anonymity is desired, CLA's are generally set up in rented facilities or previously constructed buildings. *Id.* at 317. See Lippincott, *A Sanctuary for People*, 31 STAN. L. REV. 767, 769 (1979).

8. Telephone interview with Vivian Lotz, former Director of the Southwest Community Action Program, Philadelphia, Pa. (Mar. 23, 1979); telephone interview with Marilyn Mennis, Alliance of Specialized Mental Health and Mental Retardation Agencies, Philadelphia, Pa. (Feb. 20, 1979).

9. Telephone interview with Marilyn Mennis, *supra* note 8.

habilitative process is constantly active. Clients learn much by simply living in the community. Special skills necessary for an independent life-style are taught on a daily basis and supplement programs outside the CLA.¹⁰ Maximizing individual independence is the goal.

Institutions, on the other hand, have only achieved the isolation and confinement of individuals whom society has labeled deviant.¹¹ Personnel of state institutions maintain that improvements in the clients' conditions are unattainable because of the minimal funding voted by state legislatures.¹² The fact remains, however, that life in an institution, even an adequately funded one, destroys rather than develops personal and social functioning, and harms rather than helps the retarded individual.¹³

The effects of institutionalization appear even more bleak when contrasted with the favorable results achieved, both in terms of cost and of habilitation, by providing normalization through CLA's. Partial or total self-sufficiency has been achieved in these community settings when it was never expected in institutions.¹⁴ The community provides continual "free" learning experiences and stimulation unavailable to retarded persons living in the sterile environment of a large, isolated institution. From an economic standpoint, group homes are also more profitable. In a group home, the amount of benefit bestowed per dollar expended is greater than the figure for institutions,¹⁵ while a substantial overall cost reduction per client has resulted.¹⁶ Furthermore, the resulting habilitation allows the full or partial employment of the individual.

Many mental retardation professionals, recognizing the benefits of CLA's and the potential destructiveness of institutions, have changed their views on the proper method of caring for the mentally

10. Telephone interview with Marilyn Mennis, *supra* note 8.

11. See generally E. GOFFMAN, *ASYLUMS* (1961); D. ROTHMAN, *THE DISCOVERY OF THE ASYLUM: SOCIAL ORDER AND DISORDER IN THE NEW REPUBLIC* (1971).

12. See *Halderman v. Pennhurst State School & Hosp.*, 446 F. Supp. 1295 (E.D. Pa. 1977), *aff'd in part, rev'd and remanded in part*, 612 F.2d 84 (3d Cir. 1979) (en banc), *petition for cert. filed*, 48 U.S.L.W. 3614 (U.S. Mar. 25, 1980) (No. 79-1404); *Wyatt v. Stickney*, 325 F. Supp. 781 (M.D. Ala. 1971), *remedy ordered*, 344 F. Supp. 387 (M.D. Ala. 1972), *aff'd in part, rev'd and remanded in part sub nom. Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974).

13. Ferleger & Boyd, *Anti-Institutionalization: The Promise of the Pennhurst Case*, 31 *STAN. L. REV.* 717, 721-22 (1979).

14. See *Halderman v. Pennhurst State School & Hosp.*, 446 F. Supp. 1295, 1311 (E.D. Pa. 1977), *aff'd in part, rev'd and remanded in part*, 612 F.2d 84 (3d Cir. 1979) (en banc), *petition for cert. filed*, 48 U.S.L.W. 3614 (U.S. Mar. 25, 1980) (No. 79-1404).

15. *Id.* at 1312.

16. See *Halderman v. Pennhurst State School & Hosp.*, 446 F. Supp. 1295, 1312 (E.D. Pa. 1977), *aff'd in part, rev'd and remanded in part*, 612 F.2d 84 (3d Cir. 1979) (en banc), *petition for cert. filed*, 48 U.S.L.W. 3614 (U.S. Mar. 25, 1980) (No. 79-1404). See also 611 F.2d at 116 n.39.

retarded.¹⁷ This change in attitude by mental retardation professionals has led to a change in the disposition of the legal system toward the retarded.¹⁸ The development of the habilitation-through-normalization theory (developmental model), and the revelation of the horrendous conditions in large institutions, has resulted in legislation and litigation to prevent future damage to retarded persons and to promote their present development.¹⁹ Concentrating on the environment in the state facilities, the first lawsuits and statutes established the right to habilitation for retarded residents and included in that right the right of the individual to receive habilitative services in the least restrictive alternative form of care.²⁰ A later group of lawsuits set forth the theory that the institution can never be the least restrictive alternative for any retarded person, regardless of the de-

17. See, e.g., Glenn, *supra* note 6; Nirje, *supra* note 5.

18. See, e.g., Halderman v. Pennhurst State School & Hosp., 446 F. Supp. 1295 (E.D. Pa. 1977), *aff'd in part, rev'd and remanded in part*, 612 F.2d 84 (3d Cir. 1979) (en banc), *petition for cert. filed*, 48 U.S.L.W. 3614 (U.S. Mar. 25, 1980) (No. 79-1404); Mason & Menaloscino, *supra* note 1.

19. See, e.g., Mental Health and Mental Retardation Act of 1966, PA. STAT. ANN. tit. 50, §§ 4101-4704 (Purdon 1969); Halderman v. Pennhurst State School & Hosp., 446 F. Supp. 1295 (E.D. Pa. 1977), *aff'd in part, rev'd and remanded in part*, 612 F.2d 84 (3d Cir. 1979) (en banc), *petition for cert. filed*, 48 U.S.L.W. 3614 (U.S. Mar. 25, 1980) (No. 79-1404). For a discussion of the Pennsylvania Mental Health and Mental Retardation Act, see notes 47-51 and accompanying text *infra*.

20. Welsh v. Likins, 373 F. Supp. 487, 502 (D. Minn. 1974), *aff'd in part, vacated and remanded in part*, 550 F.2d 1122 (8th Cir. 1977); Wyatt v. Stickney, 344 F. Supp. 387, 390 (M.D. Ala. 1972), *aff'd in part, rev'd and remanded in part sub nom. Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974). See Lessard v. Schmidt, 349 F. Supp. 1078 (E.D. Wisc. 1972) (three-judge court), *vacated and remanded*, 414 U.S. 473 (1974). In requiring the least restrictive alternative for the mentally ill, the district court in *Lessard* explained what it perceived to be the constitutional basis for this principle:

Even if the standards for an adjudication of mental illness and potential dangerousness are satisfied, a court should order full-time involuntary hospitalization only as a last resort. A basic concept in American justice is the principle that "even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose." Perhaps the most basic and fundamental right is the right to be free from unwanted restraint. It seems clear, then, that persons suffering from the condition of being mentally ill, but who are not alleged to have committed any crime, cannot be totally deprived of their liberty if there are less drastic means for achieving the same basic goal.

349 F. Supp. at 1095-96 (citations omitted), *quoting* Shelton v. Tucker, 364 U.S. 479, 488 (1960). The *Lessard* court continued by noting that

[i]n *Lake v. Cameron*, the [United States Court of Appeals for the District of Columbia Circuit] ruled that the state should "bear the burden of exploration of possible alternatives" to commitment. We believe that the person recommending full-time involuntary hospitalization must bear the burden of proving (1) what alternatives are available; (2) what alternatives were investigated; and (3) why the investigated alternatives were not deemed suitable. These alternatives include voluntary or court-ordered out-patient treatment, day treatment in a hospital, night treatment in a hospital, placement in the custody of a friend or relative, placement in a nursing home, referral to a community mental health clinic, and home health aide services.

349 F. Supp. at 1095-96, *quoting* *Lake v. Cameron*, 364 F.2d 657, 660 (D.C. Cir. 1966).

gree of their handicap.²¹ These suits have resulted in orders requiring community services unless movement from the institution would harm the individual.²²

B. Zoning and the Community Living Arrangement

Carefully conceived social reform may, however, be thwarted by local opposition despite state or federal support.²³ The deinstitutionalization/anti-institutionalization²⁴ movement has brought into sharp focus the inescapable conclusion that the popular perception of the retarded has not kept pace with the growth in understanding among mental retardation professionals. Communities resist the influx of group homes, while individuals profess acceptance (or at least, tolerance) of the theory behind them.²⁵ Since a community is no more than a coming together of individuals, how is it that this community resistance emerges from professed individual tolerance? It is submitted that zoning laws are used by less than intellectually honest individuals who shield their opposition to the establishment of

21. See, e.g., *Halderman v. Pennhurst State School & Hosp.*, 446 F. Supp. 1295 (E.D. Pa. 1977), *aff'd in part, rev'd and remanded in part*, 612 F.2d 84 (3d Cir. 1979) (en banc), *petition for cert. filed*, 48 U.S.L.W. 3614 (U.S. Mar. 25, 1980) (No. 79-1404); *Garrity v. Thomson*, 81 F.R.D. 633 (D.N.H. 1979); *Washington Assoc. for Retarded Citizens v. Thomas*, No. C-78-163 (E.D. Wash., filed June 16, 1978). The evolutionary process of the theory behind these cases is more fully explored in Ferleger & Boyd, *supra* note 13. See also Boyd, *The Developmental Disabilities Assistance and Bill of Rights Act: A Mechanism for the Deinstitutionalization and Enforcement of the Rights of the Mentally Retarded?* (1978) (unpublished manuscript on file with author).

In the *Pennhurst* case, the United States Court of Appeals for the Third Circuit recently affirmed the district court's finding of a right to habilitation in the least restrictive alternative, but reversed the lower court's blanket order that all retarded individuals then institutionalized be moved to CLA's and that the Pennhurst institution be closed. *Halderman v. Pennhurst State School & Hosp.*, 611 F.2d at 114-15. The Third Circuit rejected the district court's finding that an institution could *never* be the least restrictive alternative. *Id.* at 114. Despite this suggestion by the Third Circuit that for some patients the institution may be the least restrictive alternative, the court emphasized that deinstitutionalization is the preferred course and that, on remand, the master appointed by the district court should engage in a presumption in favor of placing patients in CLA's. *Id.* at 115.

22. See *Halderman v. Pennhurst State School & Hosp.*, 446 F. Supp. 1295 (E.D. Pa. 1977), *aff'd in part, rev'd and remanded in part*, 612 F.2d 84 (3d Cir. 1979), *petition for cert. filed*, 48 U.S.L.W. 3614 (U.S. Mar. 25, 1980) (No. 79-1404); note 21 *supra*. Cf. *Towne Court Nursing Home v. Beal*, — F.2d — (3d Cir. 1979), *appeal pending*, 48 U.S.L.W. — (U.S. — 1980) (No.).

23. Kressel, *The Community Residence Movement: Land Use Conflicts and the Planning Imperatives*, 5 N.Y.U. REV. L. & SOC. CHANGE 137, 137-38 (1975).

24. The term anti-institutionalization was coined by David Ferleger, Esq., as a means of expressing the belief that no retarded person should be subjected to an institution. See Ferleger & Boyd, *supra* note 13, at 723-24.

25. Sigelman, Spanhel & Lorenzen, *Community Reactions to Deinstitutionalization: Crime, Property Values, and Other Bugbears*, 45 J. REHABILITATION 52, 52 (1979) [hereinafter cited as *Bugbears*].

group homes in their own neighborhood by citing the justification of land use planning.²⁶ Two kinds of zoning barriers can be raised: 1) an ordinance which excludes group homes from all residential zones, usually by narrowly defining the family;²⁷ and 2) an ordinance which grants discretion to the planning body to authorize or to prohibit group homes.²⁸ The Pennsylvania zoning scheme makes possible both tactics.²⁹

Since the state has delegated its power to zone to local government bodies³⁰ who are more likely to respond to local pressures, and since the power to zone embraces the power to exclude,³¹ concerted community resistance may result in either the total exclusion of the retarded from the community, or in their partial exclusion by relegating CLA's to areas not zoned for single-family residences. Total exclusion stifles habilitation by forcing residents to remain in institutions, while partial exclusion creates ghettos of mentally disabled individuals in those communities or those portions of a community which have accepted their responsibilities to retarded citizens.³²

The drawbacks of community living arrangements which do exist result not from retarded persons' entry into the community, but from the failure of local and state bodies to meet their obligations to these citizens. States fail to provide adequate services to complement community placement, "dumping" the former institutional residents into the community.³³ Communities exclude them from the sacrosanct single-family residential districts, causing their sequestration in high-density, low-income neighborhoods.³⁴ Exclusion from certain zones results in the development of areas with unnaturally large numbers of group homes, each such area a sprawling institution within the com-

26. See notes 106-21 and accompanying text *infra*.

27. See *The Developmental Disabilities Model Legislation Series: Zoning for Community Homes Serving Developmentally Disabled Persons*, 2 MENTAL DISABILITY L. REP. 795, 796 (1978) [hereinafter cited as *Developmental Disabilities*].

28. Friedman, *Analysis of the Principal Issues and Strategies in Zoning Exclusion Cases*, in 2 LEGAL RIGHTS OF THE MENTALLY HANDICAPPED 1093, 1095 (1973).

29. PA. STAT. ANN. tit. 53, § 10603 (Purdon Supp. 1979).

30. *Id.* § 10601 (Purdon 1972).

31. See *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). Although the Court in *Village of Euclid* was speaking of the exclusion of uses, rather than of people, as a practical matter, many retarded people can be excluded from an area by the exclusion of the group home use.

32. See *Zoning for Community Residences*, *supra* note 7, at 316.

33. See Kressel, *supra* note 23, at 139.

34. See *id.*; *Developmental Disabilities*, *supra* note 27, at 796; *Zoning for Community Residences*, *supra* note 7, at 319.

munity.³⁵ These “disability ghettos” are by definition non-normalizing and antihabilitative.³⁶

From the standpoint of mental retardation experts, entry into single-family residential zones is not simply preferable, but in fact, it is necessary for minimally adequate habilitation to take place.³⁷ Proponents of CLA’s would support the dispersal requirements recommended by some authorities, but these cannot be met unless entire areas are open to group homes.³⁸ It would seem that minimally adequate habilitation cannot be provided without the entry of the retarded into the community and this requires community acceptance of their responsibility.

Thus, this article examines the use of zoning ordinances by communities to exclude group homes from residential areas and the arguments proponents can advance in support of the establishment of CLA’s. Specifically, this examination will be made in the context of Pennsylvania law.³⁹

II. ZONING AND MENTAL RETARDATION SERVICES IN PENNSYLVANIA: A STUDY IN LOCAL AUTONOMY

A. *The Mental Health and Mental Retardation Act of 1966: An Exercise of the Parens Patriae Power*

“*Parens patriae*” literally means “parent of the country”⁴⁰ and derives from the obligation of the English monarchy to exercise re-

35. See *Zoning for Community Residences*, *supra* note 7, at 319.

36. *Id.*; *Developmental Disabilities*, *supra* note 27, at 796.

One study summarized the situation as follows:

These types of restrictions frequently result in the creation of ghettos of community homes, particularly in larger center cities. Such a concentration occurs because the only districts open to community homes are transitional and politically weak residential neighborhoods or business or institutional zones. This ghettoizing leads to the creation of a new form of institutionalization—large numbers of community homes in certain areas of a city so that the homes become the dominant feature of a residential neighborhood. These concentrations change the character of the neighborhoods and undercut the very purposes behind “normalization.” Further, they provoke justified, negative reactions on the part of neighborhoods where the community homes are impacted, and strengthen the resolve of other communities to avoid admitting community homes for fear that such concentrations will occur in their communities.

Id.

37. See Lippincott, *supra* note 7, at 769.

38. See note 6 and accompanying text *supra*.

39. See *Mental Health and Retardation Act of 1966*, PA. STAT. ANN. tit. 50, §§ 4101-4704 (Purdon 1969); *Municipalities Planning Code*, PA. STAT. ANN. tit. 53, §§ 10101-11202 (Purdon 1972 & Supp. 1979).

Challenges to zoning laws based on both the state and federal constitutions are possible, but are generally not within the scope of this article. See *MENTAL HEALTH LAW PROJECT, COMBATTING EXCLUSIONARY ZONING: THE RIGHT OF THE HANDICAPPED PEOPLE TO LIVE IN THE COMMUNITY* 1-4 (1979).

