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"Five-Hundred-Year Flood Plains" and Other Unconstitutional Challenges to the Establishment of Community Residences for the Mentally Disabled

Cover Page Footnote

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“FIVE-HUNDRED-YEAR FLOOD PLAINS” AND OTHER UNCONSTITUTIONAL CHALLENGES TO THE ESTABLISHMENT OF COMMUNITY RESIDENCES FOR THE MENTALLY RETARDED

*Robert L. Schonfeld**

I. Introduction

Mentally retarded persons receive better care, treatment and training in small community residences than in large isolated institutions.¹ State and federal policy statements implicitly acknowledge this fact.² Furthermore, published studies demonstrate what the Supreme Court, in *City of Cleburne v. Cleburne Living Center*,³ appeared to recognize: Community residences do not decrease surrounding property values, increase crime, or detrimentally affect neighborhoods.⁴ Nonetheless, many state statutes which purport to assist the establishment of community residences fail to conform to their own stated policy

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1. Studies undertaken over the past half century have repeatedly demonstrated that mentally retarded persons develop more rapidly in residential settings than in institutions. See J. JACOBSON & A. SCHWARTZ, *THE EVALUATION OF COMMUNITY LIVING ALTERNATIVES FOR DEVELOPMENTALLY DISABLED PERSONS 5-6* (Living Alternatives Research Project 1982) (available at *Fordham Urban Law Journal* office). Additionally, experts in several lawsuits brought to force states to establish more community residences have uniformly testified to the superiority of community placement over institutional placement. See *Society for Good Will to Retarded Children v. Cuomo*, 572 F. Supp. 1300, 1306-07 (E.D.N.Y. 1983), *rev'd on other grounds*, 737 F.2d 1239 (2d Cir. 1984); *ARC of North Dakota v. Olson*, 561 F. Supp. 473, 481-82 (D.N.D. 1982); *Garrity v. Gallen*, 522 F. Supp. 171, 195 (D.N.H. 1981).

2. See *infra* notes 8-25 and accompanying text.

3. 473 U.S. 432, 449-50 (1985).

4. See *infra* notes 32-36 and accompanying text.

goals.⁵ Similarly, many local ordinances specifically aimed at excluding non-traditional families⁶ stand as barriers to the establishment of community residences. These statutes and ordinances, however, may no longer be viable after *City of Cleburne*.⁷

This Article examines the impact of state statutes and local ordinances on the establishment of community residences for mentally retarded persons in light of the Court's decision in *City of Cleburne*. First, Part II traces federal and state policies advocating the establishment of community residences for mentally retarded persons. Part III examines barriers to the establishment of community residences, including neighborhood opposition based on unjustified fears, and state statutes and local ordinances that effectively impede the development of residences. Part IV analyzes the application of the equal protection clause to statutes and ordinances affecting mentally retarded persons and discusses *City of Cleburne*. Part V considers the impact of that decision on state statutes that: (1) limit the number of persons that can be placed in community residences;

5. See *infra* notes 37-54 and accompanying text.

6. See *infra* notes 55-57 and accompanying text.

7. See *infra* notes 98-140 and accompanying text. Several law review articles on state statutes affecting the establishment of community residences appeared prior to the Supreme Court's decision in *City of Cleburne*. See generally Boyd, *Strategies in Zoning and Community Living Arrangements for Retarded Citizens: Parens Patriae Meets Police Powers*, 25 VILL. L. REV. 273 (1980); Hopperton, *A State Legislative Strategy for Ending Exclusionary Zoning of Community Homes*, 19 URB. L. ANN. 47 (1980); Kressel, *The Community Residence Movement: Land Use Conflicts & Planning Imperatives*, 5 N.Y.U. REV. L. & SOC. CHANGE 137 (1975); Lippincott, "A Sanctuary for People": *Strategies for Overcoming Zoning Restrictions on Community Homes for Retarded Persons*, 31 STAN. L. REV. 767 (1979); Schonfeld, "Not in My Neighborhood": *Legal Challenges to the Establishment of Community Residences for the Mentally Disabled in New York State*, 13 FORDHAM URB. L.J. 281 (1985); Tuoni, *Deinstitutionalization and Community Resistance by Zoning Restrictions*, 66 MASS. L. REV. 125 (1981); Note, *Group Homes and Deinstitutionalization: The Legislative Response to Exclusionary Zoning*, 6 VT. L. REV. 509 (1981); Note, *A Review of the Conflict Between Community-Based Group Homes for the Mentally Retarded and Restrictive Zoning*, 82 W. VA. L. REV. 669 (1980); Comment, *Zoning the Mentally Retarded into Single-Family Residential Areas: A Grape of Wrath or the Fermentation of Wisdom*, 1979 ARIZ. ST. L.J. 385; Comment, *Deinstitutionalizing the Mentally Retarded in Maine: The Inevitable Face-Off With Zoning*, 35 ME. L. REV. 33 (1983); Comment, *Exclusionary Zoning of Community Facilities*, 12 N.C. CENT. L.J. 167 (1980); Comment, *Zoning and Community Group Homes for the Mentally Retarded—Boon or Bust?*, 7 OHIO N.U.L. REV. 64 (1980); Comment, *Exclusionary Zoning and its Effects on Group Homes in Areas Zoned for Single-Family Dwellings*, 24 U. KAN. L. REV. 677 (1976); Comment, *Can the Mentally Retarded Enjoy "Yards That are Wide?"*, 28 WAYNE L. REV. 1349 (1982); see also Note, *Applicability and Application of Zoning Regulations to Single Residences Employed for Group Living of Mentally Retarded Persons*, 32 A.L.R.4TH 1018 (1984).

(2) impose quotas and distance limitations on residences; and (3) require notification of local officials and impose conditions not placed on other homes before a community residence can commence operations.

Part V also discusses the effect of *City of Cleburne* on local ordinances limiting the number of unrelated persons who can live in a residence. Part VI of this Article examines the shortcomings of the American Bar Association's Model Statute for regulating the establishment of residences. Part VII then recommends a model statute which includes prohibitions on the use of restrictive covenants and other strategies used by homeowners attempting to bar community residences from their neighborhoods. Finally, this Article concludes that many existing state statutes and local ordinances affecting the establishment of community residences are constitutionally invalid and should be amended in a manner consistent with the Article's recommendations.

II. Federal and State Policies Supporting the Development of Community Residences

A. Federal Policy Advocating the Establishment of Community Residences

The federal policy promoting deinstitutionalization and the care and treatment of mentally retarded persons in community settings can be traced back to the 1960's. In 1963, based upon recommendations made by the President's Panel on Mental Retardation, President Kennedy sent to Congress a "special message on Mental Illness and Mental Retardation"⁸ in which he presented a legislative package offering "a bold new approach" which would "reduce, over a number of years, and by hundreds of thousands, the persons confined to . . . institutions" and "retain in and return to the community the . . . mentally retarded."⁹ Congress enacted many of President Kennedy's recommendations in the Maternal and Child Health and

8. President's Message to Congress on Mental Illness and Mental Retardation, 1963 U.S. CODE CONG. & ADMIN. NEWS 1466.

9. *Id.* at 1467, 1477. President Kennedy's legislation was designed to bolster "our fundamental community . . . programs which can do much to eliminate or correct the harsh environmental conditions which often are associated with mental retardation." *Id.* at 1467. The legislation, authorizing funding for community health centers, recognized the need to move "from the outmoded use of distant custodial institutions to the concept of community-centered agencies." *Id.* at 1474.

Mental Retardation Planning Amendments to the Social Security Act¹⁰ and the Mental Retardation Facilities and Community Mental Health Centers Construction Act of 1963.¹¹ Both statutes were aimed at establishing community facilities for mentally retarded persons.¹²

Congress continued its policy favoring deinstitutionalization and the development of community residences with its passage of the Developmentally Disabled Assistance and Bill of Rights Act of 1975.¹³ That statute declared that mentally retarded persons have a right to live in a setting that is least restrictive of their personal liberty.¹⁴ Congress accompanied the Act with funding for community based placements, declaring that institutional care was both "inappropriate and inhumane" for most mentally retarded persons.¹⁵ Senator Javits noted that the statute established a "clear federal policy that the mentally retarded have a right to appropriate treatment, services and habilitation."¹⁶

10. Grants for Planning Comprehensive Action to Combat Mental Retardation, Pub. L. No. 88-156, § 5, 77 Stat. 275 (1963). This statute authorized appropriations for states to plan for "comprehensive [s]tate and community action to combat mental retardation." *Id.*

11. Mental Retardation Facilities Construction Act, Pub. L. No. 88-164, 77 Stat. 282 (1963). This statute authorized appropriations for community mental health centers as well as grants for research centers and teacher training. *Id.*

12. *See supra* notes 10-11.

13. 42 U.S.C. §§ 6000-6081 (1982).

14. 42 U.S.C. § 6010(1), (2) (1982). The statute provides that "persons with developmental disabilities have a right to appropriate treatment, services, and habilitation for such disabilities. . . . [T]he 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." *Id.*

15. HOUSE COMM. ON INTERSTATE AND FOREIGN COMMERCE, DEVELOPMENTALLY DISABLED ASSISTANCE AND BILL OF RIGHTS ACT OF 1975, H.R. REP. NO. 58, 94th Cong., 1st Sess. 15, reprinted in 1975 U.S. CODE CONG. & ADMIN. NEWS 919, 933.

16. S. REP. 160, 94th Cong., 1st Sess., 121 CONG. REC. 29,820 (1975). Senator Javits's statement was noted by the Supreme Court in *Pennhurst State School v. Halderman*, 451 U.S. 1, 22 (1981). The Court held, however, that Congress did not intend to create state obligations when it passed the statute but only to provide state funding. *Id.* The Third Circuit Court of Appeals had previously noted in *Halderman* "a clear congressional preference for deinstitutionalization." *Halderman v. Pennhurst State School*, 612 F.2d 84, 104 (3d Cir. 1979), *rev'd on other grounds*, 451 U.S. 1 (1981). No court has yet held that mentally retarded persons have a constitutional right to placement in a community residence, and the Second Circuit Court of Appeals has held that they do not have a constitutional right to such placement. *See Society for Good Will to Retarded Children v. Cuomo*, 737 F.2d 1239 (2d Cir. 1984). The Supreme Court, however, has held that retarded persons do have the constitutional right to appropriate care and treatment in accordance with professional standards and a level of training adequate to ensure safety and

B. State Policies Advocating Establishment of Residences

Statements made by state legislatures throughout the country demonstrate that the placement of mentally retarded persons in small community residences instead of institutions is a nationwide goal.¹⁷

freedom from undue restraint. *Youngberg v. Romeo*, 457 U.S. 307, 324 (1982).

Other federal statutes demonstrate a federal policy favoring deinstitutionalization. See, e.g., Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, 95 Stat. 357 (1981) (federal funding for community based care); Rehabilitation Act of 1973, § 2, 29 U.S.C. § 796 (1982) (statute designed to improve handicapped individual's abilities to live with greater independence and self-sufficiency); Social Services Amendments of 1974, § 2001, 42 U.S.C. 1397 (1982) (statements favoring community based care over institutional care); The Education for All Handicapped Children Act of 1975, § 612, 20 U.S.C. § 1412(5)(B) (1982) (states required to insure that handicapped children are not educated in isolated surroundings).

17. See CAL. WELF. & INST. CODE § 5115 (West 1984) ("mentally . . . handicapped persons are entitled to live in normal residential surroundings"); COLO. REV. STAT. § 31-23-303(2)(a) (1977) ("establishment of state-licensed group homes for . . . developmentally disabled persons is a matter of statewide concern"); FLA. STAT. § 393.062 (1983) ("greatest priority shall be given to the development and implementation of community-based residential placements"); HAW. REV. STAT. § 333E-1(7) (1985) ("deinstitutionalization of the developmentally disabled is a major goal of the [s]tate"); IDAHO CODE § 67-6530 (1980) ("mentally . . . handicapped persons are entitled to live in normal residential surroundings"); IOWA CODE ANN. § 358A.25(1) (West Supp. 1987) ("[i]t is the intent of this section to assist in improving the quality of life of developmentally disabled persons by integrating them into the mainstream of society by making available to them community residential opportunities in the residential areas of this state"); LA. REV. STAT. ANN. § 28:476 (West Supp. 1987) ("mentally . . . handicapped persons are entitled to live in the least restrictive environment in their own community and in normal residential surroundings"); MD. HEALTH-GEN. CODE ANN. § 7-317(1), (2) (1982) ("there is a need for public group homes for . . . mentally retarded individuals . . . [and such homes] are necessary components in meeting the residential needs of mentally retarded individuals"); MICH. COMP. LAWS ANN. § 125.216a(2) (West 1986) ("persons in need of community residential care shall not be excluded by zoning from the benefits of normal residential surroundings"); MONT. CODE ANN. § 53-20-101(1), (2) (1987) ("secure for each person who may be developmentally disabled such treatment and habilitation . . . in a community-based setting"); NEV. REV. STAT. ANN. § 278.021(1) (Michie Supp. 1986) ("remove obstacles imposed by zoning ordinances which prevent persons who are mentally retarded from living in normal residences"); N.C. GEN. STAT. § 168-20 (1982) ("policy of this [s]tate to provide handicapped persons with the opportunity to live in a normal residential environment"); OR. REV. STAT. § 443.590 (1985) ("mentally handicapped persons are entitled to live as normally as possible within communities and should not be excluded from communities because their disability requires them to live in groups"); S.C. CODE ANN. § 44-21-20 (Law. Co-op. 1985) ("public policy of state to provide . . . support necessary to enable mentally retarded individuals to remain at home and within their respective communities"); TENN. CODE ANN. § 13-24-101 (1980) ("remove any zoning obstacles which prevent mentally retarded persons from living in normal residential surroundings"); VA. CODE ANN. § 15.1-486.2 (1981) ("policy of this [s]tate that . . . mentally retarded . . . not be excluded by county or municipal

Typical of those statements is the New York State Legislature's "[d]eclaration of legislative findings and intent"¹⁸ accompanying the New York statute declaring that community residences for mentally retarded persons are family units for the purpose of all local laws and ordinances.¹⁹ The legislature has stated:

[M]entally disabled individuals have the right to attain the benefits of normal residential surroundings It is the intention of this legislation to meet the needs of the mentally disabled in New York State by providing, wherever possible, that such persons remain in normal community settings, receiving such treatment, care, rehabilitation and education as may be appropriate to each individual.²⁰

Governor Carey, in his approval memorandum, concurred with the sentiments expressed by the legislature:²¹

The national movement towards providing care and treatment for the mentally disabled in the least restrictive environment consistent with their needs has generated a great demand for community residential facilities for persons formerly served in [s]tate institutions [T]he bill aims to facilitate the establishment of community residences by discouraging frivolous legal challenges that have needlessly delayed proper establishment of such facilities in the past.²²

Other state legislatures have made similar pronouncements. The California Legislature, for example, has noted that "[i]t is the policy

zoning ordinances from the benefits of normal residential surroundings"); 1978 Ariz. Sess. Laws 650 ("community-based housing programs for mentally retarded persons should be expanded and should be the foundation of the state's mental retardation residential program"); 1978 N.Y. Laws ch. 468, § 1 ("mentally disabled individuals have the right to attain the benefits of normal residential surroundings"); 1977 Vt. Laws 96 ("policy of the state . . . that developmentally disabled . . . not be excluded by municipal zoning ordinances from the benefits of normal residential surroundings").

