THE COMMUNITY RESIDENCE MOVEMENT: LAND USE CONFLICTS AND PLANNING IMPERATIVES

LAURENCE KRESSEL*

Mr. and Mrs. George H. Kastendike, appellants, must believe in the statement, "Love thy neighbor, yet pull not down your hedge." For while professing no rancor toward or intention to prohibit their neighbor, The Baltimore Association for Retarded Children, Inc. (BARC), appellee, from moving in, the Kastendikes insist that the move should not be allowed unless BARC obtains approval of the Mayor and City Council of Baltimore City.[1]

I
INTRODUCTION

Judicial activists have traditionally been reminded that the view from the bench is better suited to applying legal rules than to making them. The legislative domain is said to provide the broader perspective necessary for examining complex problems and offering solutions which can be reconciled with competing policies. Yet it can scarcely be doubted that legislatures, like activist courts, unwittingly set collisions in motion. This often occurs when reform is pursued on a national or statewide basis without special reference to conflicting local interests. The failure to anticipate local opposition may frustrate or undo otherwise carefully conceived social reforms. One example is the recent use of zoning barriers as a means of thwarting federal[2] and state[3] "normali-

* Member, Oregon Bar. B.A., 1966, State University Of New York at Binghamton; M.S.W., 1968, University of Michigan School of Social Work; J.D., 1975, Lewis and Clark Law School. Deputy County Counsel, Multnomah County, Oregon.

1. Kastendike v. Baltimore Ass'n for Retarded Children, 267 Md. 389, 391, 297 A.2d 745, 746 (1972), *quoting* G. HERBERT, *Jacula Prudentum* in THE WORKS OF GEORGE HERBERT 325 (F.E. Hutchinson ed. 1941).

2. *See, e.g.*, 18 U.S.C. §§ 4082(b), (f) (1970), which authorizes residential community treatment centers as residences for federal prisoners on work release; 42 U.S.C. § 1397(4) (Supp. IV, 1974), which authorizes federal appropriations to encourage state programs directed, in part, toward the goal of "preventing or reducing inappropriate institutional care by providing for community-based care, home-based care or other forms of less intensive care."

3. *See, e.g.*, CAL. WELF. & INST'NS CODE §§ 5115 *et seq.* (West 1972); N.Y. MENTAL HYGIENE LAW § 75.03 (McKinney Supp. 1975).

zation" programs—programs designed to return institutionalized persons to communities in various group living arrangements.[4]

The movement to offer institutionalized persons living conditions which approximate those of "normal" society has accelerated with the advent of "right to treatment" litigation.[5] In these cases, several lower federal courts have held that persons involuntarily committed to institutions for care and treatment have a constitutional right to treatment, and that the confinement for such treatment must be the "least restrictive alternative."[6] In some instances this has meant the right to be treated beyond the walls of traditionally isolated and dehumanizing institutions. In *Dixon v. Weinberger*,[7] for example, a federal court ordered the federal government and the District of Columbia to develop nursing homes, foster homes and halfway houses as alternatives to institutional care for mentally ill persons in St. Elizabeth's Hospital in Washington, D.C.[8] Similarly, litigation brought on behalf of mentally retarded residents of New York's Willowbrook Developmental Center has recently been settled with a consent decree recognizing a corollary to the least restrictive alternative principle—a "right to protection from harm."[9] As in *Dixon*, the decree declared that a primary goal of treatment must be to prepare residents for life in the community at large. To achieve this goal the state agreed to develop a comprehensive plan for the creation of community programs, including 200 new placements in hostels, halfway houses, group homes, sheltered workshops and day care training programs.[10]

---

4. The term "normalization," with respect to mental retardation, has been defined as "making available to the mentally retarded patterns and conditions of everyday life which are as close as possible to the norms and patterns of the mainstream of society." Nirje, *The Normalization Principle and Its Human Management Implications*, in THE PRESIDENT'S COMM. ON MENTAL RETARDATION, CHANGING PATTERNS IN RESIDENTIAL SERVICES FOR THE MENTALLY RETARDED 181 (1969).

5. *See, e.g.*, O'Connor v. Donaldson, 493 F.2d 507 (5th Cir. 1974), *vacated*, 422 U.S. 563 (1975); Morales v. Turman, 364 F. Supp. 166 (E.D. Tex. 1973), *enforced*, 383 F. Supp. 53, 121-26 (E.D. Tex. 1974) (ordered closing of two Texas state institutions for juveniles and development of network of community programs); Wyatt v. Stickney, 325 F. Supp. 781 (M.D. Ala. 1971), 334 F. Supp. 1341, *enforced*, 344 F. Supp. 373 (1972), *modified sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974) (constitutional right to treatment in least restrictive setting for hospitalized mentally ill and mentally retarded).

6. Covington v. Harris, 419 F.2d 617, 623 (D.C. Cir. 1969); Lessard v. Schmidt, 349 F. Supp. 1078, 1095-96 (E.D. Wis. 1972); Wyatt v. Stickney, 325 F. Supp. 781 (M.D. Ala. 1971), 334 F. Supp. 1341, *enforced*, 344 F. Supp. 373 (1972), *modified sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974); *In re* Jones, 338 F. Supp. 428, 430 (D.D.C. 1972); *cf.* O'Connor v. Donaldson, 422 U.S. 563, 575 (1975). *See also* Dixon v. Weinberger, 405 F. Supp. 974 (D.D.C. 1975) (statutory right to treatment in least restrictive setting).

The principle of the least restrictive alternative has also been invoked where legitimate governmental action infringed fundamental, constitutional rights. In such cases, the government interference with these rights must be the minimum necessary to pursue valid governmental objectives. Eisenstadt v. Baird, 405 U.S. 438, 453 (1971); Griswold v. Connecticut, 381 U.S. 479, 485 (1965); Shelton v. Tucker, 364 U.S. 479, 488 (1960); Note, *Less Drastic Means and the First Amendment*, 78 YALE L.J. 464 (1968).

7. 405 F. Supp. 974 (D.D.C. 1975).

8. The court based its decision on the 1964 Hospitalization of the Mentally Ill Act, D.C. CODE §§ 21-501 *et seq.* (1973), although constitutional issues were also raised by plaintiffs. 405 F. Supp. at 976. The hospital's clinical staff estimated that 43% of the inpatients "require[d] care and treatment in alternative facilities." *Id.*

9. New York State Ass'n for Retarded Children v. Carey, 393 F. Supp. 715 (E.D.N.Y. 1975).

10. *Id.*

However, efforts at deinstitutionalization have too often proceeded without sufficient attention to local concerns. The appropriate accommodation of patients' civil rights and local social and economic interests has been strained by the "dumping" phenomenon, in which many people have been released from institutions to essentially unsupervised residences. For example,[11] in the year ending March 31, 1973, New York State institutions released 36,000 mental patients for residential placement throughout the state. Nearly 15,000 of these people moved to New York City, where adequate housing facilities were not available. The resulting city-state dispute over the housing issue underscored the lack of thought that had been given to post-release problems.

Facilities that are found for deinstitutionalized people are typically located in high population density, low income neighborhoods in which large houses can be converted inexpensively to community residences.[12] These neighborhoods may be further burdened when the lack of supervision or treatment threatens to convert alternative care facilities into what one writer has termed the "new back wards."[13] It is not surprising therefore that communities have frequently resorted to zoning ordinances as a means of halting the influx of newly released persons.[14] However, courts properly tend to disfavor zoning when it is a thinly disguised tool of municipal parochialism.[15] The community residence cases are the inevitable product of this convergence of local social pressures and broader policy considerations.

---

11. For a discussion of this example, see Schumach, *Halfway Houses for Former Mental Patients Create Problems for City's Residential Communities*, N.Y. Times, Jan. 21, 1974, at 31, col. 1.

12. Political organization tends to be weak in these areas, making them logical "dumping grounds" from a purely pragmatic standpoint. *See* D. LAUBER & F. BANGS, ZONING FOR FAMILY AND GROUP CARE FACILITIES 13-14 (Am. Soc'y of Planning Officials Planning Advisory Service Rep. No. 300, 1974).

The impact on one neighborhood is humorously captured by a "letter home" written by a beseiged New York City resident to her Nebraska mother:

> I'm really tired today for some reason. There was a rather spirited meeting down in Chelsea last night which I attended. Seems the State of New York is putting in a miniprison for 150 convicts right in my neighborhood and then there was some talk about somebody opening up a halfway house for the criminally insane right in the next block (that would be right around the corner from the halfway house for mentally retarded adults and right across the street from an ex-offenders program run by one of the churches all of which is down the street from the miniprison).

N.Y. Times, Aug. 31, 1974, at 19, col. 3. A model of how municipalities may prevent dumping is presented in LAUBER & BANGS, *supra* at 23-25.

13. *See* Murphy, Pennee & Luchins, *Foster Homes: The New Back Wards?*, 20 CANADA'S MENTAL HEALTH, Sept.-Oct., 1972, Supp. No. 71 (study of 50 Canadian foster homes for mental patients, which reveals a pattern of regimentation, inactivity, and social isolation).

14. *See* LAUBER & BANGS, *supra* note 12, at 15; Ross & Chandler, *Zoning Barriers to Normalization* in THE PRESIDENT'S COMM. ON MENTAL RETARDATION, SILENT MINORITY 8 (U.S. Dep't of Health, Educ. & Welfare, 1974).

15. *See, e.g.*, YWCA of Summit v. Board of Adjustment, 134 N.J. Super. 384, 391, 341 A.2d 356, 359-60 (L. Div. 1975). *See* Note, *Zoning Against the Public Welfare: Judicial Limitations on Municipal Parochialism*, 71 YALE L.J. 720, 724-25 (1962) (criticizing the judicial affirmation of a rezoning measure aimed at excluding a school for delinquent boys in Wiltwyck School for Boys, Inc. v. Perry, 14 App. Div. 2d 198, 219 N.Y.S.2d 161 (2d Dep't 1961)). The case was reversed on appeal. Wiltwyck School for Boys, Inc. v. Perry, 11 N.Y.2d 182, 182 N.E.2d 268, 227 N.Y.S.2d 655 (1962). *See also* Feiler, *Metropolitanization and Land-Use Parochialism—Toward a Judicial Attitude*, 69 MICH. L. REV. 655 (1971).

This Article will first discuss the social and legal developments which underlie the move to offer patients and prisoners "community residences."[16] The less than adequate judicial and legislative responses to the conflict between policies favoring community residences and local land use interests will then be examined in order to show the need for more comprehensive state and local legislation. Finally, a recent ordinance adopted by Portland, Oregon, will be presented as a model for such a comprehensive approach. It is submitted that judicial readiness to stretch existing land use labels to accommodate community facilities, thereby advancing federal and state policy, should not serve as a substitute for administrative mechanisms at the state and local level which better integrate land use and social planning considerations.