40. *BLACK’S LAW DICTIONARY* 1003 (5th ed. 1979).

sponsibility for dependent and vulnerable members of society, such as the insane, the retarded, and dependent children.⁴¹ As one study has indicated: "In acting as *parens patriae*, the King or his representative was required to promote the interests and welfare of his wards and was not empowered to sacrifice the ward's welfare to the welfare of others."⁴² After the American revolution, this responsibility settled in the state legislatures.⁴³

Parens patriae has been called alternatively a power, a duty, and a function of state government.⁴⁴ It is perhaps best understood as the role of a state as sovereign and guardian of persons under a legal disability.⁴⁵ When the state acts as *parens patriae* it must act in the best interest of the individual who is subject to the state action.⁴⁶

In Pennsylvania, the state's view of its *parens patriae* duty has led to the enactment of a statute providing habilitative services for the retarded.⁴⁷ Pennsylvania's Mental Health and Mental Retardation Act of 1966 (Act)⁴⁸ was adopted to further national and state objectives of community mental health care.⁴⁹ Although the developmental model had not been fully adopted by mental retardation professionals at the time the Act was passed,⁵⁰ the basic precepts of the community mental health movement which the Act embodies support the model's emphasis on community services for the retarded.⁵¹

41. *Developments in the Law—Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190, 1207-08 (1974) [hereinafter cited as *Developments in the Law*]. As the Harvard study indicates, "[u]nder English law at the time of the American colonies, the King had the authority to act as the general guardian of all infants, idiots, and lunatics." *Id.* at 1207, quoting *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 257 (1972), quoting 3 W. BLACKSTONE, COMMENTARIES 47. The study also pointed out that "[t]he sovereign, as father of the country, was responsible for the care and custody of 'all persons who had lost their intellects and became . . . incompetent to take care of themselves.'" *Developments in the Law, supra*, at 1207-08, quoting *In re Barker*, 2 Johns. Ch. 232, 236 (N.Y. 1816) (citations omitted).

42. *Developments in the Law, supra* note 32, at 1208.

43. *Id.*

44. *See id.* at 1207-20.

45. BLACK'S LAW DICTIONARY 1003 (5th ed. 1979).

46. *See Developments in the Law, supra* note 41, at 1220-21.

47. PA. STAT. ANN. tit. 50, §§ 4101-4704 (Purdon 1969).

48. *Id.*

49. *See Appeal of Niccoli*, 472 Pa. 389, 398, 372 A.2d 749, 754 (1977) (the Act manifests "a clear legislative intent not merely to sanction but to encourage necessary psychiatric care and treatment on a voluntary basis to the extent feasible"). This legislative activity was also motivated by the promise of federal funding available through a 1963 federal grant-in-aid program to support mental health planning. *See Comment, Hospitalization of the Mentally Disabled in Pennsylvania: The Mental Health—Mental Retardation Act of 1966*, 71 DICK. L. REV. 300, 302 n.16 (1967).

50. *See Mason & Menaloscino, supra* note 1, at 136-38.

51. Pennsylvania supports the movement of the retarded into the community, and through legislative appropriations for community programs, the state is trying to reduce the population of persons inside institutions. *See Halderman v. Pennhurst State School & Hosp.*, 446 F. Supp. 1295, 1311-12 (E.D. Pa. 1977), *aff'd in part, rev'd and remanded in part*, 612 F.2d 84 (3d Cir. 1979) (en banc), *petition for cert. filed*, 48 U.S.L.W. 3614 (U.S. Mar. 25, 1980) (No. 79-1404).

The Act apportions the responsibility for the delivery of services to the retarded between the Commonwealth and the counties.⁵² Unfortunately, by placing responsibility for the provision of some of the services on the counties, the Act permits the fulfillment of the *parens patriae* duties to be jeopardized by parochial and sometimes irrelevant considerations, much the same as occurs in the area of land planning where the state's delegation of the zoning power gives local governments full sway.⁵³ The initial objective of the Act—the education and protection of a vulnerable group—has been made subject to the inevitable pressures of local politics. A brief overview of the allocation of responsibilities and the method for selecting those who hold these responsibilities highlights this fact.

As previously noted,⁵⁴ the Act identifies two governmental units as conduits for the provision of services to the retarded: the Commonwealth, which acts through the Department of Public Welfare, and the counties. The Act contemplates the sharing of fiscal and managerial responsibility.⁵⁵ Each county is required to establish a Mental Health and Mental Retardation Board,⁵⁶ a body charged with the duty of advising the local authorities⁵⁷ on the needs of local citizens and helping to develop annual plans for the delivery of services and programs.⁵⁸ With the exception of the boards in cities of the first class,⁵⁹ each county Mental Health and Mental Retardation Board selects and recommends a candidate to the local authorities for the position of County Administrator for Mental Health and Mental Re-

Unfortunately, a number of factors preclude the utilization of these funds by the executive bureaucracy; principal among them is the failure to pinpoint responsibility for the creation and implementation of the necessary community services. 446 F. Supp. at 1311-12.

52. See *Hoolick v. Retreat State Hosp.*, 24 Pa. Commw. Ct. 218, 221-22, 354 A.2d 609, 611 (1976), *aff'd*, 476 Pa. 317, 382 A.2d 739 (1978). The *Hoolick* court explained that

[t]he Mental Health and Mental Retardation Act of 1966 envisions a comprehensive cooperative State-county (or multi-county) program for the care, treatment and rehabilitation of persons who are mentally disabled or mentally retarded through a system of out-patient facilities and in-patient facilities for those who need institutionalized care.

The State, through the Department of Welfare, is responsible for the overall supervision and control of the program to assure the availability of and equitable provision for adequate mental health and mental retardation facilities, and the counties, separately or in concert, are assigned responsibilities as to particular programs.

Id.

53. See note 31 and accompanying text *supra*; notes 89-95 and accompanying text *infra*.

54. See note 52 and accompanying text *supra*.

55. See *Hoolick v. Retreat State Hosp.*, 24 Pa. Commw. Ct. 218, 221-22, 354 A.2d 609, 611 (1976), *aff'd*, 476 Pa. 317, 382 A.2d 739 (1978); note 52 *supra*.

56. PA. STAT. ANN. tit. 50, § 4302 (Purdon 1969).

57. *Id.* § 4303. The Act defines the local authorities as the county commissioners of a county, or the city councils and the mayors of the first class cities. *Id.* § 4102.

58. *Id.* § 4303.

59. Philadelphia, a city of the first class, employs the merit system to select its administrator. *Id.* § 4303.

tardation.⁶⁰ This administrator is responsible for certain administrative, reporting, and liaison functions regarding the delivery of services to the mentally disabled.⁶¹

The actual provision of the services falls in the first instance on the counties.⁶² The local county authorities are under a duty to ensure that these community-based services are available to their citizens.⁶³ Conceptually, the system anticipates that the retarded individuals desiring services will be evaluated and placed in appropriate community programs by the county authorities. Institutionalization is to be used only when deemed absolutely necessary.⁶⁴ Supervision, reevaluation, and relocation are continuing client services which the local authorities are expected to perform in a manner consistent with the needs of the individual.⁶⁵ As a practical matter, however, both political and fiscal pressures prevent the realization of this ideal.

The brunt of the fiscal responsibility for these programs falls on the state which pays 90% of the costs of county programs.⁶⁶ The state also carries a residual responsibility to make available all mandated programs.⁶⁷ The Department of Public Welfare is statutorily obligated to assure the availability of services to all mentally retarded individuals who need them,⁶⁸ and to aid the counties with their local programs.⁶⁹ If a county is financially unable to provide these services it may seek a waiver from the Department of its statutory obligation, in which case the Department will assume 100% of the fiscal responsibility.⁷⁰ In addition to its supplementary responsibilities for the county programs, the Department operates all of the state facilities.⁷¹ It is fiscally responsible for the diagnosis, evaluation, and care provided in state-operated facilities, for new programs estab-

60. *Id.*

61. *Id.* § 4305.

62. *Id.* § 4301.

63. *Id.* The required services include the following: short-term in-patient care at facilities other than those provided by the state; out-patient services; partial hospitalization; emergency services; consultation and educational services to professional personnel and community agencies; aftercare services; specialized rehabilitative and training services, including sheltered workshops; interim care of the mentally retarded who have been accepted into state facilities; and a unified procedure for intake and placement. *Id.* § 4301(d).

64. See *Halderman v. Pennhurst State School & Hosp.*, 446 F. Supp. 1295, 1311-13 (E.D. Pa. 1977), *aff'd in part, rev'd and remanded in part*, 612 F.2d 84 (3d Cir. 1979) (en banc), *petition for cert. filed*, 48 U.S.L.W. 3614 (U.S. Mar.25, 1980)(No.79-1404).

65. 446 F. Supp. at 1313.

66. PA. STAT. ANN. tit. 50, § 4509 (Purdon 1969).

67. See, e.g., *In re Joyce Z.*, 123 Pitt. L.J. 181, 188-89 (C.P. Pa. 1975).

68. PA. STAT. ANN. tit. 50, § 4201 (Purdon 1969).

69. *Id.* § 4509.

70. See *id.* § 4508; *Commonwealth v. Benjamin J.*, No. 096177 (C.P. Chester Pa., Nov. 28, 1978), reprinted in PENNSYLVANIA BAR INSTITUTE, ASSERTING THE RIGHTS OF THE MENTALLY AND PHYSICALLY DISABLED 84-85 (1979).

71. PA. STAT. ANN. tit. 50, § 4202 (Purdon 1969).

lished by the state, and for certain durations of in-patient care and interim care for the mentally retarded.⁷² So, although the responsibility for initiating group homes rests with the counties,⁷³ it appears that both the state and the counties share the responsibility for the homes and for their necessary ancillary services. Unfortunately, fiscal disincentives have caused a different result.⁷⁴

Since, absent a waiver,⁷⁵ the counties must absorb 10% of the cost of services in the community, they operate under a disincentive to provide adequate local services for the retarded.⁷⁶ Because the initial assessment of the retarded individual is provided by the county, he or she is generally placed in a state institution where the state bears the entire cost.⁷⁷ Once relegated to state institutions, many individuals experience regression, thereby inhibiting their possibilities for successful community placement later.⁷⁸ Thus, the present structure of the Act permits the counties to shuffle their responsibilities off onto the state with no discernible benefit for retarded persons whose interests are purportedly at the center of the system.

The existence of this grey area of state-county responsibility has precluded the effective development of programs which are less restrictive alternatives. In addition to the fiscal considerations, the anticipated political repercussions of moving the retarded into communities creates a disincentive for municipal initiative.⁷⁹ Thus, even if the economic problems facing local mental health and retardation authorities are remedied, this will not ensure the establishment of community living arrangements, because, as will be demonstrated, community opposition to these living arrangements may surface through the zoning process and perhaps preclude the state's habilitative efforts.

72. *Id.* § 4507.

73. *Id.* § 4301. See note 63 and accompanying text *supra*.

74. PA. STAT. ANN. tit. 50, § 4508 (Purdon 1969) (allowing counties to apply to Department of Welfare to be relieved of their responsibilities).

75. See *id.*; text accompanying note 70 *supra*.

76. Although the county is entitled to recover costs from persons receiving services or from those under a legal duty to support such individuals, PA. STAT. ANN. tit. 50, § 4505 (Purdon 1969), generally, retarded persons receiving care from the state or counties come from families unable to bear the cost. See generally *id.* § 4502 (Purdon Supp. 1979). These individuals often receive only public benefits such as a social security disability which cannot be collected through legal process by the county or the Commonwealth in payment of the debts. See *Philpott v. Essex County Welfare Bd.*, 409 U.S. 413 (1973).

77. See *Halderman v. Pennhurst State School & Hosp.*, 446 F. Supp. 1295, 1312-13 (E.D. Pa. 1977), *aff'd in part, rev'd and remanded in part*, 612 F.2d 84 (3d Cir. 1979) (en banc), *petition for cert. filed*, 48 U.S.L.W. 3614 (U.S. Mar. 25, 1980) (No. 79-1404). PA. STAT. ANN. tit. 50, § 4202 (Purdon 1969); text accompanying note 71 *supra*.

78. Ferleger & Boyd, *supra* note 13, at 721-22.

79. See also note 76 and accompanying text *supra*.

**B. The Municipalities Planning Code:
An Exercise of the Police Power**

Zoning is an exercise of the state's police power—*i.e.*, the power of the state to regulate the activities of its citizens so as to protect the public's health, safety, welfare, and morals.⁸⁰ In Pennsylvania, the predominant statutory provision which governs zoning is the Municipalities Planning Code [MPC or Code],⁸¹ enabling legislation by which the state delegates a portion of its police power to local municipalities, authorizing them to exercise zoning power on behalf of the Commonwealth.⁸² The municipalities, as nonsovereign bodies, are limited by this enabling legislation to the powers specifically delegated.⁸³ Nonetheless, the delegation and the enabling legislation are to be liberally construed.⁸⁴

When the municipalities exercise the power to zone, they are subject to fourteenth amendment due process standards.⁸⁵ Because a

80. *Seattle Trust Co. v. Roberge*, 278 U.S. 116, 121 (1928); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387 (1926); *Appeal of Girsh*, 437 Pa. 237, 241 n.3, 263 A.2d 395, 397 n.3 (1970); *Sable Constr. Co. v. Zoning Hearing Bd.*, 16 Pa. Commw. Ct. 599, 607, 329 A.2d 912, 917 (1974).

81. PA. STAT. ANN. tit. 53, §§ 10101-11202 (Purdon 1972 & Supp. 1979). The purpose of the Pennsylvania Municipalities Planning Code is to foster orderly community development. *Ellis School v. City of Pittsburgh*, 4 Pa. Commw. Ct. 594, 598, 288 A.2d 844, 846 (1972). Section 10105 of the Code sets out its purpose as follows:

It is the intent, purpose and scope of this act to protect and promote safety, health and morals; to accomplish a coordinated development of municipalities, other than cities of the first and second class; to provide for the general welfare by guiding and protecting amenity, convenience, future governmental, economic, practical, and social and cultural facilities, development and growth, as well as the improvement of governmental processes and functions; to guide uses of land and structures, type and location of streets, public grounds and other facilities; and to permit municipalities, other than cities of the first and second class, to minimize such problems as may presently exist or which may be foreseen. It is the further intent of this act that any recommendations made by any planning agency to any governing body shall be advisory only.

PA. STAT. ANN. tit. 53, § 10105 (Purdon Supp. 1979).

In Philadelphia, a first class city, the statutory enabling mechanism is the First Class City Home Rule Act, *id.* § 13131-13157 (Purdon 1972 & Supp. 1979). This Act includes the power to adopt a comprehensive plan for zoning purposes. *See id.* § 13131; *Freed v. Power*, 392 Pa. 195, 197, 139 A.2d 661, 662 (1958).

82. *See* PA. STAT. ANN. tit. 53, § 10601 (Purdon 1972) (authorizing each municipality to enact, amend, or repeal zoning ordinances to accomplish any purpose of the Act). The Code enlarges the scope of the municipal zoning power beyond that of the police power. *See DeCaro v. Washington Township*, 67 Berks L.J. 41, 43, *aff'd*, 21 Pa. Commw. Ct. 252, 344 A.2d 725 (1974); PA. STAT. ANN. tit. 53, § 10604 (Purdon 1972 & Supp. 1979).

83. *See Cleaver v. Board of Adjustment*, 414 Pa. 367, 373, 200 A.2d 408, 412 (1964); *Kline v. City of Harrisburg*, 362 Pa. 438, 449-50, 68 A.2d 182, 186-87 (1949). The legislative grant of zoning power to first class cities acts as a limit upon them as well. *See School Dist. of Philadelphia v. Zoning Bd. of Adjustment*, 417 Pa. 277, 280, 207 A.2d 864, 866 (1965).

84. *See Exton Quarries, Inc. v. Zoning Bd. of Adjustment*, 425 Pa. 43, 49, 228 A.2d 169, 174 (1967). *See also Calantoni & Sons, Inc. v. Board of Supervisors*, 6 Pa. Commw. Ct. 521, 525 n.1, 297 A.2d 164, 166 n.1 (1972) (distinguishing state zoning enabling acts which are to be liberally construed and local zoning ordinances which are to be strictly construed).

