Community Integration of Persons with Mental Illness: A Legislative Proposal to Combat the Exclusionary Zoning of Community Residential Programs

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Introduction

At least 22,000 Minnesotans[1] suffer from a serious and persis-

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1. It is estimated that one percent of the adult population and from 22,368 to 29,824 Minnesotans have a serious and persistent mental illness. Telephone inter-

tent mental illness.[2] Many live outside their own homes in residential programs which provide care, supervision, and treatment.[3] Until the 1960s, supervised residential programs did not exist; persons with mental illness who were in need of residential treatment were institutionalized.[4] Institutionalization was a very severe expression of prejudice[5] in that its primary purpose was not to provide treatment and care but to isolate persons with mental illness and protect society from them.[6]

Today, persons with mental illness are no longer being institutionalized on a grand scale. The status quo favors deinstitutionalization. Several factors have contributed to this movement. The administration of John F. Kennedy established the return to the

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view with Jerry Stork, Statistician for Mental Health Division, Minnesota Dep't of Human Services (Nov. 9, 1988).

2. Minn. Stat. § 245.462, subd. 20(a) (1988), defines mental illness:

> "Mental illness" means an organic disorder of the brain or a clinically significant disorder of thought, mood, perception, orientation, memory, or behavior that is listed in the clinical manual of the International Classification of Diseases (ICD-9-CM), current edition, code range 290.0 to 302.99 or 306.0 to 316.0 . . . and that seriously limits a person's capacity to function in primary aspects of daily living such as personal relations, living arrangements, work, and recreation.

Minn. Stat. § 245.462, subd. 20(c) (1988) defines a person with serious and persistent mental illness:

> [A] person who has a mental illness and meets at least one of the following criteria:
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> (1) the person has undergone two or more episodes of inpatient care for mental illness within the preceding 24 months;
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> (2) the person has experienced a continuous psychiatric hospitalization or residential treatment exceeding six months' duration within the preceding 12 months;
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> (3) the person:
>
> (i) has a diagnosis of schizophrenia, bipolar disorder, major depression, or borderline personality disorder;
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> (ii) indicates a significant impairment in functioning; and
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> (iii) has a written opinion from a mental health professional stating that the person is reasonably likely to have future episodes requiring inpatient or residential treatment, of a frequency described in clause (1) or (2), unless an ongoing community support services program is provided; or
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> (4) the person has been committed by a court as a mentally ill person . . . .

3. *See* Ernst & Whinney, Department of Human Services Housing Study Summary 30 (Feb. 5, 1988) (on file with *Law & Inequality*).

4. Gilda Tuoni, *Deinstitutionalization and Community Resistance by Zoning Restrictions*, 66 Mass. L. Rev. 125, 129-30 (1981).

5. The desire to institutionalize persons with mental illness resulted from attitudes attributing mental illness to a wicked nature or supernatural causes. *See id.* at 129. Prejudice has been defined as irrational hostility toward a group of people whose evil attributes are exaggerated and overgeneralized. Gordon Allport, The Nature of Prejudice 15, 403 (1958).

6. Minnesota State Planning Agency, Minnesota State Hospitals 3 (1985).

community of persons with mental illness as a national goal.[7] Federal legislation has authorized funding to promote deinstitutionalization.[8] Mental health professionals advocate the principle of normalization,[9] based on the belief that community integration permits disabled persons to grow and develop to the maximum possible extent and become contributing members of society.[10] At least one state court has recognized the right of persons with mental illness to treatment in the least restrictive setting.[11]

In Minnesota, the number of persons with mental illness living in state hospitals has decreased from 10,093 in 1960 to 1,230 in 1984.[12] Prejudice against persons with mental illness continues to find expression, however, as deinstitutionalization has not resulted in community integration and acceptance. Society has found a means more subtle than institutionalization to isolate persons with mental illness: local zoning ordinances that operate to exclude community residential programs[13] from most neighborhoods.[14]

A Minnesota statute,[15] which purports to advance state policy

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7. Note, *Zoning for the Mentally Ill: A Legislative Mandate*, 16 Harv. J. on Legis. 853, 853 (1979).

8. *See generally id.* at 862-66.

9. Normalization is "the principle of providing the 'patterns of life and conditions of everyday living which are as close as possible to the regular circumstances and ways of life of society.' " *Zoning for Community Homes Serving Developmentally Disabled Persons*, 2 Mental Disability L. Rep. 794, 795 (May-June 1978) [hereinafter *Zoning for Community Homes*] (quoting B. Nirje, *The Normalization Principle*, in Changing Patterns in Residential Services for the Mentally Retarded 231 (R. Kugel & A. Shearer eds. 1976)).

10. *Id.*

11. Lessard v. Schmidt, 349 F. Supp. 1078 (E.D. Wis. 1972), *vacated on other grounds and remanded*, 414 U.S. 473 (1974).

12. *See* Minnesota State Planning Agency, *supra* note 6, at 6.

13. Minn. Stat. § 245A.02, subd. 14 (1988) defines a residential program:

> "[A] program that provides 24-hour-a-day care, supervision, food, lodging, rehabilitation, training, education, habilitation, or treatment outside a person's own home . . . to provide services for five or more persons whose primary diagnosis is . . . mental illness . . ."

Residential programs for persons with mental illness must be licensed under Minn. R. 9520.0500-9520.0690 (1987).

14. *See* Note, *supra* note 7, at 869.

15. The provisions of Minn. Stat. § 245A.11 (1988) are as follows:

> *Subdivision 1.* Policy statement. It is the policy of the state that persons shall not be excluded by municipal zoning ordinances or other land use regulations from the benefits of normal residential surroundings.
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> *Subd. 2.* Permitted single-family residential use. Residential programs with a licensed capacity of six or fewer persons shall be considered a permitted single-family residential use of property for the purposes of zoning and other land use regulations.
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> *Subd. 3.* Permitted multifamily residential use. Unless otherwise provided in any town, municipal, or county zoning regulation, a licensed residential program with a licensed capacity of seven to 16

prohibiting exclusionary zoning practices directed towards commu-

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adults or children shall be considered a permitted multifamily residential use of property for the purposes of zoning and other land use regulations. A town, municipal, or county zoning authority may require a conditional use or special use permit to assure proper maintenance and operation of a residential program. Conditions imposed on the residential program must not be more restrictive than those imposed on other conditional uses or special uses of residential property in the same zones, unless the additional conditions are necessary to protect the health and safety of the adults or children being served by the program. Nothing in sections 245A.01 to 245A.16 shall be construed to exclude or prohibit residential programs from single-family zones if otherwise permitted by local zoning regulations.

Subd. 4. Location of residential programs. In determining whether to grant a license, the commissioner shall specifically consider the population, size, land use plan, availability of community services, and the number and size of existing licensed residential programs in the town, municipality, or county in which the applicant seeks to operate a residential program. The commissioner shall not grant an initial license to any residential program if the residential program will be within 1,320 feet of an existing residential program unless the town, municipality, or county zoning authority grants the residential program a conditional use or special use permit. In cities of the first class, this subdivision applies even if a residential program is considered a permitted single-family residential use of property under subdivision 2. Foster care homes are exempt from this subdivision.

Subd. 5. Overconcentration and dispersal. (a) Before January 1, 1985, each county having two or more group residential programs within 1,320 feet of each other shall submit to the department of human services a plan to promote dispersal of group residential programs. In formulating its plan, the county shall solicit the participation of affected persons, programs, municipalities having highly concentrated residential program populations, and advocacy groups. For the purposes of this subdivision, "highly concentrated" means having a population in residential programs serving seven or more persons that exceeds one-half of one percent of the population of a recognized planning district or other administrative subdivision.

(b) Within 45 days after the county submits the plan, the commissioner shall certify whether the plan fulfills the purposes and requirements of this subdivision including the following requirements:

(1) a new program serving seven or more persons must not be located in any recognized planning district or other administrative subdivision where the population in residential programs is highly concentrated;

(2) the county plan must promote dispersal of highly concentrated residential program populations;

(3) the county plan shall promote the development of residential programs in areas that are not highly concentrated;

(4) no person in a residential program shall be displaced as a result of this section until a relocation plan has been implemented that provides for an acceptable alternative placement;

(5) if the plan provides for the relocation of residential programs, the relocation must be completed by January 1, 1990. If the commissioner certifies that the plan does not do so, the commissioner shall state the reasons, and the county has 30 days to submit a plan amended to comply with the requirements of the commissioner.

(c) After July 1, 1985, the commissioner may reduce grants under section 245.73 to a county required to have an approved plan under paragraph (a) if the county does not have a plan approved by the commissioner or if the county acts in substantial disregard of its approved

nity residential programs, actually legitimizes a powerful means by which municipalities block the siting of group homes with a maximum licensed capacity of seven or more individuals. Subdivision 2 of the statute designates residential programs with a licensed capacity of six or fewer persons as a permitted single-family residential use of property for purposes of zoning and other land use regulation.[16] Subdivision 3, however, allows municipalities to require a conditional use permit for larger group homes.[17] This provision impacts persons with mental illness, who are generally served by residential programs with licensed capacities in excess of six.[18] The result is exclusion of larger residential programs either directly through denial of the permit or indirectly through avoidance of the burdensome conditional use permit process by prospective group home providers.[19]

The statute addresses concentration of residential programs by establishing a separation requirement of at least 1,320 feet.[20] This provision has two objectives. The most often articulated is to prevent the establishment of group home ghettos such as those which exist in low income neighborhoods of both Minneapolis and St. Paul.[21] The second objective, which is primary but infrequently voiced, is to protect communities against more than their "fair share" of the programs.[22] By establishing a separation requirement based on the concept of "fair share," the statute implicitly recognizes persons who live in community residential programs as undesirable.[23] The ultimate goal of normalization of persons with mental illness is hindered by both the conditional use permit and separation requirements in the Minnesota statute.

The purpose of this article is to propose model legislation re-

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plan. The county board has the right to be provided with advance notice and to appeal the commissioner's decision. If the county requests a hearing within 30 days of the notification of intent to reduce grants, the commissioner shall not certify any reduction in grants until a hearing is conducted and a decision made in accordance with the contested case provisions of chapter 14.

Subd. 6. Hospitals; exemption. Residential programs located in hospitals shall be exempt from the provisions of this section.

16. *Id.* Subd. 2.

17. *Id.* Subd. 3.

18. Statistics compiled by the Minnesota Department of Human Services, Mental Health Division (Jan. 20, 1989) (on file with *Law & Inequality*).

19. *See infra* text accompanying notes 264-269.

20. Minn. Stat. § 245A.11, subd. 4.

21. *See* Martin Jaffe & Thomas P. Smith, *Siting Group Homes for Developmentally Disabled Persons*, 397 American Planning Association Planning Advisory Service 12 (1986). *See also Zoning for Community Homes*, *supra* note 9, at 799.

22. *See* Jaffe & Smith, *supra* note 21, at 12. *See also* Mpls. Star & Tribune, July 24, 1988 at B1, col. 1.

23. *See* Jaffe & Smith, *supra* note 21, at 13.

lated to residential programs that will combat exclusionary zoning. Since many states have enacted laws similar to Minnesota's statute,[24] the discussion and recommendations concerning statutory changes are relevant beyond Minnesota's borders. Section I reviews municipal zoning power and the parameters of zoning ordinances. Section II discusses common neighborhood concerns which prompt community resistance to residential programs for persons with mental illness. Section III outlines pertinent judicial decisions related to exclusionary zoning and case law which can be derived from the decisions. Section IV discusses the need to increase governmental and community involvement in the siting of residential treatment programs for persons with mental illness. Section V describes the conditional use permit requirement and sets forth alternatives which do not weigh as heavily against community location of residential programs for persons with mental illness. Section VI discusses various state efforts aimed at preventing concentration and promoting dispersal of residential programs. Alternatives for state legislative action derived from the various state approaches are set forth in Section VIII. Model legislation is located in Appendix A and summaries of the case law discussed in Section III are in Appendix B.

I. Zoning

Zoning is the regulation by a municipality of the use of land, buildings, and structures located in the community.[25] While zoning authority is broadly based on the municipality's exercise of the police power,[26] the power to zone in Minnesota exists only as delegated by the state legislature.[27]

Zoning ordinances create distinct zones within a municipality and restrict the use of land and buildings within each zone.[28] Residential zones are subdivided into single-family and multi-family

24. Lester Steinman, *The Effect of Land-Use Restrictions on the Establishment of Community Residences for the Disabled: A National Study*, 19 Urb. Law. 1, 18-20 (1987).

25. 1 Arden Rathkopf & Daren Rathkopf, The Law of Zoning and Planning § 1.01 (4th ed. 1988); 1 Patrick Rohan, Zoning and Land Use Controls § 1.02 (1988).

26. 1 Rohan, *supra* note 25, § 1.02 (regulations for the protection of public safety, welfare, health, and morals constitute valid exercise of the police power). *See also* Minn. Stat. § 462.357, subd. 1 (1988) (grant of zoning authority for the purpose of promoting the public health, safety, morals, and general welfare).

