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I. INTRODUCTION

This article will examine recent developments in the law of the handicapped concerning the issue of the establishment of group homes.[1] Protection of rights of persons with mental retardation in this area surprisingly has been accomplished through legislation and judicial decisions at the state level, instead of through federal efforts.[2]

Recent cases interpreting state statutes which limit the ability of local governments to exclude group homes through restrictive covenants and single-family ordinances which promote exclusionary zoning, will be analyzed. The article will conclude by suggesting that the recent development of state-wide zoning legislation has been an indispensible tool in the process of deinstitutionalization of the handicapped, providing a means to accomplish what so many people support only in theory.

II. GROUP HOMES

The group home concept involves the placement of small groups of adults or children with mental retardation in homes in residential areas to gain the benefits of family living.[3] Group homes were developed to implement the theory of "normalization" which stresses that persons with retardation must live and work in condi-

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1. *See infra* notes 3-5 and accompanying text.

2. *See infra* notes 29-47 and accompanying text.

3. Group homes are also used in the treatment of persons with mental illness, juvenile delinquents, alcohol and drug abusers, foster children, and the aged. *See* Note, *Group Homes and Deinstitutionalization: The Legislative Response to Exclusionary Zoning*, 6 VT. L. REV. 509, 509-538 (1981). These homes are outside the scope of this article.

tions which most approximate normal society in order to develop their full potential.[4] The group home also provides an alternative to institutional care, which has been criticized for promoting isolation of the individual and subsequent socially unacceptable behavior.[5]

Congress has mandated the concept of deinstitutionalization in a series of statutes designed to encourage community-based services for the persons with developmental disabilities. The Developmentally Disabled Assistance and Bill of Rights Act (the Act) of 1975 and the 1978 Amendments established a voluntary federal-state financial grant program providing federal aid for provision of services including community living arrangements.[6] Section 6010 of the Act also provides that the "treatment, services, and habilitation for a person with developmental disabilities should be . . . provided in the setting that is least restrictive of the person's personal liberty."[7] For many persons with mental retardation, placement in a group home is considered the least restrictive setting; thus, many states have effectuated their transfer from large institutions into group homes in the community.[8]

Community groups and affected citizens, however, have fought tenaciously to prevent the establishment of group homes in their neighborhoods, impeding the process of deinstitutionalization and normalization.[9] Localities have enacted zoning ordinances which exclude group homes from single family residential areas[10] and have also required conditional use permits for construction of group homes.[11] Restrictive covenants and commercial use classifications

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4. *See* Nirje, *The Normalization Principle*, in CHANGING PATTERNS IN RESIDENTIAL SERVICES FOR THE MENTALLY RETARDED, 231 (R. Kugel & A. Shearer, eds. 1976).

5. Ewing, *Health Planning and Deinstitutionalization: Advocacy within the Administrative Process*, 31 STAN. L. REV. 679, 679-83 (1979).

6. 42 U.S.C. §§ 6001-6081 (1976), *as enacted by* Act of Oct. 4, 1975, Pub. L. No. 94-103, 89 Stat. 486 (1975), *as amended by* Act of Nov. 6, 1978, Pub. L. No. 95-602, 92 Stat. 2955 (1978).

7. 42 U.S.C. § 6010(2) (1976), *as enacted by* Act of Oct. 4, 1975, Pub. L. No. 94-103, § 111, 89 Stat. 486, 502 (1975). In Pennhurst State School and Hosp. v. Halderman, 451 U.S. 1 (1981), the Supreme Court held that section 6010 did not create substantive rights, but acknowledged that it expressed congressional preference for community treatment. *Id.* at 18-19.

8. *See supra* notes 3-5.

9. Opponents of group homes fear they will affect property values, safety, and traffic and noise levels in the community, although studies have shown no justification for their fears. ABA Commission on the Mentally Disabled, *Zoning for Community Homes Serving Developmentally Disabled Persons*, 2 MENTAL DISABILITY L. REP. 794, 796 (1978).

10. *See infra* notes 29-33 and accompanying text.