85. *See Nectow v. City of Cambridge*, 277 U.S. 183 (1927).

landowner has a right to use his property as he sees fit,⁸⁶ the municipality may not impose a burden beyond what is necessary to meet police power objectives; that is to say, the municipality may not impose unreasonable, arbitrary, or confiscatory conditions restricting the use of the land.⁸⁷ Thus, zoning ordinances enacted by local government bodies will be upheld only if they bear a substantial relationship to the promotion of the public health, safety, welfare, and morals.⁸⁸

Under the MPC, land use control is essentially local, for the planning function rests primarily with the municipalities.⁸⁹ In the absence of the enactment of zoning ordinances by the municipalities, a county may enact zoning laws.⁹⁰ However, later enactment of a zoning ordinance by a municipality will supersede the county ordinance.⁹¹ Thus, the county does not have the power to impose particular land use objectives on the local government.⁹²

86. *See id.* at 188; *National Land & Inv. Co. v. Kohn*, 419 Pa. 504, 522, 215 A.2d 597, 607 (1965).

87. *See National Land & Inv. Co. v. Kohn*, 419 Pa. 504, 512, 215 A.2d 597, 602 (1965). The United States Supreme Court has stated: "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." *Seattle Trust Co. v. Roberge*, 278 U.S. 116, 121 (1928). *See also Landis v. Zoning Bd. of Adjustment*, 414 Pa. 146, 149, 198 A.2d 574, 575 (1964); *Robin Corp. v. Board of Supervisors*, 17 Pa. Commw. Ct. 386, 397, 332 A.2d 841, 847 (1975). Zoning is intended to regulate uses; it may not regulate ownership. *See Kaufman & Broad Inc. v. Board of Supervisors*, 20 Pa. Commw. Ct. 116, 120, 340 A.2d 909, 911 (1975). *See generally Dublin Properties v. Board of Comm'rs*, 21 Pa. Commw. Ct. 54, 342 A.2d 821 (1975).

88. *See Seattle Trust Co. v. Roberge*, 278 U.S. 116, 121 (1928); *Nectow v. City of Cambridge*, 277 U.S. 183, 187-88 (1927); *Sylvester v. Pittsburgh Zoning Bd. of Adjustment*, 398 Pa. 216, 222, 157 A.2d 174, 178 (1959); *Kline v. Harrisburg*, 362 Pa. 438, 451, 68 A.2d 182, 188 (1949); *Calantoni & Sons, Inc. v. Board of Supervisors*, 6 Pa. Commw. Ct. 521, 524, 297 A.2d 164, 166 (1972).

89. *See PA. STAT. ANN.* tit. 53, § 10601 (Purdon 1972) (governing body may enact ordinances to implement comprehensive plan and accomplish purposes of the MPC). The Code maintains that the purposes of zoning are as follows:

(1) To promote, protect, and facilitate one or more of the following: the public health, safety, morals, general welfare, coordinated and practical community development, proper density of population, civil defense, disaster evacuation, airports, and national defense facilities, the provision of adequate light and air, police protection, vehicle parking and loading space, transportation, water, sewerage, school, public grounds, and other public requirements as well as

(2) To prevent one or more of the following: overcrowding of land, blight, danger and congestion in travel and transportation, loss of health, life or property from fire, flood, panic or other dangers. Zoning ordinances shall be made in accordance with an overall program and with consideration for the character of the municipality, its various parts and the suitability of the various parts for particular uses and structures.

Id. § 10604.

90. *See id.* § 10602.

91. *See id.* A county may only zone until the local authorities exercise their prerogative to do so since "[t]he enactment of a zoning ordinance by any municipality, other than the county, whose land is subject to county zoning shall act as a repeal pro tanto of the county zoning ordinance, within the municipality adopting such ordinance." *Id.*

92. *See Commonwealth v. Bucks County*, 22 Bucks County L. Rep. 179, 185 (C.P. Pa. 1972), *aff'd*, 8 Pa. Commw. Ct. 295, 302 A.2d 897 (1973).

The zoning ordinances are passed following a hearing pursuant to public notice,⁹³ and may regulate or prohibit, *inter alia*, the density of population and the intensity of use, as well as make allowances for special exceptions, variances, and conditional uses.⁹⁴ The local nature of land use planning makes it especially likely to reflect the desires of the community regarding the use of their land and the land around them.⁹⁵ It is not likely, however, that it will reflect the needs and desires of those who have thus far been excluded from the community because these people presumably lack sufficient political leverage to ensure that their needs are represented in the planning decisions. For this reason, the retarded cannot expect the communities to issue an invitation in the form of a zoning ordinance which is specifically compatible with the placement of CLA's in single-family areas. It is more probable that the retarded will have to break into an already set residential area through challenges to the existing plan for development.

Challenging or modifying the zoning of a particular piece of property may be initiated in several ways under the MPC. A substantive challenge to the ordinance itself may be raised by the filing of a curative amendment directed at resolving the perceived problem.⁹⁶ The amendment is filed with the governing body of the municipality and seeks a legislative resolution to the problem.⁹⁷ In the alternative, either a substantive challenge, or a modification of the application of the zoning ordinance (*e.g.*, a special exception), may be initiated by seeking a zoning permit from the zoning hearing board.⁹⁸ From the zoning hearing board, the landowner or other persons aggrieved by the determination may appeal to the county court of common pleas.⁹⁹ Under the statute, these are the exclusive means

93. See PA. STAT. ANN. tit. 53, § 10607 (Purdon 1972) (providing for preparation of the zoning ordinance, public hearing, and presentation to the governing body); *id.* § 10608 (providing for public hearing and subsequent vote by governing body within ninety days). Under the Philadelphia Home Rule Charter, zoning ordinances may not be adopted without the approval of the City Planning Commission. 351 Pa. Code § 2.2-307. The City Planning Commission prepares the proposed ordinance and submits it to the mayor for transmission to the city council. *Id.* § 4.4-601.

94. PA. STAT. ANN. tit. 53, § 10603 (Purdon Supp. 1979). See *id.* § 10912 (Purdon 1972) (standards for variances); *id.* § 10914 (standards for special exceptions and conditional uses).

95. See Comment, *Zoning the Mentally Retarded Into Single-Family Residential Areas*, 1979 ARIZ. L. REV. 385, 385; Chandler & Ross, *supra* note 6, at 311.

96. See PA. STAT. ANN. tit. 53, § 11004 (Purdon Supp. 1979).

97. *Id.*

98. See *id.* § 10910 (Purdon 1972) (board shall hear challenges to the validity of a zoning ordinance); *id.* § 10912 (board shall hear requests for variances); *id.* § 10913 (board shall hear and decide requests for special exceptions).

99. 42 PA. CONS. STAT. §§ 5105(a)(2), 5571(b) (1978).

for raising zoning challenges.¹⁰⁰ Once in the court of common pleas, different statutory provisions apply for landowners and aggrieved persons challenging either the validity or the application of the ordinance.¹⁰¹ Other persons directly involved may also intervene.¹⁰² The court of common pleas, after having heard the appeal,¹⁰³ may grant, *inter alia*, permission for the use, or it may set aside the ordinance, retaining jurisdiction to assure that its relief is complete.¹⁰⁴

The local nature of zoning legislation and adjudication provides substantial local discretion with respect to the admission of group homes. If resistance is anticipated, the reasons for the resistance must be examined and the local ordinance must be evaluated so that the appropriate response can be prepared. The first order of business before the zoning decisionmaker must be to present the benefits of the group homes, explain their function, and discuss their positive effects.¹⁰⁵ The second step is to allay the fears which motivate public resistance.

C. Community Resistance to CLA's: Reasons and Responses

The movement of the retarded from institutions into the community has made one fact very clear: the neighborhoods will resist the establishment of group homes, despite the fact that most individuals say in the abstract that they support the idea of community living arrangements.¹⁰⁶ Since zoning is a local, political function, it tends to reflect parochial views.¹⁰⁷ Communities are under many disincentives to open their doors to community living arrange-

100. See PA. STAT. ANN. tit. 53, § 11001 (Purdon 1972); *Mazuka v. American Oil Co.*, 383 Pa. 191, 196, 118 A.2d 142, 144 (1955) (court is limited in the scope of its jurisdiction to the provision of the applicable zoning statutes and may not apply equitable principles); cf. *Commonwealth v. Bucks County*, 22 Bucks County L. Rep. 179, 181 (1972), *aff'd*, 8 Pa. Commw. Ct. 295, 302 A.2d 897 (1973) (an exception to the exclusivity of the statutory procedures has been recognized where the statutory remedy is not adequate or complete, or is nonexistent).

101. See PA. STAT. ANN. tit. 53, § 11005 (Purdon Supp. 1979) (appeal by persons aggrieved challenging validity of ordinance); *id.* § 11006 (appeal by landowner challenging decisions not involving the validity of an ordinance); *id.* § 11007 (appeal by person aggrieved challenging decisions not involving the validity of an ordinance).

102. See *id.* § 11009 (Purdon 1972).

103. See *id.* § 11010 (judge may hold hearing to receive additional evidence, but if he does not, the findings of the governing body or the zoning hearing board may not be disturbed if supported by substantial evidence).

104. See *id.* § 11011 (Purdon Supp. 1979).

105. See notes 14-16 and accompanying text *supra*.

106. See *Bugbears*, *supra* note 25, at 52. A study by the President's Commission on Mental Retardation found that 85% of the general population said they would not object to a group home on their block; however, 33% of the group homes actually established experienced community opposition at their inception. *Id.*

107. See *id.* at 53. See also Kressel, *supra* note 23, at 145-46; *Developmental Disabilities*, *supra* note 27, at 795-96.

ments.¹⁰⁸ Resistance results from many unfounded prejudices about “deviant” groups generally and from certain specific feared “attributes” of retarded individuals—for instance, that crime rates will climb, that the residential character of the neighborhood will be destroyed, and that property values will drop.¹⁰⁹ To quell this first fear, it is sufficient to note that crime rates have not, in fact, risen in neighborhoods with group homes.¹¹⁰ With respect to the second and third fears, however, a more detailed response is necessary.¹¹¹

Zoning authorities assume that community living arrangements are incompatible with the established residential patterns.¹¹² Destruction of the residential character of the neighborhood might be justification for exclusion under the police power of zoning if it actually occurred;¹¹³ however, unless a disability ghetto begins to emerge,¹¹⁴ the introduction of a group home into a neighborhood will not change its character appreciably.¹¹⁵ Even if a ghetto is forming, this is easily remedied by incorporating a dispersal requirement in the local ordinance, which is beneficial to both the residents of the group home and to others in the neighborhood; the mere fact that a ghetto seems to be emerging, however, does not justify exclusionary practices.¹¹⁶

Neighborhood residents also fear that plummeting property values will result from the local establishment of a group home.¹¹⁷ This objection, though arguable in theory,¹¹⁸ has been repeatedly disproved. Perhaps due in part to self-consciousness resulting from the

108. See *Developmental Disabilities*, *supra* note 27, at 796; notes 24 & 25 and accompanying text *supra*.

109. See Kressel, *supra* note 23, at 145; Lippincott, *supra* note 7, at 769; *Bugbears*, *supra* note 25, at 53.

110. See Kressel, *supra* note 23, at 145-46. This fear seems to apply to group homes generally, not simply to group homes for the retarded. Telephone interview with Marilyn Mennis, *supra* note 8. See *Zoning for Community Residences*, *supra* note 7, at 320. The feared crime of sexual deviancy associated with the retarded is an historical anachronism which led to the creation of the large, isolated institution. See A. DEUTSCH, *THE MENTALLY ILL IN AMERICA* 332-86 (2d ed. 1949); Wolfensburger, *supra* note 2, at 100-05, 112-15. In addition, it was sometimes assumed without scientific basis that the retarded are carriers of disease. See Chandler & Ross, *supra* note 6, at 315.

111. See notes 112-21 and accompanying text *infra*.

112. See Kressel, *supra* note 23, at 145.

113. See *Bugbears*, *supra* note 25, at 53. See also Kressel, *supra* note 23, at 145.

114. See notes 32-36 and accompanying *supra*.

115. See *Bugbears*, *supra* note 25, at 53. This result may be due in part to the fact that the residents of the group homes have little to do with the residents of the neighborhood and vice versa. *Id.*

116. See *Zoning for Community Residences*, *supra* note 7, at 320.

117. *Id.*; *Bugbears*, *supra* note 25, at 53; Telephone interview with Marilyn Mennis, *supra* note 8.

118. Cf. *Phillips v. Griffiths*, 366 Pa. 468, 471, 77 A.2d 375, 377 (1951) (“protection of property values is an incident of zoning laws”).

fear of community opposition, group home residents tend to give their properties excellent care.¹¹⁹ Empirical data indicate that property values have remained constant or have improved over time in areas where group homes have been established.¹²⁰ Additionally, real estate turnovers have not increased.¹²¹

Until this data is accepted by the public as true, resistance will continue. The ever-increasing need for group homes, however, cannot await the effects of public education about the deinstitutionalization imperative. At present, it is estimated that fifty percent of the planned group homes are blocked at the outset by members of the community whose resistance eventually causes abandonment of these projects.¹²² In the past, the basic means of working around this difficulty has been to resort to the use of apartments as the means of providing community living arrangements for the retarded.¹²³

Assuming that community resistance exists, and that attempts at education have failed, the question becomes how to deal with the resistance in the most efficacious manner. The extent and type of resistance must first be gauged. If the sponsors explain the nature and purpose of the group homes, acceptance may still be possible.¹²⁴ Realistically, this is an unlikely result and a process which may be self-defeating, for there appears to be a correlation between preestablishment community activity by proponents and the development of organized opposition to the establishment of the community living arrangement.¹²⁵

If conciliation fails and the area is not a politically weak, transitory neighborhood where group homes are often established,¹²⁶ manipulation of the zoning process to prevent the establishment of the

119. See *Bugbears*, *supra* note 25, at 53.

120. See *id.*; Study of Property Values in Allegheny County (on file with author); Abstract of study by Dr. Julian Wolpert, Princeton University, Professor of Geography and Urban Planning (1977) (on file with author).

121. See Kressel, *supra* note 23, at 146; *Bugbears*, *supra* note 25, at 53.

122. See *Bugbears*, *supra* note 25, at 53.

123. See *Developmental Disabilities*, *supra* note 27, at 796 n.14. Philadelphia County now requires the use of rental property for group homes because of the difficulties and delays entailed in zoning and property ownership. Telephone Interview with Vivian Lotz, former Director of the Southwest Community Action Program, Philadelphia, Pa. (Mar. 23, 1979). The movement to rentals in other states has not ended the problem. See *Rosen v. Birchwood Assoc.*, Case No. (S)H-D-60289-78 (N.Y. State Division of Human Rights, Dec. 18, 1979) (apartment owner's denial of lease to a group home constitutes a violation of state Human Rights Act); cf. PA. STAT. ANN. tit. 43, § 955(h)(1) (Purdon Supp. 1979) (Pennsylvania Human Relations Act makes unlawful the discriminatory practice of refusing to lease to individuals because of handicap or disability).

124. See Kressel, *supra* note 23, at 146. But see Lippincott, *supra* note 7, at 774 n.41.

125. See *Bugbears*, *supra* note 25, at 53.

126. See *Zoning for Community Residences*, *supra* note 7, at 319.

home must be anticipated.¹²⁷ It is likely that the residents of the CLA or the sponsors will be forced to come into contact with the municipal zoning system as either petitioners for a zoning permit or as defendants in an action to enjoin the use of the property.¹²⁸ Where the ordinance does not permit the intended use, the owner of the house might wish to take the offensive and seek a curative amendment on the ground that the ordinance, if applied to the group home, would violate either his constitutional right to use his property as he sees fit,¹²⁹ or the rights of the residents to minimally adequate habilitation.¹³⁰ Unless the ordinance specifically states that group homes for the retarded will not be permitted under any circumstances, it would seem to be the better route to proceed through the municipal appellate process.¹³¹

In the application for the zoning permit, the landowner must come out with all his or her guns blazing.¹³² The evidence must clearly show that all reasons for resistance are frivolous and that the group home operates much like a normal family. If neighbors exert opposition, it is doubtful that they would be able to factually support their objections.¹³³ As a practical matter, however, a preponderance of the facts may not outweigh the political considerations which may underlie the zoning decision. Unless the landowner is willing to make

127. See Lippincott, *supra* note 7, at 774-75.

128. See *id.* at 773-74.

129. See *Nectow v. City of Cambridge*, 277 U.S. 183 (1927); *National Land & Inv. Co. v. Kohn*, 419 Pa. 504, 215 A.2d 597 (1965); note 86 and accompanying text *supra*.