27. Minn. Stat. § 462.351 (1988); Denney v. City of Duluth, 295 Minn. 22, 26, 202 N.W.2d 892, 894 (1972).

28. For zoning purposes, land use is classified as residential, commercial, and industrial. The need for flexibility is accomodated through zoning techniques such as conditional use permits. *See* 1 Rathkopf & Rathkopf, *supra* note 25, § 1.02.

districts.[29] Single-family residential zones are usually open only to dwellings occupied by related persons or a small number of unrelated persons.[30] This type of ordinance is typically used to exclude community residential programs from neighborhoods.[31]

A conditional use permit[32] requirement can also prevent the placement of community residential programs.[33] A fundamental part of the conditional use permit review process is a public hearing.[34] Neighboring landowners are notified of the hearing and may attend to protest the location of a proposed residential program.[35] These hearings become very heated and local "decision makers are often persuaded by the fervor and number of opponents and not necessarily by the merit of their testimony."[36] The legitimacy of opponents' concerns about residential programs will be discussed in the next section.

II. Common Neighborhood Concerns

Objections to residential programs fall into three groups: economic, primarily property devaluation; safety, usually focused on the perceived criminality of the program residents; and esthetics, primarily concerns about unusual behavior of residents and inade-

29. *See* Minn. Stat. § 462.357 (1988). Minn. Stat. § 462.357 also allows control through establishment of regulations concerning the location, height, width, bulk, type of foundation, number of stories, size of buildings and other structures, and percentage of lot which may be occupied, the sizes of yards and other open spaces, and the density and distribution of population.

30. *See, e.g.*, St. Paul Planning Commission Task Force on Community Residential Facilities, Task Force Report 9 (1988); United States General Accounting Office, An Analysis of Zoning and Other Problems Affecting the Establishment of Group Homes for the Mentally Disabled 2 (1983).

31. Note, *supra* note 7, at 871.

32. Conditionally permitted uses are uses which "are troublesome even in districts where they logically belong." 2 Robert Anderson, American Law of Zoning § 9.18 (3d ed. 1986).

Under Minn. Stat. § 462.3595, subd. 1 (1988), municipalities may designate certain types of developments and development activities as conditional uses under zoning regulations. According to the statute, these uses *may* be approved if the standards and criteria established by the ordinance are satisfied. *Id.* The terms conditional use, special use, special use permit, and special exception are alternative terms used to designate a conditionally permitted use.

A permitted use differs from a conditionally permitted use in that it signals use by right specifically authorized in a particular zoning district. *Zoning for Community Homes*, *supra* note 9, at 796 n.15.

33. Note, *supra* note 7, at 871.

34. Jaffe & Smith, *supra* note 21, at 31.

35. Note, *City of Cleburne v. Cleburne Living Center: Denial of Quasi-Suspect Status for the Mentally Retarded and Its Effect on Exclusionary Zoning of Group Homes*, 17 Tol. L.Rev. 1041, 1060 (1986).

36. Jaffe & Smith, *supra* note 21, at 31.

quate property maintenance. The following discussion demonstrates that these objections are unsubstantiated.

A. Economic Objections

Research shows that residential programs do not decrease the value of neighboring homes. In a 1975 study of community residential facilities within the Minneapolis-St. Paul metropolitan area, the University of Minnesota Center for Urban and Regional Affairs (CURA) found evidence that decreasing property values are not associated with the location of community residential programs.[37] The Community Residences Information Services Program (CRISP) prepared a summary of studies addressing commonly expressed fears about the effects of group homes on neighborhoods.[38] The forty reported works included impact studies, surveys, literature reviews, and position papers, none of which revealed lowered property values or increased turnover of property in areas where community residential programs were located. In 1988, the Mental Health Law Project published an annotated bibliography[39] including "every available study on the subject" of property devaluation,[40] and reported that "[t]he studies conclusively establish that a group home or community residential facility (CRF) for mentally disabled people does not adversely affect neighbors' property values or destabilize a neighborhood."[41]

B. Safety Concerns

Nearly all systematic, empirical work shows that the involvement of mentally ill persons in violent crime is equal to or only slightly more than that of the general population.[42] One study tested the stereotype of the mentally ill person as dangerous and prone to commit crime and revealed that persons with mental ill-

37. Alan S. Friedlob & Thomas L. Anding, Community-Based Residential Facilities in the Twin Cities Metropolitan Area: Location and Community Response 23 (1975).

38. Community Residences Information Services Program, "There Goes the Neighborhood . . ." A Summary of Studies Addressing the Most Often Expressed Fears About the Effects of Group Homes on Neighborhoods in Which They Are Placed: Declining Property Values, Crime, Deteriorating Quality of Life and Loss of Local Control (1986) [hereinafter CRISP]. The studies included group homes for persons with mental illness, mental retardation, and chemical dependency. *Id.* at ii.

39. Mental Health Law Project, The Effects of Group Homes on Neighboring Property: An Annotated Bibliography 1988.

40. *Id.* at i.

41. *Id.*

42. Case Comment, *Community Commitment: To Accept or Reject the Mentally Ill? — City of Terrance v. Transitional Living Centers, Inc.*, 5 Whittier L. Rev. 417, 422 (1983) (quoting S.E. Estroff, Making It Crazy 11 (1981)).

ness do not commit serious crimes at a disproportionate rate.[43] Thus, the safety of a neighborhood is not negatively impacted by a residential program for persons with mental illness.

C. *Esthetics*

Studies contradict the common misconception that group homes are not well-maintained. A 1980 impact study of thirty-eight group homes found that, with one exception, the exterior condition of the group homes was equal to or better than that of surrounding properties.[44] A survey of thirty-two group homes, conducted in 1982, revealed that the homes were well-maintained.[45] Should maintenance problems arise with regard to specific homes, state licensing laws and regulations could provide authority for the enforcement of maintenance requirements.

Another aspect of the esthetics issue is concern about the eccentric or unusual behavior of group home residents.[46] While licensing regulations and program reviews should deal with prevention of behavior which is indecent or violative of the rights of others and require group home operators to be responsive to community complaints, society must become more tolerant of different behavior which is not harmful. Tolerance of diversity among people is an important American value that promotes greater understanding and benefits not only those classified as different, but society as a whole.

Based upon these studies, it appears that most community objections are grounded in generalizations and intolerance. In *City of Cleburne v. Cleburne Living Center*,[47] Justice Marshall refers to Gordon Allport's theory that separateness among groups exaggerates difference.[48] Justice Marshall concludes that "isolation of the retarded has perpetuated the ignorance, irrational fears, and stere-

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43. CRISP, *supra* note 38, at 11 (summarizing Lawrence Teplin, *The Criminality of the Mentally Ill: A Dangerous Misconception*, 142 Am. J. Psych. 593 (1985)).

44. *Id.* at 12 (summarizing Sherry Wickware & Tom Goodale, *Promoting and Resisting Group Homes: The Property Value Issue*, 4 Leisurability, 24 (1980)).

45. *Id.* at 4 (summarizing Lawrence Dolan & Julian Wolpert, Long Term Neighborhood Property Impacts of Group Homes for Mentally Retarded People (1982)).

46. Homeowners on Pillsbury Avenue in south Minneapolis have voiced complaints about "A heavy old man with the open shirt who urinates on boulevard trees in daylight. The man who every day sweeps the sidewalks and the alley and weeds other people's lawns. The people who wander around in winter parkas on sweltering summer days. . . ." Mpls. Star & Tribune, July 24, 1988 at B1, col.2.

47. 473 U.S. 432 (1985). For a discussion of *City of Cleburne v. Cleburne Living Center*, see *infra* text accompanying notes 65-70.

48. *Id.* at 464 (citing Gordon Allport, The Nature of Prejudice (1958)).

otyping that long have plagued them."[49] It follows that isolation of persons with mental illness has also perpetuated prejudice and that community integration will diminish the prejudice. The more advanced a civilization becomes, the more it will understand, value, and relate to its members who have severe handicapping conditions.[50]

III. Case Law

The courts have not looked favorably upon zoning efforts to exclude persons with mental illness from communities. This section reviews United States Supreme Court and state court decisions related to exclusionary zoning. The model legislation in Appendix A is based, in part, on parameters established by these decisions.

A. United States Supreme Court

The United States Supreme Court employs a very deferential standard when reviewing matters related to zoning.[51] This standard is based on the tenth amendment, under which state and local governments acquire the police power,[52] and on the Court's reluctance to impair the effectiveness of state and local governments. The Court articulated this standard in *Village of Euclid v. Ambler Realty Co.*,[53] where it held that zoning measures were valid unless "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare."[54] Thus, according to the Court, zoning is a local problem properly challenged in state courts or through the local democratic

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49. *Id.*

50. CRISP, *supra* note 38, at 9 (summarizing Martha Perske & Robert Perske, New Life in the Neighborhood: How Persons with Disabilities Can Help Make a Community Better (1980)).

51. *See* Note, *supra* note 7, at 1055.

52. Police power is

> [a]n authority conferred by the American constitutional system in the Tenth Amendment, U.S. Constitution, upon the individual states, and, in turn, delegated to local governments, through which they are enabled to establish a special department of police; adopt such laws and regulations as tend to prevent the commission of fraud and crime, and secure generally the comfort, safety, morals, health, and prosperity of its citizens by preserving the public order, preventing a conflict of rights in the common intercourse of the citizens, and insuring to each an uninterrupted enjoyment of all the privileges conferred upon him or her by the general laws.

Black's Law Dictionary 1041 (5th ed. 1979).

53. 272 U.S. 365 (1926).

54. *Id.* at 395.

process.[55]

Constitutional challenges to a zoning ordinance were rejected in *Village of Belle Terre v. Boraas*,[56] where six male and female college students renting a house in a single-family residential district were cited for violating a zoning ordinance which defined "family" as persons related by blood, marriage, or adoption or not more than two unrelated persons.[57] The ordinance was challenged as violative of the equal protection clause of the fourteenth amendment of the United States Constitution and the constitutional rights of association, travel, and privacy.[58] The Court upheld the ordinance, describing the police power as "ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people."[59]

The *Belle Terre* holding was limited in *Moore v. City of East Cleveland*.[60] In *Moore*, the Court struck down a zoning ordinance which generally restricted occupants of single family dwellings to members of nuclear families.[61] Inez Moore was convicted for violating the ordinance because her two grandsons lived with her.[62] In striking down the ordinance, the Court held that its usual deference was inappropriate when the government intruded on choices concerning family living arrangements.[63] The Court further declared that strong constitutional protection of the sanctity of the family is not confined within the arbitrary boundary drawn at the limits of the nuclear family.[64]

In *City of Cleburne v. Cleburne Living Center*,[65] the United States Supreme Court struck down a zoning ordinance that required a special use permit for a group home for people with mental retardation.[66] Among the permitted uses were boarding houses, fraternities, hospitals, sanitariums, and nursing homes.[67] The Court held that prejudice and unsubstantiated fears were not permissible bases for treating the group home differently from boarding houses and nursing homes and invalidated the zoning or-

55. *See* Warth v. Seldin, 422 U.S. 490, 508 n.18 (1975). *See also* Note, *Zoning for the Regional Welfare*, 89 Yale L.J. 748, 758-59 (1980).
56. 416 U.S. 1 (1974).
57. *Id.* at 2-3.
58. *Id.* at 7-8.
59. *Id.* at 9.
60. 431 U.S. 494 (1977).
61. *Id.* at 499-500.
62. *Id.* at 496-97.
63. *Id.* at 502-03.
64. *Id.* at 504-06.
65. 473 U.S. 432 (1985).
66. *Id.* at 435.
67. *Id.* at 436 n.3.

dinance as it was applied to the group home.[68] This case is significant because although the Court declined to confer suspect or quasi-suspect status on persons with mental retardation, it struck down the application of the zoning ordinance under the rational basis test.[69] The holding in *Cleburne* is narrow and leaves open the possibility that a special use permit could be required for group homes if the necessity was based on reasons other than irrational prejudice against the mentally retarded.[70]

In summary, the Supreme Court will show broad deference to a community's power to zone, except where constitutional limitations are clearly surpassed. This deferential approach results in cautious constitutional determinations and narrow holdings.

B. Minnesota State Courts

While challenges to zoning practices under the federal constitution are rarely successful, state courts often invalidate exclusionary zoning ordinances on state constitutional or statutory grounds.[71] Minnesota courts have consistently ruled in favor of residential programs threatened by zoning practices.

In the leading case, *Costley v. Caromin House, Inc.*,[72] the Minnesota Supreme Court held that a community residential program for six mentally retarded adults and two resident houseparents was a family within the meaning of the city zoning

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68. *Id.* at 450.

69. Social and economic legislation is generally presumed valid, and will be sustained if rationally related to a legitimate government interest. *Id.* at 440. The rational basis test has been described as "minimal scrutiny in theory and virtually none in fact." Gerald Gunther, 86 Harv. L. Rev. 1, 8 (1972). Where legislation seeks to classify groups which have been designated a suspect or quasi-suspect class, the legislation is subject to strict or intermediate scrutiny, respectively. *Cleburne*, 473 U.S. at 440-41. One commentator has posited that the Court is moving away from a clearly delineated two or three standard approach to a spectrum of standards as discrimination claims are reviewed. Gerald Gunther, Cases and Materials on Constitutional Law 589-91 (11th ed. 1985). Under the spectrum of standards, the level of scrutiny employed by the Court depends on the "constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn." *Id.* at 590 (citing San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 99 (1972) (Marshall, J., dissenting)).