11. *Id.*

have been used to prevent group homes in certain residential areas.[12] Consequently, recent state legislation which preempts local zoning ordinances has been instrumental in facilitating the establishment of group homes.[13]

III. EXCLUSIONARY TECHNIQUES

The most common methods utilized by communities to exclude group homes from their neighborhoods are exclusionary zoning, restrictive covenants, and commercial use classification.[14] State statutes, however, have been instrumental in overcoming these exclusionary techniques.[15]

A. *Exclusionary Zoning*

Exclusionary zoning to prevent group homes is accomplished through restrictive definitions of the term family in zoning ordinances which classify certain areas for residential use.[16] The ordinances exclude all households of unrelated persons, including group homes of mentally retarded adults or children. The Supreme Court has held that such ordinances are constitutional if they do not discriminate between those related by blood, marriage, or adoption.[17] Many group homes, however, fall under family definitions if the court chooses to construe "family" to include foster parents and their wards.[18]

In a recent Maine decision, *Penobscot Area Housing Development Corporation v. City of Brewer*,[19] a private nonprofit corporation

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12. *See infra* notes 48-52 and accompanying text.

13. *See infra* notes 38-45 and accompanying text.

14. 1 P. ROHAN, ZONING AND LAND USE CONTROLS, 3-139—3-143 (1982).

15. *See infra* notes 29-33 and accompanying text.

16. *See* Berger v. State, 71 N.J. 206, 217-18, 364 A.2d 993, 999 (1976) (where the local zoning ordinance defined family as "one person living alone or two or more persons related by blood, marriage or adoption and living together as a single unit in one house . . ."). *See also* Nichols v. Tullahoma Open Door, Inc., 640 S.W.2d 13, 15 (Tenn. Ct. App. 1982) (where local ordinance defined family as "one or more persons occupying a single dwelling unit, provided that unless all members are related by blood or marriage, no such family shall contain over five (5) persons . . .").

17. *See* Moore v. City of East Cleveland, 431 U.S. 494 (1977); Village of Belle Terre v. Boraas, 416 U.S. 1 (1974).

18. *See* City of White Plains v. Ferraioli, 34 N.Y.2d 300, 313 N.E.2d 756, 357 N.Y.S.2d 449 (1974). "Neither the foster parents nor the children are to be shifted about; the intention is that they remain and develop ties in the community. The purpose is to emulate the traditional family and not to introduce a different " 'lifestyle'." *Id.* at 308, 313 N.E.2d at 756, 357 N.Y.S.2d at 758.

19. 434 A.2d 14 (Me. 1981).

sought an occupancy certificate for a group home of six adults with mental retardation and two supervisors in the town of Brewer. The zoning ordinance that applied to the property classified it as single family residential. Family was defined in the ordinance as "a collective body of persons . . . living together as a separate housekeeping unit in a domestic relationship based upon birth, marriage, or other domestic bond . . . ."[20] The occupancy certificate was denied.[21] On appeal to the Supreme Judicial Court of Maine, the corporation argued that the residents of the home, by living and working together, created a relationship meeting the requirements of a domestic bond.[22] The court rejected this argument, stressing the importance of a "traditional family-like structure and household authority."[23] The court also stressed the lack of cohesiveness and permanence in the proposed arrangement.[24]

The court seemed to emphasize the fact that staff members in the group home would serve on a rotating basis, providing little supervision for the residents.[25] Yet, other courts have found the arrangements in group home living satisfactory in fulfilling "family" definitions. For example, in *Mongony v. Bevilacqua*,[26] the Rhode Island Supreme Court ruled that a group home for persons with retardation came under the definition of family as a "single non-profit housekeeping unit."[27] In addition, a Georgia court recently construed a similar ordinance to include group homes.[28]

Such inconsistent results have, in large part, been abolished by recent state legislation which limits the ability of local governments to zone out group homes.[29] Maine, for example, recently passed a