130. See cases cited notes 20 & 21 *supra*. Third-party standing difficulties could be an obstacle for landowners in asserting the rights of the residents. Cf. Note, *Housing for the Elderly: Constitutional Limitations and Our Obligations*, 5 FLA. S.U.L. REV. 423, 440 (1977) (open question on third-party rights in federal suit challenging the constitutionality of exclusionary zoning practices).

131. See notes 98-105 and accompanying text *supra*.

132. One author explained the need for a comprehensive presentation as follows:

In preparing for the hearing before the planning commission, the attorney should consider securing testimony on the following matters: (1) a detailed description of the plans for the group home, including number of residents, degree of retardation, screening procedures, staff-to-resident ratios, and plans for daily activity of the residents; (2) if the home is to be constructed rather than set in an already-constructed dwelling, architectural and landscaping plans; (3) state requirements for licensing of group homes, preferably presented by a representative of the state licensing department; (4) psychological evidence on the characteristics of mentally retarded people, focusing in particular on the fears and questions raised by opponents of the community home; (5) evidence from a real estate appraiser and/or owners and neighbors of other community homes that such homes do not lower local property values; and (6) the recommendations of influential members of the community.

Lippincott, *supra* note 7, at 775.

133. Two commentators have observed: "It is unlikely that the defenders of the local zoning restriction could create a record of anything more than fears over having mentally retarded people in the community. Fear is not sufficient to justify an exclusion based on the general welfare." Chandler & Ross, *supra* note 6, at 329.

a conciliation of some sort,¹³⁴ the opposition may prevail before the zoning officer or the zoning hearing board.

Once the controversy has gone beyond the municipal administrative stage, the retarded individuals may enter the controversy, not as "persons aggrieved" by the decision,¹³⁵ but as interested intervening parties.¹³⁶ Also, it is not until this point that the rights of the persons truly aggrieved by a decision adverse to the CLA will be addressed. It is submitted that landowners, unless they are an advocacy group for the retarded, may not be willing to undertake this potentially expensive appellate process, regardless of the support of outside agencies.¹³⁷ Accordingly, Part III discusses how to work through existing zoning ordinances to achieve placement of CLA's in the community. Part IV considers an alternative available when the provider of the service is the state—*i.e.*, the argument that principles of governmental immunity exempt the state when performing its *parens patriae* duty from the operation of local zoning ordinances. Finally, Part V will examine pending and proposed legislation to clarify the relationship of CLA's to local zoning ordinance classifications.

III. DEALING WITH THE ZONING LAWS AS THEY ARE

A. *Meeting the Ordinance Definitions: Residence by Right as a Permitted Use—The Family-Equivalent Analysis*

Since the residents of group homes do function as a family, the simplest and most logical argument for establishing such a living arrangement—one that avoids the complex statutory and constitutional issues—is that the group home constitutes a family use of the property within the definition of the ordinance. This "permitted use" approach has several favorable aspects. The use is one of right which may be established and proceed without the imprimatur of the local body. Therefore, unless a zoning permit for renovations is neces-

134. One group home established in Philadelphia agreed to place a restrictive covenant in the deed to return the home to a "single-family" use upon its sale. Telephone interview with Vivian Lotz, *supra* note 8.

135. Although the retarded individuals might be aggrieved by the result, a precondition to the ability to appeal is that the person be aggrieved by a "use or development *permitted* on the land of another." PA. STAT. ANN. tit. 53, §§ 11005, 11007 (Purdon Supp. 1979) (emphasis added). Thus, the only group benefiting from this provision of the statute would be the neighbors in opposition.

136. See PA. STAT. ANN. tit. 53, § 11009 (Purdon 1972). In this situation, the landowner (provider) must make the record below and file the appeal before the retarded clients may assert their rights.

137. Lippincott, *supra* note 7, at 772.

sary,¹³⁸ the onus is on the persons who wish to prevent the intended use as a group home to initiate a challenge, rather than on the provider of the service or the residents themselves to secure approval for the use.¹³⁹ This allocation of the burden necessitates organized opposition and, thus, may help minimize resistance from the outset.¹⁴⁰

Assuming that the use is challenged, the actual question at issue in terms of strict land use planning theory is whether or not a family use of the property is involved;¹⁴¹ the issue generally addressed, however, is whether or not the group seeking residence is actually a family.¹⁴² The group's success in qualifying as a permitted use will depend on the extent to which the advocate is able to direct the court's attention away from the issue of what is a family and focus it on the more general and proper issue of what is a family use. Alternatively, if the controversy is riveted around the issue of whether the group qualifies as a family, the chances of success seem to depend on the specificity with which the ordinance defines "family."

Consider an ordinance which uses the word "family" without supplementary definitions.¹⁴³ In the absence of a definition of the

138. See *Group House v. Board of Zoning and Appeals*, 45 N.Y.2d 266, 266, 380 N.E.2d 207, 208, 408 N.Y.S.2d 377, 378 (1978) (provider initiated action by applying for a building permit when structural modifications were necessary to house group home).

139. See Lippincott, *supra* note 7, at 773-74.

140. As one study has found, notice to the community allows it to better prepare to challenge the group home and thus offer more opposition, but that once established, the group home tends to be accepted. See *Bugbears*, *supra* note 25, at 52. Therefore, it appears that the best solution would seem to be to work within the zoning laws so that the opposition must initiate the action.

141. See Annot., 71 A.L.R.3d 693, 699 (1976); note 87 *supra*; note 152 *infra*.

142. *Id.* Despite this general tendency, some courts have invalidated zoning ordinances that distinguish between biologically related families and group foster homes on the grounds that regulating the internal composition of a residence has "too tenuous a connection to land use and so is unauthorized by the state enabling act." *Developments in the Law—Zoning*, 91 HARV. L. REV. 1427, 1576 (1978) [hereinafter cited as *Zoning*]. If one were to look only at the use, it would necessarily follow that a much broader group would be able to occupy the residence since "even the most narrowly defined family group may, arguably, make a family use of the premises which involves occupancy by others, such as guests or boarders." Annot., *supra* note 141, at 699.

In *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974), the Supreme Court examined the constitutionality of a single-family zone where "family" was limited to one or more persons related by blood, adoption, or marriage, or not more than two unrelated persons living and cooking together as a single house-keeping unit. *Id.* The Court found that the use of such a "single-family zone" did not violate constitutional equal protection standards when applied to a group of unrelated students living together in one house. *Id.* at 7-10. At least one commentator has found that this Supreme Court decision raises difficulties for the attorney utilizing a "single-family" argument. See Lippincott, *supra* note 7, at 770-72. It is submitted, however, that the decision in *Belle Terre* does not affect matters relating to statutory construction under state law because the plaintiffs in that case apparently did not argue that they fit within the ordinance's definition of a family. 416 U.S. at 7.

143. It should be noted that even when the term is actually defined within the statute, courts have been known to totally ignore the definition. See *Zoning*, *supra* note 142, at 1577.

family, courts generally use a broad construction of the term.¹⁴⁴ Where such an ordinance exists, courts in other states have held that a group home, intended to provide a homelike environment for retarded persons, is the functional and factual equivalent of a natural family and, thus, is a permitted use within a single-family residential zone.¹⁴⁵ The underlying rationale for this trend has been explained as follows:

So long as an institution is small, state courts seem less concerned that it may be somewhat less congenial to a residential neighborhood than a family would be, and more concerned with the function it serves. That is, . . . state courts seem most interested in protecting those institutions which, like families, raise children and shelter their members from social and economic adversity.¹⁴⁶

Other factors which may affect whether a group of retarded persons will be found to qualify as a family include, *inter alia*, whether the residents are children or adults, whether residence in the group home is a permanent or temporary placement, and whether habilitative services are provided on or off the premises.¹⁴⁷ The family-equivalent analysis is factually easier to propose, and probably more likely to be accepted by the community, if the residents of the home are children,¹⁴⁸ although groups of adults have been found to be a

144. See *YWCA v. Board of Adjustment*, 121 N.J. Super. 384, 390, 341 A.2d 356, 359 (L. Div. 1975), *aff'd*, 141 N.J. Super. 315 (App. Div. 1976); Annot., *supra* note 141, at 699-700; *Zoning*, *supra* note 142, at 1576-77.

145. See, e.g., *Brady v. Superior Court*, 200 Cal. App. 2d 69, 77-78, 19 Cal. Rptr. 242, 247-48 (1962); *State ex rel. Ello v. Liddle*, 520 S.W.2d 644, 650 (Mo. Ct. App. 1975); *Newark v. Johnson*, 70 N.J. Super. 381, 386, 175 A.2d 500, 502 (L. Div. 1961); *Group House v. Board of Zoning and Appeals*, 45 N.Y.2d 266, 274, 380 N.E.2d 207, 209-10, 408 N.Y.S.2d 377, 380 (1978); *Village of Freeport v. Association for the Help of Retarded Children*, 94 Misc. 2d 1048, 1049, 406 N.Y.S.2d 221, 222-23, *aff'd*, 60 A.D.2d 644, 400 N.Y.S.2d 724 (1977).

146. *Zoning*, *supra* note 142, at 1577.

147. See *County of Lake v. Gateway Houses Foundation*, 19 Ill. App. 3d 318, 311 N.E.2d 371 (1974). Habilitation services on the premises may cause the home to be designated a business use. See notes 198-201 and accompanying text *infra*. Services off-premises may frustrate the home's attempt to qualify as an educational use. See notes 202-06 and accompanying text *infra*.

148. See, e.g., *City of White Plains v. Ferraroli*, 34 N.Y.2d 300, 313 N.E.2d 756, 357 N.Y.S.2d 449 (1974). In explaining its family equivalent analysis, the *Ferraroli* court stated:

Whether a family be formalized along ties of blood or formal adoptions, or be a similarly structured group sponsored by the State, as is the group home, should not be consequential in meeting the test of the zoning ordinance. 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.

Id. at 305-06, 313 N.E.2d at 758, 357 N.Y.S.2d at 452-53 (citations omitted). The court concluded:

In short, an ordinance may restrict a residential zone to occupancy by stable families occupying single-family homes, but neither by express provision nor construction may it limit the definition of family to exclude a household which in every but a biological sense is a single family. The minimal arrangement to meet the test of a zoning provision, as this one, is a group headed by a householder caring for a reasonable number of children as one would be likely to find in a biologically unitary family.

Id. at 306, 313 N.E.2d at 758-59, 357 N.Y.S.2d at 453 (citations omitted).

family for purposes of zoning.¹⁴⁹ The residence of adults in a CLA will have a character of permanence, a factor of great importance to the courts,¹⁵⁰ which may be lacking when children are the residents. Both situations present facts from which it may be concluded that the CLA constitutes a family or a family use.¹⁵¹ Additionally, the number of residents should be limited to a reasonable number. Above all, the court's attention should be focused on the use of the residence, rather than on the relationship among those who live there.¹⁵²

An ordinance with a brief but nonspecific definition of the family may be used in a similar fashion. Although the courts in other jurisdictions have not been entirely in agreement depending upon the group involved,¹⁵³ they have held that an ordinance which defines a family as "a single housekeeping unit" does not bar group homes for retarded persons.¹⁵⁴ The scope of the uses permitted under this type of ordinance is still not entirely clear. One Pennsylvania court, applying an ordinance which required, *inter alia*, that the residents share a "domestic bond," found that the zoning hearing board did not err in holding that college students residing as a single household unit do not satisfy the ordinance.¹⁵⁵ The precedential value of the case is questionable, given the unusual wording of the ordinance¹⁵⁶ and the somewhat transient character of residence by students.¹⁵⁷ If

149. See *Living Resources Corp. v. Burns*, 91 Misc. 2d 919, 921, 398 N.Y.S.2d 928, 929 (App. Div. 1977).

150. See *Planning and Zoning Comm'n v. Synanon Foundation*, 153 Conn. 305, 309, 216 A.2d 442, 443 (1966); *City of White Plains v. Ferraroli*, 34 N.Y.2d 300, 306, 313 N.E.2d 756, 758, 357 N.Y.S.2d 449, 453 (1974); *Little Neck Community Ass'n v. Working Organization for Retarded Children*, 52 A.D.2d 90, 93-94, 383 N.Y.S.2d 364, 366-67, *appeal denied*, 40 N.Y.2d 803 (1976). See also *Zoning*, *supra* note 142, at 1577-78.

151. See generally Comment, *Exclusionary Zoning and its Effects on Group Homes in Areas Zoned for Single Family Dwellings*, 24 KAN. L. REV. 677, 685-88 (1976).

152. See Comment, *supra* note 151, at 686. As the New York Court of Appeals has stated, "[z]oning is intended to control types of housing and living and not the genetic or intimate internal family relations of human beings." *City of White Plains v. Ferraroli*, 34 N.Y.2d 300, 305, 313 N.E.2d 756, 758, 357 N.Y.S.2d 449, 452 (1974). See notes 141-42 and accompanying text *supra*.

153. *Zoning*, *supra* note 142, at 1577-78.

154. See, e.g., *Hessling v. City of Broomfield*, 193 Colo. 124, 127-28, 563 P.2d 12, 14 (1977); *Oliver v. Zoning Comm'n*, 31 Conn. Supp. 197, 205, 326 A.2d 841, 845 (C.P. 1974); *Robertson v. Western Baptist Hosp.*, 267 S.W.2d 395, 397 (Ky. Ct. App. 1954); *Township of Washington v. Central Berger Community Mental Health Center, Inc.*, 156 N.J. Super. 388, 419, 383 A.2d 1194, 1209 (1978).

155. See *Humphrey v. Zoning Hearing Bd.*, 36 Lehigh County L.J. 308, 309-11 (C.P. Pa. 1975). The ordinance defined a family as "[a] collective body of two (2) or more persons doing their own cooking and living as a separate housekeeping unit in relationship based upon birth, marriage, adoption or other domestic bonds." *Id.* at 309 (emphasis added).

156. See note 155 *supra*.

157. See *Humphrey v. Zoning Hearing Bd.*, 36 Lehigh County L.J. 308, 309 (C.P. Pa. 1975). The court also stated that there was evidence in the record that the property had been used as a boarding house in the past. *Id.*

nothing else, the case reiterates the idea that successful utilization of the family-equivalent analysis requires that the advocate focus the court's attention on the use of the property, rather than on the relationship of the occupants.¹⁵⁸

Although Pennsylvania courts have never directly addressed the issue, the flexibility with which they have applied the definition of "family" in other contexts appears to support the argument that the group home constitutes a family use within the definition of the ordinance.¹⁵⁹ The Pennsylvania definition of "family" applied in nonzoning situations, is broad, and encompasses more than mere blood relationships.

Family is not a technical word, nor can it be given any technical meaning In a very common, if the most usual sense, it includes all the persons of the same blood who are dwelling together in one household, and in many cases the condition of the same blood is not requisite¹⁶⁰

Using this definition, at least one Pennsylvania court has found that a woman living with a family but not related to it either by blood or marriage is still to be considered a member of the family.¹⁶¹ The definition of "household" is even broader in scope.¹⁶² The key to the definition is the existence of a single head or management of the group,¹⁶³ much like the role of houseparents in a community living arrangement.

Factors considered in the determination of the existence of a family include whether purchases are made by the group or by indi-

158. See Comment, *supra* note 151, at 685-87. But see *Pennsylvania George Junior Republic v. Zoning Hearing Bd.*, 37 Pa. Commw. Ct. 151, 389 A.2d 261 (1978). The *George Junior Republic* court addressed the issue of whether a home for juvenile offenders and unmanageable boys constituted a "one family dwelling" within the meaning of the local ordinance. *Id.* at 153, 389 A.2d at 262. Although the court concentrated on the definition of a dwelling rather than of a family, it found the use to be an institutional home, specifically excluded by the ordinance from the definition of dwelling. *Id.* at 153-54, 389 A.2d at 262. No facts or cases supporting the court's conclusion of the institutional nature of the use were given. *Id.*

159. Although the definition of a family is often an issue in such areas as the construction of wills and the award of public benefits, it is submitted that the public policy which justifies the loose construction of "family" in those areas is no more compelling than the public policy supporting minimally adequate habilitation for the retarded. See, e.g., *Way Estate*, 379 Pa. 421, 109 A.2d 164 (1954) (construction of language in a will); *Beilstein v. Beilstein*, 194 Pa. 152, 45 A. 73 (1899) (same).