18. 1978 N.Y. Laws ch. 468, § 1.

19. N.Y. MENTAL HYG. LAW § 41.34(f) (McKinney Supp. 1988). For a detailed discussion of the New York statute, see Schonfeld, *"Not in My Neighborhood:" Legal Challenges to the Establishment of Community Residences for the Mentally Disabled in New York State*, 13 FORDHAM URB. L.J. 281 (1985); see also NEW YORK STATE MENTAL HYGIENE AND ADDICTION CONTROL COMMITTEE, AFTER EIGHT YEARS: AN ANALYSIS OF THE USE, IMPACT AND EFFECTIVENESS OF THE 1978 NEW YORK STATE SITE SELECTION LAW GOVERNING COMMUNITY RESIDENCES FOR THE MENTALLY DISABLED (1986) (available at *Fordham Urban Law Journal* office) [hereinafter AFTER EIGHT YEARS].

20. 1978 N.Y. Laws ch. 468, § 1.

21. Governor's Memorandum on Approval of ch. 468, N.Y. Laws (July 6, 1978), reprinted in [1978] N.Y. Laws 1821-22 (McKinney).

22. *Id.* at 1821.

of this state . . . that mentally and physically handicapped persons are entitled to live in normal residential surroundings and should not be excluded therefrom because of their disabilit[ies]."²³ Similarly, the Iowa State Legislature has stated that "[i]t is the intent [of the statute] to assist in improving the quality of life of developmentally disabled persons by integrating them into the mainstream of society by making available to them community residential opportunities in the residential areas of this state."²⁴ Finally, in North Carolina, the state legislature has declared that "it is the public policy of this state to provide handicapped persons with the opportunity to live in a normal residential environment."²⁵ Thus, there is little question that both federal and state policies currently favor deinstitutionalization and the establishment of community residences for retarded persons.

III. Obstacles to the Establishment of Community Residences

A. Neighborhood Opposition

The nationwide trend towards deinstitutionalization and community residences, however, has spurred attempts by homeowners throughout the country to block the establishment of residences in their neighborhoods.²⁶ Neighbors have resisted community residences out of

23. CAL. WELF. & INST. CODE § 5115 (West 1984).

24. IOWA CODE ANN. § 358A.25(1) (West Supp. 1987).

25. N.C. GEN. STAT. § 168-20 (1982).

26. See *infra* notes 30-31, 143-44, 156, 175 for cases in which communities throughout the country have attempted to use zoning ordinances and restrictive covenants to exclude community residences.

The Willowbrook Wars chronicles some of the attempts by neighbors to block the establishment of community residences through extra-legal means. D. ROTHMAN & S. ROTHMAN, *THE WILLOWBROOK WARS 187-88* (1984) [hereinafter *ROTHMAN & ROTHMAN*]. The following excerpt gives several examples:

Communities . . . could, and often did, convince the owner of the property to be sold or leased to the state to cancel the agreement. In a handful of very wealthy communities, like suburban Scarsdale, neighbors would join together to buy the house themselves, . . . [b]ut not every community could come up with one hundred or two hundred thousand dollars, and so most of them had to resort to still other strategies. In some cases, angry residents persuaded an owner to find another tenant or buyer, particularly when he had a continuing stake in the area, by virtue of either his business, his professional practice, or his other property holdings. Thus one physician had initially been willing to lease a second house that he owned in the Cobble Hill section of Brooklyn . . . so that St. Vincent's, a Catholic charity, could open a group home. But when neighbors protested, he backed off and refused to sign the lease.

At other times, community protest so prolonged the process of approval

fear that property values would decrease, from concern that the persons living in the residences would commit criminal acts, and out of the belief that community residences would adversely affect the character of the neighborhood.²⁷ In fighting the establishment of community residences, residents have resorted not only to legal activity²⁸ but also to such extra-legal activities as threats to property owners wishing to sell their homes for community residence use,²⁹ arson³⁰ and, in at least one instance, the purchase of a home proposed for a community residence for the sole purpose of blocking the establishment of that residence.³¹

that the owner tired of waiting and found another purchaser. Take the case of 3350 Cross Bronx Expressway, a proposed group home in the Bronx. . . . [The site was located in June 1978 and inspections were completed by September 1978.] [I]n mid-October, Community Planning Board 10 objected, ostensibly because the house lacked a backyard and was too near a highway [Alternative sites were investigated and found inadequate], whereupon the board requested a formal hearing under the Padavan Law. The hearing was held on February 9, 1979, and in March the commissioner decided in favor of the site, at just which point the owner sold the property to a different buyer.

In still other instances . . . the situation could get nasty. Some opponents were prepared to use scare tactics, ranging from abusive telephone calls at all times of the day and night to outright threats of violence to the owner and his family. . . . [Although such incidents were not very common, approximately] thirteen [such] incidents occurred. . . . Nevertheless, its importance was greater than its frequency implied, first because these incidents generally occurred . . . as . . . a last resort when the retarded were about to arrive, which meant that the staff had invested great energy in the project. . . . Second, the recurring fear was that hooliganism would be contagious, success in scaring off an owner in one neighborhood serving as a lesson for another. Finally, these incidents were so morally outrageous as to raise the question whether integration of the retarded was possible when prejudices ran so deep.

Id.

27. See R. LUBIN, A. SCHWARTZ, W. ZIGMAN & M. JANICKI, COMMUNITY ACCEPTANCE OF RESIDENTIAL PROGRAMS FOR DEVELOPMENTALLY DISABLED PERSONS 5, 7 (Living Alternatives Research Project 1982) (available at *Fordham Urban Law Journal* office) (study involving 331 New York State community residences analyzing reasons for neighborhood opposition to community residences as well as neighborhood attitudes after opening of residences); see also ROTHMAN & ROTHMAN, *supra* note 26, at 187-88 (describing neighborhood opposition to community residences).

28. See *infra* notes 143-44, 175 for discussion of lawsuits in which communities have fought community residences.

29. See *supra* note 26.

30. See *Society for Good Will to Retarded Children v. Cuomo*, 572 F. Supp. 1300, 1340 (E.D.N.Y. 1983) (three instances of arson destroying community residences on Long Island noted in testimony at trial), *rev'd on other grounds*, 737 F.2d 1239 (2d Cir. 1984).

31. *People v. 11 Cornwell Co.*, 695 F.2d 34, 37 (2d Cir. 1982), *vacated in part on other grounds*, 718 F.2d 22 (1983).

No documented studies, however, justify these concerns or related efforts to impede the development of residences.³² In fact, the studies performed demonstrate that such fears are unfounded.³³ A study by Dr. Julian Wolpert of Princeton University, for example, comparing forty-two New York State communities containing community residences with forty-two New York State communities without residences concluded that: (1) property values in communities with group homes increased (or decreased) at rates comparable to communities without group homes; (2) the proximity of neighboring properties to a group home did not significantly affect their market values; (3) immediately adjacent properties did not experience declines in property values; and (4) the establishment of community residences did not generate greater neighboring property turnover than in neighborhoods without residences.³⁴ A study conducted by the New York State Institute for Basic Research involving 368 residences concluded that neighbors' fears that mentally retarded persons in residences would engage in anti-social behavior were unfounded.³⁵ Finally, an-

32. See *infra* notes 34-36 and accompanying text.

33. *Id.*

34. J. WOLPERT, GROUP HOMES FOR THE MENTALLY RETARDED: AN INVESTIGATION OF NEIGHBORHOOD PROPERTY IMPACTS i, ii, 15 (New York State Office of Mental Retardation and Developmental Disabilities 1978) (available at *Fordham Urban Law Journal* office). The study reached the same conclusions when it was updated in 1982. See L. DOLAN & J. WOLPERT, LONG TERM NEIGHBORHOOD PROPERTY IMPACTS OF GROUP HOMES FOR MENTALLY RETARDED PEOPLE i, ii, 10-13 (Woodrow Wilson School Discussion Paper Series, Princeton University 1982) (available at *Fordham Urban Law Journal* office) (study involving 32 New York State community residences). Other studies have reached similar conclusions. See D. LAUBER, IMPACTS ON THE SURROUNDING NEIGHBORHOOD OF GROUP HOMES FOR PERSONS WITH DEVELOPMENTAL DISABILITIES 2 (Governor's Planning Council on Developmental Disabilities, Springfield, Illinois 1986) (available at *Fordham Urban Law Journal* office) (study of 14 Illinois community residences discovered no decrease in property values after establishment of residences) [hereinafter LAUBER]; M. LINDAUER, P. TUNG & F. O'DONNELL, THE EFFECT OF COMMUNITY RESIDENCES FOR THE MENTALLY RETARDED ON REAL-ESTATE VALUES IN THE NEIGHBORHOODS IN WHICH THEY ARE LOCATED 1-2 (State University of New York, College at Brockport, N.Y. 1980) (available at *Fordham Urban Law Journal* office) (study of community residences's impact on property values in seven neighborhoods in medium-sized northeastern city and three adjoining towns). A study conducted by the Suffolk Community Council involving 10 Suffolk County, New York, community residences reached the same conclusion as the Wolpert study and noted that studies performed in Ohio, Wisconsin, Pennsylvania and Michigan also concluded that the establishment of community residences did not lower surrounding property values. SUFFOLK COMMUNITY COUNCIL, INC., THE IMPACT OF COMMUNITY RESIDENCES UPON NEIGHBORHOOD PROPERTY VALUES viii, 19-20, 33-42 (1984) (available at *Fordham Urban Law Journal* office).

35. R. LUBIN, M. JANICKI, W. ZIGMAN & R. ROSS, THE LIKELIHOOD OF POLICE

other study involving 368 residences found that community residences in general have the same exterior appearance as other residences in a neighborhood.³⁶ These studies thus demonstrate that basic attitudes towards community residences are unjustified.

B. State Statutes and Local Ordinances

Despite official state policies favoring the establishment of community residences,³⁷ state statutes often impede the establishment of those residences. A majority of state legislatures have enacted statutes governing the establishment of community residences in their states.³⁸

CONTACTS WITH DEVELOPMENTALLY DISABLED PERSONS IN COMMUNITY RESIDENCES 5-6 (Living Alternatives Research Project 1982) (available at *Fordham Urban Law Journal* office) (study involving 368 New York State community residences finding that mentally retarded persons in community residences are arrested at far lower rate than members of general public and that developmentally disabled occupants of community residences are rarely involved with police).

36. M. JANICKI, PHYSICAL AND ENVIRONMENTAL CHARACTERISTICS OF NEW YORK'S COMMUNITY RESIDENCES (Living Alternatives Research Project 1982) (available at *Fordham Urban Law Journal* office) (study of 368 New York State community residences showed that residences were physically integrated into communities); M. JANICKI & W. ZIGMAN, PHYSICAL AND ENVIRONMENTAL DESIGN CHARACTERISTICS OF COMMUNITY RESIDENCES 12 (Living Alternatives Research Project 1983) (available at *Fordham Urban Law Journal* office) (study of 368 New York State community residences showed that residences were homelike dwellings in terms of structure and physically integrated into communities). Homeowners have also opposed neighboring community residences on the grounds that such residences might increase traffic and the demand for neighborhood resources. R. LUBIN, A. SCHWARTZ, W. ZIGMAN & M. JANICKI, COMMUNITY ACCEPTANCE OF RESIDENTIAL PROGRAMS FOR DEVELOPMENTALLY DISABLED PERSONS 7-8, Table 3 (Living Alternatives Research Project 1982) (available at *Fordham Urban Law Journal* office). There are no known studies, however, demonstrating that community residences affect local traffic or neighborhood resources in such a way as to require treatment different from other single family and residential dwellings for zoning purposes. In *City of Cleburne*, the Fifth Circuit found that the city, in its attempt to justify different treatment, had failed to prove that mentally retarded persons in community residences created more traffic than residents of other homes. *Cleburne Living Center v. City of Cleburne*, 726 F.2d 191, 200-01 (5th Cir. 1984), *aff'd in part, vacated in part*, 473 U.S. 432 (1985).

37. See *supra* notes 17-25 and accompanying text.

38. See, e.g., ARIZ. REV. STAT. ANN. § 36-582 (1986); CAL. WELF. & INST. CODE §§ 5115-5116 (West 1984); COLO. REV. STAT. §§ 30-28-115(2)(a), 31-23-303(2)(a) (1977); CONN. GEN. STAT. ANN. §§ 8-3e, 8-3f (West Supp. 1987); DEL. CODE ANN. tit. 9, § 4923 (Supp. 1986); HAW. REV. STAT. §§ 321-15.6(b)(2), 333E-2 (1985); IDAHO CODE §§ 67-6530 to -6532 (1980); IND. CODE ANN. §§ 16-13-21-12, 16-13-21-14 (West Supp. 1986); IOWA CODE ANN. § 358A.25 (West Supp. 1987); LA. REV. STAT. ANN. §§ 28:381(8), 28:475-478 (West Supp. 1987); ME. REV. STAT. ANN. tit. 30, § 4962-A (Supp. 1987); MD. HEALTH-GEN. CODE ANN. §§ 7-101(h) (Supp. 1986), 7-317 to -318, 7-416 (1982); MICH. COMP. LAWS ANN. §§ 125.216a(2), 125.583b(4) (West 1986); MO. ANN. STAT. § 89.020 (Vernon Supp. 1988); MONT.