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20. *Id.* at 20.
21. *Id.* at 20-21.
22. *Id.* at 21.
23. *Id.* at 21-22.
24. *Id.* at 22.
25. *Id.* The court also emphasized the fact that the residents had no choice as to who incoming members would be. *Id.*
26. 432 A.2d. 661 (R.I. 1981).
27. *Id.* at 664. *See id.* at 663 (citing JOHNSTON, RHODE ISLAND, ZONING CODE art. XVIII(19)(1980)).
28. Douglas County Resources, Inc. v. Daniel, 280 S.E.2d 734, 247 Ga. 785 (1981). The ordinance defined family as "one or more persons occupying a dwelling unit and living as a single, non-profit housekeeping unit." *Id.* at 735, 247 Ga. at 786.
29. Twenty-six states currently have such statutes. See ROHAN, *supra* note 9, at 250-51; ARIZ. REV. STAT. ANN. §§36.581-36.582 (Supp. 1975-1982); CAL. WELF. & INST. CODE §§5115-5116 (West Supp. 1975-1982); COLO. REV. STAT. § 30-28-115 (1977 & Supp. 1982); FLA. STAT. ANN. §163.3177(6)(f)(West Supp. 1982); IDAHO CODE §§67-6530—67-6532 (1980); MD. ANN. CODE art. 59A, §20C (1979); MICH. STAT. ANN. §5.2963(16a)(Supp. 1978); MINN. STAT. ANN. §§252.28, 462.357(7), (8)(West 1982 &

statute to override zoning ordinances such as the Brewer single-family residential ordinance in *Penobscot*.[30] The Maine statute is specifically designed to affect single-family residential zones and states that " 'a community living use' shall be considered a permitted or conditional single-family residential use of property for the purposes of zoning."[31] Group homes are to house no more than eight mentally retarded or developmentally disabled persons and must be licensed by the state.[32] Rhode Island enacted a similar statute which states that group homes of six or fewer citizens with retardation "shall be considered a family and all requirements pertaining to local zoning are waived."[33]

Neighboring homeowners, however, have attacked such legislation as violative of due process and equal protection. In addition, such legislation has been challenged for unconstitutionally preempting local zoning prerogatives.

In *Costley v. Caromin House*,[34] homeowners sought a temporary restraining order to prohibit the construction of a group home because it was prohibited by local zoning laws.[35] The homeowners also sought a declaration that the state statute,[36] which characterized group homes as a permitted single-family use, was unconstitu-

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Supp. 1983); MONT. CODE ANN. §§11-2702.1, .2 (Supp. 1977); NEB. REV. STAT. §18-1744—18-1747 (Supp. 1981); N.J. STAT. ANN. §30.4C-26 (West 1981); N.M. STAT. ANN. §3-21-1(C) (Supp. 1981); N.Y. MENTAL HYG. LAW §41.34 (McKinney Supp. 1982); R.I. GEN. LAWS § 45-24-22 (1980); S.C. CODE ANN. §§44-17-10, 44-21-525 (Law. Co-op. 1982); TENN. CODE ANN. § 13-24-102 (1980); UTAH CODE ANN. §§10-9-2.5, 17-27-11.7 (Supp. 1981); VT. STAT. ANN., tit. 24, §4409(d)(Supp. 1982); VA. CODE §15.1-486.2 (1981); WIS. STAT. ANN. §59.97(15)(West Supp. 1982).

30. ME. REV. STAT. ANN. tit. 30, §4962-A (Supp. 1982).

31. *Id.* § 4962-A 2.

32. *Id.*

33. R. I. GEN. LAWS §45-24-22 (1980). In Mongony v. Bevilacqua, 432 A.2d 661, the court ruled that the proposed group home fell within the provisions of the town zoning ordinance, and did not rest its decision on the statute. *Id.* at 663.

34. 313 N.W.2d 21 (Minn. 1981).

35. *Id.* at 24-25. The home was constructed in a single-family residential zone where family was defined as "one or more persons occupying a premises and living as a single housekeeping unit as distinguished from a group occupying a boarding house, lodging house or hotel as herein defined. *Id.* at 24 (citing TWO HARBORS, MINN., ORDINANCES art. 2, § 1.16 (1979)).