160. *Beilstein v. Beilstein*, 194 Pa. 152, 155, 45 A. 73, 74 (1899).

161. See *Way Estate*, 379 Pa. 421, 436-37, 109 A.2d 164, 172 (1954) (construction of language in a will).

162. See, e.g., *Brovdy v. J. & L. Steel Corp.*, 145 Pa. Super. Ct. 602, 605, 21 A.2d 437, 438 (1941) (workmen's compensation); *Hoff v. Hoff*, 132 Pa. Super. Ct. 431, 435, 1 A.2d 506, 507 (1938) (construction of a will).

163. See *Bair v. Robinson*, 108 Pa. 247, 249 (1885) (construction of a will). See also cases cited note 162 *supra*.

viduals, whether property ownership of household items is in the group or in the individuals, and whether entertainment is done as a group or individually.¹⁶⁴ With the emphasis on the typical functioning of a contemporary family, the activities performed by members of a group home fit well within Pennsylvania's view of the family as a social and economic unit.¹⁶⁵ Wherever it is possible to do so without curtailing habilitative programs, the structure of the home should be geared to fall within the definition of the family.

B. Meeting the Ordinance Definitions: Residence by Special Exception

When the ordinance defines the family in terms of specific degrees of consanguinity or affinity, an alternative to asserting the family-equivalent analysis might be available if the zoning ordinance includes a provision for "special exceptions."¹⁶⁶

164. See *Hoff v. Hoff*, 132 Pa. Super. Ct. 431, 436, 1 A.2d 506, 508 (1938).

165. See notes 143-63 and accompanying text *supra*.

166. See PA. STAT. ANN. tit. 53, § 10603 (Purdon Supp. 1979). Courts and commentators have noted that the term "special exception" is a misnomer. See, e.g., *Tullo v. Township of Millburn*, 54 N.J. Super. 483, 490, 149 A.2d 620, 624-25 (1959); D. MANDELKER & R. CUNNINGHAM, *PLANNING AND CONTROL OF LAND DEVELOPMENT* 659-60 (1979). What is sometimes called special exception is a use permitted by the ordinance but only if specific conditions are met. See D. HAGMAN, *URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW* 103 (1975). It is not, as the name implies, an exception from the operation of the statute. This type of flexible zoning is also called a "special use" or a "conditional use," with authorities expressing a preference for one of these terms rather than "special exception." See *Tullo v. Township of Millburn*, 54 N.J. Super. 483, 490, 149 A.2d 620, 624-25 (1959); *Depue v. City of Clinton*, 160 N.W.2d 860, 863 (S. Ct. Iowa 1968). The classic explanation of this type of use was provided in *Tullo v. Township of Millburn*:

In order that our subsequent discussion of the issues in this case may be viewed in their proper legal perspective, we interrupt the factual narrative to comment on the true nature of a "special exception" under our statute. The term might well be said to be a misnomer. "Special uses" or "special use permits" would be more accurate. The theory is that certain uses, considered by the local legislative body to be essential or desirable for the welfare of the community and its citizenry or substantial segments of it, are entirely appropriate and not essentially incompatible with the basic uses in any zone (or in certain particular zones), but not at every or any location therein or without restrictions or conditions being imposed by reason of special problems the use or its particular location in relation to neighboring properties presents from a zoning standpoint, such as traffic congestion, safety, health, noise, and the like. The enabling act therefore permits the local ordinance to require approval of the local administrative agency as to the location of such use within the zone. If the board finds compliance with the standards or requisites set forth in the ordinance, the right to the exception exists, subject to such specific safeguarding conditions as the agency may impose by reason of the nature, location and incidents of the particular use. Without intending here to be inclusive or to prescribe limits, the uses so treated are generally those serving considerable numbers of people, such as private schools, clubs, hospitals and even churches, as distinguished from governmental structures or activities on the one hand and strictly individual residences or businesses on the other. This method of zoning treatment is also frequently extended to certain unusual kinds of strictly private business or activity which, though desirable and compatible, may by their nature present peculiar zoning problems or have unduly unfavorable effect on

The special exception process is highly politicized, despite legislative guidelines.¹⁶⁷ In drawing up its zoning ordinance, the governing body may include a list of uses to be treated as special exceptions in a particular zone, and the standards to be met before the use will be permitted;¹⁶⁸ neither the list nor the standards need be the same for each zone in the municipality. The application is made to the zoning hearing board which may not arbitrarily reject an application that clearly meets the standards of the ordinance and does not pose a danger to the public health, safety, welfare, or morals.¹⁶⁹ The zoning hearing board may impose additional conditions if it deems them necessary.¹⁷⁰ An ordinance may also list uses which are prohibited in certain zones.¹⁷¹ The ability of group homes to qualify as special exceptions, and the uses with which group homes should avoid comparison will now be examined.

The designation of the group home as a business use is one which is to be avoided. Because the operator of a group home is often a private person who owns or rents the property and is paid by a state agency for the room and board provided,¹⁷² a group home might be characterized as a business enterprise analogous to a boarding

their neighbors if not specifically regulated. Gasoline stations . . . are an example of this second category. The point is that such special uses are permissive

54 N.J. Super. at 490-91, 149 A.2d at 624-25 (1959).

Pennsylvania law permits municipalities to include in their ordinance a provision for "special exceptions" (the statutory terminology). See PA. STAT. ANN. tit. 53, § 10603 (Purdon Supp. 1979). Like the enabling legislation in *Tullo*, the Pennsylvania MPC gives the local zoning agency, here the Zoning Hearing Board, the power to hear and decide applications for special exceptions based on the standards and criteria expressed in the ordinance. PA. STAT. ANN. tit. 53, § 10913 (Purdon 1972). Unfortunately, the MPC also states that an ordinance may contain provisions for "conditional uses." See PA. STAT. ANN. tit. 53, § 10603 (Purdon Supp. 1979). Unlike the special exceptions which are decided by the Zoning Hearing Board, conditional uses are granted or denied by the governing body. See *id.* It is submitted that a conditional use, as the term is used in Pennsylvania, is more akin to a valid "floating zone" than to the type of special use described in the above quote from *Tullo* or discussed in the accompanying text. In the floating zone situation, the ordinance creates a zone with certain characteristics but does not apply it to any tract. See D. HAGMAN, *supra*, at 117. It "floats" until a landowner asks that it be attached to his or her property. *Id.* This attachment is accomplished by way of a second ordinance. *Id.* Hence because only the governing body can amend the local zoning ordinance, and because the approval of a conditional use *qua* floating zone requires an amendment to the ordinance, Pennsylvania law provides that the governing body decides conditional use applications.

167. See Lippincott, *supra* note 7, at 773-74.

168. See PA. STAT. ANN. tit. 53, § 10603 (Purdon Supp. 1979).

169. See *City Planning Comm'n v. Threshold, Inc.*, 12 Pa. Commw. Ct. 104, 108-09, 315 A.2d 311, 313 (1974); *Simon v. Doylestown Borough Zoning Bd. of Adjustment*, 17 Bucks County L. Rep. 103, 108 (C.P. Pa. 1967).

170. See PA. STAT. ANN. tit. 53, § 10913 (Purdon 1972).

171. See *id.* § 10603 (Purdon 1972 & Supp. 1979).

172. Chandler & Ross, *supra* note 6, at 308.

home,¹⁷³ despite the obvious distinctions between them. Although it is more likely to be found to be a business if habilitation is provided by an outside agency or separate entity coming into the home,¹⁷⁴ some courts have also characterized it as a business use when habilitation is provided inside the home by CLA staff.¹⁷⁵ Rather than concentrating on the use of the property, the zoning officials are more likely to focus on the nature of the operator. On this basis, administrative bodies have found state licensed and supported group homes to be a business use of the property.¹⁷⁶

Two other potentially dangerous classifications are a hospital and a sanitarium because these uses are sometimes totally excluded from residential areas and relegated to high-density zones.¹⁷⁷ Educational uses are more likely to be permitted within single-family residential districts.

If the nature of the use is seriously considered, group homes would seem to be an educational use, as well as a single-family use. In the area of educational use, the Pennsylvania courts have gone a little further in defining the pertinent terms than in the area of single-family residential use.¹⁷⁸ Prior decisions related to this area reflected the popular conception of the retarded which lumped them with the mentally ill; therefore, these decisions were not receptive to this handicapped group.¹⁷⁹ All rehabilitative facilities were seen as performing the function of treating a deficiency, rather than as providing education, and thus were classified as sanitarium.¹⁸⁰ It was not until very recently that the basis of an argument for group homes as an educational use emerged.

The definition of an educational use employed by the Pennsylvania courts¹⁸¹ enables the proponents of group homes to avoid two

173. *Seaton v. Clifford*, 24 Cal. App. 3d 46, 52, 100 Cal. Rptr. 779, 782 (1972); *Browndale Int'l, Ltd. v. Board of Adjustment*, 60 Wis. 2d 182, 208 N.W.2d 121, 131 (1973), *cert. denied*, 416 U.S. 936 (1974); *Chandler & Ross*, *supra* note 6, at 313. *But see* *Kastendike v. Baltimore Ass'n for Retarded Children*, 267 Md. 389, 401-03, 297 A.2d 745, 751-52 (1972).

174. *See* *Chandler & Ross*, *supra* note 6, at 308.

175. *See* *Browndale Int'l, Ltd. v. Board of Adjustment*, 60 Wis. 2d 182, 201, 208 N.W.2d 121, 121 (1973), *cert. denied*, 416 U.S. 936 (1974). *See also* *Chandler & Ross*, *supra* note 6, at 308.

176. *See* *Friedman*, *supra* note 28, at 1095.

177. *See* *Chandler & Ross*, *supra* note 6, at 313-14. *Cf.* *Montgomery County Mental Health Clinics v. Norristown Borough*, 86 Montg. County L. Rep. 194, 197 (C.P. Pa. 1965) (mental health clinic held to be a hospital).

178. *See, e.g.*, *Gilden Appeal*, 406 Pa. 484, 492, 178 A.2d 562, 566 (1962); *Appeal of St. Sophia Religious Ass'n*, 27 Pa. Commw. Ct. 237, 238-39, 365 A.2d 1389, 1390 (1976); *Burgoon v. Zoning Hearing Bd.*, 2 Pa. Commw. Ct. 238, 248-49, 277 A.2d 837, 841 (1971).

179. *See, e.g.*, *Devereaux Foundation, Inc.*, *Zoning Case*, 351 Pa. 478, 41 A.2d 744 (1945).

180. *See id.*

181. *See* *Gilden Appeal*, 406 Pa. 484, 178 A.2d 562 (1962).

pitfalls which are inescapable in other states. First, in Pennsylvania, the likelihood of a use being designated as educational is not affected by questions of public or private ownership and operation,¹⁸² for the courts will look to the nature of the use rather than to the identity of the owner.¹⁸³ Secondly, before an educational use can be found to be a prohibited business use in Pennsylvania, the ordinance must specifically require that the facility be noncommercial,¹⁸⁴ rather than requiring a consideration of the general factor of relative commercialism as is mandated in other jurisdictions.¹⁸⁵

When not specifically defined within the zoning ordinance, a permitted educational use will be broadly construed.¹⁸⁶ The case in which the Pennsylvania definition of educational use was first enunciated was *Gilden Appeal*.¹⁸⁷ In *Gilden*, the Pennsylvania Supreme Court considered a special exception application for a day-school that taught learning-disabled children in Chester County.¹⁸⁸ The local zoning hearing board had found this school to be a sanitarium and, hence, to be prohibited under the local ordinance.¹⁸⁹ Following appeals by both sides,¹⁹⁰ the Pennsylvania Supreme Court ultimately held that the school was an educational use, not a sanitarium, and adopted the following definition of an educational use:

The word [educational] taken in its full sense, is a broad, comprehensive term, and may be particularly directed to either mental, moral or physical faculties, but in its broadest and best sense it embraces them all, and includes not merely the instructions received at school, college, or university, but the whole course of training—moral, intellectual and physical.¹⁹¹

182. In most jurisdictions, if a facility is publicly owned and operated, it is generally more likely to be designated as an educational use. Annot., 64 A.L.R. 3d 1087, 1092 (1975).

183. *Burgoon v. Zoning Hearing Bd.*, 2 Pa. Commw. Ct. 238, 245-46, 277 A.2d 837, 842 (1971). See also *Devereaux Foundation, Inc., Zoning Case*, 351 Pa. 478, 488-89, 41 A.2d 744, 748-49 (1945) (Jones, J., dissenting). In attacking the majority which overruled the granting of a variance to a school for mentally deficient children, the dissent in *Devereaux* argued:

In order that mental weakness or deficiency of pupils may have bearing on the reason for discrimination between educational institutions within the contemplation of the same zoning ordinance, there must be something in connection with the mental condition which offers or fairly suggests a threat to the health, safety, or morals of the community.

Id.

184. *Burgoon v. Zoning Hearing Bd.*, 2 Pa. Commw. Ct. 238, 245-47, 277 A.2d 837, 841-42 (1971).

185. Annot., *supra* note 182, at 1091-92.

186. See, e.g., *Gilden Appeal*, 406 Pa. 484, 492, 178 A.2d 562, 566 (1962); *Appeal of St. Sophia Religious Ass'n*, 27 Pa. Commw. Ct. 237, 238-39, 365 A.2d 1389, 1390 (1976); *Burgoon v. Zoning Hearing Bd.*, 2 Pa. Commw. Ct. 238, 248-49, 277 A.2d 837, 841 (1971). See also *Temple Univ. v. Zoning Bd. of Adjustment*, 414 Pa. 191, 195, 199 A.2d 415, 417 (1964).

187. 406 Pa. 484, 178 A.2d 562 (1962).

188. *Id.* at 487, 178 A.2d at 564.

189. *Id.*

190. *Id.*

191. *Id.* at 492, 178 A.2d at 566 (citation omitted).

This general definition, based on physical or intellectual training,¹⁹² would seem to encompass habilitation of the retarded.¹⁹³ In *Gilden*, the court was impressed by the fact that the children involved had the potential to become self-sufficient members of society.¹⁹⁴ If presented with a case dealing with group homes for the mentally retarded, the court might be equally impressed with evidence regarding the degree of self-sufficiency which can be attained in a community living arrangement.¹⁹⁵

Distinguishing habilitation from treatment, one lower court in Pennsylvania has determined habilitative services to be an educational use.¹⁹⁶ The court reasoned that habilitation is educational because it improves the normal condition of the individual, while treatment is designed to restore an individual to a normal condition.¹⁹⁷

192. See also Appeal of St. Sophia Religious Ass'n, 27 Pa. Commw. Ct. 237, 240, 365 A.2d 1389, 1391 (1976) (interpreting *Gilden* to include as an educational use facilities which offer either mental, moral, or physical training, and not to require all three); Burgoon Zoning Hearing Bd., 2 Pa. Commw. Ct. 238, 244, 277 A.2d 837, 841 (1971) (same).

193. Despite the adoption of this broad definition, the court in *Gilden* also heavily emphasized similarities between the school under its consideration and a "normal" public school, stressing the "normality" of the children involved, the similarity of the subject matter taught, and the absence of any treatment on the premises:

The Center is devoted to the education of children from five to twelve years of age. These children are physically and mentally normal but, somehow, just miss being sufficiently alert to carry on progressively as normal children should. They cannot communicate their ideas with the facility and celerity associated with children of their age, but they are not to be classified as mentally deficient and certainly in no way to be regarded as lacking in proper moral fiber and behavior.

406 Pa. at 488, 178 A.2d at 564 (footnotes omitted). The court also noted that none of the children had an I.Q. below 70. *Id.* at 490, 178 A.2d at 565.

194. See *id.* at 491, 178 A.2d at 566. The court somewhat poetically emphasized that

[t]here are hospitals and sanitariums located in the valley of tragedy to care for children who have been struck down by cerebral paralysis and other dread ailments. At the top of the hill is the public school system for physically and mentally normal children. Half way up the hill we find the Center devoted to those children who have the potentialities to become excellent citizens but who, neglected and forsaken, might well tumble down the hill into the institutions for the hopelessly handicapped. The Center trains its children to climb the hill to the normal schools where they will take their places and no one will ever know that they had ever skirted on the precipice of disaster.