The Court has designated only three classifications as suspect: race, alienage, and national origin. *Cleburne*, 473 U.S. at 440. Gender and illegitimacy have been recognized as quasi-suspect. *Id.* at 440-41. The Court has used several explicit criteria to identify suspect and quasi-suspect classifications: a history of discrimination, political powerlessness, and immutability. *Id.* at 441.

70. *See* Steinman, *supra* note 24, at 10.

71. *See* Note, *supra* note 35, at 1056; Steinman, *supra* note 24, at 10.

72. 313 N.W.2d 21 (Minn. 1981).

ordinance.[73] The ordinance defined "family" as "[o]ne or more persons occupying a premises and living as a single housekeeping unit . . . ."[74] The court declared that the residents and houseparents were a single housekeeping unit as the residents shared in planning and preparation of meals, performing housekeeping duties and planning recreational activities, and the houseparents served the head of household role.[75] In addition to the language of the ordinance in question, the court relied on case law from other jurisdictions where the family designation was extended to group homes even when local zoning ordinances limited the definition of "family" to related persons.[76] The court asserted that "[t]he word 'family' is no longer limited to a traditional concept of marriage and biological ties"[77] and that "[s]o long as the group home bears the generic character of a family unit as a relatively permanent household, and is not a framework for transients . . . , it conforms to the purpose of the ordinance."[78] The *Costley* court also held that since the group home served a residential purpose, operation of the home by a for-profit corporation did not make it commercial in nature.[79]

In response to a claim that the group home would violate a restrictive covenant permitting only one dwelling and one garage on each lot,[80] the court held that the group home fit the definition of dwelling both in appearance and use, and therefore complied with the covenant.[81] The court noted that even if the covenant were interpreted to permit only single-family dwellings, the definition of "family" for the purposes of zoning regulations would apply.[82] Additionally, other state court decisions were cited in which group homes were found in compliance with single-family restric-

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73. *Id.* at 25.

74. *Id.* at 24.

75. *Id.* at 25.

76. *Id.* (citing Hessling v. City of Broomfield, 193 Colo. 124, 563 P.2d 12 (1977); Berger v. State, 71 N.J. 206, 364 A.2d 993 (1976); City of White Plains v. Ferraioli, 34 N.Y.2d 300, 313 N.E.2d 756, 357 N.Y.S.2d 449 (1974)).

77. *Id.*

78. *Id.* (quoting City of White Plains v. Ferraioli, 34 N.Y.2d 300, 305-06, 313 N.E.2d 756, 758, 357 N.Y.S.2d 449, 453 (1974)). The Court did not rely on Minn. Stat. § 462.357, subd. 7 (1980) (current version Minn. Stat. § 245A.11 (1988)) to reach its decision. Broad construction of the term family allows the possibility that group homes serving more than six residents would be considered permitted uses in areas zoned for single-family residential use.

79. *Id.*

80. *Id.* at 26. The court prefaced its discussion of this issue by asserting the basic principle that restrictive covenants are strictly construed against limitations on the use of property. *Id.*

81. *Id.*

82. *Id.*

tive covenants based on the single housekeeping structure, the relatively permanent type of living situation, and public policy supporting such living arrangements.[83]

A Minnesota statute establishes that licensed group homes for six or fewer persons with mental retardation are a single-family use for zoning purposes.[84] The plaintiffs in *Costley* alleged that this statute represented an "arbitrary and capricious imposition of legislative will upon local zoning matters and therefore unconstitutional as a violation of due process."[85] The court rejected this claim, citing *Denney v. City of Duluth*,[86] which held that a municipality has no inherent power to enact zoning regulations.[87] According to *Denney*, a municipality receives power to zone only by a legislative grant of authority.[88] The *Costley* court said that "in exercising such a delegation of power, a municipality cannot exceed the limitations imposed by the enabling legislation."[89]

Another case addressing group homes and zoning practices in Minnesota is *Northwest Residence, Inc. v. City of Brooklyn Center*.[90] Decided in 1984 by the Minnesota Court of Appeals, the case involved an action to compel the city to issue a special use permit to a group home for eighteen adults with mental illness.[91] Although the Brooklyn Center Planning Commission recommended approval, the City Council denied the special use permit after holding a public hearing on the matter.[92] Reasons for denial included inadequate parking and recreational facilities, diminution of enjoyment of adjacent property, and a determination that the group home contained adequate space for only twelve adults with mental illness.[93] The court rejected these reasons and ordered issuance of the special use permit, concurring with the lower court's findings that the claims which involved parking, recreational space, and diminution of property were not supported by the evi-

83. *Id.* (citing State *ex. rel.* Region II Child & Family Services, Inc. v. District Court of the Eighth Judicial Circuit, 609 P.2d 245 (Mont. 1980); Bellarmine Hills Assoc. v. Residential Systems Co., 84 Mich. App. 554, 269 N.W.2d 673 (Ct. App. 1978); Berger v. State, 71 N.J. 206, 364 A.2d 993 (1976)).

84. Minn. Stat. § 245A.11 (1988) (former version at Minn. Stat. § 462.357, subd. 7 (1980)).

85. *Costley*, 313 N.W.2d at 27.

86. 295 Minn. 22, 202 N.W.2d 892 (1972).

87. *Id.* at 26, 202 N.W.2d at 894.

88. *Id.*

89. *Costley*, 313 N.W.2d at 27 (quoting Reilly Tax & Chem. Corp. v. City of St. Louis Park, 265 Minn. 295, 300, 121 N.W.2d 393, 396 (1963)).

90. 352 N.W.2d 764 (Minn. Ct. App. 1984).

91. *Id.* at 765.

92. *Id.* at 766.

93. *Id.* at 765.

dence.[94] In response to the city's claim that the proposed group home was too small for eighteen adults with mental illness, the court emphasized that the space was adequate according to municipal occupancy standards and state licensing requirements.[95]

The court held that state law preempts local authority in the area of ensuring an appropriate living environment in residential facilities for the mentally ill.[96] Responding to the city's argument that state law[97] permits municipalities to impose special conditions on residential facilities if necessary to protect the health and safety of the residents, the court ruled that this grant of authority must be interpreted narrowly and not "in a manner that would run against state regulations on the operation of residential facilities, or undermine the state policy of favoring the establishment of community residential facilities."[98]

Concluding that the statute permitted the city only to impose "special health and safety standards appropriate to the characteristics of a particular site," the court held they could not "establish special regulations concerning the general welfare of mentally ill adults."[99] The court supported this holding by referencing Minn. Stat. § 462.351 and § 462.357, subd. 1 (1982).[100] Minn. Stat. § 462.351 (1988), which has not been amended since 1982, generally sets forth public policy relating to the need for municipal planning. Minn. Stat. § 462.357, subd. 1 (1988),[101] also unchanged since 1982

94. *Id.* at 768-70, 774. The court found that the group home management was willing and able to comply with parking requirements, that recreational space was adequate, and no evidence had been presented to support the claim that the proposed group home would cause diminution of adjacent property values. *Id.* at 768-69. Judicial notice was taken of a Minneapolis Planning Commission national literature search which revealed no decrease in values of property adjacent to group homes unless there were five such facilities in a block. *Id.* at 770. The court also observed that a Minneapolis Planning Commission survey found that people who live next to licensed facilities saw the residents as good neighbors. *Id.*

95. *Id.* at 771-72.

96. *Id.* at 772.

97. Minn. Stat. § 245.812, subd. 4 (1982) (current version at Minn. Stat. § 245A.11, subd. 3 (1988)).

98. Northwest Residence, Inc. v. City of Brooklyn Center, 352 N.W.2d 764, 773 (Minn. Ct. App. 1984).

99. *Id.* at 773-74.

100. *Id.* at 773.

101. Minn. Stat. § 462.357, subd. 1 provides:

> Subdivision 1. Authority for zoning. For the purpose of promoting the public health, safety, morals and general welfare, *a municipality may by ordinance regulate* on the earth's surface, in the air space above the surface, and in subsurface areas, *the location, height, width, bulk, type of foundation, number of stories, size of buildings and other structures, the percentage of lot which may be occupied, the size of yards and other open spaces, the density and distribution of population, the uses of buildings and structures for trade, industry, residence, recrea-*

except for a clarification irrelevant for purposes of this article,[102] provides zoning authority to municipalities. The statute authorizes regulation of the location and external characteristics of buildings, percentage of lot which may be occupied, size of yards, density and distribution of population, and uses which may be made of buildings.[103] According to the statute, regulations must be uniform for each class of building and kind of use throughout each district.[104]

Given the language of the *Northwest Residence* decision and statutory references therein, Minn. Stat.§ 245A.11, subd. 3 (1988) permits municipalities to impose special health and safety standards for the protection of residents of state-licensed residential programs only when the standards relate to the areas listed under Minn. Stat. § 462.357, subd. 1 (1988) and are applied uniformly to all similar buildings in the district. Additionally, municipalities are prohibited by *Northwest Residence* from establishing standards concerning services provided to or proper care of the residents or to any other area covered by state rules governing licensure of res-

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tion, public activities, or other purposes, and the uses of land for trade, industry, residence, recreation, agriculture, forestry, soil conservation, water supply conservation, conservation of shorelands, as defined in section 105.485, access to direct sunlight for solar energy systems as defined in section 116J.06, flood control or other purposes, and may establish standards and procedures regulating such uses. No regulation may prohibit earth sheltered construction as defined in section 116J.06, subdivision 2, or manufactured homes built in conformance with sections 327.31 to 327.35 that comply with all other zoning ordinances promulgated pursuant to this section. The regulations may divide the surface, above surface, and subsurface areas of the municipality into districts or zones of suitable numbers, shape and area. *The regulations shall be uniform for each class or kind of buildings, structures or land and for each class or kind of use throughout such district,* but the regulations in one district may differ from those in other districts. The ordinance embodying these regulations shall be known as the zoning ordinance and shall consist of text and maps. A city may by ordinance extend the application of its zoning regulations to unincorporated territory located within two miles of its limits in any direction, but not in a county or town which has adopted zoning regulations; provided that where two or more noncontiguous municipalities have boundaries less than four miles apart, each is authorized to control the zoning of land on its side of a line equidistant between the two noncontiguous municipalities unless a town or county in the affected area has adopted zoning regulations. Any city may thereafter enforce such regulations in the area to the same extent as if such property were situated within its corporate limits, until the county or town board adopts a comprehensive zoning regulation which includes the area. (emphasis added).

102. The clarification concerns municipality authority to regulate on the earth's surface, in the air space above the surface, and in subsurface areas. Minn. Stat. § 462.357, subd. 1 (1988).

103. *Id.*

104. *Id.*

idential programs.[105]

Another Minnesota Court of Appeals case, *Good Neighbor Care Center v. City of Little Canada*,[106] concerned the denial of a building permit for a residential facility for four aged persons and two houseparents.[107] The City Council denied the permit application on the ground that the facility was not a permitted use under the municipal ordinance provision governing single-family residential areas and Minn. Stat. § 462.357, subd. 7 (1982), which provided that "mentally retarded and physically handicapped persons should not be excluded by municipal zoning ordinances from the benefits of normal residential surroundings."[108]

The court ruled that a legislative distinction could not constitutionally be made between the elderly and physically handicapped persons for the purposes of local zoning restrictions on group homes.[109] According to the court, the exemption of facilities for fewer than five residents from state licensing requirements does not exclude such facilities from the protection of Minn. Stat. § 462.357, since the facilities hold derivative state licenses.[110] Thus, the court held that the Good Neighbor home was a permitted use under the statute.[111]

In *Horbal v. City of Ham Lake*,[112] the petitioners applied for a conditional use permit to establish a group home for troubled adolescents in an area zoned as single-family residential.[113] The city denied the permit and raised four arguments to support its decision. The city argued that the group home would need close police supervision, drawing the police away from other areas of the city; the neighborhood watch program would suffer; the community would be afraid of the residents; and the group home would operate for profit and was thereful commercial in nature.[114] The court ordered the city to grant the permit, holding that community fear is not a sufficient reason to deny a conditional use permit and that the for-profit nature of a group home is irrelevant in determining

105. *Northwest Residence*, 352 N.W.2d at 773.
106. 357 N.W.2d 159 (Minn. Ct. App. 1984).
107. *Id.* at 160.
108. *Id.* at 160-61. Note that Minn. Stat § 462.357, subd. 7 (1982) has been superceded by Minn. Stat. § 245A.11, subd. 2 (1988) which provides that "residential programs with a licensed capacity of six or fewer persons shall be considered a permitted single-family residential use of property for the purposes of zoning and other land use regulations."
109. *Id.* at 162-63.
110. *Id.*
111. *Id.*
112. 393 N.W.2d 5 (Minn. Ct. App. 1986).
113. *Id.* at 6.
114. *Id.* at 7.

its residential or commercial nature.[115] The court further asserted that there was no evidence of the need for increased police resources as a result of establishment of the home, and that detriment to the neighborhood watch program could be caused by any new residents.[116]

The United States Supreme Court and Minnesota state court decisions discussed above are binding in Minnesota. These decisions establish, *inter alia*, that for the purpose of local zoning ordinances, the term family includes functional families as well as those persons related by blood or marriage. The permanency of the living arrangement, existence of a head of household, and sharing of household duties by the residents are factors which must be considered in determining whether the residents of a group home constitute a functional family. The decisions make it clear that zoning power is held by the state legislature and delegated, as determined appropriate, to municipalities. Therefore, claims that state zoning legislation usurps local authority will fail. According to the decisions, state law preempts local authority in the area of appropriate operation of state-licensed community residential programs as set forth in state rules governing program licensure.