Most of these statutes provide that community residences for mentally retarded persons can be placed in areas zoned for single family uses.³⁹ Many of the statutes are accompanied by public policy statements noting that mentally retarded persons are better served in the community than in institutions and that there is a state-wide need for such residences.⁴⁰ Virtually all of these statutes, however, place limits on the number of retarded persons that may live in a community residence permitted in a single family or residential zone,⁴¹

CODE ANN. §§ 53-20-101, 53-20-301 to -302, 76-2-412 (1987); NEB. REV. STAT. §§ 18-1744 to -1747 (1983); NEV. REV. STAT. ANN. § 278.021 (Michie Supp. 1987); N.J. STAT. ANN. §§ 40:55D-66.1, 40:55D-66.2 (West Supp. 1986); N.M. STAT. ANN. § 3-21-1(c) (1985); N.Y. MENTAL HYG. LAW § 41.34 (McKinney Supp. 1988); N.C. GEN. STAT. §§ 168-20 to -23 (1982); N.D. CENT. CODE § 25-16-14(2) (Supp. 1985); OHIO REV. CODE ANN. § 5123.19 (Anderson Supp. 1986); OR. REV. STAT. § 443.580 to -.600 (1985); R.I. GEN. LAWS §§ 45-24-22 to -23 (1980 & Supp. 1987); S.C. CODE ANN. §§ 6-7-830(a) (Law Co-op. Supp. 1987), 44-21-20 (Law. Co-op. 1985); TENN. CODE ANN. § 13-24-102 (1980); TEX. REV. CIV. STAT. ANN. art. 1011n (Vernon Supp. 1988); UTAH CODE ANN. § 10-9-2.5 (Supp. 1987); VT. STAT. ANN. tit. 24, § 4409(d) (Supp. 1987); W. VA. CODE §§ 8-24-50b (Supp. 1987), 27-17-1 to -2 (1986); WIS. STAT. ANN. §§ 46.03(22) (West 1987), 59.97(15) (West Supp. 1987).

Courts have generally upheld the constitutionality of such statutes against claims by municipalities and homeowners that they unlawfully impinge on their right to enact zoning ordinances. *See, e.g.,* City of Los Angeles v. California Dep't of Health, 63 Cal. App. 3d 473, 133 Cal. Rptr. 771 (1976); Glennon Heights, Inc. v. Central Bank & Trust, 658 P.2d 872 (Colo. 1983); Thelen v. City of Missoula, 168 Mont. 375, 543 P.2d 173 (1975); Mental Health Ass'n of Union County, Inc. v. City of Elizabeth, 180 N.J. Super. 304, 434 A.2d 688 (1981); Zubli v. Community Mainstreaming Assocs., Inc., 102 Misc. 2d 320, 423 N.Y.S.2d 982 (Sup. Ct. Nassau County), *aff'd*, 74 A.D.2d 624, 425 N.Y.S.2d 263 (2d Dep't 1979), *aff'd as modified*, 50 N.Y.2d 1024, 410 N.E.2d 746, 431 N.Y.S.2d 813 (1980); Mongony v. Bevilacqua, 432 A.2d 661 (R.I. 1981); Nichols v. Tullahoma Open Door, Inc., 640 S.W.2d 13 (Tenn. Ct. App. 1982). *But see* Garcia v. Siffrin Residential Ass'n, 63 Ohio St. 2d 259, 407 N.E.2d 1369 (1980) (state statute purporting to override local zoning ordinances and allow community residential facilities in residential districts violates state constitution's home rule provisions), *cert. denied*, 450 U.S. 911 (1981).

For a general discussion of this type of state statute, see Salsich, *Group Homes, Shelters and Congregate Housing: Deinstitutionalization Policies and the NIMBY Syndrome*, 21 REAL PROP. PROB. TR. J. 413 (1986); Steinman, *The Effects of Land-Use Restrictions on the Establishment of Community Residences for the Disabled: A National Study*, 19 THE URB. LAW. 1 (1987).

39. *See supra* note 38. In Louisiana, however, community residences are permitted by right only in residential districts zoned for multiple family dwellings. *See* LA. REV. STAT. ANN. § 28:478(A) (West Supp. 1987). Virginia's statute permits residences in "appropriate residential zoning district[s]." VA. CODE ANN. § 15.1-486.2 (1981).

40. *See supra* note 17.

41. *See, e.g.,* ARIZ. REV. STAT. ANN. § 36-582(A) (1986) (six or fewer); CAL. WELF. & INST. CODE § 5116 (West 1984) (six or fewer); COLO. REV. STAT. §§ 30-28-115(2)(a), 31-23-303(2)(a) (1977) (eight or fewer); CONN. GEN. STAT. ANN. § 8-

while, presumably, other residences permitted in single family zones may house an unlimited number of residents.⁴² In Hawaii and Oregon, only five mentally retarded persons may live together in a residence located in a single family zone.⁴³ Ten other states provide that only six mentally retarded persons may reside together in such zones.⁴⁴

Furthermore, seventeen states and the District of Columbia impose distance limitations that prohibit a community residence from locating within a certain distance of another community residence.⁴⁵ In Utah,

3e(a) (West Supp. 1987) (six or fewer); DEL. CODE ANN. tit. 9, § 4923(a) (Supp. 1986) (10 or fewer); HAW. REV. STAT. § 321.15.6(b)(2) (1985) (five or fewer); IDAHO CODE § 67-6531 (1980) (eight or fewer); IND. CODE ANN. §§ 16-13-21-12, 16-13-22-1 (West Supp. 1986) (four to eight persons); IOWA CODE ANN. § 358A.25(2)(b) (West Supp. 1987) (eight or fewer); LA. REV. STAT. ANN. § 28:477(1) (West Supp. 1987) (six or fewer); ME. REV. STAT. ANN. tit. 30, § 4962-A(1-A(B)) (Supp. 1987) (eight or fewer); MD. HEALTH-GEN. CODE ANN. § 7-101(h)(2) (Supp. 1986) (four to eight persons); MICH. COMP. LAWS ANN. §§ 125.216a(2), 125.583b(2) (West 1986) (six or fewer); MO. ANN. STAT. § 89.020(2) (Vernon Supp. 1988) (eight or fewer); MONT. CODE ANN. § 76-2-412(3) (1987) (eight or fewer); NEB. REV. STAT. § 18-1744 (1983) (four to eight persons); NEV. REV. STAT. ANN. § 278.021(2) (Michie Supp. 1987) (six or fewer); N.J. STAT. ANN. § 40-55D-66.2 (West Supp. 1986) (15 or fewer); N.M. STAT. ANN. § 3-21-1(c) (1985) (10 or fewer); N.Y. MENTAL HYG. LAW §§ 41.34(a)(1), (f) (McKinney Supp. 1988) (four to 14 persons); N.C. GEN. STAT. § 168-21 (1982) (six or fewer); N.D. CENT. CODE § 25-16-14(2) (Supp. 1985) (six or fewer); OHIO REV. CODE ANN. § 5123.19(3) (Anderson Supp. 1986) (six to eight persons); OR. REV. STAT. § 443.580(3) (1985) (five or fewer); R.I. GEN. LAWS § 45-24-23 (Supp. 1987) (eight or fewer); S.C. CODE ANN. § 6-7-830 (Law. Coop. Supp. 1987) (nine or fewer); TENN. CODE ANN. § 13-24-102 (1980) (eight or fewer); TEX. REV. CIV. STAT. ANN. art. 1011n, §§ 3(b), 4 (Vernon Supp. 1988) (six or fewer); UTAH CODE ANN. § 10-9-2.5(1)(b) (Supp. 1987) (eight or fewer); VT. STAT. ANN. tit. 24, § 4409(d) (Supp. 1987) (six or fewer); W. VA. CODE § 27-17-1 (1986) (eight or fewer); WIS. STAT. ANN. § 59.97(15)(c) (West Supp. 1987) (eight or fewer).

42. See *infra* note 55-57 and accompanying text.

43. HAW. REV. STAT. § 321.15.6(b)(2) (1985); OR. REV. STAT. § 443.580(3) (1985).

44. See ARIZ. REV. STAT. ANN. § 36-582(A) (1986); CAL. WELF. & INST. CODE § 5116 (West 1984); CONN. GEN. STAT. ANN. § 8-3e(a) (West Supp. 1987); LA. REV. STAT. ANN. § 28:477(1) (West Supp. 1987); MICH. COMP. LAWS ANN. §§ 125.216a(2), 125.583b(2) (West 1986); NEV. REV. STAT. ANN. § 278.021(2) (Michie Supp. 1987); N.C. GEN. STAT. § 168-21 (1982); N.D. CENT. CODE § 25-16-14(2) (Supp. 1985); TEX. REV. CIV. STAT. ANN. art. 1011n, §§ 3(b), 4 (Vernon Supp. 1988); VT. STAT. ANN. tit. 24, § 4409(d) (Supp. 1987).

45. See ARIZ. REV. STAT. ANN. § 36-582(H) (1986) (1,200 feet between residences); COLO. REV. STAT. §§ 30-28-115(2)(b), 31-23-303(2)(b) (1977) (750 feet between residences); CONN. GEN. STAT. ANN. § 8-3f (West Supp. 1987) (1,000 feet between residences); DEL. CODE ANN. tit. 9, § 4923(c) (Supp. 1986) (5,000 feet between residences); IND. CODE ANN. § 16-13-21-12 (West Supp. 1986) (3,000 feet between residences); IOWA CODE ANN. § 358A.25(3) (West Supp. 1987) (1/4 mile between residences); LA. REV. STAT. ANN. § 28:478(B) (West Supp. 1987) (1,000 feet between residences); ME. REV. STAT. ANN. tit. 30, § 4962-A(4) (Supp. 1987) (1,500 feet

for example, community residences must be located three quarters of a mile apart;⁴⁶ in Delaware 5,000 feet apart;⁴⁷ and in Detroit, Michigan, 3,000 feet apart.⁴⁸ Four states set quotas for the number of mentally retarded persons that may live in community residences in a given area.⁴⁹ In New Jersey, for example, only fifty persons or .5 percent of a municipality's population (whichever is greater) may reside in community residences in a particular municipality.⁵⁰ Moreover, while some states merely require that agencies seeking to establish community residences for mentally retarded persons notify municipalities of their intent to establish residences,⁵¹ other state

between residences and no "excessive concentration" of residences); MICH. COMP. LAWS ANN. §§ 125.216a(4), 125.583b(4) (West 1986) (1,500 feet between residences but 3,000 feet in cities with population over one million and no excessive concentration); NEB. REV. STAT. § 18-1746 (1983) (1,200 feet between residences); N.J. STAT. ANN. § 40:55D-66.1 (West Supp. 1986) (1,500 feet between residences); N.C. GEN. STAT. § 168-22 (1982) (1/2 mile between residences); TEX. REV. CIV. STAT. ANN. art. 1011n, § 3(e) (Vernon Supp. 1988) (1/2 mile between residences); UTAH CODE ANN. § 10-9-2.5(2)(f) (Supp. 1987) (3/4 mile between residences); VT. STAT. ANN. tit. 24, § 4409(d) (Supp. 1987) (1,000 feet between residences); W. VA. CODE § 27-17-2(a) (1986) (1,200 feet between residences outside of municipality); WIS. STAT. ANN. § 59.97(15)(a) (West Supp. 1987) (2,500 feet between residences). The District of Columbia has also enacted regulations placing distance limitations between residences. See AFTER EIGHT YEARS, *supra* note 19, at 58; cf. N.Y. MENTAL HYG. LAW § 41.34(c)(5) (McKinney Supp. 1988) (no distance limitation between residences, but residences not permitted if municipality objects and can demonstrate that establishment of proposed residence would create overconcentration of similar facilities that would substantially alter area); see also MO. ANN. STAT. § 89.020(2) (Vernon Supp. 1988) (municipalities may set "reasonable" density standards).

46. See UTAH CODE ANN. § 10-9-2.5(f) (Supp. 1987).

47. See DEL. CODE ANN. tit. 9, § 4923(c) (Supp. 1986).

48. See MICH. COMP. LAWS ANN. §§ 125.216a(4), 125.583b(4) (West 1986).

49. See NEB. REV. STAT. § 18-1747 (1983) (one home permitted in municipalities of 1,000 residents or fewer; one home for every 2,000 residents permitted in municipalities of 1,001-9,999; one home for every 3,000 residents in municipalities of 10,000-49,999; one home for every 10,000 residents in municipalities of 50,000-249,999; one home for every 20,000 residents in municipalities of 250,000 or more); N.J. STAT. ANN. § 40:55D-66.1 (West Supp. 1986) (50 persons or .5% of municipal population, whichever is greater); VA. CODE ANN. § 15.1-486.2 (1981) (proportional to population and population density of state and local subdivisions); WIS. STAT. ANN. § 59.97(15)(b) (West Supp. 1987) (greater of 25 persons or one percent of municipality's population).

50. See N.J. STAT. ANN. § 40:55D-66.1 (West Supp. 1986).

51. See ARIZ. REV. STAT. ANN. § 36-582(I) (1986) (municipality may object to proposed site, seek administrative hearing, and bring court actions but statute does not specify grounds upon which municipality can challenge residence); MD. HEALTH-GEN. CODE ANN. §§ 7-318 to -319, 7-418 (1982) (municipality can object to proposed publicly-sponsored residences, but statute does not specify grounds upon which municipality can base objection); N.Y. MENTAL HYG. LAW § 41.34 (McKinney Supp. 1988) (municipality can object only if proposed residence would create

statutes permit local authorities to place special requirements on residences declared to be single family dwellings.⁵² In Colorado, a municipality can challenge a community residence that is architecturally inconsistent with other homes in the area⁵³ while in Maine, a municipality may, in some circumstances, challenge a residence on the ground that it does not provide convenient access to shopping.⁵⁴

In states where statutes do not totally pre-empt municipalities from regulating community residences, municipalities have enacted ordinances that have the effect of excluding some community residences from areas zoned for single family use. These ordinances accomplish that purpose by using a restrictive definition of the term "family" for zoning purposes. For example, in Brewer, Maine, the term "family" in the zoning ordinance is defined as:

[A] single individual doing his own cooking, and living upon the premises as a separate housekeeping unit, or a collective body of persons doing their own cooking and living together upon the premises as a separate housekeeping unit in a domestic relationship based upon birth, marriage or other domestic bond as distinguished from a group occupying a boarding house, lodging house, club, fraternity or hotel.⁵⁵

Similarly, the zoning ordinance in Kenner, Louisiana defines "family" as:

overconcentration of similar residences resulting in substantial alteration of area, and it can suggest alternative site); OHIO REV. CODE ANN. § 5123.19(k)(1) (Anderson Supp. 1986) (notification of municipalities required, but no grounds stated for municipality objection to residence); S.C. CODE ANN. § 6-7-830(a) (Law. Co-op. Supp. 1987) (municipality has opportunity to name alternate site).