II
THE COMMUNITY RESIDENCE MOVEMENT

Residential care and treatment in the community is not a new concept. Indeed, informal parallels of the modern halfway house have been traced back as far as the seventh century.[17] In America, the transcendental movement in eighteenth century New England advocated family care of the mentally ill,[18] although even then the physically isolated, fortress-like mental hospital was the preferred locus of "treatment."[19]

The contemporary movement in mental health towards community treatment began in the early 1950's and was encouraged by the passage of New York's innovative Community Mental Health Services Act of 1954,[20] which called for the "development of preventive, rehabilitative and treatment services through new community mental health programs and improvement and expansion of existing community services."[21] A further stimulus was provided in 1963 with the passage of the National Community Mental Health Centers Act,[22] which was designed to implement the replacement of isolated mental

16. The term "community residence" is used in a broad sense in this Article to refer to the spectrum of community residential facilities for persons previously isolated in "total" institutions, such as mental hospitals, training centers for the mentally retarded, juvenile detention centers and correctional facilities. In the area of mental health, "community residence" has been defined by New York as

> [a] residential facility which is . . . designed to assist mentally disabled individuals in the transition from institutional to independent living in the community, to provide a long-term supervised residence to individuals whose mental disability is such that independent living is improbable, to provide a temporary shelter for short periods of time in order to offer an alternative for admission to an institution, to provide a brief stay substitute home to mentally disabled individuals, or to allow a respite or vacation to such individual's family or legal guardian. A community residence shall include, but shall not be limited to, halfway houses and hostels but shall not include family care homes.

N.Y. MENTAL HYGIENE LAW § 1.05(24) (McKinney Supp. 1975).

17. C. RAUSH & H. RAUSH, THE HALFWAY HOUSE MOVEMENT: A SEARCH FOR SANITY 3-4 (1968).

18. *Id.* at 3.

19. D. ROTHMAN, THE DISCOVERY OF THE ASYLUM 130-54 (1971).

20. N.Y. MENTAL HYGIENE LAW §§ 190-91 (McKinney 1971).

21. *Id.* § 190(2). *See also* Chambers, *Alternatives to Civil Commitment of the Mentally Ill: Practical Guides and Constitutional Imperatives*, 70 MICH. L. REV. 1107, 1114 (1972); Ewalt & Ewalt, *History of the Community Psychiatry Movement*, 126 AM. J. PSYCHIATRY 43 (1969).

22. 42 U.S.C. §§ 2681-87 (1970).

hospitals with an array of community facilities for both residential and outpatient care.[23] Although community residences were not mandatory components of the new mental health centers,[24] the Act did facilitate their growth. A study in 1963 reported 40 settings which could be described as halfway houses for the mentally ill;[25] within seven years, the figure had increased to 128.[26] Similarly, federal legislation concerning alcohol and drug abuse,[27] and juvenile runaways,[28] as well as reforms in adult corrections[29] have encouraged the creation of residential facilities as partial alternatives to institutional care.[30]

This legislative revolution in the area of institutional treatment was precipitated by a variety of factors. Widespread use of tranquilizing drugs to control behavior problems has significantly reduced the average length of hospital confinement, particularly for the mentally ill.[31] Research in the social sciences in general, and in the mental health area in particular, has exposed the destructive effects of institutionalization.[32] State agencies have perceived fiscal advantages in reducing institutional populations.[33] Finally, various federal courts have

23. The optimistic tone of the new community services movement was initiated in a presidential message to Congress. President John F. Kennedy declared: "[t]he time has come for a bold new approach. . . . When carried out, reliance on the cold mercy of custodial isolation will be supplanted by the open warmth of community concern and capability." H.R. Doc. No. 58, 88th Cong., 1st Sess. 2-3 (1963). At the local level, however, "open warmth" infrequently described the community response. *See, e.g.*, Stoner v. Miller, 377 F. Supp. 177 (E.D.N.Y. 1974).

24. Jansen, *The Role of the Halfway House in Community Mental Health Programs in the United Kingdom and America*, 126 AM. J. PSYCHIATRY 1498 (1970).

25. RAUSH & RAUSH, *supra* note 17, at 6.

26. R. GLASSCOTE, HALFWAY HOUSES FOR THE MENTALLY ILL: A STUDY OF PROGRAMS AND PROBLEMS 1 (1971). A recent survey of community residences in New York's Westchester County revealed that between 1970 and 1975, the number of residences (group homes, halfway houses, hostels and proprietary homes for adults) rose from 36 to 92. Forty-seven more residences were predicted for the area by mid-1976. Brown, *'Group Homes' Gain Amid Hostility*, N.Y. Times, Aug. 3, 1975, § 8, at 1, col. 3.

27. Alcoholic and Narcotic Addict Rehabilitation Amendments of 1968, 42 U.S.C. §§ 2688e-j (1970).

28. Runaway Youth Act, 42 U.S.C. §§ 5701 *et seq.* (Supp. IV, 1974).

29. *See, e.g.*, NATIONAL ADVISORY COMM. ON CRIMINAL JUSTICE STANDARDS & GOALS, CORRECTIONS 237-39 (1973).

30. This trend has been indicated by the reduction of inpatient populations in mental hospitals over the past twenty years. California reduced its inpatient population from 50,000 in 1955 to 7,000 in 1973. MED. WORLD NEWS, Apr. 12, 1974, at 57. Similarly, between 1967 and 1975 the state mental hospital population in New York was reduced from 80,000 to 33,000. Brown, *supra* note 26, at 1, col. 3.

National statistics from the National Institute of Mental Health show that inpatient populations of state and local government mental hospitals peaked at 558,900 in 1955. By 1973 the number had fallen to 248,600. Between 1955 and 1972, admissions rose from 178,000 to 390,000 per year, while annual discharges increased from 126,000 to 419,000. MED. WORLD NEWS, Apr. 12, 1974, at 48.

There are slight indications that a reverse trend is developing, with hospital populations stabilizing or increasing in some places. For example, the New York State Department of Mental Hygiene was recently directed to slow down mental patient releases, in response to widespread community resistance. N.Y. Times, Apr. 28, 1974, at 1, col. 4.

31. B. PASAMANICK, F. SCARPITTI & S. DINITZ, SCHIZOPHRENICS IN THE COMMUNITY 17 (1967); Chambers, *supra* note 21, at 1116-17.

32. *See* A. DEUTSCH, THE MENTALLY ILL IN AMERICA (1949); E. GOFFMAN, ASYLUMS (1961); J.K. WING & G.W. BROWN, INSTITUTIONALISM AND SCHIZOPHRENIA (1970). For a discussion of the damage caused by incarceration in large mental hospitals, see Note, *Developments in the Law—Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190, 1193-97 (1974).

33. Advocates of community treatment appeal to cost-conscious administrators when they argue that substantial savings can be realized by moving people out of institutional settings. For

handed down decisions certain to increase the pressure on communities to provide acceptable alternative living arrangements for persons previously confined in isolated institutions.[34] Because many of these decisions recognize a *constitutional* "right to treatment in the least restrictive setting," which may be a basis for future attacks on exclusionary zoning, they merit special attention.

The breakthrough in the right to treatment area came in an opinion written by Judge David Bazelon in *Rouse v. Cameron*.[35] Plaintiff Rouse had been involuntarily committed to St. Elizabeth's Hospital after being found not guilty of a misdemeanor by reason of insanity. Although his contention that confinement could only be sustained if accompanied by adequate treatment was upheld on

---

example, a work release program sponsored by the District of Columbia Department of Corrections in 1970 resulted in substantial savings to the Department in terms of housing costs—$90,342.16 in an eighteen month period. V. McARTHUR, COST ANALYSIS OF THE DISTRICT OF COLUMBIA WORK RELEASE PROGRAM 9 (D.C. Dep't of Corrections Research Rep. No. 24, June, 1970). Moreover, work release earnings were then available to pay the taxes and debts of participants, including obligations of family support previously provided by public assistance. *Id.* at 18-19. *See also* R. SWANSON, WORK RELEASE—TOWARD AN UNDERSTANDING OF THE LAW, POLICY AND OPERATION OF COMMUNITY-BASED STATE CORRECTIONS 19 (Center for the Study of Crime, Delinquency and Corrections. Southern Ill. Univ. at Carbondale, Carbondale, Ill., July, 1973).

In the mental health field, community care has also been attractive to state fiscal agents, who appreciate a chance to shift costs traditionally borne by the state to the local level. This has been a major issue in New York, where localities have complained bitterly over the "dumping" of costs, as well as mental patients. A recent exchange between a representative from the New York State Department of Mental Hygiene and a New York City councilman illustrates the buck-passing problem. In response to a contention that the state did not bear responsibility for housing released patients the city councilman queried:

> It is all well and good to say this is not the responsibility of the state or of the city. Whose responsibility is it?

Came the reply:

> I would say it is the responsibility of society.

N.Y. Times, Apr. 24, 1974, at 45, col. 1.

Not surprisingly, community care advocates in New York have thus repeatedly charged the state with failing to utilize existing statutory authority and financial resources to build local facilities for the mentally handicapped. N.Y. Times, Aug. 20, 1974, at 22, col. 3.

34. *See, e.g.*, cases cited in notes 5, 6, 9 *supra*. In Stoner v. Miller, 377 F. Supp. 177 (E.D.N.Y. 1974), the court struck down a municipal ordinance which barred persons "requiring continuous psychiatric, medical or nursing services" from registering at hotels in Long Beach, New York. Although it did not rely on a constitutional right to treatment theory, the court stated:

> It is apparent that this ordinance can effectively frustrate the movement towards deinstitutionalization in the treatment of the mentally ill, also, *the issues herein bear directly upon the rights of citizens who are mentally ill to be treated in the least restrictive setting appropriate to their needs, and upon the right of such persons to choose their own places of residence without unreasonable governmental interference.*

Id. at 180 (emphasis added).

The implications of a judicially imposed requirement to offer treatment in the least restrictive setting can be appreciated in light of a report by the National Institute of Mental Health that over 1,600,000 inpatients were "treated" in American psychiatric facilities in 1972. Of this figure 400,000 were admissions to state and county mental hospitals. At the same time, it is universally agreed that community-based facilities do not exist in adequate numbers and are inhibited by insufficient funds, as well as zoning and building code obstacles at the local level. For a discussion of one state's innovative approach to removing building code obstacles, see Budson, *Legal Dimensions of the Psychiatric Halfway House*, 11 COMMUNITY MENTAL HEALTH J. 316 (1975).

35. 373 F.2d 451 (D.C. Cir. 1966).

statutory grounds,[36] the court perceived constitutional issues as well.[37] In addressing the adequacy of treatment question, Judge Bazelon noted that "it may not be assumed that confinement in a hospital is beneficial 'environmental therapy' for all,"[38] thereby laying the foundation for subsequent decisions acknowledging a constitutional right to be treated in the least restrictive setting.[39]

Since *Rouse*, courts have attempted to protect the rights of those confined by setting minimum treatment standards and requiring the release of persons for whom no such treatment is provided.[40] These standards have included the development of environments which are less restrictive of personal liberty than those traditionally present in mental hospital wards, training schools, or other institutional settings. Moreover, the courts have stressed the need to pursue these alternatives both inside and outside the institutions.[41] For example, in *Morales v. Turman*,[42] a federal court ordered the state to abandon two Texas training schools for juveniles, and to develop community programs to foster rehabilitation at the community level.[43]

Although community residential alternatives have been widely advocated, objective research has not yet established their superiority to institutional treatment. As Judge Bazelon has noted with respect to juvenile facilities:

---

36. The case was controlled by the 1964 Hospitalization of the Mentally Ill Act, D.C. CODE §§ 21-501 *et seq.* (1973).

37. 373 F.2d 451, 455. The opinion was preceded by an influential law review article by Dr. Morton Birnbaum, a major figure in the right to treatment movement. Birnbaum, *The Right To Treatment*, 46 A.B.A.J. 499 (1960). Since then, there has been substantial commentary on the right to treatment. *See, e.g.*, Chambers, *supra* note 21; Note, *The Rights of the Mentally Ill During Incarceration*, 25 U. FLA. L. REV. 494 (1973); Note, *Developments in the Law—Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190 (1974); Note, *Civil Restraint, Mental Illness, and the Right to Treatment*, 77 YALE L.J. 87 (1967); Comment, *Wyatt v. Stickney and the Right of Civilly Committed Mental Patients to Adequate Treatment*, 86 HARV. L. REV. 1282 (1973).