The decisional law discussed in this section provides a foundation for modifications to Minnesota legislation to promote community integration of residential programs. A summary of this decisional law is located in Appendix B.

C. Case Law from Other Jurisdictions

While decisions from other jurisdictions are not binding in Minnesota, they do provide information about legal trends and judicially established policy which the Minnesota courts and legislature may rely on for guidance. This section analyzes decisions concerning group home issues.

1. Permitted Single-Family Use

A major area of litigation is whether a group home is a functional family and thus a permitted single-family use. *City of White Plains v. Ferraioli* [117] is a New York case which involved a

115. *Id.*

116. *Id.*

117. 34 N.Y.2d 300, 313 N.E.2d 756, 357 N.Y.S.2d 449 (1974). In Costley v. Caromin House Inc., 313 N.W.2d 21 (Minn. 1981), the Minnesota Supreme Court held that for the purpose of local zoning ordinances, the term family would be interpreted liberally to include single housekeeping units which function as families.

household consisting of a married couple, their two children and ten foster children.[118] The *Ferraioli* court ruled that the household was a permitted single-family use because it resembled a traditional family unit in theory, size, structure, and appearance.[119] In rejecting arguments that the home was an institution or a boarding house, the court asserted that the outward appearance of the structure, the stability and permanency of the living arrangement, and the household's intention to remain and develop ties in the community emulated a traditional family.[120] The court thus distinguished the household from the communal living arrangement in *Belle Terre*,[121] where a group of college students shared a house and commuted to a nearby school.[122]

A group home for six mentally retarded children and a married couple acting as surrogate parents was declared a permitted single-family use in *Hessling v. City of Broomfield*.[123] In terms of family characteristics, the Colorado Supreme Court said the Hessling household could not be distinguished from one consisting of a married couple and six natural or adopted children.[124] The court acknowledged that the city had the power to control physical use of the premises, but held that this power did not extend to distinguishing among the occupants making physical use of the premises.[125]

In *City of West Monroe v. Ouachita Association for Retarded Children*,[126] a group home for six mentally retarded adults and two houseparents was considered a permitted single-family use and not a boarding house because the residents of the home were living and working together toward common goals, had common interests and problems, and were supervised by resident houseparents.[127]

A group home for a licensed capacity of ten adults with mental retardation was declared a permitted single-family use in

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Costley, 313 N.W.2d at 24-25. As support for this interpretation, the court cited City of White Plains v. Ferraioli, 34 N.Y.2d 300, 313 N.E.2d 756, 357 N.Y.S.2d 449. *Costley*, 313 N.W.2d at 25. See *supra* text accompanying notes 72-89 for a discussion of *Costley*.

118. *Ferraioli*, 34 N.Y.2d at 300, 313 N.E.2d at 757, 357 N.Y.S.2d at 450.

119. *Id.* at 303, 313 N.E.2d at 757, 357 N.Y.S.2d at 450-51.

120. *Id.* at 304-05, 313 N.E.2d at 758, 357 N.Y.S.2d at 452.

121. Village of Belle Terre v. Boraas, 416 U.S. 1 (1974).

122. See *supra* text accompanying notes 56-59 for a discussion of *Belle Terre*.

123. 193 Colo. 124, 563 P.2d 12 (1977).

124. *Id.* at 127, 563 P.2d at 14.

125. *Id.* at 128, 563 P.2d at 14 (citing Y.W.C.A. v. Board of Adjustment, 134 N.J. Super. 384, 341 A.2d 356 (Super. Ct. Law Div. 1975)).

126. 402 So.2d 259 (La. Ct. App. 1981).

127. *Id.* at 265.

Oliver v. Zoning Commission,[128] since state licensing regulations contemplated that the home would operate as a single housekeeping unit under the supervision of houseparents.[129] The court declined to set a limit on the size of a family unit, deferring to standards established by state licensing regulations and building, fire, safety, and public health codes.[130]

A New Jersey court declared a group home for five adults with mental illness a permitted use in a single-family residential area in *Township of Washington v. Central Bergen Community Health Center*.[131] The court based this characterization of the home as a single housekeeping unit on its outward appearance which was indistinguishable from similar one-family residences in the community; the permanent rather than transitory character of the residence; and the joint responsibilities of the occupants in cooking, cleaning, and shopping.[132] The traditional family character of the residence was not upset by a part-time worker providing supervisory services.[133] The court also placed some emphasis on the fact that no medical or therapeutic services were offered at the residence.[134]

In *Incorporated Village of Freeport v. Association for the Help of Retarded Children*,[135] a New York court held that a group home for eight women with mental retardation was a residential use that would not conflict with a stable, uncongested single-family environment.[136] Quoting *City of White Plains v. Ferraioli*, the court reiterated that "[z]oning is intended to control types of housing and living and not the genetic or intimate internal family relations of human beings."[137] In declaring the proposed home the equivalent of a single-family use, the court relied on the deliberate attempt by the Department of Mental Hygiene and the provider to create a family unit and the relatively stable and permanent nature of the household.[138]

Where six residents with mental retardation, supervised by

128. 31 Conn. Supp. 197, 326 A.2d 841 (C.P. 1974).

129. *Id.* at 205, 326 A.2d at 846.

130. *Id.*, 326 A.2d at 845.

131. 156 N.J. Super. 388, 383 A.2d 1194 (Super. Ct. Law Div. 1978).

132. *Id.* at 418-19, 383 A.2d at 1209.

133. *Id.* at 418, 383 A.2d at 1209.

134. *Id.* at 419, 383 A.2d at 1209.

135. 94 Misc.2d 1048, 406 N.Y.S.2d 221 (Sup. Ct.), *order aff'd* 60 A.D.2d 644, 400 N.Y.S.2d 724 (App. Div. 1977).

136. *Id.* at 1049, 400 N.Y.S.2d at 223.

137. *Id.* (quoting City of White Plains v. Ferraioli, 34 N.Y.2d 300, 305, 313 N.E.2d 756, 758, 357 N.Y.S.2d 449, 452 (1974)).

138. *Id.*

rotating staff, would participate in household duties such as washing dishes, making beds, preparing meals, and setting the table, the Rhode Island Supreme Court held that the group home constituted a single housekeeping unit and, as such, was a permitted single-family use.[139]

A group home for up to twelve children with mental retardation and rotating houseparents was held by a New York court to constitute a family in *Little Neck Community Association v. Working Organization for Retarded Children*.[140] The court based its decision on the fact that, pursuant to state law governing the establishment of residential programs, the home was specifically designed to emulate a reasonably sized biological unitary family.[141] Distinguishing the case from *Village of Belle Terre v. Boraas*,[142] the court noted that the proposed group home would not provide transitory housing or introduce a life-style repugnant to family values.[143] The court rejected the argument that the group home could be more properly characterized as an institution because the children's handicaps would require special care and prevent them from establishing normal family relations among themselves.[144]

While the preceding decisions have demonstrated courts' willingness to characterize residents of group homes as families, some courts have refused this characterization for the purpose of local zoning ordinances. The case of *Penobscot Area Housing Development Corp. v. City of Brewer*[145] involved a group home for six adults with mental retardation and a rotating staff.[146] The court held that the group home more closely resembled a boarding house than a traditional family and was therefore properly excluded from a single-family residential area.[147] The holding was based, in part, on the fact that the group home would not include houseparents. The court reasoned that traditional family units include "one or more resident authority figures charged with the responsibility of maintaining a separate housekeeping unit and regulating the activity and duties of the other residents."[148] Stabilization and coordination of household activity by a resident au-

139. Mongony v. Bevilacqua, 432 A.2d 661 (R.I. 1981).
140. 52 A.D.2d 90, 383 N.Y.S.2d 364 (App. Div. 1976).
141. *Id.* at 94, 383 N.Y.S.2d at 367.
142. 416 U.S. 1 (1974). See *supra* text accompanying notes 56-59 for a discussion of *Belle Terre*.
143. *Little Neck Community Ass'n*, 52 A.D.2d at 94, 383 N.Y.S.2d at 367.
144. *Id.* at 94-95, 383 N.Y.S.2d at 367.
145. 434 A.2d 14 (Me. 1981).
146. *Id.* at 21.
147. *Id.* at 22.
148. *Id.* at 21.

thority figure was seen as consistent with a family life-style.[149] Another factor influencing the court's decision was that the average length of stay for the group home residents was only one to one and one-half years.[150] The court held that this factor was not consistent with the development of permanent and cohesive relationships, characteristic of those between traditional family members, amongst the residents of the group home.[151] Finally, the court noted that extensive outside aid in the management and operation of the group home belied its family nature.[152]

In *Garcia v. Siffrin Residential Association*,[153] a decision that has been criticized,[154] the Ohio Supreme Court denied "family" status for zoning purposes to a group home for eight adults with mental retardation.[155] The court based its decision on the purpose for which the home would be established, i.e., to bring together a group of developmentally disabled persons for their training and education in life skills.[156] The group home residents were contrasted with traditional single-housekeeping units which join together in a dwelling to share and maintain a household.[157]

The Washington Court of Appeals, in *Culp v. City of Seattle*,[158] held that a group home for up to twelve mentally retarded children could be excluded from an area zoned as single-family residential.[159] The basis for the decision was that children supervised by rotating staff would not be compatible with the traditional notion of a family.[160]

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149. *Id.*

150. *Id.* at 22.

151. *Id.*

152. *Id.*

153. 63 Ohio St.2d 259, 407 N.E.2d 1369 (1980), *cert. denied*, 450 U.S. 911 (1981).

154. *See, e.g.*, Note, *Garcia v. Siffrin: Ohio's Cities May Deny Their Retarded Citizens the Least Restrictive Living Environment*, 11 Cap. U.L. Rev. 111 (1981). The author states that testimony at the *Garcia* trial indicated that the residents would work in the community, cook and eat together, be assigned responsibility for household chores, and socialize within the home. *Id.* at 124. The Note concludes that "[a] focus on the use and character of the home, rather than on its purpose, is appropriate in such cases," and that appropriate criteria to establish whether the occupants of a residence function as a family include shared responsibility for housework, eating meals together, and the presence of surrogate parents. Use of these criteria would likely have resulted in classification of the group home residents as "family." *Id.* at 124-25 (citing Comment, *Exclusionary Zoning and Its Effects on Group Homes in Areas Zoned for Single-Family Dwellings*, 24 U. Kan. L. Rev. 677, 693 (1976)).

155. *Garcia*, 630 Ohio St.2d at 268, 407 N.E.2d at 1376.

156. *Id.*

157. *Id.*

158. 22 Wash. App. 618, 590 P.2d 1288 (Ct. App. 1979).

159. *Id.* at 618-19, 590 P.2d at 1289.

160. *Id.* at 620-21, 590 P.2d at 1290.

The case of *Crane Neck Association, Inc. v. New York City/ Long Island County Services Group*[161] involved a restrictive covenant limiting residences to those which both architecturally and functionally serve as single-family dwellings.[162] The court held that a group home occupied by eight disabled adults was not a functional family because of the presence of a large number of nonresident staff, including nurses, therapists, dieticians, and others and the absence of regular houseparents.[163]

In general, these decisions regarding permitted single-family use from jurisdictions outside Minnesota establish that group homes resembling the traditional family unit in theory, size, structure, and appearance will be considered a functional family and thus a permitted single-family use for zoning purposes. A summary of this case law outside Minnesota concerning single-family use is located in Appendix B.

2. State Preemption of Local Ordinances

Many states have enacted legislation designed to override local zoning ordinances which frustrate state policy objectives associated with the establishment of group homes in residential areas. With one exception,[164] courts have upheld the statutes because they are reasonably related to a legitimate government objective.[165]

In *City of Los Angeles v. California Department of Health*,[166] the court upheld a statute conferring permitted use status in all residential zones on group homes with six or fewer residents.[167] The court reasoned that the statute concerned a matter of statewide concern which transcended municipal boundaries and therefore preempted municipal regulation in the field.[168]

In *Glennon Heights, Inc. v. Central Bank & Trust*,[169] the Colorado Supreme Court held that enactment of a Colorado statute, which makes state-licensed group homes serving eight or fewer developmentally disabled persons a permitted use in all residential

161. 61 N.Y.2d 154, 460 N.E.2d 1336, 472 N.Y.S.2d 901 (1984).

162. *Id.* at 158-59, 460 N.E.2d at 1338, 472 N.Y.S.2d at 903.