52. See COLO. REV. STAT. §§ 30-28-115(2)(c) (1977), 31-23-303(3) (Supp. 1984) (municipality permitted to challenge community residence if it is architecturally inconsistent with other homes in area or provides treatment services inconsistent with rest of community or is sited in area lacking community services such as shopping, hospitals and public recreation); ME. REV. STAT. ANN. tit. 30, § 4962-A(3)(B) (Supp. 1987) (municipality in some circumstances can challenge residence if it creates traffic hazard, hampers pedestrian circulation, violates local building codes and fails to provide convenient access to shopping, medical, fire and police services); MO. ANN. STAT. § 89.020(2) (Vernon Supp. 1988) (municipality permitted to regulate distances between community residences in area and can require that exterior appearance of residence conforms to other residences in area); MONT. CODE ANN. § 53-20-305 (1987) (local control permitted over residences); N.M. STAT. ANN. § 3-21-1(C) (1985) (same); UTAH CODE ANN. § 10-9-2.5 (1986 & Supp. 1987) (same); see also W. VA. CODE §§ 8-24-50b(a) (Supp. 1987), 27-17-2(a) (1986) (statute unclear as to whether community residences for seven or eight persons must obtain permit before operation).

53. See COLO. REV. STAT. §§ 30-28-115(3) (1977), 31-23-303(3) (Supp. 1984).

54. See ME. REV. STAT. ANN. tit. 30, § 4962-A(3)(B) (Supp. 1987).

55. Brewer, Me., Zoning Ordinance, art. 1, § 101, *quoted in* Penobscot Area Hous. Dev. Corp. v. City of Brewer, 434 A.2d 14, 20 (Me. 1981).

[A]n individual or two or more persons who are related by blood or marriage living together and occupying a single house-keeping unit with single culinary facilities, or a group of not more than four persons living together by joint agreement and occupying a single housekeeping unit with single culinary facilities on a non-profit, cost sharing basis. Domestic servants employed and residing on the premises shall be considered as part of the family.⁵⁶

Courts have enjoined the establishment of community residences in single family areas in these two cities on the ground that the residences did not come within the ordinances' definitions of the term "family."⁵⁷

IV. *City of Cleburne*: Equal Protection for the Mentally Retarded

A. The Equal Protection Clause and Mentally Retarded Persons

The equal protection clause of the fourteenth amendment requires that no state "deny to any person within its jurisdiction the equal protection of the laws."⁵⁸ In other words, a state or entity engaged in "state action"⁵⁹ must treat all similarly situated persons alike.⁶⁰ In general, however, statutes treating certain classifications of persons differently from others will be upheld if they are rationally related to a legitimate state interest.⁶¹ For example, differential treatment of persons based upon age is permissible if rationally related to a legitimate state interest.⁶²

56. Kenner, La., Zoning Ordinance § 6.02, *quoted in* *City of Kenner v. Normal Life of Louisiana, Inc.*, 483 So. 2d 903, 904-05 (La. 1986) (emphasis omitted).

57. *See, e.g.*, *Penobscot Area Housing Dev. Corp. v. City of Brewer*, 434 A.2d 14 (Me. 1981); *City of Kenner v. Normal Life of Louisiana, Inc.*, 483 So. 2d 903 (La. 1986).

58. U.S. CONST. amend. XIV, § 1.

59. The city in *City of Cleburne* failed to assert that its attempted enforcement of the zoning ordinance was not "state action." *See* *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985).

60. *See, e.g.*, *Plyler v. Doe*, 457 U.S. 202, 216 (1982) (undocumented resident aliens).

61. *See, e.g.*, *Schweiker v. Wilson*, 450 U.S. 221, 230 (1981) (congressional exclusion from reduced Supplemental Security Income benefits of mentally ill patients in certain public institutions not equal protection violation under rational basis standard); *United States Retirement Bd. v. Fritz*, 449 U.S. 166, 174-75 (1980) (reasonable basis for distinction drawn between groups of railroad employees for windfall benefits eligibility insulates § 231b(h) of Railroad Retirement Act of 1974 from equal protection challenge).

62. *See, e.g.*, *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307 (1976) (rational basis exists for statute mandating state police officer retirement at age 50).

The general rule that to be upheld, statutes treating classes of persons differently must be rationally related to a legitimate state interest, does not apply to classifications by race, alienage and national origin.⁶³ Because these factors are virtually never relevant to the accomplishment of any legitimate state interest, statutes treating individuals differently on the basis of their race, alienage and national origin are subject to strict scrutiny and will be sustained only if they serve a compelling state interest.⁶⁴ These classifications are more commonly known as "suspect" categories.⁶⁵ Statutes treating persons differently because of gender or illegitimacy also call for a heightened standard of review because those classifications generally do not provide a sensible ground for disparate treatment.⁶⁶ A gender or illegitimacy classification will be stricken unless it is substantially related to a sufficiently important governmental interest.⁶⁷ These classifications are generally known as "quasi-suspect" categories.⁶⁸

City of Cleburne specifically addressed the question whether mental retardation is a "quasi-suspect" classification.⁶⁹ In determining whether a classification is "quasi-suspect," thus requiring a heightened standard of scrutiny, courts examine whether the group has distinguishing characteristics that legislatures may properly take into account⁷⁰ as well as whether there is a history of discrimination and prejudice against the group.⁷¹ With regard to mental retardation, the record before the Supreme Court in *City of Cleburne* demonstrated that mentally retarded persons have distinguishing characteristics that legislatures have legitimately taken into account⁷² and that there is a history of prejudice and discrimination against mentally retarded persons.⁷³

63. See, e.g., *Graham v. Richardson*, 403 U.S. 365 (1971) (alienage); *McLaughlin v. Florida*, 379 U.S. 184 (1964) (race).

64. See *supra* note 63. Courts will also view with strict scrutiny statutes that impinge on fundamental personal rights of individuals. See, e.g., *Shapiro v. Thompson*, 394 U.S. 618 (1969) (right to travel); *Skinner v. Oklahoma ex rel Williamson*, 316 U.S. 535 (1942) (right to procreate).

65. See *supra* note 63.

66. See, e.g., *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982) (gender); *Mathews v. Lucas*, 427 U.S. 495 (1976) (illegitimacy).

67. See *supra* note 66.

68. *Id.*

69. 473 U.S. 432, 442-47 (1985).

70. Cf. *id.* at 446 (fact that "mental retardation is a characteristic that the government may legitimately take into account in a wide range of decisions" militates against elevating mentally retarded to quasi-suspect classification).

71. See, e.g., *Frontiero*, 411 U.S. at 684-86; see also *City of Cleburne*, 473 U.S. at 461-64 (Marshall, J., dissenting).

72. *City of Cleburne*, 473 U.S. at 443-45.

73. *Id.* at 461-64 (Marshall, J., dissenting).

B. City of Cleburne Decision

The *Cleburne* Court did not find, however, that mentally retarded persons constitute a "quasi-suspect" category.⁷⁴ Nonetheless, the Court invalidated a municipal zoning ordinance that prohibited homes

74. *Id.* at 442-47. In finding that mental retardation was not a quasi-suspect classification, the Supreme Court reversed the court of appeals's holding that mental retardation was a "quasi-suspect" classification because of the history of mistreatment of mentally retarded persons resulting in deep-seated prejudice and discrimination against them, the powerlessness of such persons in the political arena and the irreversibility of the condition of mentally retarded persons. *Cleburne Living Center v. City of Cleburne*, 726 F.2d 191, 197-98 (5th Cir. 1984), *aff'd in part, vacated in part*, 473 U.S. 432 (1985). In justifying its holding that mental retardation was not a "quasi-suspect" classification, the Court found that mentally retarded persons have unique and special problems that have been addressed by legislatures in non-prejudicial and beneficial ways and that mentally retarded persons were thus not powerless in the political arena. *City of Cleburne*, 473 U.S. at 442-47. In dissent, Justice Marshall wrote that mentally retarded persons should be considered a "quasi-suspect" classification because of a documented history of prejudice against such persons. *Id.* at 461-65 (Marshall, J., dissenting).

Several articles have been written on the Supreme Court's holding that mentally retarded persons do not constitute a "quasi-suspect" category. *See generally* Margulies, *The Newest Equal Protection: City of Cleburne and a Common Law for Statutes and Covenants Affecting Group Homes for the Mentally Disabled*, 3 HUM. RTS. ANN. 359 (1986); Minow, *When Difference Has Its Home: Group Homes for the Mentally Retarded, Equal Protection and Legal Treatment of Difference*, 22 HARV. C.R.-C.L. L. REV. 111 (1987); Note, *A Changing Equal Protection Standard? The Supreme Court's Application of a Heightened Rational Basis Test in City of Cleburne v. Cleburne Living Center*, 20 LOY. L.A.L. REV. 921 (1987); Note, *A House is Not a Home: City of Cleburne v. Cleburne Living Center*, 6 PACE L. REV. 267 (1986); Note, *Constitutional Law: City of Cleburne v. Cleburne Living Center In Search of Equal Protection: Are the Mentally Retarded Lost in Wonderland?*, 54 UMKC L. REV. 541 (1986); Note, *City of Cleburne v. Cleburne Living Center: Rational Basis With a Bite?*, 20 U.S.F. L. REV. 927 (1986); Note, *City of Cleburne v. Cleburne Living Center: Denial of Quasi-Suspect Status for the Mentally Retarded and its Effect on Exclusionary Zoning of Group Homes*, 17 U. TOL. L. REV. 1041 (1986); Comment, *The City of Cleburne v. Cleburne Living Center and The Supreme Court: Two Minorities Move Toward Acceptance*, 63 DEN. U.L. REV. 697 (1986); Comment, *Equal Protection and the Mentally Retarded: A Denial of Quasi-Suspect Status in City of Cleburne v. Cleburne Living Center*, 72 IOWA L. REV. 241 (1986); Comment, *City of Cleburne v. Cleburne Living Center, Inc.: Judicial Step or Stumble?*, 6 N. ILL. U.L. REV. 409 (1986); Comment, *Equal Protection and the New Rational Basis Test: The Mentally Retarded are not Second Class Citizens in Cleburne*, 13 PEPPERDINE L. REV. 333 (1986); Comment, *Constitutional Law—Equal Protection—Mental Retardation Is Not A Quasi-Suspect Classification; Therefore, Classifications On That Basis Are Subject To Rational Relation Limitations*, 17 ST. MARY'S L.J. 1053 (1986); Comment, *City of Cleburne, Texas v. Cleburne Living Center, Inc.: The Mentally Retarded And The Demise of Intermediate Scrutiny*, 20 VAL. U.L. REV. 349 (1986); Comment, *Constitutional Law: Although Mentally Retarded Not a Quasi-Suspect Class, Denial of Special Use Permit Deprived Applicants of Constitutional Right [City of Cleburne v. Cleburne Living Center, 105 S. Ct. 3249 (1985)]*, 25 WASHBURN L.J. 575 (1986).

for mentally retarded persons while allowing other similar homes on the ground that the ordinance's differential treatment of mentally retarded persons was not rationally related to any legitimate municipal interest.⁷⁵

In 1980, Cleburne Living Centers, Inc. (CLC or the Center) leased property in the City of Cleburne, Texas for the purpose of operating a supervised community residence for thirteen mentally retarded persons.⁷⁶ The home was located in a zone permitting (without a special permit) apartment houses, multiple dwellings, boarding and lodging houses, fraternity and sorority houses, dormitories, apartment hotels, hospitals, sanitariums, nursing homes and homes for convalescents and the elderly (other than for the insane or feeble-minded) and some private clubs and fraternal orders.⁷⁷

The city classified the proposed group home as a "hospital for the feeble-minded"⁷⁸ and therefore required CLC to obtain a special permit for the operation of the residence.⁷⁹ When CLC's application for a permit was denied,⁸⁰ the Center filed suit against the city in federal district court.⁸¹ CLC's complaint alleged that the zoning ordinance was invalid because it discriminated against the mentally retarded in violation of the federal equal protection rights of the Center and its future residents.⁸²

The Supreme Court invalidated the zoning ordinance as applied to the CLC home.⁸³ Unlike the court of appeals, the Court refused to recognize mental retardation as a "quasi-suspect" class.⁸⁴ The Court therefore applied the rational basis test⁸⁵ to determine whether requiring the special use permit for the Center while not requiring

75. 473 U.S. at 447-50.

76. *Id.* at 435.

77. *Id.* at 436 n.3.

78. *Id.* at 436-37.

79. *Id.* at 436.

80. *Id.* at 437.

81. *Id.* The district court ruled in favor of the city. Applying the rational basis test, the district court found the ordinance to be rationally related to the city's legitimate interests in "the legal responsibility of CLC and its residents, . . . the safety and fears of residents in the adjoining neighborhood," and the number of persons to be housed in the residence. *Id.*

82. *Id.*

83. *Id.* at 447-50. For further discussion of the impact of *City of Cleburne* on zoning ordinances, see Note, *Cleburne Living Center v. City of Cleburne, The Irrational Relationship of Mental Retardation to Zoning Objectives*, 19 J. MARSHALL L. REV. 469 (1986); Note, *Zoning for Land Users and Not Land Use*, 16 STETSON L. REV. 165 (1986).