38. 373 F.2d at 456 (footnotes omitted).

39. *See, e.g.*, Covington v. Harris, 419 F.2d 617, 623 (D.C. Cir. 1969) (burden on hospital authorities to make in-hospital placement in least restrictive setting); Lessard v. Schmidt, 349 F. Supp. 1078, 1096 (E.D. Wis. 1972); *In re* Jones, 338 F. Supp. 428, 430 (D.D.C. 1972) (hospital had obligation to seek alternative courses of treatment both within and without the institution, including nursing homes and foster care homes and the like).

40. Wyatt v. Stickney, 325 F. Supp. 781 (M.D. Ala. 1971), 334 F. Supp. 1341, *enforced*, 344 F. Supp. 373 (1972), *modified sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974).

41. *E.g., In re* Jones, 338 F. Supp. 428, 430 (D.D.C. 1972).

42. 364 F. Supp. 166 (E.D. Tex. 1973), *enforced*, 383 F. Supp. 53, 121-26 (E.D. Tex. 1974).

43. After describing a history of "brutality and repression" at the two Texas institutions, 383 F. Supp. at 72-77, the court concluded:

> In summary, Gatesville and Mountain View must be abandoned as quickly as possible. The court will consider the consensus of the parties as to how soon this may be accomplished. Within a reasonable period, making allowance for careful planning but not for foot-dragging, the defendants must cease to institutionalize any juveniles except those who are found by a responsible professional assessment to be unsuited for any less restrictive, alternative form of rehabilitative treatment. Additionally, the defendants must within the same period create or discover a system of community-based treatment alternatives adequate to serve the needs of those juveniles for whom the institution is not appropriate. Those juveniles for whom close institutional confinement is necessary must *actually* be treated. They may not be abandoned as hopeless and simply warehoused until they grow too old for juvenile facilities.

Id. at 125. For a discussion of *Morales*, see Shrag, *A Blow Against Sadism*, NEW YORK REVIEW OF BOOKS, Oct. 31, 1974, at 41-42.

> [E]ven when the resources are there, it's by no means clear that we know very much about what to do with them. Studies suggest that children who receive "treatment" after adjudication do not fare much better in the long run than those who receive none. Even more discouragingly, even those who go through halfway houses seem to do little better than those in conventional jails or training schools. . . . [I]n the 50 long years of juvenile court experience, we just have not learned how to "treat" delinquents . . . .[44]

Similar doubts have surfaced in the corrections field. A recent evaluation of a work release program sponsored by the District of Columbia Department of Corrections concluded that substantial savings had been realized by moving prisoners out of the institution.[45] However, the report conceded that it was unknown whether work release effectively reduced new correctional costs arising from recidivism. Indeed, the available data suggested that work release might be positively associated with higher rates of recidivism.[46] While these questions do not lessen the importance of developing alternatives to traditional institutional approaches, they emphasize the need for increased monitoring and evaluation of community based facilities and programs.

Unfortunately, states have not developed adequate procedures for monitoring their deinstitutionalization policies.[47] Too often, community treatment programs are evaluated only in the limited context of zoning litigation. In light of the increasing pressure for the development of alternatives to institutional care, it is important to examine the zoning obstacles which have been encountered by those attempting to establish various types of community residential facilities. To a great extent these obstacles have not been anticipated by deinstitutionalization proponents, yet they threaten to frustrate implementation of their goals.

---

44. Bazelon, *Beyond Control of the Juvenile Court*, 21 JUV. CT. JUDGES J. 42 (1970). This same issue has been raised in the mental health field. *See, e.g.*, 25 HOSP. & COMMUNITY PSYCHIATRY 395 (1974) which reports that follow-up studies over long periods show that social and psychological functioning of those treated in communities does not substantially differ from those who are treated in hospitals. *But see* Chambers, *supra* note 21, at 1113.

The issue has also been raised in England, with respect to its halfway house movement. R. APTE, HALFWAY HOUSES: A NEW DILEMMA IN INSTITUTIONAL CARE 9 (1968). *See also* N.Y. Times, Aug. 20, 1974, at 23, col. 1, which reports that inadequate community aftercare facilities in Britain and America have led to reevaluation of the dehospitalization concept, particularly with regard to severely disabled schizophrenics. With respect to reform in mental hospitals, *see generally*, J. CUMMINGS & E. CUMMINGS, EGO AND MILIEU (1966). *See also Hearings on Street Crime in America (Corrections Approaches) Before the House Select Comm. on Crime*, 93d Cong., 1st Sess. 821 (1973) (statement of Rosemary C. Sarri and Paul Isenstadt), in which they conclude that community treatment has become a euphemism to describe locally based residential programs, merely duplicating the traditional training school model.

45. MCARTHUR, *supra* note 33, at 9. *See also* G. GODBY, WORK RELEASE SIX YEAR REPORT 4-5, (Ore. Dep't of Human Services, Corrections Div., 1972).

46. MCARTHUR, *supra* note 33, at 20. GODBY, *supra* note 45, at 16 (after six years, Oregon corrections officials still unable "to state emphatically that it [work release program] is having a significant impact on the rate of return to institutions.").

47. *See, e.g.*, text accompanying note 11 *supra*.

III
ZONING CATEGORIES AND THE COMMUNITY RESIDENCE: THE SQUARE PEG PROBLEM

Zoning laws which bar effective deinstitutionalization are typically based on the assumption that a proposed or existing community facility, whether termed a halfway house, group care home, or residential treatment center is incompatible with an established residential pattern.[48] Unfortunately, residential zoning categories in most ordinances do not specifically provide for these facilities. They are neither single family residences as defined in traditional terms; nor are they boarding houses, rooming houses, educational institutions or nursing homes, as defined in other zoning categories. This uncertain status underlies numerous disputes between facility sponsors and community opponents.

In the absence of appropriate legislation, the judiciary has undertaken the task of reforming institutions both by forcing state mental hospitals to begin meeting treatment needs of patients and by requiring local zoning authorities to accommodate community treatment facilities. While the courts have effectively lowered some zoning barriers, community opposition to deinstitutionalization remains. Therefore state and local legislation designed to coordinate the release of institutionalized persons with their reentry into and acceptance by the community must be adopted. Moreover, such legislation must acknowledge and abate, if possible, community objections to these facilities.

A. Community Opposition

Prominent among neighborhood concerns regarding community residences are fears of crime and diminished property values. However, despite considerable litigation relating to residential care, there is almost no data substantiating these fears. Several limited studies suggest that there is no significant correlation between the presence of a halfway house for the mentally ill and either an increase in neighborhood crime or a reduction in property values.[49] The

---

48. Ironically, the problem of fitting a residential care facility into a land regulation scheme that does not provide for such a use mirrors the problem encountered by an individual seeking treatment inside a state mental hospital: the institutional system is not designed to accommodate individual needs. Judge Bazelon has commented:

> Many failures of institutional treatment and the general problem of a standardized institutional response are centrally linked to certain requirements of the closed institution—the need for order, for "administrative efficiency," for discipline, for bureaucratic routine. These needs are all too often counter-therapeutic. Trying to accommodate the needs of the individual to the needs of the institution is often like *trying to fit a square peg in a round hole.*

Bazelon, *Institutionalization, Deinstitutionalization and the Adversary Process*, 75 COLUM. L. REV. 897, 907 (1975) (emphasis added).

It should be noted that although the basic concept underlying community facilities is the same, they vary widely in size, program, sponsorship, and funding. Zoning treatment should correspond to the problems presented by the type of facility regardless of its name. One study suggests a breakdown into two broad categories for zoning purposes: family care facilities (six or fewer clients in a homelike setting) and group care facilities, accommodating seven or more residents. LAUBER & BANGS, *supra* note 12, at 20.

49. J. HECHT, EFFECTS OF HALFWAY HOUSES ON NEIGHBORHOOD PROPERTY VALUES: A PRELIMINARY STUDY (D.C. Dep't of Corrections Research Rep. No. 37, Nov. 1970). The study is

Green Bay, Wisconsin, Planning Commission studied the effect of the establishment of a group home on property values and found no increase in the rate at which neighboring residences were sold after a group home had been located in the area.[50] In fact, in a case involving a halfway house for juveniles, the evidence suggested that the young people, who would provide maintenance and repair services in their home, would *increase* the value of their dwelling and would not adversely affect surrounding property.[51] If reliable legislative studies were undertaken to determine more accurately the effect of such programs on neighborhood crime and property values, these fears might be better allayed.

A second, more generalized fear may also be anticipated: the fear of exposure to social deviancy. Some courts have been sensitive to the possibility that this social rejection mechanism, rather than specific complaints about a given facility, motivates community opposition.[52] To alleviate this problem, attention should be paid to informing the public and developing community support in advance of facility placement.[53] Community residence sponsors should be prepared to respond to legitimate community concerns by discussing the details of program operation, including client screening, method of treatment, security, and program evaluation.[54] These details should be dealt with in a programmatic review or licensing procedure, as some commentators have urged.[55] Moreover, the initial information-sharing should be considered only the begin-

---

of dubious validity since those responding were themselves halfway house personnel. The author also cites another study conducted by a single halfway house in 1966. That study found no correlation between location of the halfway house and nearby property values. *Id.* at 9. *See* Brown, *supra* note 26, at 12, col. 2 (sales prices for homes near residential facility for children had not decreased after one year according to realtor).

Research has established that only a small percentage of the mentally ill present danger to others. Chambers, *supra* note 21, at 1124.

50. E. KNOWLES & R. BABA, THE SOCIAL IMPACT OF GROUP HOMES: A STUDY OF RESIDENTIAL SERVICE PROGRAMS IN FIRST RESIDENTIAL AREAS (Green Bay, Wis. Planning Comm'n, 1973).

51. Shuman v. Board of Aldermen, 361 Mass. 758, 768, 282 N.E.2d 653, 660 (1972).

52. *See generally* State *ex rel.* Ellis v. Liddle, 520 S.W.2d 644, 649 (Mo. Ct. App. 1975); County of Lake v. Gateway Houses Foundation, 19 Ill. App. 3d 318, 321, 311 N.E.2d 371, 374 (1974).

A goal of the right to treatment movement has been to impress upon the judiciary its leadership role in overcoming the social rejection of the mentally ill. Birnbaum, *Some Remarks on "The Right to Treatment,"* 23 ALA. L. REV. 623, 626 (1971).