163. *Id.* at 160, 460 N.E.2d at 1339, 472 N.Y.S.2d at 904. Although the court refused to find the group home a functional family, it held that public policy prohibited enforcement of the restrictive covenant. *Id.*

164. Garcia v. Siffrin Residential Ass'n, 63 Ohio St.2d 259, 407 N.E.2d 1369 (1980), *cert. denied*, 450 U.S. 911 (1981). *See infra* text accompanying notes 191 and 196.

165. See 2 Rathkopf & Rathkopf, *supra* note 25, at § 17A.05.

166. 63 Cal.App.3d 473, 133 Cal. Rptr. 771 (Ct. App. 1976).

167. *Id.* at 476, 133 Cal. Rptr. at 772.

168. *Id.* at 479-80, 133 Cal. Rptr. at 774-75.

169. 658 P.2d 872 (Colo. 1983).

areas, through the usual legislative process did not violate neighboring property owners' due process rights.[170] The express reservation to municipalities of the right to regulate several aspects of the group homes in order to avoid adverse impacts was evidence that the legislature had considered the concerns of property owners and local government.[171] According to the court, the legislation did not constitute usurpation of local authority in that "[t]he power to promulgate zoning regulations in furtherance of the general health, safety and welfare is reposed in the legislative branch of state government, and any such legislative powers of statutory cities are derived through a delegation of state power."[172]

A New York court rejected a constitutional challenge to the Padavan Law[173] in *Zubli v. Community Mainstreaming Associates, Inc.*.[174] The Padavan Law provides, *inter alia*, that group homes shall be considered family units for the purpose of local ordinances.[175] Addressing the plaintiffs' due process claim, the court ruled that the absence of provisions in the legislation for notice and public hearing before siting of a group home did not render the legislation constitutionally defective.[176] According to the court, notice and hearing are required by due process only in quasi-judicial or adjudicatory settings, and not with respect to legislation, where due process rights are protected by the democratic process.[177] The court further asserted that the Padavan Law was a reasonable exercise of the state's police power, and therefore not an unconstitutional use of zoning power.[178] Finally, the Padavan Law was held not to constitute taking of property by the state without just compensation, since there was no taking either by physical invasion or direct legal restraint on the use of property.[179] The court declared that "as a matter of law, adjacent property owners are not deprived of their property because of the State's use of a contiguous property," even where the value of the prop-

170. *Id.* at 877-78.

171. *Id.*

172. *Id.* at 876.

173. N.Y. Mental Hygiene Law § 41.34 (McKinney 1988). The statute is named for State Senator Frank Padavan, Chairman of the New York State Senate Mental Hygiene and Addiction Control Committee.

174. 102 Misc.2d 320, 423 N.Y.S.2d 982 (Sup. Ct. 1979), *aff'd*, 74 A.D.2d 624, 425 N.Y.S.2d 263 (App. Div. 1980).

175. N.Y. Mental Hygiene Law § 41.34(f).

176. *Zubli*, 102 Misc.2d at 333, 423 N.Y.S.2d at 992.

177. *Id.* at 333, 423 N.Y.S.2d at 992 (citing San Diego Building Contractors Ass'n v. City Council of City of San Diego, 13 Cal.3d 205, 118 Cal. Rptr. 146, 529 P.2d 570 (1974), *appeal dismissed*, 427 U.S. 901 (1976)).

178. *Id.* at 337-38, 423 N.Y.S.2d at 994-95.

179. *Id.* at 336, 423 N.Y.S.2d at 993-94.

erty of the adjacent owner is decreased.[180]

In *Mahrt v. City of Kalispell*,[181] the Montana Supreme Court dismissed the appeal of a decision granting a conditional use permit to a group home as meritless and frivolous.[182] The court stated that it would "not require community residential facilities to repeatedly defend their well established right to locate in any residential area in Montana."[183] The court based its decision on a Montana law governing group homes.[184]

In *Nichols v. Tullahoma Open Door, Inc.*,[185] the Tennessee Court of Appeals rejected a constitutional challenge to a state law which made group homes for eight or fewer mentally retarded, mentally disabled, or physically handicapped persons a permitted single-family use. The plaintiffs claimed the law violated their due process and equal protection rights, and that the legislation improperly usurped local zoning powers.[186] Responding to the first claim, the court noted that no due process claim could properly be made since the statute did not result in the taking of property.[187] The plaintiffs' equal protection argument arose because benefits of the statute extended to disabled persons but not to others.[188] The court also dismissed this argument, declaring the statute had a reasonable basis and did not operate arbitrarily.[189] Speaking to the claim that the legislation usurped local power, the court held that municipalities in Tennessee have no authority other than that granted by the legislature, and that the legislature may remove or alter the authority as it chooses.[190] The court thus distinguished *Garcia v. Siffrin Residential Association*,[191] a case in which the Ohio Supreme Court invalidated a state statute which conferred permitted use status on group homes for not more than eight persons with developmental disabilities based on the Ohio Constitution's direct grant of zoning authority to Ohio municipalities.[192]

The power to zone is not an inherent right of cities in Michigan, according to *City of Livonia v. Department of Social Serv-*

180. *Id.* at 332, 423 N.Y.S.2d at 994.
181. 213 Mont. 96, 690 P.2d 418 (1984).
182. *Id.* at 97, 690 P.2d at 419.
183. *Id.*
184. *Id.* (citing Mont. Code Ann. §§ 76-2-411, 76-2-412 (1983)).
185. 640 S.W.2d 13 (Tenn. Ct. App. 1982).
186. *Id.* at 16, 18.
187. *Id.* at 16-17.
188. *Id.* at 18.
189. *Id.*
190. *Id.*
191. 63 Ohio St.2d 259, 407 N.E.2d 1369 (1980), *cert. denied*, 450 U.S. 911 (1981).
192. *Nichols*, 640 S.W.2d at 18. See *supra* text accompanying notes 153-154 for a discussion of *Garcia*.

ices.[193] While the *Livonia* court recognized a protected property interest in the value, use, and enjoyment of private property,[194] the plaintiffs' due process claim was rejected because they failed to allege deprivation of any of these property rights as a result of licensure and siting of a group home for six or fewer developmentally disabled adults.[195]

In the cases cited above, only *Garcia v. Siffrin Residential Association*[196] struck down legislation preempting a local zoning ordinance. The *Garcia* decision, however, was based on the direct grant of zoning authority by the Ohio Constitution to municipalities in that state;[197] this case is clearly inapplicable in Minnesota, where the power to zone is held by the state legislature and delegated to municipalities.[198]

These decisions establish that preemptive zoning legislation which is reasonable[199] and deals with a matter of statewide concern,[200] such as the integration of individuals with developmental disabilities or mental illness into normal, residential communities, will be upheld. A summary of preemption case law is in Appendix B.

IV. Government and Community Involvement

The observations of two groups which are often involved in siting controversies support the need for increased government involvement in the process. A 1988 St. Paul Planning Commission Task Force Report[201] concluded that community opposition is related to a perceived lack of accountability for community residential programs.[202] The report recommended that city, county, and state government should work together to establish a process for receiving and resolving neighborhood concerns and complaints.[203] Advocates for persons with mental illness believe that increased

193. 423 Mich. 466, 493, 378 N.W.2d 402, 415 (1985).
194. *Id.* at 507, 378 N.W.2d at 421.
195. *Id.* at 507-08, 378 N.W.2d at 421-22.
196. 63 Ohio St.2d 259, 407 N.E.2d 1369 (1980), *cert. denied*, 450 U.S. 911 (1981).
197. *Id.* at 269, 407 N.E.2d at 1377 (citing Ohio Const. art. XVIII, § 3).
198. Denney v. City of Duluth, 295 Minn. 22, 26, 202 N.W.2d 892, 894 (1972).
199. Glennon Heights, Inc. v. Central Bank & Trust, 658 P.2d 872 (Colo. 1983); Zubli v. Community Mainstreaming Assoc., Inc., 102 Misc.2d 320, 423 N.Y.S.2d 982 (Sup. Ct. 1979), *aff'd*, 74 A.D.2d 624, 425 N.Y.S.2d 263 (App. Div. 1980); Nichols v. Tullahoma Open Door, Inc., 640 S.W.2d 13 (Tenn. Ct. App. 1982).
200. City of Los Angeles v. California Dep't of Health, 63 Cal. App.3d 473, 133 Cal. Rptr. 771 (Ct. App. 1976).
201. St. Paul Planning Commission Task Force on Community Residential Facilities, *supra* note 30.
202. *Id.* at 17.
203. *Id.* at 3.

government involvement in the community residential program siting process could reduce community opposition.[204] These advocates reason that communities may be less likely to take specific action to oppose a siting if they must contend with the government and its legal resources.[205]

Community opposition often works through the conditional use permit process to keep residential programs out of desirable neighborhoods.[206] There are various ways to attempt to neutralize this opposition, including negotiation with the specific neighborhood in which a residential program siting is planned, educational programs aimed at the neighborhood, and increased government involvement in the siting process. Based on a study by the American Planning Association, specific efforts to educate neighborhoods prior to the siting of a group home are counter-productive.[207] Studies call for education and involvement of citizens on a broader level than specific siting controversies. A recent study of community resistance to residential programs indicates that the involvement of the community in the siting process was not associated with decreased opposition and that resident characteristics were not related to the likelihood of encountering community resistance.[208] The study also suggests that education efforts directed toward specific communities may have unintended negative consequences and may provoke rather than minimize opposition.[209]

A 1975 study completed by the University of Minnesota Center for Urban and Regional Affairs (CURA) reported "that no amount of educational programs before or presentations during the controversy about constitutional or human rights or about the benign nature of mentally retarded children and adults will significantly change the minds of those organized in opposition."[210] The

204. Telephone interview with Bill Conley, Legislative Consultant with Mental Health Association (Mar. 16, 1989).

205. *Id.*

206. *See, e.g., supra* text accompanying note 92.

207. Jaffe & Smith, *supra* note 21, at 33.

208. *See* CRISP, *supra* note 38, at 11 (summarizing Marsha Seltzer, *Correlates of Community Opposition to Community Residences for Mentally Retarded Persons*, 1 American J. Mental Deficiency 89 (1984)). Seltzer concluded, on the basis of this study, that intensive community education campaigns before a facility opens may not be the method of choice and in some cases may actually mobilize community opposition. *Id.*

209. *Id.*

210. *See* Friedlob & Anding, *supra* note 37, at 29 (quoting Earl Craig Associates, Inc., A Political Strategy to Combat Community Resistance to Residential Facilities for the Mentally Retarded in Minnesota: A Preliminary Report to the Department of Public Welfare (not dated)).

The Seltzer and Friedlob & Anding studies deal with community reaction to residential programs for persons with mental retardation. Since opposition related

CURA report thus suggests that hostility towards community residential programs might be reduced if citizens are involved and informed on a broader level than specific siting controversies. This involvement might include citizen representation on a state facility distribution task force. Educating the general public about the need for facilities, financial status of community residential programs, licensing requirements, and government responsibility for licensing would demonstrate that community residential programs are a legitimate and important government concern.

Although the research indicates that the best approach to the siting of community residential programs is one which is low-profile, coupled with general education and increased community involvement on a broad level, several states have enacted legislation which requires community involvement in the siting of specific residential programs. Other states ensure community involvement on a broader level. A few states mandate government involvement in the siting process. The following review of these varying state approaches suggests methods to reduce opposition to the establishment of group homes or to facilitate the location of such homes.

Before the establishment of a group home in a residential area, Arizona law requires notification of the affected local government.[211] The local government unit may contest the siting of the group home and request an administrative hearing.[212] Since the statute does not specify standards which must be applied to evidence presented at the hearing, it appears that the purpose of the hearing is to provide a forum for community grievances.

Connecticut law provides that a resident of a municipality in which a group home is located may, with approval of the municipal governing body, petition the state to revoke the license of the group home.[213] This statutory provision requires government involvement in siting controversies by giving community residents access to the licensing authority.

The Louisiana Supreme Court struck down, as violative of the equal protection clause, a state statute[214] requiring group home managers to secure site approval from the local governing author-

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to programs for both persons with mental illness and mental retardation is grounded in unsubstantiated fear and prejudice (*see* Tuoni, *supra* note 4; Allport, *supra* note 5), it follows that similar strategies should be employed for dealing with community opposition to residential programs for each population.

211. Ariz. Rev. Stat. Ann. § 36-582(I) (1986).

212. *Id.*

213. Conn. Gen. Stat. Ann. § 8-3e (West Supp. 1988).

214. La. Rev. Stat. Ann. § 28:478(c) (West 1981).

ity.[215] According to the court, the local approval requirement, which only applied to community residences for people with mental retardation, was based on unfounded prejudice and not on a legitimate state interest.[216] The court held that restrictive zoning practices aimed at group homes must be based on valid government objectives, not on fear and prejudice.[217]

In Florida, local governments prepare comprehensive land use plans which must be submitted to the state land use planning agency for a determination as to whether the plans comply with statutory requirements.[218] Local plans must include provisions for adequate group home sites, and must be compatible with and further the state comprehensive plan.[219] The Administration Commission makes final compliance decisions following an administrative hearing.[220] The public is involved in the preparation of the local plan as well as the administrative hearing if one is convened.[221] This approach changes the posture of the group home zoning ordinance issue from one where a local government's position is defensive or resistant to one which places responsibility for group home siting at the local level.