84. 473 U.S. at 442-47; see *supra* note 74.

85. 473 U.S. at 442-47.

a similar permit for other similar homes violated the equal protection rights of future CLC residents.⁸⁶ The Court found that the record did not demonstrate that the CLC home would “pose any special threat to the city’s legitimate interests”⁸⁷ and held that the ordinance was invalid.⁸⁸

The Supreme Court rejected the city’s attempts to justify the rationality of the ordinance’s application.⁸⁹ First, the Court concluded that negative attitudes and unsubstantiated fears were not sufficient reasons for the city treating the home for mentally retarded persons differently from apartment houses and other multiple dwellings.⁹⁰ Second, the Court rejected the city’s objections to the residence’s location near a school and on a “five-hundred-year flood plain,”⁹¹ because neither the fear that some of the students could harass CLC residents nor the possibility of a flood justified a distinction between the community residence and other permitted uses.⁹² Similarly, the Court rejected the argument that the city was uncertain about its potential responsibility for actions that the CLC residents might take.⁹³ The Court noted that it was hard to believe that the retarded residents would present any more of a hazard than persons living in permitted uses such as boarding and fraternity houses.⁹⁴ Finally, the Court dismissed the city’s allegations regarding the size of the home and the number of persons that would occupy it.⁹⁵ Observing that there were no restrictions on the number of persons who could occupy a boarding home, nursing home, family dwelling, fraternity house or dormitory, the Court found that the record did not justify different treatment of a home for retarded persons.⁹⁶ Writing for the Court, Justice White concluded “that requiring the permit in

86. *Id.* Because the proposed residence would not be located in a single-family zone, the case failed to pose the question whether the residences should be treated like other single family residences.

87. *Id.* at 448.

88. *Id.* at 450.

89. *Id.* at 448-50.

90. *Id.* at 448.

91. *Id.* at 449. A “five-hundred-year flood plain” is a topographical area in which a flood is expected every 500 years. See *Cleburne Living Center v. City of Cleburne*, 726 F.2d 191, 202 (5th Cir. 1984), *aff’d in part, vacated in part*, 473 U.S. 432 (1985).

92. 473 U.S. at 449.

93. *Id.*

94. *Id.* at 449-50.

95. *Id.* at 450.

96. *Id.*

this case appears to us to rest on an irrational prejudice against the mentally retarded."⁹⁷

V. Viability of State Statutes and Local Ordinances in Light of *City of Cleburne*

As a result of the Court's decision in *City of Cleburne*, community residences for mentally retarded persons cannot be subjected to rules and regulations not imposed on other similar residences unless those rules and regulations are rationally related to a legitimate interest.⁹⁸ In order to justify a statute or ordinance treating community residences for mentally retarded persons differently from other similar residences, a governmental body must demonstrate that there are real and undeniable differences between community residences for mentally retarded persons and other residences and that such disparate treatment serves a legitimate interest.⁹⁹

A. *City of Cleburne's* Impact on State Statutes

After the decision in *City of Cleburne*, many state statutes that impede the establishment of community residences may be unconstitutional. Particularly suspect are statutes that: (1) limit the number of persons that may reside in a community residence in single family zones;¹⁰⁰ (2) place distance limitations¹⁰¹ or quotas¹⁰² on community residences; and (3) permit municipalities to place special limitations on community residences not required of other similar homes.¹⁰³

1. Numerical Limitations

Although *City of Cleburne* does not directly address this issue,¹⁰⁴ specific language in the decision indicates that numerical limitations may be constitutionally invalid. In *City of Cleburne*, the city contended that the requirement of a special use permit was rational

97. *Id.*

98. *See id.*

99. *See supra* notes 58-62 and accompanying text.

100. *See supra* notes 41-44 and accompanying text; *infra* notes 104-20 and accompanying text.

101. *See supra* notes 45-48 and accompanying text; *infra* notes 121-28 and accompanying text.

102. *See supra* notes 49-50 and accompanying text; *infra* notes 122-28 and accompanying text.

103. *See supra* notes 52-54 and accompanying text.

104. The Cleburne home was located in an "Apartment House District" and not a single family zone. 473 U.S. at 436 n.3.

because of the number of people who would be housed in the proposed community residence.¹⁰⁵ After noting that there were no restrictions on the number of persons that could occupy other permitted uses within the zone, the Court rejected the argument, holding:

It is true that [the mentally retarded] suffer disability not shared by others; but why this difference warrants a density regulation that others need not observe is not at all apparent. At least this record does not clarify how, in this connection, the characteristics of the intended occupants of the . . . home . . . justify denying to those occupants what would be permitted to groups occupying the same site for different purposes.¹⁰⁶

This language thus suggests that when a state legislature has permitted community residences to be placed in single family or residential zones, it cannot place any limits on the number of persons who may reside in such residences. Such a numerical limitation can be upheld only if the state can demonstrate that there is a rational basis for placing limits on the number of residents in a community residence for retarded persons that differs from limits placed on other single family or residential units.¹⁰⁷ Considering the strong nationwide public policy favoring the establishment of residences¹⁰⁸ and the evidence demonstrating that community residences do not have any substantial negative effect on neighborhoods,¹⁰⁹ states may have a difficult time justifying statutes limiting the number of mentally retarded persons residing in community residences.

Moreover, the Court's strong language in *City of Cleburne* overrides two other arguments that may be posited in favor of the constitutionality of numerical limitations. One argument is that mentally retarded persons are better served in smaller community residences.¹¹⁰ The fact that mentally retarded persons may be best served

105. *Id.* at 449-50. The proposed home consisted of 2700 square feet intended to house 13 people. *Cleburne Living Center v. City of Cleburne*, 726 F.2d 191, 202 (5th Cir. 1984), *aff'd in part, vacated in part*, 473 U.S. 432 (1985).

106. 473 U.S. at 449-50.

107. *Id.*

108. *See supra* notes 8-25 and accompanying text.

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

110. *See* M. JANICKI, *PERSONAL GROWTH AND COMMUNITY RESIDENCE ENVIRONMENTS: A REVIEW* 35-37 (Living Alternatives Research Project 1981) (available at *Fordham Urban Law Journal* office) (studies favoring limits on number of persons permitted to reside in community residences). In rejecting the application of a heightened scrutiny test to the ordinance in *City of Cleburne*, the Supreme Court noted that many statutes recognizing the unique problems of mentally retarded persons are passed to benefit such persons and that a heightened scrutiny test

in smaller residences, however, does not mean that larger residences are not viable. In fact, expert testimony in the *City of Cleburne* trial indicated that community residences with up to fifteen residents tend to work as well as those for six or fewer residents.¹¹¹

A second argument can be made that setting the number of mentally retarded persons permitted in a residence in a single family zone is an exercise of legislative discretion not reviewable by courts. In *Village of Belle Terre v. Boraas*,¹¹² the Supreme Court adopted this position in upholding the validity of a zoning ordinance limiting to two, the number of unrelated persons allowed to live in a single family zone¹¹³ over an argument that the numerical limitation was arbitrary.¹¹⁴ The zoning ordinance found constitutional in *Village of Belle Terre*, however, differs from a limitation on the number of mentally retarded persons that may live together in a community residence in a single family zone. The zoning ordinance does not have a discriminatory purpose—it treats all persons alike.¹¹⁵ In contrast, by declaring that community residences for mentally retarded persons are single family and residential uses and then placing numerical limitations on such residences not imposed upon other single family and residential uses, state legislatures appear to be treating mentally retarded persons differently from other persons. It would

might discourage legislatures from enacting such statutes: 473 U.S. at 443-45.

The *City of Cleburne* Court later noted, however, that its refusal to recognize the retarded as a quasi-suspect class “does not leave them entirely unprotected from invidious discrimination. To withstand equal protection review, legislation that distinguishes between the mentally retarded and others must be rationally related to a legitimate governmental purpose.” *Id.* at 446.

111. 726 F.2d 191, 202 (5th Cir. 1984), *aff'd in part, vacated in part*, 473 U.S. 432 (1985).

112. 416 U.S. 1 (1974). *Village of Belle Terre* involved a residence for six college students. *Id.* at 2.

113. *Id.* at 2-10. *City of Cleburne* did not overrule *Village of Belle Terre*. Moreover, the *City of Cleburne* Court cites *Village of Belle Terre* with implicit approval in distinguishing *City of Cleburne* from *Macon Association for Retarded Citizens v. Macon-Bibb County Planning & Zoning Comm'n*, 252 Ga. 484, 314 S.E.2d 218, *appeal dismissed*, 469 U.S. 802 (1984). See *City of Cleburne*, 473 U.S. at 439 n.8. *Macon Association* involved a challenge to a local ordinance similar to that challenged in *Village of Belle Terre*. See *Macon Ass'n*, 252 Ga. at 485-86, 314 S.E.2d at 220.

114. 416 U.S. at 8. Although the Supreme Court in *Moore v. City of East Cleveland*, 431 U.S. 494 (1977), invalidated a zoning ordinance that attempted to limit the types of blood relatives who could live together in a single family zone, the Court found that the ordinance in *Moore* was excessively intrusive and was thus distinguishable from that in *Village of Belle Terre*. *Id.* at 499-500.

115. *City of Cleburne*, 473 U.S. at 439 n.8.

be difficult for a state to compile a record justifying this disparate treatment.¹¹⁶

Moreover, language in *Village of Belle Terre* itself supports an argument that such numerical limitations impair a statute's viability in light of *City of Cleburne*. In *Village of Belle Terre*, the Court cited with approval a dissenting opinion of Justice Holmes¹¹⁷ which noted that "the decision of the legislature must be accepted unless we can say that it is very wide of any reasonable mark."¹¹⁸ As discussed previously, however, published studies indicate that community residences pose no threat to communities.¹¹⁹ Thus, it can be argued that because there are no limitations on the number of persons residing in traditional families in single family and residential zones, a legislature's imposition of a numerical limitation on the number of retarded persons living in a community residence is in fact "very wide of any reasonable mark."¹²⁰

2. Distance Limitations and Quotas

Some state statutes require that community residences be placed at specified distances from one another.¹²¹ Others impose quotas on the number of persons that may live in community residences within a certain municipality.¹²² Because such statutes do not place distance limitations on other residences (or even institutions) within an area and do not set quotas on other persons living in similar types of residences in an area, these statutes are invalid after *City of Cleburne*.¹²³ Considering that community residences pose no threat to their neighbors,¹²⁴ states will be extremely hard-pressed to formulate rational reasons as to why distances should exist between community residences or why there should be quotas on the number of retarded persons living in residences in a community. While an argument can be made that community residences should be separated to avoid

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

117. 416 U.S. at 8 n.5 (citing *Louisville Gas & Elec. Co. v. Coleman*, 277 U.S. 32, 41 (1928) (Holmes, J., dissenting)).

118. *Id.* (quoting *Louisville Gas & Elec. Co. v. Coleman*, 277 U.S. 32, 41 (1928) (Holmes, J., dissenting)).

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

120. See *supra* note 118.

121. See *supra* notes 45-48 and accompanying text.

122. See *supra* notes 49-50 and accompanying text.

123. 473 U.S. at 449-50.

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

the "ghettoization"¹²⁵ of mentally retarded persons, distance limitations of one-fifth of a mile to one mile between residences¹²⁶ or quotas limiting mentally retarded persons in residences to one-half of one percent of the population¹²⁷ would hardly seem to serve that purpose. In any event, a distance limit between residences without regard to the topography or nature of an area is arbitrary, especially in large, vertical cities.¹²⁸

3. Notification to Communities and the Necessity of Community Approval

While it is unlikely that *City of Cleburne* invalidates statutes requiring notification of the presence of community residences to communities provided there is a rational basis for such notification, the rationale of that decision challenges state statutes which mandate greater municipal control over community residences than over other single family dwellings.

Prior to the Supreme Court's decision in *City of Cleburne*, an appellate court in New York upheld a statute which declared that community residences were single family dwellings¹²⁹ but required sponsoring agencies of community residences to give notification to municipalities of their intent to establish residences.¹³⁰ In *Di Biase v. Piscitelli*,¹³¹ the appellate division rejected a sponsoring agency's claim that the statute violated the equal protection clause¹³² and

125. NEW YORK STATE SENATE MENTAL HYGIENE AND ADDICTION CONTROL COMM., SITE SELECTION OF COMMUNITY RESIDENCES FOR THE MENTALLY DISABLED: HISTORICAL PERSPECTIVE AND LEGISLATION 26-27 (1979) (available at *Fordham Urban Law Journal* office) [hereinafter SITE SELECTION STUDY].

126. See *supra* note 45.

127. See *supra* note 49.

128. SITE SELECTION STUDY, *supra* note 125, at 35-36 (New York State's site selection law did not include distance limitations or quotas on theory that former were inflexible in their application and latter were potentially unconstitutional). Michigan's statute, which imposes greater distance limitations on community residences in Detroit than in other parts of that state, seems particularly irrational. Compare MICH. COMP. LAWS ANN. § 125.216a(2) (West 1986) with MICH. COMP. LAWS ANN. § 125.583b(4) (West 1986); cf. W. VA. CODE § 27-17-2 (1986) (distance limitations inapplicable in larger municipalities).

129. See N.Y. MENTAL HYG. LAW § 41.34 (McKinney Supp. 1986) (sponsoring agency must inform municipality of its interest in establishing community residence within municipality's boundaries).

130. *Di Biase v. Piscitelli*, 87 A.D.2d 611, 611-12, 448 N.Y.S.2d 35, 36 (2d Dep't), *appeal dismissed*, 57 N.Y.2d 672, 439 N.E.2d 1248, 454 N.Y.S.2d 1034 (1982).

131. 87 A.D.2d 611, 448 N.Y.S.2d 35 (2d Dep't), *appeal dismissed*, 57 N.Y.2d 672, 439 N.E.2d 1248, 454 N.Y.S.2d 1034 (1982).