Id.

195. See note 14 and accompanying text *supra*.

196. *School Lane Hills, Inc. v. East Hempfield Township Zoning Bd.*, 18 Pa. Commw. Ct. 519, 524, 336 A.2d 901, 903-04 (1975) (rehabilitation center for the physically handicapped found to be a sanitarium; development center for retarded persons found to be an educational use).

197. *Id.* The court explained its distinction as follows:

Clearly, the emphasis of the proposed rehabilitation center lies not with training, an *improvement* in the normal human condition, but rather with treatment, a *restoration* to a normal human condition. . . . The evidence presented to the Board defined the purpose of this Center as the training of retarded youths to assume a positive role in society, by providing them with certain industrial skills. While such skills may appear simplistic to a "normal" person, their assimilation nonetheless represents a great improvement in the normal human condition of the trainees. The nature of the Child Development Center is no less educational than that of the most demanding university.

Id. at 523-24, 336 A.2d at 903-04 (emphasis supplied by the court) (citations and footnote omitted).

Although the treatment/habilitation distinction was somewhat artificial,¹⁹⁸ the opinion does provide precedent favorable to the characterization of group homes as educational uses. The training of a wide range of skills would probably stand a group home in its best stead,¹⁹⁹ but would not be a prerequisite to characterizing the group home as an educational use.²⁰⁰

The nonresidential nature of the school was also of importance to the court in *Gilden*,²⁰¹ but it is not critical to the designation of an educational use. When a facility is residential,²⁰² the education should be provided at the facility and not elsewhere for the use to be characterized as educational.²⁰³ Because the current provision of services in most community living arrangements includes day placement outside the group home,²⁰⁴ this may present some difficulties in making an educational use argument. However, as one court has indicated, the in-house education provided need only be minimal²⁰⁵—a standard which can easily be met by the fact that self-care/independent living skills are taught in community living arrangements.²⁰⁶

While an educational use provides an alternative to the family-equivalent analysis, it is not the preferable mode of securing the entry of group homes into neighborhoods. It does, however, provide an alternative which has been more fully considered and accepted by Pennsylvania courts.

198. This distinction fails to take into account the fact that appropriate habilitation may allow some retarded people to progress to the point where they are no longer considered retarded. See generally *Halderman v. Pennhurst State School & Hosp.*, 446 F. Supp. 1295, 1317-18 (E.D. Pa. 1977), *aff'd in part, rev'd and remanded in part*, 612 F.2d 84 (3d Cir. 1979) (en banc), *petition for cert. filed*, 48 U.S.L.W. 3614 (U.S. Mar. 25, 1980) (No. 79-1404).

199. See Annot., *supra* note 160, at 1091.

200. See Appeal of St. Sophia Religious Ass'n, 27 Pa. Commw. Ct. 237, 240, 365 A.2d 1389, 1391 (1976); *Burgoon v. Zoning Hearing Bd.*, 2 Pa. Commw. Ct. 238, 244-45, 277 A.2d 837, 841 (1971).

201. 406 Pa. at 490, 178 A.2d at 565.

202. It should be noted that an ordinance may specifically exclude residential schools for the "deficient." See *Devereaux Foundation, Inc., Zoning Case*, 351 Pa. 478, 481-82, 41 A.2d 744, 745 (1945).

203. If the facility is comprised of more than one building, each building may be required to provide educational services. See *id.* at 481-82, 41 A.2d at 745-46. Where the residents attended area public schools, no educational use was found in a residential facility. See *Pennsylvania George Junior Republic v. Zoning Hearing Bd.*, 37 Pa. Commw. Ct. 151, 153, 389 A.2d 261, 262 (1978). Cf. Appeal of Hart, 15 Cumb. L.J. 56 (C.P. Pa. 1964) (variance for orphanage and home for handicapped children denied).

204. Generally residents leave the home for school or participation in a sheltered workshop during the day. Telephone interview with Marilyn Mennis, Alliance of Specialized Mental Health and Mental Retardation Agencies, Philadelphia, Pa. (Feb. 20, 1979).

205. See *Evans v. Zoning Hearing Bd.*, 40 Pa. Commw. Ct. 103, 107, 396 A.2d 889, 891-92 (1979).

206. See *id.*

IV. AVOIDING THE ZONING LAWS: GOVERNMENTAL IMMUNITY

A. Introduction

The police power to regulate land use so as to protect the public health, safety, welfare, and morals is not inherently at odds with the establishment of community-based habilitative services by the state as *parens patriae*. We have observed, however, that the local governments to whom the state has delegated the power to zone will sometimes use this power to impede the establishment of CLA's by governmental units charged with the state's *parens patriae* responsibilities.²⁰⁷ Where, in a situation such as this, these powers are brought into conflict by the agencies that exercise them, the concept of governmental immunity may provide a solution.

Governmental immunity is sometimes invoked to exempt governmental units or instrumentalities from the operation of local zoning ordinances.²⁰⁸ The theories invoked by courts to resolve these "jurisdictional" disputes vary.²⁰⁹ In some cases, the resolution rests upon a determination of which of the antagonistic units or instrumentalities occupies the superior position in the governmental hierarchy.²¹⁰ Where this test is employed, the zoning laws will frequently give way since they are delegated to relatively small, local governmental units.²¹¹

Other courts resolve the issue whether a governmental unit or instrumentality is subject to the zoning ordinances of a municipality by determining whether the instrumentality seeking the immunity is acting in a "governmental" or a "proprietary" capacity.²¹² A governmental unit is deemed to be engaged in a governmental function, and hence to be immune from zoning ordinances, when "it is acting pursuant to and in furtherance of obligations imposed by legislative mandate."²¹³ The activity is proprietary if the governmental unit carrying it out has the power, but not the duty, to perform a specific

207. See notes 106-09 and accompanying text *supra*.

208. See, e.g., *Township of South Fayette v. Commonwealth*, 477 Pa. 574, 385 A.2d 344 (1978); *City of Pittsburgh v. Commonwealth*, 468 Pa. 174, 360 A.2d 607 (1976). See generally Annot., 84 A.L.R. 3d 1187 (1978); Note, 84 HARV. L. REV. 869 (1971).

209. For very good summaries of these approaches, see Note, *supra* note 208; *City of Pittsburgh v. Commonwealth*, 468 Pa. 174, 178-79 n.4, 360 A.2d 607, 609-10 n.4 (1976). The Harvard commentator suggests that the theories are merely "distracting surrogates for reasoned adjudication." Note, *supra*, at 869.

210. See, e.g., *Metropolitan Dade County v. Parkway Towers Condominium Ass'n*, 281 So. 2d 68 (Fla. App. 1973); *Davidson County v. Harmon*, 200 Tenn. 575, 292 S.W.2d 777 (1956).

211. See notes 80-95 and accompanying text *supra*.

212. See, e.g., *City of Scottsdale v. Municipal Court*, 90 Ariz. 393, 368 P.2d 637 (1962); *Pruett v. Dayton*, 39 Del. Ch. 537, 168 A.2d 543 (1961).

213. Note, *supra* note 208, at 870 (footnote omitted).

function.²¹⁴ The test is not uniformly applied because jurisdictions which follow this rule differ on the characterization of specific functions.²¹⁵

Finally, some courts use the eminent domain power as their yardstick.²¹⁶ Positing that the power of eminent domain is inherently superior to the exercise of the zoning power, these jurisdictions hold that "the mere grant of eminent domain to a governmental unit automatically renders the unit immune from zoning regulations."²¹⁷

B. Pennsylvania Law: The "Competing Legislative Grants" Test

The Pennsylvania Supreme Court has explicitly rejected the hierarchy theory, recognizing that "the municipalities exercising such state powers [as zoning] are 'equally agents of the state.'" ²¹⁸ Moreover, the governmental-proprietary distinction has been specifically disapproved for determining governmental tort liability²¹⁹ and has been implicitly rejected as the sole determiner of immunity from zoning ordinances.²²⁰ In Pennsylvania, the grant of eminent domain power is, however, considered persuasive and may, in fact, be dispositive.²²¹ The Pennsylvania test is developed in two cases: *City of Pittsburgh v. Commonwealth* ²²² and *Township of South Fayette v. Commonwealth*.²²³

214. *Id.*

215. *Id.* Compare *County of Westchester v. Village of Mamaroneck*, 22 App. Div. 2d 143, 255 N.Y.S.2d 290 (1964), *aff'd*, 16 N.Y.2d 940, 212 N.E.2d 442, 264 N.Y.S.2d 925 (1965) (sewage disposal is a governmental function) with *Jefferson County v. City of Birmingham*, 256 Ala. 436, 55 So. 2d 196 (1951) (sewage disposal is a proprietary function for zoning purposes).

216. See, e.g., *Mayor of Savannah v. Collins*, 211 Ga. 191, 84 S.E.2d 454 (1954) (grant of eminent domain power conclusive); *State ex rel. Askew v. Kopp*, 330 S.W.2d 882 (Mo. 1960) (same); cf. *City of Pittsburgh v. Commonwealth*, 468 Pa. 174, 184-85, 360 A.2d 607, 613 (possession of eminent domain power would tip balance in favor of entity seeking to avoid zoning ordinances; evidences legislative intent to preempt zoning laws).

217. Note, *supra* note 208, at 874. See *City of Pittsburgh v. Commonwealth*, 468 Pa. 174, 178-79 n.4, 360 A.2d 607, 609-10 n.4 (1976).

218. *City of Pittsburgh v. Commonwealth*, 468 Pa. 174, 182, 360 A.2d 607, 610 (1976), quoting Note, *supra* note 208, at 877. Adopting this position makes possible a corollary argument that if a municipality has not subjected itself to its own zoning ordinances, then other equal bodies are also exempt. See *Lauderdale County Bd. of Educ. v. Alexander*, 269 Ala. 79, 86, 110 So. 2d 911, 917-18 (1959); *Lees v. Sampson Land Co.*, 372 Pa. 126, 130-31, 92 A.2d 692, 695 (1952). See also Comment, *The Inapplicability of Municipal Zoning Ordinances to Governmental Land Uses*, 19 SYRACUSE L. REV. 698, 707 (1968).

219. *Ayala v. Philadelphia Bd. of Educ.*, 453 Pa. 584, 597-98, 305 A.2d 877, 883-84 (1973).

220. See *City of Pittsburgh v. Commonwealth*, 468 Pa. 174, 178-79 n.4, 181-82, 360 A.2d 607, 609-10 n.4, 611-12 (1976).

221. See *id.* at 184-85, 360 A.2d at 613 (grant of eminent domain power evidences intent to override municipal zoning powers). But see *id.* at 191, 360 A.2d at 616 (Eagen, J., dissenting) ("the presence or absence of eminent domain power is not a valid consideration").

222. 468 Pa. 174, 360 A.2d 607 (1976).

223. 477 Pa. 574, 385 A.2d 344 (1978).

In *City of Pittsburgh*, the Bureau of Corrections (Bureau) sought to establish a prerelease center for women convicts.²²⁴ The city sought an injunction against the operation of the center.²²⁵ In a four to three decision, the Pennsylvania Supreme Court reversed a determination by the Commonwealth Court²²⁶ that the Commonwealth was immune from zoning restrictions.²²⁷ The court held that whether the Bureau was subject to local zoning ordinances was a question of statutory interpretation²²⁸ and that the act authorizing the Bureau to establish the center did not indicate, either by express language or implicitly by granting the Bureau the power of eminent domain, legislative intent to override municipal zoning powers.²²⁹

The court enunciated three factors to be considered in determining the legislative intent: 1) the nature of the competing legislative grants; 2) the purposes for which they were given; and 3) the circumstances of the individual case.²³⁰ In examining the legislative grants, the court found that although the Bureau was given the power to establish the prerelease centers "at such locations throughout the Commonwealth" as it deemed necessary,²³¹ that did not amount to a grant of eminent domain power.²³² In addition, the court found no legislative history otherwise indicating an intent to overcome the applicable zoning enabling act which states that, in the event of a conflict, it is to take priority if it imposes a higher standard.²³³ Finally, the court emphasized the existence, in this particular case, of alternatives that would accommodate the needs of the Bureau as well as the community.²³⁴

The dissent agreed that an analysis of the competing statutory grants was the appropriate way to resolve this conflict, but strongly protested the majority's narrow reading of the Bureau's mandate to establish centers "*at such locations throughout the Commonwealth* as the Bureau deems necessary."²³⁵ In the dissent's view this language

224. 468 Pa. at 177, 360 A.2d at 609.

225. *Id.*

226. *City of Pittsburgh v. Commonwealth*, 20 Pa. Commw. Ct. 226, 341 A.2d 228 (1974), *rev'd*, 468 Pa. 174, 360 A.2d 607 (1976).

227. 468 Pa. at 186, 360 A.2d at 613. *See* Note, 15 DUQ. L. REV. 721, 722 (1977).

228. 468 Pa. at 182, 360 A.2d at 611.

229. *Id.* at 184-85, 360 A.2d at 613.

230. *Id.* at 182, 360 A.2d at 611-12.

231. PA. STAT. ANN. tit. 61, § 1051 (Purdon Supp. 1979).

232. 468 Pa. at 183-84, 360 A.2d at 612-13.

233. *See* 468 Pa. at 185-86, 360 A.2d at 613. For the text of the zoning enabling act, *see* PA. STAT. ANN. tit. 53, §§ 25051-25058 (Purdon 1957 & Supp. 1979). For the text of the conflicts clause, *see id.* § 25058 (Purdon 1957).

234. 468 Pa. at 187, 360 A.2d at 614.

235. 468 Pa. at 188, 360 A.2d at 614-15 (Eagen, J., dissenting) (emphasis supplied by the dissent).

was intended to preempt local zoning ordinances.²³⁶ The dissent criticized the majority for placing the decision of where to locate such facilities with the local zoning authorities who have no expertise in determining locations which are consistent with the rehabilitative process.²³⁷ The dissent's interpretation, on the other hand, would put that responsibility in the hands of an authority with the requisite expertise—*i.e.*, the Bureau.²³⁸ Thus, the dissent maintained that the legislative intent must have been to give the Bureau the power to override local zoning ordinances.²³⁹

In *South Fayette*, the Commonwealth Court granted a preliminary injunction which the township had sought in order to enjoin the Department of Public Welfare from operating an intensive treatment center for juvenile delinquents.²⁴⁰ On appeal, the Pennsylvania Supreme Court began its analysis by observing that "[i]n order to sustain a preliminary injunction, the plaintiff's right to relief must be clear, the need for relief must be immediate, *and* the injury must be irreparable if the injunction is not granted."²⁴¹ The court then reversed the grant of the injunction both because the plaintiff's right to relief was uncertain and because immediate, irreparable injury had not been shown.²⁴² Applying the three-pronged test announced in *City of Pittsburgh*, the court stated that unlike that case, in this instance, it was not at all clear that the state instrumentality was subject to the local zoning ordinance.²⁴³ Two significant differences between *South Fayette* and *City of Pittsburgh* presumably account for this conclusion.

In *City of Pittsburgh*, the *parens patriae* responsibility of the state was not an element. Although the Bureau of Corrections in that case was acting at the direction of the legislature, it was not carrying out a *parens patriae* obligation.²⁴⁴ On the other hand, the activity of the Department of Public Welfare in *South Fayette*, the care of disturbed juveniles, is a *parens patriae* activity.²⁴⁵ The court's opinion

236. *Id.*, 360 A.2d at 615 (Eagen, J., dissenting).

237. *Id.* at 190, 360 A.2d at 615 (Eagen, J., dissenting).

238. *Id.*

239. *Id.* at 189-90, 360 A.2d at 615 (Eagen, J., dissenting).

240. 477 Pa. at 578, 385 A.2d at 345.

241. *Id.* at 580, 385 A.2d at 347 (emphasis supplied by the court).

242. *Id.* at 584-85, 385 A.2d at 349-50.

243. *Id.* at 580-81, 385 A.2d at 347-48.

244. 468 Pa. at 183-84, 360 A.2d at 612.