Both public and private group homes for persons with developmental disabilities are operated in Maryland.[222] Public group homes are owned by or leased to the state, while private group homes are owned by nongovernmental parties.[223] Maryland law provides that, upon a determination of need for a public group home, the affected county, in consultation with local consumer groups, must select a site in accordance with state plan requirements.[224] The state is required to help the county choose a suitable site, and if the county defaults, the responsibility for locating a suitable site falls on the state.[225] After a public hearing, the site is recommended to the Board of Public Works.[226] If approved, the state acquires the site, renovates the building, and finds a suitable private, nonprofit entity to operate the group home, on terms and

215. Clark v. Manuel, 463 So.2d 1276, 1286 (La. 1985).
216. *Id.*
217. *Id.*
218. Fla. Stat. Ann. §§ 163.3167, 163.3184 (West Supp. 1989).
219. *Id.* § 163.3177.
220. *Id.* § 163.3184.
221. *Id.*
222. Md. Health-Gen. Code Ann. § 7-602 (Supp. 1988).
223. *Id.*
224. *Id.* §§ 7-604, 7-605.
225. *Id.* § 7-605.
226. *Id.*

conditions approved by the state.[227]

Private group homes in Maryland must obtain both a license and a certificate of approval from the state.[228] The investigation process following application for such a certificate includes a public hearing conducted by the state.[229] Before the hearing, the state must notify local government officials and publish notices in a local newspaper with substantial circulation.[230] A certificate of approval must be issued if statutory criteria are met.[231] These criteria include all general zoning requirements that apply to the site, such as building height, size, open space, and density requirements.[232] Thus, Maryland law gives state government final authority concerning compliance with local zoning ordinances. Recognizing the political pressures which operate when local elected officials decide land use issues, Maryland law removes decisions concerning group home establishment to the state administrative level.

Reacting to obstacles which community opposition had posed against the establishment of community residences for disabled persons, New York enacted the Padavan Law[233] in 1978. The statute attempts to facilitate the development of community residences while giving municipalities input into site selection.[234] Recognition is given both to the need to encourage establishment of community residences and the concerns of municipalities regarding siting.

Under the Padavan Law, a community residence provider must send written notification of intent to establish a residence to the affected municipality.[235] Within forty days of receipt, the municipality must respond by approving the site, suggesting alternative sites, or objecting to the community residence because its establishment would result in concentration of such facilities.[236] If the municipality does not respond within forty days, the provider is free to establish the residence.[237] The municipality may hold a

227. *Id.* § 7-606.
228. *Id.* § 7-608.
229. *Id.* § 7-611.
230. *Id.*
231. *Id.* § 7-612.
232. *Id.* § 7-609.
233. N.Y. Mental Hygiene Law § 41.34 (McKinney 1988). *See supra* note 173 and accompanying text.
234. *See* Robert L. Schonfeld, *"Not in My Neighborhood:" Legal Challenges to the Establishment of Community Residences for the Mentally Disabled in New York State*, 13 Fordham Urb. L.J. 281, 283 (1985).
235. N.Y. Mental Hygiene Law § 41.34(c)(1).
236. *Id.* § 41.34(c)(1)(A)(B)(C).
237. *Id.* § 41.34(c)(1).

public hearing before it responds.[238] The options available to the municipality, however, foreclose objection on grounds such as the residence would lower property values, create more traffic, or result in increased crime.[239] If a satisfactory alternative is suggested, the community residence must locate there.[240] When the suggested alternative site is unsatisfactory with regard to nature, size, or community support requirements, the provider must notify the municipality which is then required to provide another alternative within fifteen days.[241] If the provider and the municipality cannot agree, either may request an immediate hearing in front of the commissioner of the state agency responsible for licensing community residences.[242] Under the statute, the hearing decision must be based on the following criteria: the need for such a facility in the municipality, existing concentration, and whether establishment of the residence would change the nature and character of the area.[243] The law also provides for judicial review of the administrative decision.[244]

Critics argue that the statute is an impediment to the development of community residences.[245] Sites identified at the beginning of the lengthy Padavan process may be lost to other buyers by the time the process ends. Since providers must accept satisfactory alternatives suggested by municipalities, purchase of the identified property is not an option. As in Maryland, New York law removes decision-making authority concerning the establishment of community residences from elected local authorities to state administrative officials. Judicial challenges to the New York administrative decisions are common.[246] In many cases, however, administrative decisions are favorable to the group home and the burden of pursuing judicial review is on the community opposition.[247] In systems such as New York's, where state government intervenes in zoning disputes, the heavy burden of initiating court action often is transferred from the provider to the community.

South Carolina law requires the provider to notify the local governing body of the location of the proposed group home.[248] If

238. *Id.* § 41.34(c)(2).
239. *See* Schonfeld, *supra* note 234, at 302-03.
240. N.Y. Mental Hygiene Law § 41.34(c)(4).
241. *Id.* § 41.34(c)(5).
242. *Id.*
243. *Id.*
244. *Id.* § 41.34(d).
245. *See, e.g.*, Schonfeld, *supra* note 234, at 300.
246. *Id.* at 285.
247. *See* cases cited *id.* at 328.
248. S.C. Code Ann. § 6-7-830(a) (Law. Co-op. Supp. 1988).

the local government objects to the site, it must notify the provider within fifteen days and appoint a representative to assist the provider in selection of a comparable alternative site.[249] The provider and the local government representative are required to select a mutually agreeable third person.[250] These three parties have forty-five days to make a final selection of the site by majority vote.[251] The final selection is binding on both the provider and local government.[252]

Before a group home license is issued in West Virginia, the state licensing agency must notify the affected municipality of the location of the proposed group home.[253] The municipality has thirty days to file objections or request a hearing with the licensing agency.[254] The state licensing agency is required to hold an administrative hearing when objections or a request for a hearing are filed.[255] West Virginia law also provides that neighborhood residents may file complaints concerning group homes with the state licensing agency.[256] The state agency must conduct an investigation upon receipt of a complaint stating specific conduct on the part of a group home resident which adversely affects public health and safety.[257] If the complaint is substantiated, the agency must reconsider the resident's placement in a community residential facility.[258] While the complainant is entitled to the results of the reconsideration, no private information about the group home resident may be disclosed.[259]

The state approaches reviewed in this section suggest methods to reduce opposition to the establishment of a community residence in a neighborhood or to otherwise facilitate the location of such residences. Increased state participation in the siting process emphasizes the important role played by group homes and demonstrates that the dispute is not simply over a single provider and a discrete group of residents, but with overall policy objectives embraced by state government.

State participation can take the form of arbitration and final decision-making authority or total control of the zoning issue,

249. *Id.*
250. *Id.*
251. *Id.*
252. *Id.*
253. W. Va. Code § 8-24-50b(b) (Supp. 1988).
254. *Id.*
255. *Id.*
256. W. Va. Code § 27-17-2(b) (1986).
257. *Id.*
258. *Id.*
259. *Id.*

through removal of consideration of proposed group home sitings from the local to the state level of government. State agency officials do not have direct political accountability to neighborhood residents, thus treatment of community residences will be more equitable under this approach. Providers would be encouraged to pursue sitings in unconcentrated areas, knowing that where a favorable decision is reached at the state level, community opponents will be less likely to pursue judicial remedies. Where legal action is taken, the support of state legal resources will reduce the risks and financial burden associated with litigation.

After the establishment of a group home, the state agency should continue its active participation by receiving community complaints. This would serve to establish a mechanism to promptly deal with legitimate complaints and also to remind community residents of state government's involvement. Action could be taken to encourage local governments to take responsibility for locating group homes in communities. One method would require municipalities to provide county officials with a list of appropriate group home sites. This list could be made available to group home providers.

Thus, state level participation and accountability coupled with a low-profile approach are important elements of a successful strategy aimed at the community integration of persons with mental illness. This integration will not occur where communities and political figures directly accountable to the communities have unfettered discretion to allow or prohibit residential programs for persons with mental illness.

V. Conditional Use Permits

An issue closely related to government and community involvement in group home sitings is the conditional use permit requirement. In Minnesota, this requirement applies to group homes serving more than six residents.[260] Group homes for persons with mental illness are especially impacted by this requirement since the capacity of these homes often exceeds six.[261]

As noted earlier, a permitted use is a use by right. A condi-

260. Minn. Stat. § 245A.11, subd. 2, 3 (1988). For the text of this statute, see *supra* note 15.

Note that while subdivision 3 is entitled "Permitted Multi-family Residential Use," the language of the subdivision provides no meaningful protection to larger group homes from restrictive conditional use permit requirements. *See supra* text accompanying notes 16-19.

261. *See supra* note 18 and accompanying text.

tional use is one considered "troublesome" even though it logically belongs in a particular district.[262] Minnesota law authorizes municipalities to designate certain types of land use as conditionally permitted, i.e., approved only if zoning ordinance standards and criteria are satisfied.[263] Zoning ordinance standards are often vague, leaving a great deal of discretion to municipalities as they decide whether or not to grant a permit.

When a conditional use permit is denied, a provider can either challenge the denial in court or look for another site.[264] Although the results of litigation have been favorable,[265] the time and expense involved in pursuing judicial relief often foreclose this option. Many providers opt for a different location instead. The City of Brooklyn Center, Minnesota denied a conditional use permit for the Bill Kelly House, a community residential program for persons with mental illness. Bill Kelly House did not initiate court action against the suburb and is currently located in a south Minneapolis neighborhood. The Minnesota Department of Human Rights has charged Brooklyn Center with discrimination as a result of the conditional use permit denial.[266]

Public hearings are a fundamental part of the conditional use permit review process.[267] These hearings often become very heated. As already discussed, concerns held by opponents of community residential programs are based on fear and prejudice and often cannot be countered with reasoning or evidence.[268] If public hearings are simply a forum for the expression of community fear and prejudice, serious questions arise concerning the propriety of subjecting providers and, more importantly, the persons who hope to live in the proposed group homes, to this ordeal.[269]

Despite the difficulties associated with conditional use permits, most of the thirty-four states with preemptory group home zoning legislation allow municipalities to require conditional use permits for larger group homes that wish to locate in single- or multi-family residential zones.[270] Absent preemption, municipalities will generally allow only four or fewer unrelated persons to

262. *See supra* note 32.

263. Minn. Stat. § 462.3595 (1988).

264. Minn. Stat. § 462.361 (1988).

265. *See supra* text accompanying notes 72-116.

266. Telephone interview with Stephen Cooper, Commissioner, Minn. Dept. Human Rights (Feb. 24, 1988).

267. *See supra* text accompanying note 34.

268. *See supra* text accompanying notes 47-50.

269. Jaffe & Smith, *supra* note 21, at 31.

270. Steinman, *supra* note 24, at 25-36.

live together in a single family residential area.[271] Those advocating the establishment of group homes in neighborhoods criticize this rule, noting that group home residents function as a family and municipalities do not exclude large or extended families from single-family zones.[272] The competing interests involved when preemptory legislation has been considered are local government's historical control over land use and normalization goals.[273] As a result, smaller, less threatening living arrangements that more closely resembled traditional families were permitted in all residential areas, while municipalities retained control over larger group homes.[274] Advocates may have favored this approach because they viewed it as encouraging smaller, more homelike living arrangements. It seems, however, that the interests of persons with mental illness have been neglected by the zoning legislation since group homes serving these persons generally are not small.

Minnesota law defines "small" group homes as those with a capacity of six or fewer residents.[275] Several states have expanded the definition to include group homes serving a maximum of eight residents.[276] West Virginia permits group homes serving up to eight developmentally disabled residents or up to twelve residents with mental illness to locate, by right, in all residential areas.[277] Thus, if the conditional use permit requirement in Minnesota is retained, the definition of "small" group homes could be amended to allow more than six residents. This option merits attention only if financial considerations, e.g., minimum size necessary to ensure economic viability of a group home accord with political realities.[278]

A second option, short of total preemption of local zoning authority with regard to community residential programs, is to allow for state agency administrative review of local decisions concerning conditional use permit applications. If the provider requests a hearing, and the administrative hearing judge finds the denial decision to be arbitrary or not supported by evidence, the decision

271. *See, e.g.*, St. Paul Planning Commission Task Force on Community Residential Facilities, *supra* note 30, at 9.

272. *See, e.g.*, Note, *supra* note 7, at 875.

273. *See Zoning for Community Homes*, *supra* note 9, at 804.

274. *See* Steinman, *supra* note 24, at 25-36.

275. Minn. Stat. § 245A.11, subd. 2 (1988).

276. *See, e.g.*, Colo. Rev. Stat. § 30-28-115 (Supp. 1987); Idaho Code § 67-6530 (1980); Iowa Code Ann. § 414.22 (West Supp. 1988); Me. Rev. Stat. Ann. tit. 30, § 4962-A (Supp. 1988); Mont. Code Ann. § 76-2-412 (1987); Tenn. Code Ann. § 13-24-102 (1987); Utah Code Ann. § 10-9-2.5 (1986).