132. *Id.* at 611-12, 448 N.Y.S.2d at 36.

discriminated against mentally retarded persons.¹³³ Relying on the same rational basis test later used by the Supreme Court in *City of Cleburne*, the appellate division held that the statute was reasonably related to the policy sought to be implemented—facilitation of the establishment of community residences by encouraging discussion about sites between communities and sponsors.¹³⁴

Because the *Di Biase* court applied the same rational basis test later used by the Supreme Court, *Di Biase* is still viable and its rationale would likely be applicable to other state statutes requiring notification to municipalities. Thus, unless a notification statute is unduly onerous to a sponsoring agency seeking to establish a community residence, it is probable that a court would find that the statute has a rational basis tied to a legitimate governmental purpose. Such a statute would likely be upheld in spite of *City of Cleburne* and in spite of the fact that it would impose different conditions on community residences for mentally retarded persons than on other similar residences.

On the other hand, using equal protection arguments similar to those raised in *City of Cleburne*, the Louisiana Supreme Court found unconstitutional a statute that required only community residences for mentally retarded persons to solicit governmental approval before operating.¹³⁵ In *Clark v. Manuel*,¹³⁶ the court held that the statute was not substantially related to any legitimate governmental purpose.¹³⁷ Rejecting the argument that the statute was aimed at avoiding

133. *Id.*

134. *Id.* The appellate division noted:

[O]n its face, . . . the challenged statute is patently designed to encourage the establishment and licensing of community residential facilities for persons formerly served in [s]tate institutions and to insure that providers of care establish such facilities with the participation of local communities in site selection. . . . By amending the Mental Hygiene Law, the [l]egislature expressed a public policy that the needs of the mentally disabled should be met through the concept of group homes in community settings chosen through a process of joint discussion and accomodation between the providers of care and services to the mentally disabled and representatives of the community. Section 41.34 of the Mental Hygiene Law [Padavan Law] is rationally related to the public policy sought to be implemented by the [l]egislature, and to that extent, is constitutional. . . .

Id.

The rational basis test had been applied in New York to statutes involving handicapped persons prior to *Di Biase*. See, e.g., *Levy v. City of New York*, 38 N.Y.2d 653, 658, 345 N.E.2d 556, 558, 382 N.Y.S.2d 13, 15, *appeal dismissed*, 429 U.S. 805 (1976).

135. *Clark v. Manuel*, 463 So. 2d 1276, 1286 (La. 1985).

136. *Id.*

137. *Id.*

concentrations of population and congestion in the street,¹³⁸ the court noted that “[i]f the occupants were not mentally retarded, the same house with the same number of residents and even with the same number of potential drivers would be a permitted use.”¹³⁹ Although the *Clark* court relied upon the circuit court decision in *City of Cleburne* holding that mentally retarded persons are a “quasi-suspect” class and that the heightened scrutiny test was thus applicable,¹⁴⁰ the court’s decision leaves no doubt that it would still invalidate the statute under the rational basis test used by the Court in *City of Cleburne*.

B. *City of Cleburne* and Local Ordinances

While the decision in *City of Cleburne* would affect state statutes treating community residences for mentally retarded persons differently from other similar homes,¹⁴¹ the decision would not have a similar impact on local ordinances containing a definition of the term “family” which, although restrictive, applied to everyone.¹⁴²

Some courts have found that community residences are single family or residential dwellings for the purpose of local laws and ordinances even in the absence of a state statute declaring community residences to be single family dwellings.¹⁴³ When no state statute

138. *Id.* The court expressly noted that the state legislature had recognized that “mental retardation/development disability does not in and of itself pose a threat to the safety and security of a community or the individual.” *Id.*

139. *Id.*

140. *Id.* at 1284-86. The court used the “heightened scrutiny” test on the grounds that mentally retarded persons were the subject of historical prejudice and powerlessness and that the statute in question made it difficult for mentally retarded persons to live in the community and thus enjoy an important right. *Id.* at 1285. The court noted the Louisiana statute declaring that mentally handicapped persons were entitled to reside “in their own community and in normal residential surroundings.” *Id.* at 1285 n.14; see *supra* note 17.

141. 473 U.S. at 449-50.

142. See *supra* notes 55-57 and accompanying text; *infra* notes 143-51 and accompanying text.

143. See, e.g., *Hessling v. City of Broomfield*, 193 Colo. 124, 563 P.2d 12 (1977); *Oliver v. Zoning Comm’n*, 31 Conn. Supp. 197, 326 A.2d 841 (Conn. C.P. 1974); *City of College Park v. Flynn*, 248 Ga. 222, 282 S.E.2d 69 (1981); *Douglas County Resources, Inc. v. Daniel*, 247 Ga. 785, 280 S.E.2d 734 (1981); *Linn County v. City of Hiawatha*, 311 N.W.2d 95 (Iowa 1981); *Hamner v. Best*, 656 S.W.2d 253 (Ky. Ct. App. 1983); *Tucker v. Special Children’s Found., Inc.*, 449 So. 2d 45 (La. Ct. App.), *cert. denied*, 450 So. 2d 959 (1984); *City of West Monroe v. Ouachita Ass’n for Retarded Children, Inc.*, 402 So. 2d 259 (La. Ct. App. 1981); *Costley v. Caromin House, Inc.*, 313 N.W.2d 21 (Minn. 1981); *Region 10 Client Management, Inc. v. Town of Hampstead*, 120 N.H. 885, 424 A.2d 207 (1980);

exists, however, community residences often have a difficult time overcoming local ordinances that merely limit the number of unrelated persons that may live in a residence in a single family or residential zone.¹⁴⁴ This type of local ordinance was found not to violate the federal due process clause by the Supreme Court in *Village of Belle Terre*.¹⁴⁵ In a footnote in its decision in *City of Cleburne*,¹⁴⁶ the Court noted that the principles of *Village of Belle Terre* did not apply to *City of Cleburne* because unlike the ordinance in *City of Cleburne*, the type of ordinance challenged in *Village of Belle Terre* did not discriminate against mentally retarded persons.¹⁴⁷

White v. Board of Zoning Appeals, 6 Ohio St. 3d 68, 451 N.E.2d 756 (1983); Freedom Township Bd. of Zoning Appeals v. Portage County, 16 Ohio App. 3d 387, 476 N.E.2d 360 (1984); Jackson v. Williams, 714 P.2d 1017 (Okla. 1985); JALC Real Estate v. Zoning Hearing Bd., 104 Pa. Commw. 605, 522 A.2d 710 (1987); Hopkins v. Zoning Hearing Bd., 55 Pa. Commw. 365, 423 A.2d 1082 (1980); Children's Home of Easton v. City of Easton, 53 Pa. Commw. 216, 417 A.2d 830 (1980); Collins v. City of El Campo, 684 S.W.2d 756 (Tex. Ct. App. 1984). A particularly interesting case is Fitchburg Housing Authority v. Board of Zoning Appeals of Fitchburg, 380 Mass. 869, 406 N.E.2d 1006 (1980), in which the court held that the zoning ordinance could not be used to block a community residence in light of a statute prohibiting zoning ordinances from barring the use of land for educational purposes. *Id.* at 875, 406 N.E.2d at 1010; *see also* Allegheny Valley School v. Zoning Hearing Bd., 102 Pa. Commw. 290, 291, 517 A.2d 1385, 1389 (1986) (community residence deemed to be "charitable institution" permissible under zoning ordinance).

144. A number of courts have held that community residences do not fall within the definition of the term "family" for the purpose of local zoning ordinances. *See, e.g.*, Civitans Care, Inc. v. Board of Adjustment of Huntsville, 437 So. 2d 540 (Ala. Civ. App. 1983); Roundup Found., Inc. v. Board of Adjustment of Denver, 626 P.2d 1154 (Colo. Ct. App. 1981); Macon Ass'n for Retarded Citizens v. Macon-Bibb County Planning & Zoning Comm'n, 252 Ga. 484, 314 S.E.2d 218, *appeal dismissed*, 469 U.S. 802 (1984); Adult Group Properties, Ltd. v. Imler, 505 N.E.2d 459 (Ind. Ct. App. 1987); City of Kenner v. Normal Life of Louisiana, Inc., 483 So. 2d 903 (La. 1986); Zoning Bd. of City of Hammond v. Tangipahoa Ass'n for Retarded Citizens, 510 So. 2d 751 (La. Ct. App. 1987); Normal Life of Louisiana, Inc. v. Jefferson Parish Dep't of Inspection & Code Enforcement, 483 So. 2d 1123 (La. Ct. App. 1987); Penobscot Area Hous. Dev. Corp. v. City of Brewer, 434 A.2d 14 (Me. 1981); Garcia v. Siffrin Residential Ass'n, 63 Ohio St. 2d 259, 407 N.E.2d 1369 (1980), *cert. denied*, 450 U.S. 911 (1980); Culp v. City of Seattle, 22 Wash. App. 618, 590 P.2d 1288 (1979).

145. 416 U.S. 1, 7 (1974). The *Village of Belle Terre* ordinance defined family as "one or more persons related by blood, adoption, or marriage, living and cooking together as a single housekeeping unit, exclusive of household servants. A number of persons but not exceeding two (2) living and cooking together as a single housekeeping unit though not related by blood, adoption or marriage shall be deemed to constitute a family." *Id.* at 2.

146. 473 U.S. at 439 n.8.

147. *Id.* The Court noted:

Macon Ass'n for Retarded Citizens v. Macon-Bibb County Planning and

The court of appeals in Louisiana followed *City of Cleburne* in holding that the principles applicable to statutes and ordinances that treated community residences differently from other similar types of residences did not apply to a nondiscriminatory ordinance that had the effect of excluding a residence.¹⁴⁸ In *Normal Life of Louisiana, Inc. v. Jefferson Parish Department of Inspection and Code Enforcement*,¹⁴⁹ the court upheld a municipality's decision to block the establishment of a community residence in an area zoned to prohibit more than four unrelated persons living together.¹⁵⁰ The court noted:

This situation is the opposite of that found in *City of Cleburne, Texas v. Cleburne Living Center* . . . in which no special use permit was required for the operation of multiple dwellings, boarding houses, etc., except for that of the defendant. There, the [Supreme Court] decided that the City of Cleburne could not require a permit for such a facility for the handicapped when other similar facilities were freely permitted.

. . . [Here], any owner or lessor in Jefferson Parish is required to secure approval of a local governing authority before attempting a special use, exception or variance.

The statute as applied to the facts of this case does not violate the equal protection clause of the Constitution since it creates no material distinction between the plaintiff [sponsoring agency of community residence] and any similarly situated party under the zoning laws.¹⁵¹

Thus, *City of Cleburne* does not provide a basis for invalidating zoning ordinances that do not specifically discriminate against men-

Zoning Comm'n, 252 Ga. 484, 314 S.E.2d 218 (1984), dism'd for want of a substantial federal question, 469 U.S. 802 . . . (1984), has no controlling effect on this case. Macon Ass'n for Retarded Citizens involved an ordinance that had the effect of excluding a group home for the retarded only because it restricted dwelling units to those occupied by a single family, defined as no more than four unrelated persons. In *Village of Belle Terre v. Boraas*, 416 U.S. 1 . . . (1974), we upheld the constitutionality of a similar ordinance, and the Georgia Supreme Court in *Macon Ass'n* specifically held that the ordinance did not discriminate against the retarded. 252 Ga. at 487, 314 S.E.2d at 221.

Id.

148. *Normal Life of Louisiana, Inc. v. Jefferson County Parish Dep't of Inspection & Code Enforcement*, 483 So. 2d 1123, 1126-27 (La. Ct. App. 1986).

149. *Id.*

150. *Id.* at 1127. The *Jefferson Parish* ordinance defined "family" as "one or more persons related by blood or marriage living together and occupying a single housekeeping unit with single culinary facilities or a group of not more than four persons living together by mutual agreement and occupying a single housekeeping unit with single culinary facilities on a non-profit cost sharing basis." *Id.* at 1125.

151. *Id.* at 1126-27.

tally retarded persons. The due process clauses of state constitutions, however, can provide a sound basis for challenging such ordinances. Courts have overturned statutes and ordinances that do not violate the federal due process clause on the ground that they violate a state's due process clause.¹⁵²

For example, in *McMinn v. Town of Oyster Bay*,¹⁵³ the New York Court of Appeals voided a town's zoning ordinance prohibiting more than two unrelated persons under the age of sixty-two from residing in a single family zone¹⁵⁴ on the ground that it violated the due process clause of the New York State Constitution.¹⁵⁵ In *McMinn*, which concerned four unrelated non-retarded men between the ages of twenty-two and twenty-five residing in a house in a single family zone,¹⁵⁶ the court noted that in order for a zoning ordinance to be valid under the New York State Constitution, it must have been enacted "in furtherance of a legitimate governmental purpose"¹⁵⁷ with "a reasonable relation between the end sought to be achieved by the regulation and the means used to achieve that end."¹⁵⁸ After finding that the ordinance was enacted to further legitimate governmental purposes,¹⁵⁹ the court then held that restricting occupancy of single family housing based upon biological or legal relationship bore no reasonable relation to the legitimate goals of "reducing parking and traffic problems, controlling population density and preventing noise and disturbance."¹⁶⁰ The *McMinn* court then found that the ordinance did not bear a reasonable relationship to the town's desire to preserve the character of traditional single family neighborhoods, holding that "a municipality may not seek to achieve it[']s [goals] by enacting a zoning ordinance that 'limit[s] the definition of family to exclude a household which in every but a biological sense is a single family.'"¹⁶¹ Consequently, finding that

152. See *infra* notes 153-65 and accompanying text.

153. 66 N.Y.2d 544, 488 N.E.2d 1240, 498 N.Y.S.2d 128 (1985).

154. *Id.* at 547-48, 488 N.E.2d at 1241-42, 498 N.Y.S.2d at 129-30.

155. *Id.* at 552, 488 N.E.2d at 1244, 498 N.Y.S.2d at 132.

156. *Id.* at 548, 488 N.E.2d at 1242, 498 N.Y.S.2d at 130.

157. *Id.* at 549, 488 N.E.2d at 1242, 498 N.Y.S.2d at 130.

158. *Id.*

159. *Id.* at 549, 488 N.E.2d at 1243, 498 N.Y.S.2d at 131.

160. *Id.* The court noted that the definition of family in the ordinance was fatally overinclusive in prohibiting an unmarried couple from living in a four-bedroom house and underinclusive in failing to prohibit the occupancy of a two-bedroom house by 10 or 12 distantly related persons. *Id.* at 549-50, 488 N.E.2d at 1243, 498 N.Y.S.2d at 131.