53. It has been suggested, for example, that the term "halfway house" should be avoided since communities tend to associate the word with negative images. The more positive label of "rehabilitation house" was thought to have more appeal. Coates & Miller, *Neutralization of Community Resistance to Group Homes,* in CLOSING CORRECTIONAL INSTITUTIONS: NEW STRATEGIES FOR YOUTH SERVICES 67 (Y. Bakal ed. 1973) (comparing successful and unsuccessful group homes for juveniles in Massachusetts in terms of strategies used in achieving community acceptance).

54. In 1975, the Oregon Legislature passed a bill requiring any agency planning a community residential facility for persons released from correctional institutions, but still in custody, to designate a citizens advisory committee and inform the committee of the following:

(a) The proposed location, estimated population size and use;
(b) The numbers and qualifications of resident professional staff;
(c) The proposed rules of conduct and discipline to be imposed on residents; and
(d) Such other relevant information as the agency responsible for establishing the house, center or facility considers appropriate or which the advisory committee requests.

ORE. REV. STAT. § 169.690 (1975).

55. LAUBER & BANGS, *supra* note 12, at 22; Ross & Chandler, *supra* note 14, at 63-65.

ning of a continuing process of communication between a facility and surrounding neighbors.[56]

B. Judicial Responses

The literature on halfway houses has emphasized the rehabilitative effect of creating a homelike, family atmosphere which fosters the feeling that one is a resident rather than a patient or prisoner.[57] Whatever the therapeutic validity of this approach, a facility that can qualify as a "single family" unit may locate in any residential area as a matter of right.[58] Such a categorization allows sponsors to avoid the delays and barriers which face facilities seeking placement under other zoning categories.

Zoning ordinances have defined "single family" with varying degrees of specificity. Some definitions have offered no guidelines, while others have required a blood or marriage relationship among co-occupants, as did the ordinance upheld in *Village of Belle Terre v. Boraas*.[59] That case involved six unrelated college students who leased a house in a Long Island village zoned exclusively for single family dwellings. The village ordinance defined "family" to include any number of related persons, but only two unrelated persons living and cooking together. In an opinion by Justice Douglas, the Supreme Court held that the ordinance was a rational means of achieving the legitimate objectives of preserving a "quiet place where yards are wide, people few, and motor vehicles restricted."[60] *Belle Terre* is typical of the difficulty that nontraditional family arrangements have faced in meeting the requirements of most zoning ordinances.[61] However, recent decisions concerning juvenile care suggest that *Belle Terre*'s imprimatur on restrictive single family zoning may not totally obstruct the community residential care movement, regardless of how "family" is defined.

1. The Broad Definition of Family

Under the zoning ordinances which broadly define family in terms of a single housekeeping unit, nontraditional families, including a few community residential facilities, have been judicially approved in single family zones.[62] For

---

56. *Compare* PORTLAND, ORE., CITY CODE § 8.80.070(e)(3) (1975) (requiring planned program of continuous communication with neighbors of a residential care facility as condition precedent to licensing) *with* ORE. REV. STAT. § 169.690 (1975), *quoted in* note 54 *supra* (requiring only that sponsoring corrections agency *consult* with a citizens advisory committee before placing a halfway house, work release center or other domiciliary facility in a community).

57. RAUSH & RAUSH, *supra* note 17, at 71.

58. A peculiar case is Oliver v. Zoning Comm'n, 31 Conn. Supp. 197, 326 A.2d 841 (C.P. 1974), where the residence sponsors went through a special permit review process, only to have the facility finally adjudged a family unit and, therefore, permissible as of right under the zoning ordinance.

59. 416 U.S. 1, 2 (1974).

60. *Id.* at 9.

61. *See, e.g.*, Palo Alto Tenants Union v. Morgan, 321 F. Supp. 908 (N.D. Cal. 1970).

62. City of Des Plaines v. Trottner, 34 Ill. 2d 432, 216 N.E.2d 116 (1966) (four single men); Robertson v. Western Baptist Hosp., 267 S.W.2d 395 (Ky. 1954) (twenty nurses); *In re* Laporte, 2 App. Div. 2d 710, 152 N.Y.S.2d 916 (2d Dep't 1956) (sixty student members of religious order); Missionaries of Our Lady of La Salette v. Village of Whitefish Bay, 267 Wis. 609, 66 N.W.2d 627 (1954) (three priests and two lay brothers). Cases in which community residential facilities received approval include those discussed in text accompanying notes 63-74 *infra*.

example, in *State ex rel. Ellis v. Liddle*,[63] a residence for ten juvenile boys under the direction of a married couple was recently held to be "single family" over objections that it was a detention or penal institution. The court relied in part on the broad definition of family in the zoning ordinance.[64] In a recent New Jersey case, *YWCA of Summit v. Board of Adjustment*,[65] a group home for adolescent girls was denied a certificate of occupancy after the local board of adjustment determined that the home did not qualify as a single family use. The zoning ordinance defined family as "a group of persons related by blood or marriage or otherwise lawfully living together in a dwelling unit."[66] Noting that the New Jersey Legislature had expressly established the status of group homes as single family units, the court found the board to be without authority to construe the ordinance so as to exclude the home and therefore held that the board's action was void.[67] Since *Belle Terre* was factually dissimilar, the court in *Summit* did not directly confront that case in holding that the group home could not be excluded. The opinion in *Summit*, however, can be read as a critique of *Belle Terre*'s implicit approval of zoning designed to fence out nontraditional lifestyles.[68] In a passage that parallels Justice Marshall's dissent in *Belle Terre*,[69] the New Jersey court stated:

> To suggest that "families" composed of residents of group homes are to be distinguished from natural families in determining which single-family districts will be considered open to them *is to confuse the power to control physical use of premises with the power to distinguish among occupants making the same physical use of them*.[70]

The court added:

> By its "interpretative decision," the board of adjustment denied these children the same benefits as those of natural families just as surely as if the ordinance had done so directly. Discrimination is the result, and will not be sanctioned.[71]

Two Connecticut community residence cases exemplify the potential for inconsistent constructions of broadly worded single family ordinance provisions and are worthy of comment. In *Oliver v. Zoning Commission*,[72] a Connecticut

---

63. 520 S.W.2d 644 (Mo. Ct. App. 1975).
64. *Id.* at 650.
65. 134 N.J. Super. 384, 341 A.2d 356 (L. Div. 1975).
66. *Id.* at 390, 341 A.2d at 359.
67. *Id.* at 391, 341 A.2d at 360.
68. Village of Belle Terre v. Boraas, 416 U.S. 1, 17 (1974) (Marshall, J., dissenting).
69. The instant ordinance . . . permits any number of persons related by blood or marriage, be it two or twenty, to live in a single household, but it limits to two the number of unrelated persons bound by profession, love, friendship, religious or political affiliation, or mere economics who can occupy a single home. Belle Terre imposes upon those who deviate from the community norm in their choice of living companions significantly greater restrictions than are applied to residential groups who are related by blood or marriage, and compose the established order within the community. The town has, in effect, acted to fence out those individuals whose choice of lifestyle differs from that of its current residents.

Id. at 16-17 (footnotes omitted).
70. 134 N.J. Super. 384, 391, 341 A.2d 356, 359 (emphasis added).
71. *Id.* at 391, 341 A.2d at 360.
72. 31 Conn. Supp. 197, 326 A.2d 841 (C.P. 1974).

court found that a state-sponsored group home for mentally retarded adults constituted a single family use under an ordinance defining family as "[o]ne or more persons occupying the premises as a single housekeeping unit, as distinguished from a group occupying a boarding house, lodging house, club, fraternity or hotel."[73] Apart from the flexible language of the ordinance, the *Oliver* court was obviously influenced by the social value of the group home. As in *Summit*, a restrictive construction was disfavored because the home implemented a state policy of deinstitutionalization and was "geared to the best interests and greatest welfare of [the state's] less fortunate citizens."[74] On the other hand, an earlier Connecticut decision had enjoined the occupancy of a halfway house for drug abusers in a single family residential zone. In *Planning & Zoning Commission v. Synanon Foundation*,[75] the Connecticut Supreme Court downplayed the social value of a drug treatment program and restrictively interpreted the word family, which was not defined by the local ordinance. The court concluded that the single family zone was intended to control population density,[76] an objective violated by the presence of a halfway house which housed from 11 to 34 persons at various times.[77]

The factual dissimilarities between the facilities involved in *Synanon* and *Oliver* explain the results in the two cases. While *Oliver* involved an estate-like facility to be occupied by ten mentally retarded persons characterized as "perpetual children,"[78] the *Synanon* house sheltered a transient population of drug abusers. Indeed, it is probably safe to assume that among the various types of community residential facilities, those serving drug related problems and ex-offenders face the stiffest local opposition and will receive the least sympathetic response from the courts.[79] Nonetheless, it appears that an open-ended family definition, broadly permitting occupancy by a "single housekeeping

---

73. *Id.* at 201, 326 A.2d at 845.
74. *Id.* at 199, 326 A.2d at 843.
75. 153 Conn. 305, 216 A.2d at 442 (1966).
76. *Id.* at 310, 216 A.2d at 444.
77. *Id.* at 308, 216 A.2d at 443.
78. 31 Conn. Supp. 197, 201, 326 A.2d 841, 844.
79. Arkansas Release Guidance Foundation v. Hummel, 245 Ark. 953, 435 S.W.2d 774 (1969) (halfway house for released convicts prohibited); Long Branch Div. of United Civic & Taxpayers Org. v. Cowan, 119 N.J. Super. 306, 291 A.2d 381 (App. Div. 1972) (state immunity from local zoning not grounds for ignoring opposition to drug treatment center); People v. Renaissance Project, Inc., 36 N.Y.2d 65, 324 N.E.2d 355, 364 N.Y.S.2d 885 (1975) (state law supporting halfway house for drug addicts could not alone authorize avoidance of local zoning); *accord*, Ibero-American Action League, Inc. v. Palma, 47 App. Div. 2d 998, 366 N.Y.S.2d 747 (4th Dep't 1975). *See also* Gaudenzia, Inc. v. Zoning Bd. of Adjustment, 4 Pa. Commw. 355, 287 A.2d 698 (1972) (processing center for drug addicts denied use certificate). *But see* Scerbo v. Board of Adjustment, 121 N.J. Super. 378, 297 A.2d 207 (L. Div. 1972) (residential narcotics addict rehabilitation center qualified as institutional use in business/high density residential zone); Margolies v. Encounter, Inc., 45 App. Div. 2d 833, 357 N.Y.S.2d 114 (1st Dep't 1974) (vacated temporary injunction against halfway house for youthful drug abusers); Hepper v. Town of Hillsdale, 63 Misc. 2d 447, 311 N.Y.S.2d 739 (Sup. Ct. 1970) (regulations excluding drug treatment center void in light of state policy). *Compare* West Shore School Dist. v. Commonwealth, 15 Pa. Commw. 243, 325 A.2d 669 (1974) (injunction against trailer camp for prerelease prisoners denied in absence of proof of unreasonable use) *with* Arkansas Release Guidance Foundation v. Needler, 252 Ark. 194, 477 S.W.2d 821 (1972) (injunction granted against halfway house for ex-convicts after proof of sex offense and alcohol abuse). For a discussion of the unsuccessful attempt to permit halfway house for ex-offenders in San Francisco's exclusive single family districts, see note 113 *infra*.

unit," does leave room for a group care facility, particularly where state policy encourages such a use.