277. W. Va. Code §§ 27-17-1, 27-17-2 (1986).

278. *See Zoning for Community Homes*, *supra* note 9, at 807.

would be reversed. The advantage of this approach is that it allows local government to retain control, while providing for a review of negative decisions which is quicker and less expensive than judicial remedies. Additionally, the burden of initiating a court challenge would be transferred from providers to local government or community opposition. These parties might be reluctant to pursue judicial remedies where the siting decision was upheld by state government. This approach would be favored by advocates who believe the state agency should play a more active role in siting controversies. Local government would probably prefer this method over complete loss of control. One disadvantage of the system is that it would require state administrative resources. The cost of the resources, however, would likely be less than costs associated with judicial challenges and thwarted group home sitings. Another disadvantage is that the conditional use permit process, including public hearings, is retained.

While retaining all the procedural aspects of the conditional use permit process, Maryland places decision-making responsibility at the state government level.[279] Compliance with zoning requirements is one criterion a private group home must meet before the state agency will issue a certificate of approval.[280] As part of the approval process, the state agency notifies the affected municipality and neighborhood residents of the proposed group home and holds a public hearing.[281] This alternative has the advantage of removing decision-making authority from politically accountable local officials. Instead of using political power to effect denial of a permit, community opposition has the burden of proving that the proposed group home does not meet objective land use criteria. Since negative decisions based on subjective factors are less likely to result at the state level, group home providers and residents do not face the significant litigation burden which is the only recourse to negative local level decisions. Rather, this burden is transferred to localities who must prove the merits of their case in court. Retaining the public hearing is a disadvantage of this alternative.[282] It is very unlikely that localities would support this alternative since it would be viewed as state usurpation of power formerly held by localities.

Arizona and West Virginia require the state agency to notify affected localities of receipt of applications for licensure from

279. See the discussion of Maryland law *supra* text accompanying notes 222-232.

280. Md. Health-Gen. Code Ann. § 7-609 (Supp. 1988).

281. *Id.* § 7-611.

282. *See supra* text accompanying notes 267-68.

group homes[283] which are a permitted residential use by operation of state law.[284] If a locality objects to the establishment of the group home, the state agency holds a public hearing.[285] Thus, while state law does not allow localities to impose a conditional use permit requirement on group homes, a forum to voice objections is provided.

Ohio law permits group homes serving from nine to sixteen persons to locate in multi-family residential areas, but municipalities may designate these group homes a conditionally permitted use.[286] The statute limits the standards that can be imposed through the conditional use permit process to those concerning architectural compatibility, yard, parking, sign regulation, and concentration.[287] This approach restricts municipalities to consideration of traditional land use issues and prevents denial based on factors related to the condition of the residents. In situations where there is substantial community opposition, however, conditional use permits may be improperly denied under the guise of one of the permitted standards. When this is the case, group home providers must either bear the expense associated with a judicial remedy or find another location.

Wisconsin has eliminated local zoning ordinances as a barrier to community integration of persons with mental illness. State law designates community residential programs licensed by the Department of Health and Human Services which serve from nine to fifteen persons a permitted use in all residential areas except those zoned exclusively for single- or two-family residences.[288] The residences are, however, subject to the same building and housing ordinances, codes, and regulations as similar residences located in the same area.[289] While this approach does not allow municipalities to block the establishment of community residential programs through the conditional use permit process, municipalities are permitted to regulate yard size, parking, architectural compatibility, and other traditional land use issues. Group home providers are not discouraged from locating in unconcentrated ar-

283. Ariz. Rev. Stat. Ann. § 36-582(I) (1986); W. Va. Code § 8-24-50b(b) (Supp. 1988).

284. Ariz. Rev. Stat. Ann. § 36-582(A) (1986); W. Va. Code § 8-24-50b(a) (Supp. 1988).

285. Ariz. Rev. Stat. Ann. § 36-582(I); W. Va. Code § 8-24-50b(b).

286. Ohio Rev. Code Ann. § 5123.19(M) (Anderson 1989).

287. *Id.*

288. Wis. Stat. Ann. § 59.97(15)(d) (West 1988).

289. Wis. Stat. Ann. § 46.03(22)(b) (West 1987).

eas by the delays and costs associated with the conditional use permit requirement.

The Wisconsin approach has many positive features. Legislation designating larger group homes a permitted use in multi-family areas will facilitate dispersal of group homes and promote normalization goals for the residents of larger homes, primarily persons with mental illness. Under a preemption statute, the locality's ability to regulate traditional land use issues should not be upset. Narrow tailoring of the statute may reduce municipal opposition to preemption.

If political opposition to preemption is strong, the next best approach is a requirement for state agency review of local decisions concerning conditional use permits for group homes. As stated above, with this option local government retains control, while a less expensive and time-consuming remedy is available to the provider.

In addition to allowing communities to impose a conditional use permit requirement on residential programs for persons with mental illness, some states have enacted legislation aimed at eliminating group home ghettos. Concentration and dispersal legislation is discussed in the next section.

VI. Concentration and Dispersal of Community Residential Programs

Several states have enacted legislation which establishes minimum distances, ranging from 1,200 feet to one mile, that must separate community residential programs.[290] Minnesota has such a separation requirement and additionally requires local agencies to prepare plans to eliminate existing concentration of group homes.[291] While normalization through the prevention of group home ghettos is the stated purpose of the legislation, the unstated reason is to ensure that no community has more than its fair share of a land use considered by many to be undesirable.[292]

Such separation legislation is vulnerable under the *Cleburne* standard,[293] since normalization is not furthered by separation re-

290. Steinman, *supra* note 24, at 21.

291. Minn. Stat. § 245A.11, subd. 3-5 (1988). For the text of this statute, see *supra* note 15. While the statute requires concentrated counties to submit plans to promote dispersal of established residential programs, there are no penalties if dispersal does not actually occur. Minn. Stat. § 245A.11, subd. 5. Other states have not legislatively encouraged or required the dispersal of established group homes. *See* Steinman *supra* note 24, at 21-22.

292. *See* Jaffe & Smith, *supra* note 21, at 11-13. *See also* Mpls. Star & Tribune, July 24, 1988 at B1, col. 1.

293. *See supra* text accompanying notes 65-70. Under City of Cleburne Living

quirements. Three factors account for the development of group home ghettos: inexpensive housing, the availability of large residences for which there is little demand, and the ability of middle and upper class neighborhoods to block, through local zoning ordinances, the siting of community residential programs.[294] None of these factors is countered by separation requirements. Inexpensive housing is necessary because low funding levels have been allocated for residential programs serving persons with mental illness.[295] Given low funding levels, economies of scale dictate large residential programs for these individuals. Large, inexpensive housing is available almost exclusively in low income, inner city neighborhoods. Where this housing is available in other neighborhoods, state legislation endorses the use of local zoning ordinances to block the siting of a residential program.[296] Thus, the way to prevent group home ghettos is to increase funding levels and prohibit exclusionary zoning practices aimed at community residential programs.

It may be argued that while separation requirements do not address the problems which cause group home ghettos, the requirements, by preventing any group home from locating within a set distance from another, at least prevent further concentration. This argument ignores normalization, the ultimate purpose at which separation requirements are ostensibly directed.[297] Separation requirements actually have a detrimental effect on normalization goals. Group home ghettos arose out of necessity, not choice.[298] The number of available sites will remain constant without increased funding levels. With the imposition of separation requirements, the number of available sites decreases. If sites are more difficult or impossible to obtain, persons with mental illness will have less desirable or no housing alternatives. Since normalization is not served and is, in fact, impeded by separation legislation, it cannot be advanced as a defense to a constitutional challenge. Therefore, under *Cleburne*, it is likely that separation legislation would be struck down.

Center, 473 U.S. 432 (1985), which applies to persons with mental retardation and probably extends to persons with mental illness, these groups are neither suspect or quasi-suspect classes and therefore not entitled to heightened scrutiny. The Court established, however, that classifications based on prejudice and unsubstantiated fears alone would never pass constitutional muster. 473 U.S. at 446-48.

294. United States General Accounting Office, *supra* note 30, at 1; Jaffe & Smith, *supra* note 21, at 12.

295. United States General Accounting Office, *supra* note 30, at 1.

296. Minn. Stat. § 245A.11, subd. 3 (1988).

297. See *supra* note 9 for the definition of "normalization."

298. Jaffe & Smith, *supra* note 21, at 12.

Dispersal will take place, albeit gradually, if local zoning ordinances are preempted, smaller living arrangements for persons with mental illness are encouraged, and funding levels are increased. A gradual approach would be more attentive to the preferences of group home residents. Rather than transplanting residents from one community to another, residents under a gradual approach could choose between their current living arrangement and another arrangement in a different community. This concept of choice is "consistent with current practices that address housing discrimination by encouraging individual liberties and freedom of choice."[299]

County officials report, however, that dispersal according to short-term time limits cannot be accomplished without a significant allocation of resources to cover the expense of provider settlement costs, higher interest rates, and remodeling expenses.[300]

VII. Recommendations

As established by Minnesota law, the power to zone in Minnesota exists only as delegated by the state legislature.[301] The Minnesota Supreme Court upheld a state law designating residential programs with a licensed capacity of six or fewer persons a permitted single-family use for zoning purposes.[302] Courts in other states have likewise rejected constitutional challenges to preemptive legislation, reasoning that such legislation is reasonable and concerns a matter of state-wide concern.[303] Thus, courts probably will uphold the constitutionality of further reasonable preemptive legislation promoting community integration of residential programs. Minnesota and other states with similar legislation should strengthen preemptive zoning legislation so that community integration can become a reality for persons with mental illness.

Model preemptive legislation is set forth in Appendix A. The

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299. *Id.* at 12-13.

300. Telephone interview with Marjorie Wherley, Program Supervisor, Adult Housing, Hennepin County Community Services Department (Apr. 4, 1989).

301. Denney v. City of Duluth, 295 Minn. 22, 26, 202 N.W.2d 892, 894 (1972).

302. Costley v. Caromin House, 313 N.W.2d 21 (Minn. 1981). See *supra* text accompanying notes 72-83 for a discussion of *Costley*.

303. *See, e.g.*, City of Los Angeles v. California Dep't of Health, 63 Cal. App.3d 473, 133 Cal. Rptr. 771 (Ct. App. 1976); Glennon Heights, Inc. v. Central Bank & Trust, 658 P.2d 872 (Colo. 1983); Zubli v. Community Mainstreaming Assoc., Inc., 102 Misc. 2d 320, 423 N.Y.S.2d 982 (Sup. Ct., 1979), *aff'd*, 74 A.D.2d 624, 425 N.Y.S.2d 263 (App. Div. 1980); Mahrt v. City of Kalispell, 213 Mont. 96, 690 P.2d 418 (1984); Nichols v. Tullahoma Open Door, Inc., 640 S.W.2d 13 (Tenn. Ct. App. 1982); City of Livonia v. Department of Social Serv., 423 Mich. 466, 378 N.W.2d 402 (1985). *But see* Garcia v. Siffrin Residential Ass'n, 63 Ohio St.2d 259, 407 N.E.2d 1369 (1980), *cert. denied*, 450 U.S. 911 (1981).

model legislation draws from decisional law, studies reported in this article, and approaches taken by other states. The remainder of this section evaluates possible approaches to group home siting presented by the various state methods discussed in Section IV.

A. Government and Community Involvement

The following is a list of possible approaches to government and community involvement in group home siting.

Alternative 1

Provide for notification of the affected municipality and an administrative hearing if the siting is opposed, where state legislation provides for preemption of local zoning authority related to group home siting.[304] This alternative is not suggested because administrative hearings held simply to provide a forum for community grievances are likely to increase rather than dissipate opposition.[305]

Alternative 2

Create a mechanism by which the state licensing agency is accessible to communities and can receive and deal with community complaints concerning group homes.[306] By adopting this alternative, state government will become more responsive to communities once residential programs are established, ensuring that problems are solved and relations between the program residents and neighbors are not adversely affected as the result of lingering and unresolved complaints. State agency accessibility to communities will also serve an educational function.

Alternative 3

Encourage local governments to take responsibility for locating group homes in communities. One method would be to require municipalities to provide county officials with a list of possible, appropriate group home sites.[307] Implementing this approach will make municipalities partners rather than adversaries in the community integration effort.

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304. Ariz. Rev. Stat. Ann. §§ 36-581, 36-582 (1986); N.Y. Mental Hygiene Law § 41.34 (McKinney 1988); W. Va. Code § 8-24-50b (Supp. 1988).

305. *See supra* notes 267-68 and accompanying text.

306. Connecticut provides community residents access to the state licensing authority. Conn. Gen. Stat. Ann. § 8-3e (West Supp. 1988).

307. This recommendation is based on Florida legislation. Fla. Stat. Ann. § 163.3177 (West Supp. 1988).

B. Conditional Use Permit Requirement

The following approaches address the issue of conditional use permit requirements for larger community residential programs.

Alternative 1

Designate residential programs with a licensed capacity in excess of six persons a permitted multi-family residential use.[308] This alternative will best facilitate group home dispersal and promote normalization goals for residents of larger group homes, particularly persons with mental illness. In order to reduce opposition from city government, a statute designating larger residential programs a permitted use in multi-family residential areas should be narrowly tailored. States should set an upper limit on the number of residents and allow a municipality to retain its ability to regulate traditional land use issues, such as yard size, parking, and architectural compatibility.[309]

Alternative 2

Transfer authority for issuing conditional use permits from local to state government.[310] A state licensing process could include wider consideration of land use issues and an opportunity for municipalities to voice objections to proposed plans. Rather than totally preempting local zoning ordinances, this approach gives state government decision-making authority over local zoning ordinance compliance issues. Decision-making authority is therefore located at a level not as politically sensitive to local opposition to residential programs. State administrative expenses would replace the burdens associated with the conditional use permit process.[311] This alternative is second only to eliminating the conditional use permit requirement.