36. MINN. STAT. ANN. §462.357, subd. 7 (West Supp. 1983). The statute reads in part:

> *Permitted single family use*. In order to implement the policy of this state that mentally retarded and physically handicapped persons should not be excluded by municipal zoning ordinances from the benefits of normal residential surroundings, a state licensed group home or foster home serving six or fewer mentally retarded or physically handicapped persons shall be considered a permitted single family residential use of property for the purposes of zoning.

tional.[37] The court construed the local ordinance to include group homes, but ruled on the constitutionality of the statute because the home had to be licensed by the state.[38]

Plaintiffs attacked the statute on the ground that it arbitrarily and capriciously imposed "legislative will" upon local zoning matters.[39] The court, however, expressed the view that the municipality had no inherent power to enact zoning regulations because it received its zoning power only by state legislative grant.[40]

The court then refused to rule on the constitutionality of the statute at issue unless it was clearly unconstitutional.[41] Ruling that the statute was substantially related to the broad program to deinstitutionalize persons with mental retardation, the court upheld its validity.[42] The court concluded by emphasizing that the statute's purpose of facilitating acceptance of group homes in residential communities justified the overriding of local controls.[43]

In *Nichols v. Tullahoma Open Door*,[44] plaintiffs attacked a similar statute on the grounds that it arbitrarily or capriciously impaired their property rights by nullifying zoning restrictions which previously barred group homes from their neighborhoods.[45] The court held that zoning restrictions do not create vested property rights even if the state statute causes diminution in property values.[46] The statute was also upheld as a reasonable exercise of the legislature's power to institute programs under the police powers.[47]

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37. 313 N.W.2d at 24.

38. *Id.*

39. *Id.* at 27.

40. *Id. But see* Garcia v. Siffron Residential Ass'n, 63 Ohio St. 2d 259, 407 N.E.2d 1369 (1980) (municipalities have "home rule" power to zone which cannot be abridged by state), *cert. denied*, 450 U.S. 911 (1981).

41. 313 N.W.2d at 27.

42. *Id.* at 28.

43. *Id.* at 27-28.

44. 640 S.W.2d 13 (Tenn. Ct. App. 1982).

45. *Id.* at 16-17. The statute, TENN. CODE ANN. §13-24-102 (1980), reads in part:

> "The classification single family residence shall include any home in which eight (8) or fewer unrelated mentally retarded, mentally handicapped or physically handicapped persons reside, and may include two (2) additional persons acting as houseparents or guardians who need not be related to each other or to any of the mentally retarded, mentally handicapped or physically handicapped persons residing in the home."

Tenn. Code Ann. § 13-24-103 (1980) provides that the provisions of §13-24-102 take precedence over any local zoning law or ordinance to the contrary.

46. 640 S.W.2d at 16.

47. *Id.* at 18.

B. *Commercial Use Classification*

Plaintiffs have also attacked group homes on the ground that they are commercial ventures. This argument has largely been rejected, particularly in light of protective state statutes.

In the two cases just discussed, plaintiffs claimed the houses were being used for commercial, rather than residential purposes, because they were operated by corporations which received money from various state and federal agencies. In *Nichols*, the court rejected the claim that the home was operating on a commercial basis simply because it received subsidies and rent to repay the mortgage loan and pay staff members' salaries.[48] The court in *Costley*, went so far as to say that a corporation operating a group home for profit does not make the home commercial in nature.[49] Both courts seemed to emphasize the family living style of the residents as the key in determining whether the home operated on a commercial basis, not, its for-profit status.[50]

C. *Restrictive Covenants*

Private restrictive covenants are used by neighborhoods and real estate developers in much the same way localities use single-family zoning to maintain family oriented neighborhoods. Restrictive covenants have sometimes been successful in excluding group homes from neighborhoods,[51] but, protective state statutes now override them.[52]

IV. CONCLUSION

State legislatures, willing to provide a statutory framework enabling citizens with mental retardation to establish group homes, have been instrumental in protecting the rights of persons with handicaps. Due to state efforts, local exclusionary ordinances can no longer keep citizens with mental retardation from desperately needed residential placements.

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48. *Id.* at 19.

49. 313 N.W.2d at 25.

50. *See, e.g., id.* ("The residents interact and live as a family whether the management is by a for-profit corporation, a non-profit corporation, a religious group, or a governmental unit.").

51. Shaver v. Hunter, 626 S.W.2d 574 (Tex. Civ. App. 1981).

52. *See, e.g.*, 313 N.W.2d 21 (restrictive covenant falls in face of important governmental objective of deinstitutionalization).