However, *Belle Terre*, having given its blessing to restrictive single family zoning under the rationale of protecting "family values" and "youth values,"[80] may encourage narrow readings of liberally drafted definitions of family in communities facing incursion by various types of nontraditional living arrangements.[81] Since community residences often shelter fifteen to twenty unrelated persons, definitions imposing blood or marriage requirements and setting upper limits on membership at five or six may prevent many facilities from locating in otherwise desirable areas.[82]

2. The Narrow Definition of Family

Despite its restrictive implications, *Belle Terre* has not foreclosed all prospects for a small-group home's qualifying under an ordinance with a narrow family definition. In fact, New York courts have displayed a readiness to stretch the family definition to advance state social policy in cases involving state authorized group homes under nonprofit sponsorship.[83]

The leading post-*Belle Terre* case bringing a group facility within a family definition despite a narrowly drawn ordinance is *City of White Plains v. Ferraioli*.[84] In that case, a defendant had leased a building in a single family district to Abbott House, a nonprofit agency authorized to operate group homes under New York law.[85] The family consisted of a couple, their two children and ten foster children, seven of whom were siblings. In the White Plains Zoning Ordinance family was defined as

> [o]ne or more persons limited to the spouse, parents, grandparents, grandchildren, sons, daughters, brothers or sisters of the owner or the tenant or of the owner's spouse or the tenant's spouse living together as a single housekeeping unit with kitchen facilities.[86]

The trial court granted the city's motion for summary judgment and enjoined defendants from locating the home in the single family district without a special permit as a "philanthropic institution." This decision was affirmed by the Appellate Division.[87] The New York Court of Appeals, however, reversed the

---

80. 416 U.S. 1, 9 (1974).

81. Note, *Entrenchment of Traditional Family Structure*, 13 J. FAM. L. 901, 906 (1974). *But see The Supreme Court, 1973 Term*, 88 HARV. L. REV. 119, 129 (1974).

82. U.S. DEP'T OF JUSTICE, LAW ENFORCEMENT ASSISTANCE ADMINISTRATION, GUIDELINES AND STANDARDS FOR HALFWAY HOUSES AND COMMUNITY TREATMENT CENTERS 8 (1973).

83. In contrast, the family classification was denied in a Wisconsin case involving plans to create a colony of "therapeutic treatment centers," operated at a profit by a halfway house entrepreneur. Browndale Int'l Ltd. v. Board of Adjustment, 60 Wis. 2d 182, 208 N.W.2d 121 (1973), *cert. denied*, 416 U.S. 936 (1974).

84. 34 N.Y.2d 300, 313 N.E.2d 756, 357 N.Y.S.2d 449 (1974).

85. New York law defines "group home" as

> [a] facility for the care and maintenance of not less than seven, nor more than twelve children, who are at least five years of age, operated by an authorized agency except that such minimum age shall not be applicable to siblings placed in the same facility nor to children whose mother is placed in the same facility.

N.Y. SOC. SERVICES LAW § 371(17) (McKinney 1975).

86. City of White Plains v. Ferraioli, 34 N.Y.2d at 304, 313 N.E.2d at 758, 357 N.Y.S.2d at 451.

87. 40 App. Div. 2d 1001, 339 N.Y.S.2d 27 (2d Dep't 1972).

lower courts, holding that the group care home, "set up in theory, size, appearance and structure to resemble a family unit, fits within the definition of family, for purposes of a zoning ordinance."[88]

In its interpretation of the proper limits of a single family restriction, the court contrasted the stable, family-like atmosphere of the group home, with the off-campus student arrangement excluded under Belle Terre's ordinance. It was conceded that under *Belle Terre*, uses conflicting with a "stable, uncongested single family environment"[89] could be excluded. Such uses would include facilities which housed many people and those which were occupied by numbers of transients, as in the *Synanon* case discussed earlier.[90] However, according to the *White Plains* court, the municipality had exceeded permissible limits by defining family so narrowly as to exclude the stable group home occupied by persons unrelated in a biological sense:

> In short, an ordinance may restrict a residential zone to occupancy by stable families occupying single family homes, but neither by express provision nor construction may it limit the definition of family to exclude a household which in every but a biological sense is a single family.[91]

The *White Plains* opinion has been cited with approval in other New York cases involving group home care.[92] These cases should encourage advocates of normalization, at least in terms of possibilities for youth care. As the *White Plains* court stated: "[t]he minimal arrangement to meet the test of a zoning provision, as this one, is a group headed by a householder caring for a reasonable number of children as one would be likely to find in a biologically unitary family."[93]

However, while *White Plains* provides some encouragement to group care advocates, it does reaffirm the traditional concept of the family as a group including children. Therefore, the case would seem to be inapplicable to other family-style arrangements common in the community residence movement, such as an adult home for mentally ill persons, drug addicts or prisoners. Although there would be no problem if other zoning categories adequately provided for such uses in residential areas, that is not usually the case.[94]

In holding that the group care home constituted a family within the ordinance, the *White Plains* court stopped short of endorsing a broader principle

---

88. 34 N.Y.2d at 303, 313 N.E.2d at 757, 357 N.Y.S.2d at 450-51. The New Jersey legislature has protected group homes against restrictive single family zoning by statute. N.J. STAT. ANN. 40:55-33.2 (Supp. 1975).

89. 34 N.Y.2d at 305, 313 N.E.2d at 758, 357 N.Y.S.2d at 452.

90. *Id.* Planning & Zoning Comm'n v. Synanon Foundation, 153 Conn. 305, 216 A.2d 442 (1966), is discussed in text accompanying notes 75-79 *supra*.

91. 34 N.Y.2d at 306, 313 N.E.2d at 758-59, 357 N.Y.S.2d at 453.

92. McMahon v. Amityville Union Free School Dist., 48 App. Div. 2d 106, 368 N.Y.S.2d 534 (2d Dep't 1975); Moore v. Nowakowski, 46 App. Div. 2d 996, 361 N.Y.S.2d 795 (4th Dep't 1974); Group House of Port Washington, Inc. v. Board of Zoning & Appeals, 82 Misc. 2d 634, 370 N.Y.S.2d 433 (Sup. Ct. 1975). *McMahon* involved refusal by a Long Island school district to enroll residents of a state supported group home, on grounds, *inter alia*, that only residents of *family* homes were entitled to enrollment under New York's education law. Relying on *White Plains* the court stated that the "concept of 'family' is inherent in the concept of group homes," and rejected the district's position. 48 App. Div. 2d at 118, 368 N.Y.S.2d at 545.

93. 34 N.Y.2d at 306, 313 N.E.2d at 759, 357 N.Y.S.2d at 453.

94. Nonetheless, courts have provided relief by stretching other zoning categories. *See* notes 113-22 & accompanying text *infra*.

articulated by lower New York courts in analogous cases, a principle which would clearly extend to other community residence arrangements.[95] These cases held that local power to restrict the placement of certain residential facilities was impliedly preempted by state deinstitutionalization policy, as embodied in constitutional or statutory law.[96] This theory of implied preemption or overriding state policy has been best articulated in a strong dissent in the lower court in *White Plains*, which stated:

> To compel application for special permission—which may or may not be granted—by persons seeking to occupy premises in a one-family residential zone as a group home clearly "*hinders* an overriding State law and policy favoring the care of neglected and abandoned children" as that interest is set forth in the Social Services Law.[97]

Indeed, another New York group care case, *Abbott House v. Village of Tarrytown*,[98] was decided against a municipality on precisely these grounds. In *Abbott House*, the court ruled that since the definition of family in the zoning ordinance prohibited a proposed boarding home, it had the effect of thwarting a state policy of providing for neglected children and was therefore void.[99]

In the absence of legislation directly addressing land use problems generated by deinstitutionalization, preemption as applied by New York lower courts provides a viable basis for challenging zoning barriers to community care.[100] In addition, increased state action promoting community care can be expected in response to successful "right to treatment" litigation.[101] Likewise, federal law

95. Defendants contend, and the issue is not without trouble, that the zoning ordinance, if it prohibits a group home use in an R-2 district, absolutely or without a special permit, contravenes the State's Social Services Law. . . . In somewhat analogous circumstances, courts have held local zoning ordinances void as contrary to State policy when they restricted an "agency boarding home", a day care center, and a center for delinquent youths [citing cases]. . . . *Since it is concluded, however, that a group home is a family, this broader question need not now be resolved by this court.*

City of White Plains v. Ferraioli, 34 N.Y.2d at 306, 313 N.E.2d at 759, 357 N.Y.S.2d at 453 (1974) (emphasis added). *See* Anderson, *Land Use Controls*, 26 SYRACUSE L. REV. 449, 452 (1975).

96. The *White Plains* court cited three cases: Abbott House v. Village of Tarrytown, 34 App. Div. 2d 821, 312 N.Y.S.2d 941 (2d Dep't 1970) (group care home); Unitarian Universalist Church v. Shorten, 63 Misc. 2d 978, 314 N.Y.S.2d 66 (Sup. Ct. 1970) (day care center in church); Nowack v. Department of Audit & Control, 72 Misc. 2d 518, 338 N.Y.S.2d 52 (Sup. Ct. 1973) (youth residential and rehabilitation center). *See also* Hepper v. Town of Hillsdale, 63 Misc. 2d 447, 311 N.Y.S.2d 739 (Sup. Ct. 1970) (rehabilitation center for drug addicts). *But see* People v. Renaissance Project, Inc., 36 N.Y.2d 65, 324 N.E.2d 355, 364 N.Y.S.2d 885 (1975) (mental hygiene law provisions supporting halfway house for drug addicts could not alone authorize avoidance of local zoning). On implied preemption, see Allan & Sawyer, *The California City Versus Preemption by Implication*, 17 HASTINGS L.J. 603 (1966). The subject is discussed in the context of local zoning barriers to state normalization policy in Ross & Chandler, *supra* note 14, at 33-38.

97. 40 App. Div. 2d 1001, 1002, 339 N.Y.S.2d 27, 28-29, *quoting* Abbott House v. Village of Tarrytown, 34 App. Div. 2d 821, 822, 312 N.Y.S.2d 841, 843 (2d Dep't 1970) (emphasis added by court).

98. 34 App. Div. 2d 821, 312 N.Y.S.2d 841 (2d Dep't 1970).

99. *Id.* at 822, 312 N.Y.S.2d at 843. *See also* Hepper v. Town of Hillsdale, 63 Misc. 2d 482, 311 N.Y.S.2d 739 (Sup. Ct. 1970) (ordinance making it a misdemeanor to use any building for care of drug addicts was void as in conflict with state law pertaining to drug addiction).

100. State *ex rel.* Ellis v. Liddle, 520 S.W.2d 644, 652 (Mo. Ct. App. 1975). *See generally* Ross & Chandler, *supra* note 14, 24-38 (discussing the doctrines of express and implied preemption of local zoning by state normalization policy).