245. 477 Pa. at 581, 385 A.2d at 348.

in *South Fayette* emphasizes the state's obligation to establish adequate facilities for juveniles.²⁴⁶

Secondly, the cases involved two entirely different zoning enabling acts. The *City of Pittsburgh* case was decided under the zoning enabling act for second-class cities,²⁴⁷ while the *South Fayette* case was decided under the Municipalities Planning Code.²⁴⁸ The second-class cities' enabling act, as well as the act which applies to first-class cities, contains specific conflict of law provisions.²⁴⁹ The MPC, by contrast does not contain any conflicts language.²⁵⁰ The *South Fayette* court gave this as one of the reasons for its finding that the township had not established a right to relief with the requisite certainty for a preliminary injunction.²⁵¹ Thus, in *South Fayette*, the presence of *parens patriae* considerations, and the lack of a specific conflicts provision in the applicable zoning enabling act, tipped the balance of competing legislative grants in favor of the state instrumentality seeking immunity.

C. The Pennsylvania "Competing Legislative Grants" Test and Community Living Arrangements

The Pennsylvania test, then, requires a court to balance the legislative grant of the zoning power against the grant of power to the governmental unit or instrumentality seeking immunity. It requires that this balance take into account 1) the nature of the competing grants; 2) their purpose; and 3) the circumstances of the case.²⁵²

Applying the approach of *City of Pittsburgh* and *South Fayette* to the establishment of CLA's, it appears that a government instrumen-

246. *Id.* In addition to the *parens patriae* element, the *South Fayette* court mentioned that Commonwealth ownership of the regulated land might be significant. *Id.* It is difficult to discern why the court thought this should make a difference in balancing the competing interests. As one commentator stated: "In as much as it is the use by the state of property in the performance of its governmental function which generally runs afoul of zoning restrictions, it would seem there should be no distinction between such use on state owned property or on property leased to the state." Miller, *Zoning and the State's Primary Police Power to Use Its Property in Performing Governmental Functions*, 3 SO. U.L. REV. 133, 142 (1977) (emphasis in the original). The court, itself, noted in the *City of Pittsburgh* case that "[t]he lessee of property is bound by zoning ordinances in the same manner as the lessor is; zoning ordinances enacted pursuant to a state statute are aimed at the use of property." 468 Pa. at 186 n.10, 360 A.2d at 613 n.10. Accordingly, it is hoped that courts applying the analysis of *South Fayette* will not over-emphasize the significance of what was surely no more than a suggested consideration. The *South Fayette* court never returned to the point. See 477 Pa. at 581-85, 385 A.2d 348-50.

247. PA. STAT. ANN. tit. 53, §§ 25051-25058 (Purdon 1957 & Supp. 1979).

248. PA. STAT. ANN. tit. 53, §§ 10101-11202 (Purdon 1972 & Supp. 1979).

249. 477 Pa. at 582, 385 A.2d at 348. See PA. STAT. ANN. tit. 53, § 14762 (Purdon 1957 & Supp. 1979) (first class cities); *id.* § 25058 (second class cities).

250. PA. STAT. ANN. tit. 53, §§ 10101-11202 (Purdon 1972 & Supp. 1979).

251. 477 Pa. at 582, 385 A.2d at 348.

252. *Id.* at 580-81, 385 A.2d at 347-48; 468 Pa. at 182, 360 A.2d at 612.

tality, such as the Department of Public Welfare, or a governmental unit, such as a county, will be able to circumvent local zoning ordinances enacted pursuant to the Municipalities Planning Code.

To begin, consider the treatment of the eminent domain power in the balancing of the legislated grants. In *City of Pittsburgh*, the court clearly indicated that if, in examining the competing grants, it found that the unit or instrumentality trying to avoid the zoning ordinance had been given the power of eminent domain by the legislature, the court would have to conclude that the zoning laws were preempted.²⁵³ Although the ability to exercise the power of eminent domain is not given to the state Department of Public Welfare, such power does rest with the counties²⁵⁴ which are also under an obligation to ensure the availability of group homes.²⁵⁵ Counties could use this power to establish group homes and thus be able to circumvent local zoning restrictions, although the likelihood of adverse political reaction may deter them from doing so.²⁵⁶ Nonetheless, based on *City of Pittsburgh*, proponents of CLA's may argue that the very fact that the counties—one of the governmental units responsible for habilitation²⁵⁷—possess the eminent domain power²⁵⁸ indicates that the legislature intended the delivery of habilitative services to be free of local zoning restrictions.

Another factor which may lead a court to conclude that CLA's are exempt from local zoning ordinances is the fact that, like the juvenile centers in *South Fayette*, CLA's involve an exercise of the *parens patriae* obligation.²⁵⁹ In discussing the nature of the state's *parens patriae* obligation to juveniles, the court in *South Fayette* indicated its awareness of the preference for a normalized atmosphere for these facilities.²⁶⁰ It would seem, therefore, that the *parens pat-*

253. 468 Pa. at 184-85, 360 A.2d at 613.

254. See PA. STAT. ANN. tit. 16, § 2305 (Purdon Supp. 1979). County institution districts, which are governmental units having the duty of providing for persons in institutions, PA. STAT. ANN. tit. 62, § 2301(e) (Purdon 1968), are given the power of eminent domain as well. PA. STAT. ANN. tit. 62, § 2255(a) (Purdon Supp. 1979). See also *Institution Dist. v. Township of Middletown*, 450 Pa. 282, 288-89, 299 A.2d 599, 602-03 (1973) (a county institution district seeking to establish a facility is not subject to local interference through zoning regulations). It appears that the *City of Pittsburgh* decision did not adversely affect this holding. See R. RYAN, PENNSYLVANIA ZONING LAW AND PRACTICE § 3.3.14 (1977).

255. See notes 61-65 & 76-78 and accompanying text *supra*. See also *Halderman v. Pennhurst State School & Hosp.*, 446 F. Supp. 1295 (E.D. Pa. 1977), *aff'd in part, rev'd and remanded in part*, 612 F.2d 84 (3d Cir. 1979), petition for cert. filed, 48 U.S.L.W. 3614 (U.S. Mar. 25, 1980) (No. 79-1404).

256. See notes 87-92 and accompanying text *supra*.

257. See notes 54-78 & 89-95 and accompanying text *supra*.

258. See note 254 and accompanying text *supra*.

259. See notes 40-51 & 244-46 and accompanying text *supra*.

260. See 477 Pa. at 581-82 n.7, 385 A.2d at 348 n.7.

riae obligation would be certain of receiving the same emphasis in a CLA case as it received in *South Fayette*.

Finally, *South Fayette's* emphasis on the lack of a conflicts provision in the MPC, and the court's subsequent holding against the zoning authority,²⁶¹ are promising signs for proponents of CLA's who encounter opposition through ordinances enacted pursuant to the MPC. While the absence of such a provision in the MPC is not determinative of the entire immunity question, the omission substantially reduced the chances of a summary disposition.²⁶² Further, when the lack of a conflicts clause in the MPC is combined with the fact that CLA's are *parens patriae* facilities, it is clear that CLA's present the same two crucial facts that accounted for the different results between *City of Pittsburgh* and *South Fayette*.²⁶³

Where placement of the CLA is sought and opposed in an area subject to either the first or the second class cities zoning enabling act,²⁶⁴ as was the case in *City of Pittsburgh*, the situation is less hopeful. The outcome of a balancing of competing grants will depend upon whether there is language in the Department of Public Welfare's mandate sufficient to offset the conflicts language in the zoning law.²⁶⁵ As it now stands, the legislative mandate to the Department under the Mental Health and Mental Retardation Act of 1966 is quite similar to the language under which the Bureau of Corrections operated in *City of Pittsburgh*.²⁶⁶ It would seem that a more strongly worded legislative mandate to the Department is required if it is to overcome the zoning ordinances enacted by first and second class cities.

V. RELIEF BY LEGISLATION

The entire morass of litigation might be completely avoided simply by the passage of a statute clarifying the nature of group homes and the legislative intent regarding their location. Several states have

261. See notes 247-51 and accompanying text *supra*.

262. See 477 Pa. at 581-85, 385 A.2d at 348-50.

263. See notes 240-51 and accompanying text *supra*.

264. PA. STAT. ANN. tit. 53, §§ 14751-14762 (Purdon 1957 & Supp. 1979) (first class cities); *id.* §§ 25051-25058 (second class cities).

265. See note 252 and accompanying text *supra*.

266. Compare PA. STAT. ANN. tit. 61, § 1051 (Purdon Supp. 1979) and text accompanying note 231 *supra* (Bureau of Correction) with PA. STAT. ANN. tit. 50, § 4202(b) (Purdon 1969) (Department of Public Welfare). The 1966 Act describes the Department's authority as follows: "The department is hereby authorized to establish, extend, operate, and maintain additional facilities and provide mental health and mental retardation services therein. The department may also lease or otherwise acquire, through the Department of Property and Supplies, other additional facilities." *Id.*

adopted such legislation,²⁶⁷ and the American Bar Association Commission on the Mentally Disabled has proposed a model statute²⁶⁸ (Model Statute) dealing with these issues. Proposed statutes are presently before the Pennsylvania legislature. House Bills 2111,²⁶⁹ 2112,²⁷⁰ and 2113,²⁷¹ as well as Senate Bill 182,²⁷² all provide that community facilities housing from three to eight developmentally disabled persons²⁷³ (along with one or two other persons) shall be designated a residential use in all zones, including single-family residential zones.²⁷⁴ There is a similar provision in the Model Statute,²⁷⁵ but that act would also impose quality regulations as well as a zoning exemption.²⁷⁶

The bills presently before the House and Senate perform two functions beyond simply defining group homes as residential uses. In

267. See, e.g., CAL. WELF. & INST. CODE §§ 5115-5116 (West 1972); COLO. REV. STAT. §§ 27-10.5-133 (Supp. 1973); MINN. STAT. ANN. §§ 252.28, 462.357 (West Supp. 1979); N.J. STAT. ANN. §§ 30:4c-2(m) to 26.0 (West 1979); VA. CODE § 15.1-486.2 (Michie Supp. 1979). A chart of recent statutes broken down into categories according to such factors as residents, types of community facilities, and other pertinent items may be found in 2 MENTAL DISABILITY L. REP. at 800-02 (1978).

268. ABA MODEL STATUTE, AN ACT TO ESTABLISH THE RIGHT TO LOCATE COMMUNITY HOMES FOR DEVELOPMENTALLY DISABLED PERSONS IN THE RESIDENTIAL NEIGHBORHOODS OF THIS STATE, reprinted in *Developmental Disabilities*, supra note 27, at 806 [hereinafter cited as ABA MODEL STATUTE]. For the complete text of the Act, see Appendix A *infra*.

269. H. 2111, Pa. House, 1979 Sess. For the complete text of H. 2111, see Appendix B *infra*.

270. H. 2112, Pa. House, 1979 Sess.

271. H. 2113, Pa. House, 1979 Sess.

272. S. 182, Pa. Senate, 1979 Sess. For the complete text of S. 182, see Appendix C *infra*.

273. S. 182, Pa. Senate, 1979 Sess. § 1; H. 2111, Pa. House, 1979 Sess. § 2; H. 2112, Pa. House, 1979 Sess. § 1; H. 2113, Pa. House, 1979 Sess. § 2. These bills also cover the mentally ill, the physically handicapped, the elderly, and dependent children. S. 182, Pa. Senate, 1979 Sess. § 1; H. 2111, Pa. House, 1979 Sess. § 2; H. 2112, Pa. House, 1979 Sess. § 1; H. 2113, Pa. House, 1979 Sess. § 2.

274. S. 182, Pa. Senate, 1979 Sess. § 2; H. 2111, Pa. House, 1979 Sess. § 4; H. 2112, Pa. House, 1979 Sess. § 4; H. 2113, Pa. House, 1979 Sess. § 4. Unfortunately, the House bills contain some disturbing definitional language relating to the mentally ill. Two restrictions on eligibility for mentally ill persons are included in the bills. First, all mentally ill persons who are to be placed in community residential facilities must be certified by the county mental health and mental retardation authorities as being capable of residing in a group home and receiving services at a local community mental health center. H. 2111, Pa. House, 1979 Sess. § 2; H. 2112, Pa. House, 1979 Sess. § 1; H. 2113, Pa. House, 1979 Sess. § 2. Second, no one undergoing involuntary treatment or subject to criminal charges is to be eligible for placement in a community residential facility. H. 2111, Pa. House, 1979 Sess. § 2; H. 2112, Pa. House, 1979 Sess. § 1; H. 2113, Pa. House, 1979 Sess. § 2. These provisions are a patent denial of the right of the mentally ill to treatment in the least restrictive alternative and to have a judicial determination of the least restrictive alternative. PA. STAT. ANN. tit. 50, §§ 7106, 7107 (Purdon Supp. 1979). See *Eubanks v. Clark*, 434 F. Supp. 1022, 1027-28 (E.D. Pa. 1977). See also *Halderman v. Pennhurst State School & Hosp.*, 446 F. Supp. 1295, 1319 (E.D. Pa. 1977), *aff'd in part, rev'd and remanded in part*, 612 F.2d 84 (3d Cir. 1979), *petition for cert. filed*, 48 U.S.L.W. 3614 (U.S. Mar. 25, 1980) (No. 79-140).

275. ABA MODEL STATUTE, *infra* Appendix A, § 4.

276. *Id.* § 5.

addition, these bills provide the mechanisms for registration²⁷⁷ and dispersal.²⁷⁸ Both are necessary for the success of the deinstitutionalization/anti-institutionalization movement as an exercise of the state's *parens patriae* obligation.²⁷⁹ On their face, the bills appear to be an honest attempt to alleviate some of the difficulties of the group home movement, while truly promoting the primary objective of normalization. Parts of these bills appear to promote all of the requisites for normalization—*i.e.*, integration, dispersal, specialization, and continuity.²⁸⁰ Unfortunately, several other sections of the bills will enable the community prejudices against the mentally disabled²⁸¹ to interfere with these good intentions.

Under the Senate and House Bills, dispersal of group homes is mandatory.²⁸² A community living arrangement may not be established within 2,000 feet of another facility or within 1,000 feet of a drug and alcohol treatment center.²⁸³ In light of the possibilities of impacted areas of group homes emerging, this provision would seem to be not only desirable, but essential to ensure normalization. The bills also provide for the granting of exceptions to this location requirement.²⁸⁴ The defect in the proposed legislation is that the granting of exceptions is left to the unbridled discretion of the local authorities;²⁸⁵ this may allow for ghettoization or exclusion.²⁸⁶ The Model Statute, on the other hand, incorporates dispersal within the overall licensing process and requires consideration of population, need, and the provision of other services.²⁸⁷ This would seem to be a better way of ensuring the provision of appropriate services to mentally retarded persons. Certainly there must be some consideration of needs which exceed the area encompassed by the municipality. To avoid the possibility of exclusionary zoning or the denial of services,

277. See note 288 *infra*.

278. See notes 6 & 38 and accompanying text *supra*.

279. The need for dispersal depends in part on the size of the home. If there are fewer than four persons, dispersal is not as necessary since the size approximates that of a normal family. See *Zoning for Community Residences*, *supra* note 7, at 319.

280. See note 6 and accompanying text *supra*.

281. See notes 25-26 & 106-09 and accompanying text *supra*.

282. S. 182, Pa. Senate, 1979 Sess. § 3; H. 2111, Pa. House, 1979 Sess. § 5; H. 2112, Pa. House, 1979 Sess. § 4; H. 2113, Pa. House, 1979 Sess. § 5.

283. S. 182, Pa. Senate, 1979 Sess. § 3; H. 2111, Pa. House, 1979 Sess. § 5; H. 2112, Pa. House, 1979 Sess. § 4; H. 2113, Pa. House, 1979 Sess. § 5.

284. S. 182, Pa. Senate, 1979 Sess. § 3; H. 2111, Pa. House, 1979 Sess. § 5; H. 2112, Pa. House, 1979 Sess. § 4; H. 2113, Pa. House, 1979 Sess. § 5.

285. S. 182, Pa. Senate, 1979 Sess. § 3; H. 2111, Pa. House, 1979 Sess. § 5; H. 2112, Pa. House, 1979 Sess. § 4; H. 2113, Pa. House, 1979 Sess. § 5.