161. *Id.* at 550, 488 N.E.2d at 1243, 498 N.Y.S.2d at 131 (quoting *City of White Plains v. Ferraioli*, 34 N.Y.2d 300, 306, 313 N.E.2d 756, 759, 357 N.Y.S.2d 449, 453 (1974)).

there was no reasonable relation between the ends sought to be achieved by the town's ordinance and the means used to achieve that end, the court invalidated the ordinance under the due process clause of the New York State Constitution.¹⁶²

Using the principles delineated in *McMinn*, courts in California,¹⁶³ Michigan¹⁶⁴ and New Jersey¹⁶⁵ have invalidated local ordinances limiting the number of unrelated persons that may live in single family zones. The *McMinn* holding thus should be applicable to establish community residences where state statutes are nonexistent or inapplicable and local ordinances limit the number of unrelated persons that may live together in a single family zone.

VI. Inadequacies of the American Bar Association Model Statute

Sharing the concerns expressed by the federal government and state governments about the adequacy of the care and treatment of

162. *Id.* at 552, 488 N.E.2d at 1244, 498 N.Y.S.2d at 132. New York leads the present trend in which state courts have interpreted their own constitutions more expansively than federal courts have interpreted the United States Constitution. *See Kaye Sees 'New Federalism' Return to Intent of Founders*, N.Y.L.J., Mar. 2, 1987, at 1, col. 3 (speech by Judge Judith Kaye of New York Court of Appeals noting increased use of state constitutional provisions to overturn statutes and governmental practices). *Compare* *Rivers v. Katz*, 67 N.Y.2d 485, 498, 495 N.E.2d 337, 344, 504 N.Y.S.2d 74, 81 (1986) (administrative review procedure granted to involuntarily committed mental patients upon refusal of anti-psychotic medication violates due process guarantee of New York State Constitution) *with* *Project Release, Inc. v. Prevost*, 722 F.2d 960, 981 (2d Cir. 1983) (same administrative review procedure granted to involuntarily committed mental patients upon refusal of anti-psychotic medication valid under federal Constitution). *See also* *People v. P.J. Video, Inc.*, 68 N.Y.2d 296, 299, 501 N.E.2d 556, 558, 508 N.Y.S.2d 907, 909 (1986) (search and seizure of pornographic materials violated New York State Constitution which "imposes a more exacting standard for issuance of search warrants authorizing the seizure of allegedly obscene material than does the [f]ederal Constitution"); *Bellanca v. New York State Liquor Auth.*, 54 N.Y.2d 228, 235-37, 429 N.E.2d 765, 768-69, 445 N.Y.S.2d 87, 90-91 (1981) (New York statutory ban on topless dancing valid under federal Constitution is unconstitutional under state constitution), *cert. denied*, 456 U.S. 1006 (1982). *But see* *SHAD Alliance v. Smith Haven Mall*, 66 N.Y.2d 496, 499-500, 488 N.E.2d 1211, 1213, 498 N.Y.S.2d 99, 101 (1985) (declining to interpret New York State Constitution differently from United States Constitution in area of free speech).

163. *City of Santa Barbara v. Adamson*, 27 Cal. 3d 123, 134, 610 P.2d 436, 442, 164 Cal. Rptr. 539, 545 (1980) (ordinance violates California Constitution).

164. *Charter Township of Delta v. Dinolfo*, 419 Mich. 253, 270-72, 351 N.W.2d 831, 840-41 (1984) (ordinance violates due process clause of Michigan Constitution).

165. *State v. Baker*, 81 N.J. 99, 113-14, 405 A.2d 368, 375 (1979) (ordinance violates due process clause of New Jersey Constitution). *But see* *Penobscot Area Hous. Dev. Corp. v. City of Brewer*, 434 A.2d 14, 24 & n.9 (Me. 1981) (refusing to interpret Maine Constitution differently from United States Constitution and holding zoning ordinance's definition of family constitutional in light of *Village of Belle Terre*); *see also* *City of Ladue v. Horn*, 720 S.W.2d 745, 752 (Mo. Ct. App. 1986) (*Village of Belle Terre* principles applicable to challenge of zoning ordinance under state constitution.)

the mentally retarded,¹⁶⁶ the American Bar Association Commission on the Mentally Disabled has attempted to formulate a model statute to govern and facilitate the establishment of community residences for mentally retarded persons.¹⁶⁷ That statute, proposed in the late

166. See *supra* notes 8-25 and accompanying text.

167. The model statute appears in Hopperton, *A State Legislative Strategy for Ending Exclusionary Zoning of Community Homes*, 19 URB. L. ANN. 47, 77-80 (1980). It provides as follows:

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, habilitation 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

1970's, was entitled "An Act to Establish the Right to Locate

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 date it is issued or renewed although 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 . . . 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 number, occupancy, and location of similar community residential facilities serving 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 habilitation 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

Community Homes for Developmentally Disabled Persons in the Residential Neighborhoods of this State" (Model Act or the Act).¹⁶⁸

The purpose of the Act is "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."¹⁶⁹ The Model Act provides that only "family homes" containing six or fewer persons may be considered as permitted uses in single family or residential zones.¹⁷⁰ Under the Act, the state director of developmental disabilities has the power to promulgate regulations to limit the number of community residences to be permitted based upon population density and the location of previously established residences.¹⁷¹ Neighbors have standing to challenge a community residence application on the ground that the residence is violative of a distance limitation or quota.¹⁷² The Model

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 home 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.

MODEL ACT TO ESTABLISH THE RIGHT TO LOCATE COMMUNITY HOMES FOR DEVELOPMENTALLY DISABLED PERSONS IN THE RESIDENTIAL NEIGHBORHOODS OF THIS STATE 1978 [hereinafter ABA MODEL ACT].

168. *Id.*

169. *Id.* § 2.

170. *Id.* §§ 3(4), 4.

171. *Id.* § 5(1)(a).

172. *Id.* § 5(1)(d). One state statute actually gives homeowners standing to bring proceedings against community residences. See CONN. GEN. STAT. ANN. § 8-3e(b).

Act further provides that community residences need only follow the building, housing, health, fire, safety, motor vehicle parking and environmental provisions applicable to single family dwellings.¹⁷³ Sponsoring agencies are required to notify local officials of their intent to establish a residence.¹⁷⁴ Finally, restrictive covenants permitting residential use of property but prohibiting the use of property for community residences are void as against public policy and hence, are unenforceable.¹⁷⁵

(West Supp. 1987). By applying New York's liberal standing doctrine, New York courts have granted homeowners standing to challenge community residence determinations. See, e.g., *Grasmere Homeowners Ass'n v. Introne*, 84 A.D.2d 778, 443 N.Y.S.2d 956 (2d Dep't 1981); *Karas v. New York State Office of Mental Retardation & Developmental Disabilities*, No. 15601/82 (Sup. Ct. N.Y. County), *aff'd mem.*, 95 A.D.2d 984, 464 N.Y.S.2d 613 (1st Dep't), *appeal denied*, 60 N.Y.2d 560, 459 N.E.2d 863, 471 N.Y.S.2d 1028 (1983). *But see* *Polo Park Civic Ass'n v. Kiernan*, 133 A.D.2d 116, 518 N.Y.S.2d 652 (2d Dep't 1987) (neighbors cannot challenge municipality's decision not to oppose community residence site), *leave to appeal denied*, N.Y.L.J., Jan. 14, 1988, at 13, col. 2; *Town of Hempstead v. Commissioner*, 119 A.D.2d 582, 500 N.Y.S.2d 751 (2d Dep't 1986) (neighbors have no right to participate in early stages of site selection procedure). For a discussion of homeowners' attempts to block the establishment of community residences in their neighborhoods, see *supra* notes 26-31 and accompanying text.

173. ABA MODEL ACT, *supra* note 167, § 5(1)(c).

174. *Id.* § 5(3). Authorities disagree as to the wisdom of notifying municipalities and communities about the planned development of community residences. Some authorities advocate a "Machiavellian" approach towards the establishment of community residences; sponsoring agencies should not give communities any notice on the theory that communities will develop more favorable attitudes towards residences after their establishment. See R. LUBIN, A. SCHWARTZ, W. ZIGMAN & M. JANICKI, COMMUNITY ACCEPTANCE OF RESIDENTIAL PROGRAMS FOR DEVELOPMENTALLY DISABLED PERSONS 9 (Living Alternatives Research Project 1981) (available at *Fordham Urban Law Journal* office). Other authorities favor notification and note the success of New York's statute which provides for community notification. See ROTHMAN & ROTHMAN, *supra* note 26, at 195-96; see also M. JANICKI, P. CASTELLANI & R. LUBIN, A PERSPECTIVE ON THE SCOPE AND STRUCTURE OF NEW YORK'S COMMUNITY RESIDENCE SYSTEM 2 (Living Alternatives Research Project 1982) (available at *Fordham Urban Law Journal* office). A study of New York's statute providing for community notification indicated that lawsuits were brought against only one out of every 10 community residences. AFTER EIGHT YEARS, *supra* note 19, at 36.

175. ABA MODEL ACT, *supra* note 167, § 6. Only five states have statutes similar to the provisions of the Model Code. See IND. CODE ANN. § 16-13-21-14 (West Supp. 1986); IOWA CODE ANN. § 358A.25(4) (West 1983 & Supp. 1987); N.C. GEN. STAT. § 168-23 (1982); W. VA. CODE § 27-17-4 (1986); WIS. STAT. ANN. § 46.03(22)(d) (West 1987). Three states have recently enacted statutes inapplicable to previously drafted covenants. See ARIZ. REV. STAT. ANN. § 36-582(G) (1986); MO. ANN. STAT. § 89.020(3) (Vernon Supp. 1988); TEX. REV. CIV. STAT. ANN. art. 1011n, § 5 (Vernon Supp. 1988). The majority of state courts, however, have refused to enforce restrictive covenants to enjoin the establishment of community residences. See, e.g., *Cain v. Delaware Sec. Invs.*, 7 Mental Disab. Law Rptr. 384 (Del. Ch. 1983);

The Model Act, however, is flawed. In declaring that only "family homes" containing six or fewer persons may be considered as permitted uses in single family or residential zones,¹⁷⁶ the Act ignores the viability of community residences for more than six persons.¹⁷⁷ By treating community residences for mentally retarded persons differently from other single family and residential dwellings, the Model Act would appear to violate *City of Cleburne*.¹⁷⁸ The portion of the Model Act permitting the state director to set distance limitations and quotas on community residences for mentally retarded persons

Clark v. Manuel, 463 So. 2d 1276 (La. 1985); Vienna Bend Subdivision Homeowners Ass'n v. Manning, 459 So. 2d 1345 (La. Ct. App. 1984); Concord Estates Homeowners Ass'n Inc. v. Special Children's Found., Inc., 459 So. 2d 1242 (La. Ct. App. 1984); Harbour v. Normal Life of Louisiana, Inc., 454 So. 2d 1208 (La. Ct. App. 1984); Tucker v. Special Children's Found., Inc., 449 So. 2d 45 (La. Ct. App.), *cert. denied*, 450 So. 2d 959 (1984); Craig v. Bossenberry, 134 Mich. App. 543, 351 N.W.2d 596 (1984); McMillan v. Iserman, 120 Mich. App. 785, 327 N.W.2d 559 (1982); Leland Acres Homeowners Ass'n v. R.T. Partnership, 106 Mich. App. 790, 308 N.W.2d 648 (1981); Malcolm v. Shamie, 95 Mich. App. 132, 290 N.W.2d 101 (1980); Bellarmine Hills Ass'n v. Residential Sys. Co., 84 Mich. App. 554, 269 N.W.2d 673 (1978); Costley v. Caromin House, Inc., 313 N.W.2d 21 (Minn. 1981); Blevins v. Barry-Lawrence County Ass'n for Retarded Citizens, 707 S.W.2d 407 (Mo. 1986); State v. District Court, 187 Mont. 126, 609 P.2d 245 (1980); Knudtson v. Trainor, 216 Neb. 653, 345 N.W.2d 4 (1984); Berger v. State, 71 N.J. 206, 364 A.2d 993 (1976); Crane Neck Ass'n v. NYC/Long Island County Servs. Group, 61 N.Y.2d 154, 460 N.E.2d 1336, 472 N.Y.S.2d 901, *cert. denied*, 469 U.S. 804 (1984); J.T. Hobby & Sons v. Family Homes, 302 N.C. 64, 274 S.E.2d 174 (1981); Smith v. Association for Retarded Citizens, 75 N.C. App. 435, 331 S.E.2d 324 (1985); Beres v. Hope Homes, Inc., 6 Ohio App. 3d 71, 453 N.E.2d 1119 (1982), *cert. denied*, 464 U.S. 937 (1983); Jackson v. Williams, 714 P.2d 1017 (Okla. 1985); Gregory v. State Dep't of Mental Health, Retardation and Hosps., 495 A.2d 997 (R.I. 1985); Permian Basin Centers v. Alsobrook, 723 S.W.2d 774 (Tex. Ct. App. 1986); Collins v. City of El Campo, 684 S.W.2d 756 (Tex. Ct. App. 1984); Crowley v. Knapp, 94 Wis. 2d 421, 288 N.W.2d 815 (1980). *But see* Seaton v. Clifford, 24 Cal. App. 3d 46, 50-51, 100 Cal. Rptr. 779, 781 (1972) (sheltered living facility for handicapped did not constitute a "residential purpose" use and thus violated restrictive covenant); Omega Corp. of Chesterfield v. Malloy, 228 Va. 12, 19, 319 S.E.2d 728, 732 (1984) (public officials supervising operation of home deemed to have changed character of home from residence to institution), *cert. denied*, 469 U.S. 1192 (1985). *See also* Welsch v. Goswick, 130 Cal. App. 3d 398, 407, n.7, 181 Cal. Rptr. 703, 709, n.7 (1982) (questioning vitality of *Seaton* in light of "changed circumstances in a rapidly developing area of social concern"); Brussack, *Group Homes, Families and Meaning in the Law of Subdivision Covenants*, 16 GA. L. REV. 33 (1981) (framework for analyzing constitutional validity of restrictive covenants); Guernsey, *The Mentally Retarded and Private Restrictive Covenants*, 25 WM. & MARY L. REV. 421, 442 (1984) (same); Annotation, *Community Residence for Mentally Disabled Persons as Violation of Restrictive Covenant*, 41 A.L.R.4TH 1216 (1985).