101. For a discussion of New York State Ass'n for Retarded Children v. Carey, 393 F. Supp.

in the areas of mental health and juvenile delinquency envisions the creation of new community alternatives to hospitalization or imprisonment.[102] If local, single family zoning regulations are inconsistent with these measures, they may well be rejected for impermissibly interfering with overriding federal or state policies.[103]

The decision in *White Plains* makes no reference to yet another doctrine which has been used to circumvent the application of exclusionary zoning to residential care facilities—the doctrine of the superior sovereign. Under this theory, units of local government may not regulate the local activities of state agencies absent a grant of constitutional or statutory authority.[104] When a state agency is immune from local zoning regulation, the immunity traditionally attaches to a party performing services on behalf of that agency, such as the sponsor of a state-supported halfway house.[105]

While this doctrine has been applied to protect both a halfway house[106] and a work release center[107] against exclusionary zoning, courts may be reluctant to uphold broad immunity of the superior sovereign. In *City of Temple Terrace v. Hillsborough Association for Retarded Citizens*,[108] for instance, a Florida intermediate court recently held that a privately owned house for mentally retarded persons may be subject to local zoning. Although the court acknowledged that a residence of this type performs a state function and would traditionally be entitled to whatever zoning immunity the state may have, the court held that the legislature must expressly provide for such immunity.[109] In the absence of such a provision, a balancing test will be applied, with the agency seeking to override local zoning bearing the burden of proving that the weightier public interests favor the proposed use.[110] Thus, except in unusual cases where an overriding public need for a particular use might justify exemption from local zoning,[111] a state agency would be expected to apply for the appropriate zoning changes or approvals.

---

715 (E.D.N.Y. 1975), see text accompanying notes 9-10 *supra*. In New York State, where deinstitutionalization policy has been actively pursued, the number of community residences has climbed steadily. The results of a 1970-75 survey on residences in Westchester County are summarized at note 26 *supra*.

102. *See* 18 U.S.C. §§ 4082(b), (f) (1970); 42 U.S.C. §§ 1397(4), 2681-87, 2688e-j, 5701 *et seq.* (1970 & Supp. IV, 1974).

103. Ross & Chandler, *supra* note 14, at 37.

104. 2 R. ANDERSON, AMERICAN LAW OF ZONING § 9.06 at 115 (1968) [hereinafter ANDERSON], *cf.* ORE. REV. STAT. § 215.130(3) (1973) (subjecting nonfederally owned public property to the land regulations of Oregon counties).

105. City of Temple Terrace v. Hillsborough Ass'n for Retarded Citizens, 322 So. 2d 571, 573 (Fla. Ct. App. 1975), *citing* Abbott House v. Village of Tarrytown, 34 App. Div. 2d, 312 N.Y.S.2d 941 (2d Dep't 1970) *and* Unitarian Universalist Church v. Shorten, 63 Misc. 2d 978, 314 N.Y.S.2d 66 (Sup. Ct. 1970).

106. Nowack v. Department of Audit & Control, 72 Misc. 2d 518, 520, 338 N.Y.S.2d 52, 54 (Sup. Ct. 1973).

107. City of Pittsburgh v. Commonwealth, 20 Pa. Commw. 226, ___ 341 A.2d 228, 229 (1975).

108. 322 So. 2d 571 (Fla. Ct. App. 1975).

109. *Id.* at 573, 579. *See also* Long Branch Div. of United Civic & Taxpayers Org. v. Cowan, 119 N.J. Super. 306, 291 A.2d 381 (App. Div. 1972) (immunity doctrine could not be used in disregard of local sentiment towards halfway house).

110. City of Temple Terrace v. Hillsborough Ass'n for Retarded Citizens, 322 So. 2d 571, 574, 579.

111. *Id.* at 579.

Nonetheless, the decision in *Temple Terrace* should not be viewed as a complete setback by those who advocate normalization policies. Certain normalization objectives, such as honest community acceptance of the mentally handicapped, would be thwarted, not advanced, by widespread application of zoning immunity to impose residential facilities on local communities.[112]

3. The Non-Family Zoning Categories: Stretching the Legal Labels

While attempts to qualify community residential facilities as family uses are likely to encounter serious difficulties, other zoning categories may provide options for accommodating these facilities. However, the sponsor of a community residence should be prepared to encounter a confusing array of such zoning categories, including rooming house, boarding house, nursing home, and welfare institution. Uses which qualify under these categories may be permitted to locate as of right in certain zoning districts; often they require approval of a planning commission or governing body prior to occupying a given site. However, in most zoning ordinances, no category specifically permits the housing of deinstitutionalized groups.[113] Fortunately, this vacuum in present zoning laws has been partially filled by the courts, which have generally favored a liberal interpretation of the existing categories so as to allow various forms of community residential care.[114] At least three factors influence such interpreta-

112. Such an approach could meet the same fate as New York's controversial Urban Development Corporation, which lost part of its power to override local zoning early in its career of low cost housing construction. N.Y. PRIVATE HOUSING FINANCE LAW §26.1(a) (McKinney 1975). Nonetheless, a bill was recently passed by the New York legislature which, impliedly at least, exempts licensed, certified or state approved community facilities for the mentally ill from local zoning ordinances. N.Y. MENTAL HYGIENE LAW § 29.15(i) (McKinney 1975).

113. A recent survey of 400 municipal planning departments in the United States revealed that over half the cities failed to provide specifically for family and group care facilities in their zoning ordinances. LAUBER & BANGS, *supra* note 12, at 12. Yet attempts to improve the zoning situation have not always met with success. For example, in 1973, a proposed amendment to San Francisco's municipal code creating a new conditional use category called "place of aid" was rejected. SAN FRANCISCO, CAL., MUNICIPAL ORDINANCE NO. 271-73, *amending* Part II, Ch. II, SAN FRANCISCO, CAL., MUNICIPAL CODE § 201.2 to include "Places of Aid" for the rehabilitation of adult persons in the conditional uses permitted in single family districts (disapproved by City Planning Comm'n Res. 7084, Oct. 4, 1973).

The amendment was proposed largely with a view towards facilitating halfway houses sponsored by the Delancey Street Foundation, whose goal is to help ex-convicts reenter society. It was rejected as "inappropriate in single-family residential districts" and in "conflict with the overall concepts and practice of zoning." Letter to Robert J. Dolan, Clerk of the Board of Supervisors of San Francisco, from Walter S. Newman, President, San Francisco City Planning Commission, Dec. 14, 1973 (on file with author).

A few courts have noted that zoning ordinances which absolutely fail to provide for a particular use are void. *See, e.g.*, Ganim v. Village of New York Mills, 75 Misc. 2d 653, 657, 347 N.Y.S.2d 372, 377 (Sup. Ct. 1973) (family care homes for mentally ill). *See generally* East Pikeland Township v. Bush Bros., 13 Pa. Commw. 578, 319 A.2d 701 (1974) (zoning amendment prohibiting mobile home parks anywhere in township was invalid); Camp Hill Dev. Co. v. Zoning Bd. of Adjustment, 13 Pa. Commw. 519, 319 A.2d 197 (1974) (ordinance prohibiting townhouse construction anywhere in borough is void).

114. Kastendike v. Baltimore Ass'n for Retarded Children, 267 Md. 389, 297 A.2d 745 (1972) (no assent needed for home for retarded adults in residential district); Beckman v. City of Grand Island, 182 Neb. 840, 157 N.W.2d 769 (1968) (rehabilitation center for alcoholics met requirements of "boarding house" in business residential district); Scerbo v. Board of Adjustment, 121 N.J. Super. 378, 297 A.2d 207 (L. Div. 1972) (residential narcotics treatment center was "institutional

tions. First, the courts have traditionally protected the rights of property owners against limitations on land use imposed by government. Terms used in zoning ordinances to describe permitted uses are therefore liberally construed.[115] Second, the courts have stretched zoning categories where, as in the family definition cases, they perceive substantial social benefits to the community at large.[116] Facilities which implement public policy are likely to receive sympathetic judicial treatment.[117] Third, the courts have employed the nuisance law requirement that there be *substantial* infringement of the use of another's land, or unreasonable use of one's own land, in protecting residential facilities against restrictions based on hypothetical claims of damage or speculative fears.[118]

In *East House Corp. v. Riker*,[119] for instance, a zoning board of appeals' decision refusing to permit a halfway house for mentally retarded persons under the category of "convalescent home"[120] was reversed. The court found

---

use" in business/high density residential district); Ganim v. Village of New York Mills, 75 Misc. 2d 653, 347 N.Y.S.2d 372 (Sup. Ct. 1973) (family care home for mentally ill was considered "rooming house" in residential zone); Crist v. Bishop, 520 P.2d 196 (Utah 1974) (institution for maladjusted boys was treated as a "school" in unidentified zone though Justice Henriod, in a strong dissent, observed that the "education" program at the alleged school included the use of chains and locked rooms, and stated, "only the wildest of social softies would dub this institution a 'school.' " *Id.* at 200); State *ex rel.* Lyon v. Snohomish County Bd. of Adjustment, 9 Wash. App. 446, 512 P.2d 1114 (1973) (alcohol recovery center was considered a "hospital" in rural use zone). *But see* Arkansas Release Guidance Foundation v. Hummel, 245 Ark. 950, 435 S.W.2d 774 (1969) (resident facility for probationers and parolees was not considered an "educational, religious, or philanthropic" use in multi-family zone); Inn, Home for Boys v. City Council, 16 Ore. App. 497, 519 P.2d 390 (1974) (home for juveniles was a "welfare institution" but failed to meet minimum yard requirements).

115. 2 ANDERSON, *supra* note 104, § 12.02 at 475.

116. However, residential facilities are excluded from single family districts in most localities. A recent study of 400 municipalities revealed that two-thirds of the zoning ordinances excluded group care facilities (five or more residents) from these districts. On the other hand, more than forty percent of the cities allowed the houses in commercial districts. LAUBER & BANGS, *supra* note 12, at 13.

117. *See* County of Lake v. Gateway Houses Foundation, 19 Ill. App. 3d 318, 311 N.E.2d 371 (1974); Shuman v. Board of Aldermen, 361 Mass. 758, 282 N.E.2d 653 (1972) (assisting alienated youth); Scerbo v. Board of Adjustment, 121 N.J. Super. 378, 297 A.2d 207 (L. Div. 1972) (drug addict rehabilitation); Ganim v. Village of New York Mills, 75 Misc. 2d 653, 347 N.Y.S.2d 372 (Sup. Ct. 1973) (care of mentally ill); East House Corp. v. Riker, 72 Misc. 2d 823, 339 N.Y.S.2d 511 (Sup. Ct. 1973) (care of mentally ill); City Planning Comm'n v. Threshold, Inc., 12 Pa. Commw. 104, 315 A.2d 311 (1974) (care of mentally ill). *But see* Kanasy v. Nugent, 206 Misc. 826, 135 N.Y.S.2d 128 (Sup. Ct. 1954), *aff'd*, 286 App. Div. 1038, 145 N.Y.S.2d 638 (2d Dep't. 1955) (upholding ordinance providing that no premises could be used as boarding house for mentally ill without special permit, despite state mental health law).