286. See notes 32-36 and accompanying text *supra*.

287. See ABA MODEL STATUTE, *infra* Appendix A, § 5(a).

municipalities should be required to promulgate ordinances which set concrete standards for determining the exception. Such standards should take into account the quality of services to retarded persons.

Other provisions of the Pennsylvania bills attempt to inhibit ghettoization by permitting the political subdivision to limit those served by the community's group homes to residents of that community.²⁸⁸ If, however, a group home cannot be filled by appropriate residents of the community, the state or county agency in charge of placement may locate other residents of the county in the home.²⁸⁹ If a retarded individual cannot be served within his or her community, the state or county may place the person in the nearest facility with available space.²⁹⁰ The Model Statute, on the other hand, leaves the responsibility for continuity and specialization to the regulatory powers of the state director.²⁹¹

Regulating the quality of care in community living arrangements, as provided in the Model Statute,²⁹² is still a necessity in Pennsylvania,²⁹³ but appears to be outside the scope of the proposed Pennsylvania bills. With the innumerable questions surrounding the status of group homes at the present time, the clarification which might be available from these proposed acts would certainly be a welcome relief,²⁹⁴ although certain revisions may be necessary. Inhibiting the ghettoization of group homes by limiting them to community residents must be balanced against other fundamental rights held by retarded individuals. The right to travel is abridged if a retarded person, wishing to relocate, is confined to the area in which he or she is found to be a resident by virtue of his or her inability to receive resi-

288. S. 182, Pa. Senate, 1979 Sess. § 4; H. 2111, Pa. House, 1979 Sess. § 7; H. 2112, Pa. House, 1979 Sess. § 4; H. § 2113, Pa. House, 1979 Sess. § 7. The registration provisions of the bills have the potential to perform many useful functions. Each political subdivision is required to keep records available on the location and capacity of each group home within its boundaries. S. 182, Pa. Senate, 1979 Sess. § 4; H. 2111, Pa. House, 1979 Sess. § 6; H. 2112, Pa. House, 1979 Sess. § 4; H. 2113, Pa. House, 1979 Sess. § 6. The Model Statute has similar registration requirements. See ABA MODEL STATUTE, *infra* Appendix A, § 5(4).

289. S. 182 Pa. Senate, 1979 Sess. § 4; H. 2111, Pa. House, 1979 Sess. § 7; H. 2112, Pa. House, 1979 Sess. § 4; H. 2113, Pa. House, 1979 Sess. § 7.

290. S. 182, Pa. Senate, 1979 Sess. § 4; H. 2111, Pa. House, 1979 Sess. § 7; H. 2112, Pa. House, 1979 Sess. § 4; H. 2113, Pa. House, 1979 Sess. § 7.

291. ABA MODEL STATUTE, *infra* Appendix A, § 5(1)(b).

292. See *Developmental Disabilities*, *supra* note 27, at 804-05.

293. See *generally Zoning for Community Residences*, *supra* note 7, at 319.

294. Senate Bill 182 and its companion bills in the House mark the third attempt to pass legislation of this kind since the fall of 1976. The Senate Bill was introduced as S. 1442 in 1976 and died on the floor of the legislature. It was reintroduced in 1977 and passed, but on the same day, a vote on reconsideration was taken, thereby revoking the earlier passage. Letter from Thomas F. Halloran, Esq., Pennsylvania Department of Justice Community Advocacy Unit, to Penelope A. Boyd (April 18, 1979). The past failures of the bill have been attributed to two factors—feared erosion of the power of local government and a fear of the mentally ill in the community. *Id.*

dential services in another community. This confinement certainly raises serious constitutional questions with respect to these portions of the bills.²⁹⁵

VI. CONCLUSION

The mentally retarded have faced years of prejudice as a result of their handicap. Often, their greatest problem is not the handicap itself, but rather the reactions of those around them. Such reactions have caused the retarded to be hidden away in institutions and subjected to many personal and physical indignities. The growing awareness of the normalization potential and the concurrent elimination of exclusive dependence upon the institution have created a new set of community and zoning conflicts. On the horizon, after the resolution of the zoning question, the applicability and enforceability of restrictive covenants must be addressed.²⁹⁶ The advent of the belief that the retarded can grow has been a great step toward the return of the retarded to their communities and society. It would be disastrous to allow the irrational fears of others to deny the retarded and non-retarded members of society the benefits of the experiences which they might both share.

295. See *Memorial Hosp. v. Maricopa County*, 415 U.S. 250, 261-62 (1974) (invalidating one-year residence requirement in county as prerequisite to indigent's receipt of medical services at county's expense because such a requirement penalizes indigents for exercising their constitutional right to migrate). See also *Shapiro v. Thompson*, 394 U.S. 618, 630-33 (1969) (invalidating one-year residency requirement as prerequisite to receipt of welfare benefits because such a requirement infringes upon right of interstate movement); *Dunn v. Blumstein*, 405 U.S. 330, 338-39 (1972) (durational residency requirement for voter registration directly impinges on the exercise of the fundamental right to travel). Cf. *Sosna v. Iowa*, 419 U.S. 393, 406-09 (1975) (residency requirement for nonessential services not unconstitutional).

296. See generally *Seaton v. Clifford*, 24 Cal. App. 3d 46, 100 Cal. Rptr. 779 (1972); *Brownfield v. Ohio*, No. 77-12-2995 (C.P. Summit County, June 12, 1978). The Model Statute would eliminate this problem as well as the zoning problem. See ABA MODEL STATUTE, *infra* Appendix A, § 6.

APPENDIX A

ABA MODEL STATUTE, AN ACT TO ESTABLISH THE RIGHT TO LOCATE COMMUNITY HOMES FOR DEVELOPMENTALLY DISABLED PERSONS IN THE RESIDENTIAL NEIGHBORHOODS OF THIS STATE*

Section 1. Title

This act shall be known as the "Location Act for Community Homes for Developmentally Disabled Persons."

Section 2. Statement of Purpose

The general assembly declares that it is the goal of this act to improve the quality of life of all developmentally disabled persons and to integrate developmentally disabled persons into the mainstream of society by ensuring them the availability of community residential opportunities in the residential areas of this state. In order to implement this goal, this act should be liberally construed toward that end.

Section 3. Definitions

As used in this act:

- (1) "Developmental 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 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 required for such persons; or
 - (iii) is attributable to dyslexia resulting from a disability described in clause (i) or (ii) of this paragraph; and
 - (b) has continued or can be expected to continue indefinitely.
- (2) "Developmentally Disabled Person" means a person with a developmental disability.
- (3) "Director" means the director of developmental disabilities (or appropriate state official).
- (4) "Family Home" means a community-based residential home licensed by the director that provides room and board, personal care, rehabilitation services, and supervision in a family environment for not more than [six (6)] developmentally disabled persons.
- (5) "Permitted Use" means a use by right which is authorized in all residential zoning districts.
- (6) "Political Subdivision" means a municipal corporation, township, or county.

Section 4. Permitted Use for Family Homes

A family home is a residential use of property for the purposes of zoning and shall be treated as a permitted use in all residential zones or districts, including all single-family residential zones or districts, of all political subdivisions. No political subdivision may require that a family home, its owner, or operator obtain a conditional use permit, special use permit, special exception, or variance.

Section 5. Licensing Regulations and Density Control for Family Homes

(1) For the purposes of safeguarding the health and safety of developmentally disabled persons and avoiding over-concentration of family homes, either along or in conjunction with similar community-based residences, the director or the director's designee shall inspect and license the operation of family homes and may renew and revoke such licenses. A license is valid for one year from the director may inspect such homes more frequently, if needed. The director shall not issue or renew and may revoke the license of a family home not operating in compliance with this section and regulations adopted hereunder. Within one hundred eighty (180) days of the enactment of this act, the director shall promulgate regulations which shall encompass the following matters:

- (a) Limits on the number of new family homes to be permitted on blocks, block faces, and other appropriate geographic areas taking into account the existing residential population density and the number, occupancy, and location of similar community residential facilities serving

* Comments, alternatives, and footnotes omitted.

persons in drug, alcohol, juvenile, child, parole, and other programs of treatment, care, supervision, or rehabilitation in a community setting;

(b) Assurance that adequate arrangements are made for the residents of family homes to receive such care and rehabilitation as is necessary and appropriate to their needs and to further their progress towards independent living;

(c) Protection of the health and safety of the residents of family homes, provided that compliance with these regulations shall not relieve the owner or operator of any family home of the obligation to comply with the requirements or standards of a political subdivision pertaining to building, housing, health, fire, safety, and motor vehicle parking space that generally apply to single family residences in the zoning district; and provided further that no requirements for business licenses, gross receipt taxes, environmental impact studies or clearances may be imposed on such homes if such fees, taxes, or clearances are not imposed on all structures in the zoning district housing a like number of persons;

(d) Procedures by which any resident of a residential zoning district or the governing body of a political subdivision in which a family home is, or is to be, located may petition the director to deny an application for a license to operate a family home on the grounds that the operation of such a home would be in violation of the limits established under paragraph (1)(a) of this section;

(2) all applicants for a license to operate a family home shall apply to the director for the license and shall file a copy of the application with the governing body of the political subdivision having jurisdiction over the zoning of the land on which the family home is to be located. All applications must include population and occupancy statistics reflecting compliance with the limits established pursuant to paragraph (1)(a) of this section.

(3) The Director may not issue a license for a family home until the applicant has submitted proof of filing with the governing body of the political subdivision having jurisdiction over the zoning of the land on which such a home is to be located, a copy of the application at least thirty (30) days prior to the granting of such a license, and any amendment of the application increasing the number of residents to be served at least fifteen (15) days prior to the granting of a license.

(4) In order to facilitate the implementation of paragraph (1)(a), the director shall maintain a list of the location, capacity, and current occupancy of all family homes. The director shall ensure that this list shall not contain the names or other identifiable information about any residents of such homes and that copies of this list shall be available to any resident of this state and any state agency or political subdivision upon request.

Section 6. Exclusion by Private Agreement Void

Any restriction, reservation, condition, exception, or covenant in any subdivision plan, deed, or other instrument of or pertaining to the transfer, sale, lease, or use of property which would permit residential use of property but prohibit the use of such property as a family home for developmentally disabled persons shall, to the extent of such prohibition, be void as against the public policy of this state and shall be given no legal or equitable force or effect.

Section 7. Severability of Sections

If any section, subsection, paragraph, sentence, or any other part of this act is adjudged unconstitutional or invalid, such judgment shall not affect, impair or invalidate the remainder of this act, but shall be confined to the section, subsection, paragraph, sentence, or any other part of this act directly involved in the controversy in which said judgment has been rendered.

APPENDIX B

THE GENERAL ASSEMBLY OF PENNSYLVANIA, 1979 SESSION, HOUSE BILL 2111

AN ACT PROVIDING FOR THE LOCATION AND OPERATION OF COMMUNITY RESIDENTIAL FACILITIES.

The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows:

Section 1. Short title.

This act shall be known and may be cited as the "Community Residential Facility Siting Act."

Section 2. Community residential facility defined.

For the purposes of this act, "community residential facility" means a facility providing residence and specialized services for a minimum of three but no more than eight developmentally disabled, mentally retarded, mentally ill, physically handicapped, elderly persons or dependent children referred by the appropriate county or State agency responsible for placement and qualified staff who provide 24-hour care, supervision and services for such residents and not more than two of whom shall be residents of the facility. In order to qualify for assignment to a community residential facility, mentally ill persons shall be certified by county mental health and mental retardation authorities as capable of residing in a group home and receiving services from a local community mental health program. No person receiving treatment under Article III (Involuntary Examination and Treatment) or Article IV (Determinations Affecting Those Charged with Crime, or Under Sentence) of the act of July 9, 1976 (P.L.817, No.143), known as the "Mental Health Procedures Act" shall be eligible for such facility.

Section 3. Applicability and construction of act.

(a) The provisions of this act shall be applicable in every municipality throughout the Commonwealth, including those operating under home rule charters and optional plans of government.

(b) The provisions of this act shall be applicable to all community residential facilities established subsequent to the effective date of this act, notwithstanding any inconsistent provisions of any other act or ordinance. Nothing in this act shall effect the status of community residential or similar facilities established prior to the effective date of this act except that those community residential facilities established prior to the effective date of this act shall register with the appropriate municipality. This act shall not be construed to limit or restrict the authority or appropriate State agencies to approve or license community residential facilities.

Section 4. Status for zoning purposes.

A community residential facility shall be considered a residential use of property permitted in all residential zones. All comprehensive zoning plans shall be construed to permit the location of community residential facilities in all residential zones.

Section 5. Restrictions on locations.

No community residential facility shall be established within 2,000 feet of any other such facility nor shall it be established within 1,000 feet of any drug and alcohol center. Agents of a facility may apply for an exception to those requirements and such exceptions may be granted at the discretion of the zoning hearing board of the municipality.

Section 6. Municipal records.

Each municipality shall maintain appropriate records indicating the location, capacity and agent of each community residential facility within its jurisdiction and such information shall be available to the public. Each community residential facility shall register its location, capacity and agent with the appropriate officials of the municipality. The agent shall be responsible for maintaining the facility to ensure that it is similar in appearance and condition to other private residences in the community.

Section 7. Residents of community residential facilities.

A municipality may require that all residents of the community residential facility shall be residents of the municipality in which the facility is located or a contiguous municipality. In the event there are not enough appropriate residents of that municipality or contiguous municipalities to maintain full occupancy of the community residential facility then the appropriate county or State agency responsible for placement shall notify the municipality and that community residential facility shall be available for new placements from other residents of the county in which the facility is located. However, if it is certified by the appropriate county or State agency responsible for placement either that there is no space available in an appropriate community residential facility, or that there is no appropriate community residential facility available, then with the approval of that agency an occupant may reside in the nearest appropriate community residential facility with space available.

Section 8. Effective date.

This act shall take effect in 90 days.

APPENDIX C

THE GENERAL ASSEMBLY OF PENNSYLVANIA, 1979 SESSION, SENATE BILL 182

AN ACT PROVIDING THAT A COMMUNITY RESIDENTIAL FACILITY SERVING NO LESS THAN THREE OR MORE THAN EIGHT MENTALLY RETARDED, PHYSICALLY HANDICAPPED, OR ELDERLY PERSONS, OR DEPENDENT CHILDREN BE CONSIDERED A RESIDENTIAL USE OF PROPERTY AND PERMITTED IN ALL RESIDENTIAL ZONES OF ALL CITIES, COUNTIES AND OTHER POLITICAL SUBDIVISIONS.

The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows:

Section 1. (a) A community residential facility means a facility providing residence for a minimum of three but no more than eight elderly, physically handicapped, mentally ill or developmentally disabled persons or dependent children and providing residence for one or two other persons who provide services for such residents.

Section 2. A community residential facility shall be considered a residential use of property in all residential zones, including but not limited to residential zones for single family dwellings within all cities, counties and other political subdivisions.

Section 3. No community residential facility as defined in section 1, shall be established within 2,000 feet of any other facility nor shall it be established within 1,000 feet of any drug and alcohol center. Agents of a facility may apply for an exception to those requirements and such exceptions may be granted at the discretion of the local political subdivision.

Section 4. Each political subdivision shall mention appropriate records indicating the location and number of residents served by each community residential facility within its jurisdiction; such information shall be available to the public. Each community residential facility shall register its location, capacity and agent with the appropriate officials of the political subdivision. The agent shall be responsible for maintaining the facility to ensure that it is similar in appearance and condition to other homes in the community. A political subdivision may require that all the occupants of the community residential facility shall be residents of the municipality in which the facility is located. In the event there are not enough appropriate residents of that municipality to maintain full occupancy of the community residential facility then the appropriate county or State agency responsible for placement shall notify the political subdivision and that community residential facility shall be available for new placements from other residents of the county in which the facility is located. Notwithstanding, if it is certified by the appropriate county or State agency responsible for placement either that there is no space available in an appropriate community residential facility, or that there is no appropriate community residential facility available, then with the approval of that agency an occupant may reside in the nearest appropriate community residential facility with space available.

Section 5. Nothing in this act shall effect the status of community residential or similar facilities established prior to the effective date of this act; however, those community residential facilities established prior to the effective date of this act shall register with the appropriate political subdivision.

Section 6. This act shall not limit or restrict the authority of appropriate State agencies to approve or license community residential facilities.

Section 7. This act shall take effect immediately.