176. ABA MODEL ACT, *supra* note 167, §§ 3(4), 4.

177. *See supra* note 111 and accompanying text.

178. *See supra* notes 98-99, 104-20 and accompanying text.

not applicable to other similar permitted uses would also run afoul of *City of Cleburne*.¹⁷⁹ Moreover, the portion of the Act granting neighboring homeowners standing to challenge a community residence application on the ground that the residence violates a distance limitation or quota can only encourage litigation between neighbors and sponsoring agencies of community residences and thus would not further the Act's goal of promoting the establishment of community residences.¹⁸⁰

Nonetheless, the Model Act does have some salutary provisions. By providing that community residences are single family dwellings for all purposes,¹⁸¹ it would forbid municipalities from enforcing institutional building codes¹⁸² and requiring environmental impact studies¹⁸³ of community residences. In this respect, the Model Act correctly recognizes that there is no legitimate reason for treating community residences differently from other single family residences.

With regard to the Model Act's provision declaring that restrictive covenants prohibiting community residences are void and unenforceable,¹⁸⁴ an argument can be made that by having a retroactive effect on previously agreed upon covenants, the Model Act would impair

179. See *supra* notes 121-28 and accompanying text.

180. See ABA MODEL ACT, *supra* note 167, § 2.

181. *Id.* §§ 4, 5(1)(c).

182. *Id.* If the state or county operates the community residence, it should be immune from local building codes under the doctrine of sovereign immunity. See, e.g., *County of Westchester v. Village of Mamaroneck*, 22 A.D.2d 143, 255 N.Y.S.2d 290 (2d Dep't 1964), *aff'd*, 16 N.Y.2d 940, 212 N.E.2d 442, 264 N.Y.S.2d 925 (1965); *Gedney Ass'n v. New York State Dep't Of Mental Hygiene*, 112 Misc. 2d 209, 446 N.Y.S.2d 876 (Sup. Ct. Westchester County 1982); *Incorporated Village of Old Field v. Introne*, 104 Misc. 2d 122, 430 N.Y.S.2d 192 (Sup. Ct. Suffolk County 1980). Several state statutes bar the application of institutional building codes to community residences. See ARIZ. REV. STAT. ANN. § 36-582(C), (D) (1986); IDAHO CODE § 67-6532(c) (1980); N.Y. MENTAL HYG. LAW § 41.34(f) (McKinney Supp. 1986); OHIO REV. CODE ANN. § 5123.19(f) (Anderson Supp. 1985); WIS. STAT. ANN. § 46.03(22)(b) (West 1987).

183. ABA MODEL ACT, *supra* note 167, § 5(1)(c). Because other single family dwellings are not subjected to environmental review, such review would not be imposed on community residences. In New York, a commissioner's regulation specifically declares that community residences need not submit to environmental review before their establishment. See N.Y. COMP. CODES R. & REGS. tit. 14, § 52.14(b)(Type II)(h) (1977); see also *Town of Pleasant Valley v. Wassaic Developmental Disabilities Servs. Office*, No. 2983-82 (Sup. Ct. Dutchess County 1983) (no environmental impact study required of community residences in New York); *Brennan v. Office of Mental Retardation and Developmental Disabilities of New York*, No. 21697/81 (Sup. Ct. Warren County 1981) (same).

184. See *supra* note 175 and accompanying text.

private contracts in violation of the United States Constitution.¹⁸⁵ The New York Court of Appeals, however, rejected that argument in *Crane Neck Association v. NYC/LI County Services Group*.¹⁸⁶ In that case, the court of appeals held that executive pronouncements made between 1954 and 1984 and statutes favoring the establishment of community residences for mentally retarded persons¹⁸⁷ prohibited enforcement of a 1945 restrictive covenant against the establishment of a community residence.¹⁸⁸ The *Crane Neck* court rejected the argument that the later policies could not prohibit the enforcement of the earlier covenant.¹⁸⁹ The court held that the state has the right to impair contracts by subsequent legislation "so long as it is reasonably necessary to further an important public purpose and the measures taken that impair the contract are reasonable and appropriate to effectuate that purpose"¹⁹⁰ even in situations not requiring emergency, temporary state actions.¹⁹¹ The court then found:

[T]he state's interest in protecting the welfare of mentally and developmentally disabled individuals is clearly an important public purpose, and the means used to select the sites for community residences are reasonable and appropriate to effectuate the state's program of providing the most effective care in the least restrictive environment. In such circumstances, appellants' private contract rights may not override state policy.¹⁹²

In sum, the Model Act contains some laudatory provisions, particularly those relevant to local building codes and restrictive covenants. The Model Act's inclusion of provisions limiting the number of persons that may reside in a community residence in single family zones and permitting officials to place distance limitations and quotas on community residences, however, does not facilitate the estab-

185. Article I, § 10 of the United States Constitution provides, in relevant part, that "No state shall . . . pass any . . . law impairing the obligation of contracts." U.S. CONST. art. I, § 10.

186. 61 N.Y.2d 154, 166-67, 460 N.E.2d 1336, 1343, 472 N.Y.S.2d 901, 908-09, *cert. denied*, 469 U.S. 804 (1984).

187. *Id.* at 164, 460 N.E.2d at 1341, 472 N.Y.S.2d at 906-07.

188. *Id.*

189. *Id.* at 167, 460 N.E.2d at 1343, 472 N.Y.S.2d at 908.

190. *Id.*

191. *Id.* The plaintiffs cited cases involving Depression-era, emergency legislation to support their argument that a state can impair contract rights in only limited circumstances. *Id.* The more modern view, as adopted by the court of appeals in *Crane Neck*, is that the public policy that can prohibit the enforcement of a contract does not have to be related to an emergency or temporary situation. *See Energy Reserves Group v. Kansas Power & Light Co.*, 459 U.S. 400, 411-12 (1984).

192. 61 N.Y.2d at 167, 460 N.E.2d at 1343, 472 N.Y.S.2d at 909.

lishment of community residences. Furthermore, as previously discussed, such restrictions may be unconstitutional.¹⁹³

VII. Recommendations

Pursuant to *City of Cleburne*, state statutes regulating community residences for mentally retarded persons must treat such residences like any other homes absent a rational basis grounded in a legitimate state interest justifying different treatment.¹⁹⁴ The following are proposed recommendations for a model statute that would, in general, treat community residences like other homes.

First, like the Model Act,¹⁹⁵ a community residence statute should begin with a preamble stating that it is the policy of the state to encourage the establishment of community residences and that the statute and any other statutes or ordinances should be construed liberally toward that end.¹⁹⁶

Next, because community residences pose no greater threat to a neighborhood than other residences¹⁹⁷ and there is no evidence that community residences housing more than a certain number of residents are not viable,¹⁹⁸ the statute should permit the operation of community residences in single family and residential zones without specifying the number of persons that may reside in such residences.¹⁹⁹ Some community residences may be too large to provide their residents with a home-like atmosphere. Therefore, the statute should give the state commissioner who licenses residences for mentally retarded persons the discretion to bar residences whose size inhibits a home-like atmosphere.

Similarly, a community residence statute should not include distance limitations between community residences or quotas on the

193. See *supra* notes 104-28 and accompanying text.

194. See *supra* notes 98-140 and accompanying text.

195. See *supra* note 167.

196. ABA MODEL ACT, *supra* note 167, § 2. Court decisions denying enforcement of restrictive covenants because of a statute's stated public policy favoring community residences demonstrate the necessity of such public policy statements. See, e.g., *Cain v. Delaware Sec. Invs.*, 7 Mental Disab. Law Rptr. 384 (Del. Ch. 1983); *Vienna Bend Subdivision Homeowners Ass'n v. Manning*, 459 So. 2d 1345 (La. Ct. App. 1984); *Craig v. Bossenberry*, 134 Mich. App. 543, 351 N.W.2d 596 (1984); *Bellarmino Hills Ass'n v. Residential Sys. Co.*, 84 Mich. App. 554, 269 N.W.2d 673 (1978); *Crane Neck Ass'n v. NYC/Long Island County Servs. Group*, 61 N.Y.2d 154, 460 N.E.2d 1336, 472 N.Y.S.2d 901, *cert. denied*, 469 U.S. 804 (1984).

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

198. See *supra* note 111 and accompanying text.

199. See *supra* notes 104-20 and accompanying text.

number of mentally retarded persons that may reside in a community residence. Distance limitations and quotas are clearly unconstitutional²⁰⁰ and do not effectively serve to avoid "ghettoization"²⁰¹ of mentally retarded persons. Again, discretion should be left to the state commissioner on mental retardation to determine whether the location of a particular residence would hinder its ability to provide a home-like atmosphere to its residents. New York's statute providing that a community residence location can be rejected only if it creates an overconcentration of similar residences that would result in the substantial alteration of an area,²⁰² has been upheld²⁰³ and is beneficial to both communities and to mentally retarded persons who may not benefit from living in a substantially altered area.²⁰⁴

To promote good will and communication between community residence operators and local officials, statutes should provide that the sponsoring agencies of community residences give municipalities some notification of their intentions prior to the establishment of such facilities.²⁰⁵ The statute should make clear that no notice need be given to neighbors and homeowners groups and that neighbors and homeowners groups have no standing to bring court actions against community residences. Neighbors and homeowners groups, in attempts to block the establishment of residences, have used numerous legal and extra-legal tactics.²⁰⁶ Given this fact, notice to them of a community residence prior to its establishment will not promote or facilitate the development of such residences.

200. See *supra* notes 121-28 and accompanying text.

201. See *supra* note 125 and accompanying text.

202. N.Y. MENTAL HYG. LAW § 41.34(c)(5) (McKinney Supp. 1988). In New York, the commissioner can refuse to license a community residence that does not meet his standards even if the residence demonstrates that it would not create an overconcentration of residences substantially altering the area. See N.Y. COMP. CODES R. & REGS. tit. 14, § 686.1 (1985); N.Y. MENTAL HYG. LAW § 31.05 (McKinney 1978 & Supp. 1988). Because state commissioners responsible for the care and treatment of mentally retarded persons have the expertise and duty to provide services, state commissioners rather than local zoning officials should make the final determination as to whether a community residence can provide a safe setting for its residents. See *Town of Oyster Bay v. New York State Office of Mental Retardation & Developmental Disabilities*, 115 A.D.2d 536, 537, 496 N.Y.S.2d 61, 62 (2d Dep't 1985) (state commissioner rather than municipality had right to determine whether persons designated to reside in proposed community residence were capable of self-preservation).

203. See *supra* notes 129-34 and accompanying text.

204. See SITE SELECTION STUDY, *supra* note 125, at 26-27.

205. See *supra* note 174 and accompanying text.

206. See *supra* notes 26-31 and accompanying text.

It is further recommended that, like the Model Act, the statute clearly state that community residences are single family homes for building, housing, health, fire, safety, motor vehicle parking and environmental purposes.²⁰⁷ Similarly, the statute should declare that restrictive covenants cannot be enforced against the establishment of community residences²⁰⁸ and that the statute applies to restrictive covenants entered into prior to the enactment of the statute.²⁰⁹ Finally, it is recommended that the statute contain a clause stating that it is unlawful to discriminate in the sale or rental of any housing accommodation against any person because of his or her mental retardation.²¹⁰

VIII. Conclusion

The deinstitutionalization of mentally retarded persons and the placement of such persons in community settings have been nationwide policies for the past two decades. The evidence is overwhelming that community residences do not pose threats to their neighbors. Many state statutes purporting to facilitate the devel-

207. ABA MODEL ACT, *supra* note 167, § 5(1)(c).

208. *See supra* note 175 and accompanying text.

209. *See supra* notes 185-92 and accompanying text.

210. A statutory provision of this type proved enormously valuable to a community residence in New York. *See People v. 11 Cornwell Co.*, 695 F.2d 34 (2d Cir. 1982), *vacated in part on other grounds*, 718 F.2d 22 (1983). In *11 Cornwell Company*, a group of homeowners learned of plans for a proposed community residence in their neighborhood. They united to purchase the house proposed for the community residence solely to prevent the sponsoring agency interested in the site from purchasing the property. 695 F.2d at 37-38. The federal District Court for the Eastern District of New York found that the neighbors's actions violated a New York State statute prohibiting homeowners from discriminating against a person because of his disability in the sale of a housing accommodation. *Id.* This finding was upheld by the Court of Appeals for the Second Circuit. *Id.* at 44.

A bill that would amend Title VIII of the Civil Rights Act of 1968 to prohibit sellers of property and landlords from discriminating against prospective buyers and renters on account of their physical or mental handicaps has been introduced before Congress. S. 558, 100th Cong., 1st Sess., 133 CONG. REC. 2229 (daily ed. Feb 19, 1987). Section 6 of the bill forbids a seller or landlord to "discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap of . . . that buyer or renter, . . . a person residing in or intending to reside in that dwelling after it is so sold, rented, or made available; or . . . any person associated with that buyer or renter." S. 558, 100th Cong., 1st Sess. § 6. Section 5 of the bill defines handicap as "a physical or mental impairment which substantially limits one or more of such person's major life activities." *Id.* § 5. Section 8 of the bill provides for an administrative procedure to settle disputes and permits aggrieved parties to bring their own civil actions against discriminatory sellers and landlords. *Id.*

opment of residences and local ordinances, however, still stand in the way of further residential development. As a result of the Supreme Court's decision in *City of Cleburne*, state statutes that treat community residences differently from other residences without a rational basis grounded in a legitimate state interest are, arguably, no longer viable. Therefore, it is doubtful that statutes limiting the number of persons that may live in community residences in single family areas are still valid. Also suspect are statutes that impose distance limitations between residences, statutes that impose quotas on residences and some regulations that are solely applicable to community residences. Moreover, while local ordinances using a nondiscriminatory definition of the term "family" were not invalidated by *City of Cleburne*, those ordinances may be invalid under state due process clauses. In response to the *City of Cleburne* decision and to assure that the nationwide policy of deinstitutionalization is furthered, state legislatures should amend their statutes to treat community residences for mentally retarded persons like other homes.