118. *See, e.g.*, Nicholson v. Connecticut Half-Way House, Inc., 153 Conn. 507, 510-11, 218 A.2d 383, 385-86 (1966); Nowack v. Department of Audit & Control, 72 Misc. 2d 518, 520, 338 N.Y.S.2d 52, 54 (Sup. Ct. 1973); West Shore School Dist. v. Commonwealth, 15 Pa. Commw. 243, ___ n.1, 325 A.2d 669, 670 n.1 (1974) (denying injunction against prerelease convict program in absence of proof of unreasonable use, but adding "the writer of this opinion would be remiss if he did not note for the satisfaction of plaintiffs [objecting homeowners] *that within 24 hours after the argument and assignment of opinion writing responsibility in this case, his home was burglarized by an escaped resident of a forestry camp of the State Correctional Institution at Rockview.*" *Id.* (emphasis added)); Schuback v. Silver, 9 Pa. Commw. 152, ___, 305 A.2d 896, 905 (1973).

119. 72 Misc. 2d 823, 339 N.Y.S.2d 511 (Sup. Ct. 1973).

120. *Id.* at 825, 339 N.Y.S.2d at 514.

that the use was "within the spirit of the ordinance" and reminded the board that:

> The standard here is the injury to the contiguous and surrounding property and the observance of the spirit of the ordinance. The gist of the findings, which resulted in the denial of the application, relate to increased occupancy, the number of such institutions in the area and the affect [*sic*] such institutions have on what is termed ". . . permitted uses . . .". These conclusory statements find no substantiation in the record. There is no finding whatever as to the injurious affect [*sic*] of the use on the surrounding property.[121]

Other courts have similarly insisted that the actual use of the facility, not merely the name used to describe it, will determine whether a facility complies with local zoning categories.[122]

C. *Emerging Legislation*

The cases discussing the doctrines of implied preemption and the superior sovereign underscore the need for new legislation addressing the land use planning issues raised by deinstitutionalization.[123] Although legislation aimed primarily at overcoming exclusionary zoning has emerged in a few states, the broader task of developing local policies which provide for the planning, siting and monitoring of a range of facilities in various community settings remains to be addressed throughout the nation.

California is one of at least three states which have taken legislative action to correct conflicts between local restrictive zoning practices and state normalization policies.[124] In 1970, California's Lanterman-Petris Short Act, providing for community care of the mentally and physically handicapped,[125] was amended to address the exclusionary zoning issue:

> Pursuant to the policy stated in section 5115, a state-authorized, certified, or licensed family care home, foster home or group home serving six or fewer mentally disordered or otherwise handicapped persons or dependent

---

121. *Id.*, 339 N.Y.S.2d at 513 (ellipsis by the court).

122. County of Lake v. Gateway Houses Foundation, 19 Ill. App. 2d 318, 325-26, 311 N.E.2d 371, 377-78 (1974). *See* Beckman v. City of Grand Island, 182 Neb. 840, 843-47, 157 N.W.2d 769, 772-73 (1968). *But see* Slevin v. Long Island Jewish Medical Center, 66 Misc. 2d 312, 315-19, 319 N.Y.S.2d 937, 943-46 (Sup. Ct. 1971) (nonresidential drug treatment program housed in church was a "religious use"). *Slevin* presents a prime example of "label stretching" by a court sympathetic to a social program, in addition to illustrating the "actual use" doctrine.

123. *See* text accompanying notes 96-112 *supra*.

124. *See* CAL. WELF. & INST'NS CODE §§ 5115–16 (West 1972 & West Supp. 1974); MINN. STAT. ANN. §§ 252.28, 462.357 (Supp. 1976), MONT. REV. CODES ANN. §§ 11.2702.1–.2 (1973).

125. CAL. WELF. & INST'NS CODE §§ 5000 *et seq.* (West 1972 & West Supp. 1974). The community care approach is discussed in Urmer, *Implications of California's New Mental Health Law*, 132 AM. J. PSYCHIATRY 251 (1975). The author points out an unexpected irony in the chaotic "deinstitutionalization" scheme: persons who had been hospitalized because they were "social nuisances" (due to bizarre behavior) now walked the streets, eventually coming to the attention of the police, who placed them in local jails in absence of more appropriate community accommodations. *Id.* at 253. *See also* The Oregonian (Portland), Feb. 7, 1975, at 24, col. 5 (Eugene, Oregon, police charged mentally ill persons with minor offenses so that they could be lodged in jail).

or neglected children, shall be considered a residential use of property for the purposes of zoning, if such homes provide care on a 24 hour basis.[126]

The amendment was narrow in scope and disappointed those who felt it should expressly apply in exclusive single family districts as well as in other residential areas.[127] Shortly after the amendment's passage, there was evidence that single family zones were still being considered exempt from the Act by some localities.[128] The issue was resolved by a further amendment in 1972, which provided in part: "Such homes shall be a permitted use in all residential zones, including but not limited to, residential zones for single family dwellings."[129]

This measure, like that in the *White Plains* decision,[130] is limited to small group homes and does not provide for other types of residential facilities equally valuable in the community care scheme.[131] The California statute may be contrasted with model state legislation being prepared by the Mental Health Law Project, Washington, D.C., which would require local accommodation of a variety of community residential facilities for the mentally handicapped in residential zones.[132] The Model Act, now in draft form, provides that state licensed or state operated community residences serving eighteen or fewer mentally handicapped persons are to be considered residential uses of property for zoning purposes.[133] Such facilities would be permitted in districts zoned exclusively for single family use as well as in all other residential districts. Unlike the California legislation, the Model Act exempts residences from local conditional or special use permit requirements, placing the regulatory power at

126. CAL. WELF. & INST'NS CODE § 5116 (West Supp. 1974). *See* CALIFORNIA STATE DEP'T OF HEALTH, REPORT AND RECOMMENDATIONS TO THE LEGISLATURE ON THE IMPACT OF LOCAL ZONING ORDINANCES ON COMMUNITY CARE FACILITIES (1974). Only one case directly construing the statute has reached the appellate level. Defoe v. San Francisco City Planning Comm'n, Civil No. 30789 (Cal. Ct. App., filed May 30, 1973). In that case, the city argued that the state law could not control in a chartered locality. The court held that local zoning in conflict with the statute was unenforceable. Since the local ordinance was not being enforced by the city, however, the court declined to declare it void. A brief discussion of *Defoe* appears in Note, *Exclusion of the Mentally Handicapped: Housing the Non-Traditional Family*, 7 U.C.D.L. REV. 150, 159 (1974). The home-rule challenge to California's anti-exclusionary zoning legislation is discussed in Ross & Chandler, *supra* note 14, at 23-33.

127. One version of the amendment declared that a designated state facility was a "family" for zoning purposes. The legislative history is discussed in Ross & Chandler, *supra* note 14, at 29-33; Note, *Exclusion of the Mentally Handicapped: Housing the Non-Traditional Family*, *supra* note 126, at 151-55.

128. The communities contended that the statutory requirement was satisfied if the homes were permitted in at least one *multiple dwelling* zone in a locality. Ross & Chandler, *supra* note 14, at 31.

129. CAL. WELF. & INST'NS CODE § 5116 (West Supp. 1974). *See* MONT. REV. CODES ANN. §§ 11.2702.1–.2 (1973).

130. City of White Plains v. Ferraioli, 34 N.Y.2d 300, 313 N.E.2d 756, 357 N.Y.S.2d 449 (1974). *See* text accompanying notes 93-96 *supra*.

131. New Jersey has passed legislation prohibiting localities from enacting single-family zoning provisions which discriminate against state sponsored group homes. N.J. STAT. ANN. § 40:55-33.2 (Supp. 1975). The statute has been applied in a recent case. YWCA of Summit v. Board of Adjustment, 134 N.J. Super. 384, 341 A.2d 356 (L. Div. 1975).

132. The work is being done under a grant from the National Institute of Mental Health. The present draft is entitled PROPOSED STATUTE REGARDING ZONING FOR COMMUNITY RESIDENCES FOR MENTALLY HANDICAPPED, THE MENTAL HEALTH LAW PROJECT, WASHINGTON, D.C.

133. *Id.* § 4(a).

the state level.[134]

Legislation modestly resembling the Model Act has been adopted in Minnesota[135] and rejected in Wisconsin.[136] The Minnesota law designates state licensed group or foster homes serving six or fewer mentally retarded persons as permitted single family residential uses of property, and state licensed facilities serving seven through sixteen mentally retarded persons as permitted multi-family uses in residential zones.[137] Importantly, however, licensure of new facilities is to be denied where issuance "would substantially contribute to an excessive concentration of community residential facilities within any town, municipality or county of the state."[138] In achieving this dispersal objective, the state licensing agency is directed to consider the following factors: population, land use plan, availability of community services and number and size of existing facilities.[139]

The foregoing legislation and the measures which may follow are important for recognizing that local zoning barriers must be overcome if deinstitutionalization policy is to be implemented. Minnesota's approach wisely acknowledges that community residential facilities present special land use problems and that relaxation of all regulatory controls would subvert, rather than facilitate normalization goals for the mentally retarded. The legislation should be extended to other groups seeking to establish community residences. On the other hand, a major question facing the Minnesota law is the degree to which localities will support the licensure decisions made at the state level.

IV
DIRECTIONS FOR CHANGE

The favorable judicial posture in the community residence cases[140] should not obscure the many deficiencies in systems currently used to channel the residences into or out of the local land use scheme. The guessing game of zoning categorization fosters uncertainty and breeds costly litigation.[141] Further, planning the balanced dispersal of facilities throughout a locality is impossible in the absence of uniform regulation. In addition, the failure to provide a specific mechanism for accommodating these facilities probably reinforces community skepticism about their value and legitimacy. Finally, as courts have indicated and planners have recognized, there is a need to monitor the quality of programs offered, for the protection of both neighborhood interests and the occupants of the facilities themselves.[142]

---

134. *Id.* §§ 4(a), (b). Individuals and local governments would be permitted to participate in the state licensing procedure on a case by case basis. *Id.* § 4(b)(iv). This severe limitation on local participation in the siting of residential facilities would work against the goal of local acceptance underlying normalization policy.

135. MINN. STAT. ANN. §§ 252.28, 462.357 (Supp. 1976).

136. *See* Wis. Assembly Bill 1052 (1975).

137. MINN. STAT. ANN. §§ 462.357 subd. 7-8 (Supp. 1976).

138. *Id.* § 252.28 subd. 3(1).

139. *Id.* § 252.28 subd. 3(2).

140. *See* text accompanying notes 113-22 *supra*.

141. *See, e.g.*, City Planning Comm'n v. Threshold, Inc., 12 Pa. Commw. 104, 315 A.2d 311 (1974) (conditional use permit approved by planning commission, overruled by city council, reinstated by lower court and affirmed on appeal).

142. *See* cases cited in notes 48-52 *supra*; LAUBER & BANGS, *supra* note 12, at 22. For a

The costs, confusion and distrust resulting from an absence of uniform zoning regulations manifest the need for a coordinated scheme in which state deinstitutionalization policy is complemented by local procedures for accommodating community care facilities. Statutory zoning reform in California and elsewhere may override local opposition, but has not yet resolved the difficult problems faced by local communities.[143] While a recent survey of local zoning treatment of group care facilities indicates that few municipalities have responded to these issues,[144] one city, Portland, Oregon, has developed an approach which could serve as a useful guide to planning elsewhere.

Until 1974, Portland, like most American municipalities, had no specific zoning or licensing controls over community residential facilities. Under the municipal zoning ordinance, the facilities were variously permitted as single family dwellings, rooming houses and boarding houses. As in other cities, they were concentrated in a few low income neighborhoods and occupied large, older structures. However, in 1973, a dispute over whether foster care was consonant with the definition of family triggered an extensive reassessment of the land use regulation of residential facilities. As a first step, the city redefined family to include adult and child foster care arrangements.[145] Since these small units were thought to present no land use problems in residential areas, they were considered families for zoning purposes under the new approach.[146] However, the new family definition excluded "facilities or institutions that are operated for the purpose of providing care that includes the provision of a

---

discussion of Portland, Oregon's recently adopted licensing procedure, see text accompanying notes 145-68 *infra*.

143. The objectives of the California statutes have been thwarted in one of the few cases decided since passage of the law. In Seaton v. Clifford, 24 Cal. App. 3d 46, 100 Cal. Rptr. 779 (1972), a recorded subdivision deed restriction limited tracts to single family dwellings. The operation of a facility for six mentally retarded persons was attacked by subdivision neighbors for violating the restrictive covenant. In an ill-considered opinion, the court permanently enjoined operation of the facility, finding it to be a business enterprise rather than a residence. California's anti-exclusionary zoning statute was deemed ineffective against the private restriction:

> While Welfare and Institutions Code sections 5115 and 5116 may operate as a shield to the operator of such a facility as against the attempted enforcement of its zoning regulations by a municipality, such an artificial and arbitrary attempt by the state at redefinition of terms cannot impair private contractual and property rights.

Id. at 52, 100 Cal. Rptr. at 782, *citing* U.S CONST., art. I, § 10; CAL. CONST., art. I, § 16.

144. LAUBER & BANGS, *supra* note 12, at 12. Municipalities in New York State are beginning to adopt measures incorporating community facilities into the land regulation system. *See, e.g.*, Town of Orangetown, N.Y., Local Law No. 6, June 23, 1975 (amending zoning ordinance to provide for agency boarding homes, agency group homes, agency community residences and family day care homes as conditional uses). *See also* N.Y. Times, Aug. 3, 1975, § 8, at 1, col. 1 (Westchester Community Services Council to draft model municipal ordinance regulating community residences).

145. The history of the word family in Portland's Planning and Zoning Code is confused at best and is a tribute to the obfuscatory skills of lawyers and planners alike. The central dispute has been whether the ordinance permitted either (1) a traditional family of any size *or* five unrelated persons, or (2) a traditional family *plus* five unrelated persons. The present state of affairs appears to be that family in Portland means (1) a traditional family (blood, marriage, adoption or guardianship) of any size, or (2) a traditional family of any size plus four unrelated persons, or (3) five unrelated individuals provided that in no case a planned treatment or training program is offered. PORTLAND, ORE., CITY CODE § 33.12.310 (1974).

146. *See* Memo to Members of the City Council of Portland, Oregon, from Dale D. Cannady, Acting Planning Director, Oct. 4, 1973, at 3 (on file with author).

planned treatment or training program."[147] Because such "residential care facilities" raised significant land use issues, they were treated separately under a regulatory scheme which was adopted, after much debate, in October, 1974.[148]

The Portland approach integrates two key functions in the siting of residential care facilities: programmatic licensure and land use regulation. Under an amendment to the Health and Sanitation Code, a licensing review board, appointed by the mayor, was created.[149] The nine member board is composed of a majority of representatives from the community at large and a minority of social service agency personnel.[150] The amendment proscribes operation of a residential care facility unless a valid certificate of review (license to operate) has been issued by the board.[151] The granting of a license depends on a series of findings, including findings that a "planned treatment program" is to be offered to persons who can benefit from such a program[152] and that "[t]he operation of the program will include provision for adequate supervision and management considering the needs and circumstances of the persons to be served."[153] Significantly, a finding must also be made that a "planned program in connection with the neighborhood" will be pursued "to encourage an attitude of community acceptance."[154] Negative decisions by the board can be appealed to the city council.[155] The power to revoke a license or to impose conditions for continued program operation is also conferred on the board.[156]

After a facility receives a certificate of review it must then obtain a conditional use permit from the Portland City Planning Commission under the category "residential care facility."[157] Such a facility is defined as "an establishment operated with 24 hour supervision for the purpose of serving not more than 15 persons who by reason of their circumstances or condition require care while living as a single housekeeping unit in a dwelling unit."[158] Care is defined as "room and board and the provision of a planned treatment program."[159] Program is described as "a previously determined program of counseling therapy, or other rehabilitative social service provided for a group of persons of similar or compatible circumstances or conditions."[160] However, the program cannot require "regular on-premise physician's or nurse's care" as a component of treatment.[161]

147. PORTLAND, ORE., CITY CODE § 33.12.310 (1974).
148. *Id.* §§ 33.12.615 *et seq.*, 8.80.010 *et seq.* (1975).
149. *Id.* § 8.80.050.
150. *Id.*
151. *Id.* § 8.80.070. Under regulations adopted in November, 1975, Portland's licensing requirement may be satisfied by proof of compliance with the rules for program administration imposed by a governmental agency which licenses, certifies, makes payment to or assigns residents to a residential care facility. Portland, Ore., Licensing Requirements for Residential Care Facilities § VI(D)(1)(c)(ii), Nov. 4, 1975, (adopted by the Residential Care Facilities Licensing Board).
152. PORTLAND, ORE., CITY CODE § 8.80.070e(1) (1975).
153. *Id.* § 8.80.070e(3).
154. *Id.* § 8.80.070e(4).
155. *Id.* § 8.80.100.
156. *Id.* § 8.80.090.
157. *Id.* § 33.106.010(a).
158. *Id.* § 33.12.615.
159. *Id.*
160. *Id.*
161. *Id.*

The conditional use approach to classifying residential care facilities in Portland's residential districts is significant. This procedure enables the Planning Commission to address traditional land use considerations, such as lot size, on-site open space per resident, impact on neighboring property values and dispersal of facilities.[162] Overconcentration of facilities is to be avoided by the publication[163] of "guidelines to insure that the use of the subject property will not result in the concentration of social service facilities."[164]

Although it is premature to evaluate the practical effects of the Portland model,[165] a few general points should be made. First, the creation of a specific category for residential care facilities eliminates the frustrating search for accommodation in conventional zoning ordinance classifications. Sponsors of residential care facilities now have a coherent, uniform, and seemingly flexible siting procedure. Furthermore, the new classification officially recognizes residential care facilities as valid elements in the residential land use design. The city's acknowledgment of its responsibility to integrate these facilities may foster greater acceptance in neighborhoods where the ultimate success of normalization policy will be determined.

Second, the Portland scheme properly recognizes the need to review community facilities from a programmatic as well as a traditional land use standpoint. There should be no question that the police power confers upon the municipality an interest in monitoring the services inside these facilities. Yet there is real danger that pressures to deinstitutionalize, combined with the present shortage of local facilities, will encourage the formation of what amount to community-based "back wards,"[166] and de facto social service districts.[167] In addition, as the courts have noted in a few cases, it is important that programmatic review address legitimate concerns such as neighborhood security, particularly with reference to ex-offender and drug treatment programs.[168] Finally, the Portland requirement that facility sponsors engage in sustained community relations acknowledges that physical presence in the community is not synonymous with the long-term goal of social acceptance.

V
CONCLUSION

Among the far reaching social changes of the past two decades has been the reassessment of society's treatment of a large, yet barely visible minority. These are the inhabitants of state mental hospitals, training and reform schools, prisons and other institutions created to isolate social deviants from "normal" society. Federal and state legislation, as well as judicial activism in "right to

---

162. *Id.*

163. *Id.* § 33.106.010(b).

164. *Id.* § 33.106.010(c).

165. As of December, 1975, the licensing board had been appointed and had promulgated rules governing licensure of residential care facilities.

166. *See* note 13 & accompanying text *supra*.

167. LAUBER & BANGS, *supra* note 12, at 23.

168. *See, e.g.*, Shuman v. Board of Aldermen, 361 Mass. 758, 766, 282 N.E.2d 653, 658-59 (1972); Scerbo v. Board of Adjustment, 121 N.J. Super. 378, 392-93, 297 A.2d 207, 215 (L. Div. 1972); West Shore School Dist. v. Commonwealth, 15 Pa. Commw. 243, ___, 325 A.2d 669, 670-71 (1974).

treatment'' cases, have begun to return many of these persons to less restrictive and, hopefully, more rehabilitative environments in the community. Yet as the trend to deinstitutionalize has gained momentum, it has become clear that a collision course with local policies of land use regulation had been unknowingly charted. Community residence cases are the inevitable consequence of this collision.

In a sense, the greatest challenge facing advocates of community residential care has been the inflexible zoning system itself. Traditional zoning is simply not geared to accommodate a use which may at once be a boarding home, a school, a hospital extension and a family.[169] Efforts to introduce group living arrangements in many residential areas have foundered on the obsolete principle that the conventional nuclear family is the basic residential unit.

Faced with local zoning laws which do not accommodate group facilities, sponsors have gambled that local officials or the courts will interpret the law permissively. This game of chance is too costly for nonprofit sponsors and financially limited state social agencies. Moreover, it obstructs the planned dispersal of facilities sheltering deinstitutionalized groups, contravening both land use planning principles and the normalization concept.

A review of the community residence cases reveals a judicial tendency to favor the facility where neighborhood opposition is unsupported by substantial evidence of negative impact. The existence of state policy promoting community care and evidence that a given facility is programmatically sound have greatly influenced the decisions in these cases. Consequently, it may be said that the worst fears of *Belle Terre*'s impact on the community residence movement have been partially dispelled, at least with respect to small, youth-oriented facilities.[170] Moreover, one jurisdiction has rejected zoning which forbids halfway houses on the ground that such ordinances violate overriding state policy,[171] and a few states have enacted legislation specifically aimed at protecting certain types of facilities against exclusionary local zoning. Other legislative measures can be expected.

Despite occasional favorable judicial holdings in the community residence cases and the protective state legislation which is beginning to appear, the primary focus should be placed on developing new planning mechanisms at the local level. The approach should integrate social and land use planning. For facilities sheltering numbers greater than the typical foster care family (five or six unrelated persons), programmatic review through a licensing procedure should precede or accompany evaluation of the impact on neighborhoods. Such a review should include an inventory of existing and anticipated local residential care facilities and the development of guidelines for the uniform dispersal of community facilities throughout all residential areas. The Portland approach and similar schemes emerging in other municipalities, as well as models developed recently by the American Society of Planning Officials,[172] provide sound points of departure.

---

169. *See* RAUSH & RAUSH, *supra* note 17, at 192-93.

170. *See, e.g.*, City of White Plains v. Ferraioli, 34 N.Y.2d 300, 313 N.E.2d 756, 357 N.Y.S.2d 449 (1974).

171. *See* Abbott House v. Village of Tarrytown, 34 App. Div. 2d 821, 312 N.Y.S.2d 841 (2d Dep't 1970).

172. *See* LAUBER & BANGS, *supra* note 12, at 20-25.