Alternative 3

Provide for state administrative review of local denials of conditional use permit applications. If a provider requests a hearing and the administrative hearing judge finds the denial decision to be arbitrary or not supported by evidence, the decision would be reversed. This alternative allows local government to retain control over land use, while providing an appeals process which is quicker and less expensive than judicial review. Additionally,

308. Wisconsin has adopted this approach. Wis. Stat. Ann. § 59.97(15)(d) (West 1988).

309. *Compare* Wis. Stat. Ann. § 46.03(22)(b), § 59.97(15)(d)(West 1988).

310. This alternative is based on Maryland law. See the discussion of Maryland law *supra* text accompanying notes 222-232.

311. *See supra* text accompanying notes 264-269.

when a denial is overturned, the burden of initiating a court challenge is on local government or community opposition. These parties might be reluctant to pursue judicial remedies when state government supports a particular siting decision. This alternative is not recommended, however, because it retains the burdensome local level public hearing and involves a siting process which could be quite lengthy.

Conclusion

The deinstitutionalization movement has not returned persons with mental illness to the communities where they grew up or enabled them to live in communities of their choice. Rather, society continues to shun them. One of the most powerful legal methods used to keep mentally ill persons from residing in all but the least desirable neighborhoods has been the local zoning ordinance. As a condition precedent to locating in a particular community, local zoning ordinances often compel community residential program providers to obtain a conditional use permit. The standards in zoning ordinances are often vague, leaving a great deal of discretion to municipalities as they decide whether or not to grant a permit. A fundamental part of the conditional use permit process is a public hearing. These hearings often become very heated and local decisionmakers bend to the will of their constituents.

Minnesota, like many other states, enacted legislation aimed at preempting these zoning ordinances. The legislation, however, did not go far enough. While smaller residential programs were designated a permitted use in all residential areas, larger programs, which primarily serve persons with mental illness, continue to be a conditional use and are repeatedly excluded from desirable neighborhoods.

Additionally, under the legislation, community residential programs must be separated by at least 1,320 feet, larger programs cannot be located in any highly concentrated planning district, and counties including such a district must develop a plan to promote dispersal of established programs. These concentration and dispersal requirements are patently offensive since they limit residential choices available to persons with mental illness. Under the guise of normalization, Minnesota concentration and dispersal legislation actually promotes the "fair share" doctrine, by allowing neighborhoods to accept no more than a token residential program.

The model legislation in Appendix A is designed to vigorously promote the community integration of persons with mental illness. Residential programs for this population are designated a

permitted use, subject to legitimate zoning concerns such as building and housing codes and regulations which are applied to other residences in the same area. The state agency responsible for licensing residential programs is given responsibility for ensuring that normalization goals are promoted.

Persons with mental illness are entitled to the full rights of citizenship. Legal means to exclude and isolate mentally ill persons can no longer be tolerated. Community integration of persons with mental illness can become a reality if preemptive zoning legislation is passed.

Appendix A: Model Statute

An Act to Establish the Right of Persons with Mental Illness to Live in Residential Programs Located in Desirable Neighborhoods.

Subdivision 1. Policy statement. It is the policy of the state that persons shall not be excluded by municipal zoning ordinances or other land use regulations from the benefit of normal residential surroundings.

Subdivision 2. Permitted single-family residential use. Residential programs with a licensed capacity of six or fewer persons shall be considered a permitted single-family residential use of property for purposes of zoning and other land use regulations. Notwithstanding licensed capacity, licensed residential programs operated in single-family structures; providing permanent (as opposed to transient) living arrangements; occupied by residents working together toward common goals, sharing common interests, problems, and household responsibilities; and including resident houseparents in cases where residents are in need of 24-hour supervision, shall also be considered a permitted single-family residential use of property for purposes of zoning and other land use regulations.

Subdivision 3. Permitted single-family residential use. A licensed residential program with a licensed capacity in excess of six shall be considered a permitted multi-family residential use of property for the purposes of zoning and other land use regulations. Municipalities are permitted to regulate yard size, parking, architectural compatibility, and building and housing codes to the same extent as other residences in the area.

Subdivision 4. Location of residential programs. In determining whether to grant a license, the commissioner shall specifically consider the population, size, land use plan, availability of community services, normalization opportunities, and the number and size of existing licensed residential programs in the town, municipality, or county in which the applicant seeks to operate a residential program.

Subdivision 5. Community education. The commissioner shall take action to educate all communities in this state about community residential programs. This educational activity may include collaboration with advocacy groups. The commissioner shall also establish a system for receiving complaints concerning established community residential programs. All complaints shall be promptly resolved and the originator of the complaint shall be notified of the nature of the resolution.

Subdivision 6. Separation requirements. Municipalities shall not establish minimum separation requirements applicable to community residential programs.

Subdivision 7. Municipality responsibility. Each municipality shall provide the county agency in which it is located, on an annual basis, a list of available appropriate residential program sites within the municipality.

Appendix B: Case Law Summary

United States Supreme Court and Minnesota State Courts

- Local zoning ordinances are valid if they are reasonable, not arbitrary, and substantially related to public health, safety, morals, or general welfare.[312]
- Use of property by an unrelated single housekeeping unit which is transient in nature and departs from traditional family values may properly be excluded from a single-family residential area.[313]
- For the purpose of local zoning ordinances, "family" may not be defined to exclude extended families.[314]
- Municipalities may not discriminate against group homes on the basis of irrational prejudice and unsubstantiated fear.[315]
- For the purpose of local zoning ordinances the term family will not be interpreted as only those persons related by blood or marriage. In determining whether a group home constitutes a functional family, the following factors must be considered: permanency of the living arrangement, existence of a head of household, and sharing of household duties by the residents.[316]
- Operation of a state-licensed residential program by a for-profit corporation does not automatically give the program commercial status.[317]
- A group home complies with a single-family restrictive covenant as long as it is a single housekeeping structure, a relatively permanent type of living situation, and public policy supports such an arrangement.[318]
- A municipality has no inherent power to zone. Zoning power is held by the state legislature and delegated, in the manner determined by the legislature, to municipalities.[319]
- State law preempts local authority in the area of appropriate operation of state-licensed community residential programs, as set forth in state rules governing licensure of such programs.[320]
- Municipalities are permitted to impose on community residen-

312. Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).
313. Village of Belle Terre v. Boraas, 416 U.S. 1 (1974).
314. Moore v. City of East Cleveland, 431 U.S. 494 (1977).
315. City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985); Horbal v. City of Ham Lake, 393 N.W.2d 5 (Minn. Ct. App. 1986).
316. Costley v. Caromin House, Inc., 313 N.W.2d 21 (Minn. 1981).
317. *Id.*
318. *Id.*
319. Denney v. City of Duluth, 295 Minn. 22, 202 N.W.2d 892 (1972).
320. Northwest Residence, Inc. v. City of Brooklyn Center, 352 N.W.2d 764 (Minn. Ct. App. 1984).

tial facilities only those special health and safety standards which relate to the characteristics of a particular site, provided such standards are uniformly applied to all sites in the district which are similarly classified. Municipalities may not impose special health and sfety standards to care of residents of state-licensed community residential programs, to services provided to residents, or to any other area covered by state rules governing licensure of community residential programs.[321]

Jurisdictions Outside Minnesota and Single-Family Use

- Group homes that resemble the traditional family unit in theory, size, structure, and appearance will be considered a permitted single-family use for zoning purposes.[322]
- Courts will look to whether the outward appearance of the home is distinguishable from neighboring homes when evaluating the structure and appearance criteria.[323]
- To resemble a traditional family unit in theory, a group home must offer a stable and permanent living arrangement.[324]
- A showing that the household intends to remain and develop ties in the community may help to convince the court that it emulates a family.[325]
- The courts are divided as to whether resident houseparents are a necessary component for a group home to be considered a family for zoning purposes.[326]

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321. *Id.*

322. City of White Plains v. Ferraioli, 34 N.Y.2d 300, 313 N.E.2d 756, 357 N.Y.S.2d 449 (1974).

323. *Id.*; Township of Washington v. Central Bergen Community Health Center, 156 N.J. Super. 388, 383 A.2d 1194 (Super. Ct. Law Div. 1978).

324. City of White Plains v. Ferraioli, 34 N.Y.2d 300, 313 N.E.2d 756, 357 N.Y.S.2d 449 (1974); Hessling v. City of Broomfield, 193 Colo. 124, 563 P.2d 12 (1977); Township of Washington v. Central Bergen Community Health Center, 156 N.J. Super. 388, 383 A.2d 1194 (Super. Ct. Law Div. 1978); Incorporated Village of Freeport v. Association for the Help of Retarded Children, 94 Misc. 2d 1048, 406 N.Y.S.2d 221 (Sup. Ct.), *aff'd*, 60 A.D.2d 644, 400 N.Y.S.2d 724 (App. Div. 1977); Little Neck Community Ass'n v. Working Organization for Retarded Children, 52 A.2d 90, 383 N.Y.S.2d 364 (App. Div. 1976).

325. City of White Plains v. Ferraioli, 34 N.Y.2d 300, 313 N.E.2d 756, 357 N.Y.S.2d 449 (1974).

326. *Compare* Crane Neck Ass'n, Inc. v. New York City/Long Island County Serv. Group, 61 N.Y.2d 154, 460 N.E.2d 1336, 472 N.Y.S.2d 901 (1984); Hessling v. City of Broomfield, 193 Colo. 124, 563 P.2d 12 (1977); City of West Monroe v. Ouachita Ass'n for Retarded Children, 402 So.2d 259 (La. Ct. App. 1981); Oliver v. Zoning Comm'n, 31 Conn. Supp. 197, 326 A.2d 841 (C.P. 1974); Penobscot Area Housing Dev. Corp. v. City of Brewer, 434 A.2d 14 (Me. 1981); and Culp v. City of Seattle, 22 Wash. App. 618, 590 P.2d 1288 (Ct. App. 1979) *with* Township of Washington v. Central Bergen Community Health Center, 156 N.J. Super. 388, 383 A.2d 1194 (Super. Ct. Law Div. 1978); Mongony v. Bevilacqua, 432 A.2d 661 (R.I. 1981); and Little

- Family characteristics such as residents working together toward common goals; developing cohesive and permanent relationships; and sharing common interests, problems, and household responsibilities are sometimes determinative of a group home's classification as a functional family.[327]
- Extensive delivery of medical or therapeutic services may bar classification of a group home as a functional family.[328]
- The size of group homes considered functional families ranges from six to twelve members. One court declined to set a limit on the size of a family unit, deferring to state licensing standards and building, fire, safety, and public health codes.[329]
- Deliberate attempts by the state and the provider to emulate a family unit have been persuasive in the determination that a group home is a functional family.[330]

Jurisdictions Outside Minnesota and State Preemption of Local Zoning Ordinances

- Preemptive zoning legislation which is reasonable and deals with a matter of statewide concern will be upheld in states where a municipality's power to zone is derived from legislative delegation.[331]
- Property owners adjacent to a proposed group home do not have a due process right to notice and hearing where state legislation establishes that the group home is a permitted use.[332]

Neck Community Ass'n v. Working Organization for Retarded Children, 52 A.2d 90, 383 N.Y.S.2d 364 (App. Div. 1976).

327. City of West Monroe v. Ouchita Ass'n for Retarded Children, 402 So.2d 259 (La. Ct. App. 1981); Township of Washington v. Central Bergen Community Health Center, 156 N.J. Super. 388, 383 A.2d 1194 (Super. Ct. Law Div. 1978); Mongony v. Bevilacqua, 432 A.2d 661 (R.I. 1981); Penobscot Area Housing Dev. Corp. v. City of Brewer, 434 A.2d 14 (Me. 1981).

328. Township of Washington v. Central Bergen Community Health Center, 156 N.J. Super. 388, 383 A.2d 1194 (Super. Ct. Law Div. 1978); Crane Neck Ass'n, Inc. v. New York City/Long Island County Services Group, 61 N.Y.2d 154, 460 N.E.2d 1336, 472 N.Y.S.2d 901 (1984). *But see* Little Neck Community Ass'n v. Working Organization for Retarded Children, 52 A.2d 90, 383 N.Y.S.2d 364 (App. Div. 1976).

329. Oliver v. Zoning Comm'n of Town of Chester, 31 Conn. Supp. 197, 326 A.2d 841 (C.P. 1974).

330. Incorporated Village of Freeport v. Association for the Help of Retarded Children, 94 Misc.2d 1048, 406 N.Y.S.2d 221 (Sup. Ct.), *aff'd*, 60 A.D.2d 644, 400 N.Y.S.2d 724 (App. Div. 1977); Little Neck Community Ass'n v. Working Organization for Retarded Children, 52 A.2d 90, 383 N.Y.S.2d 364 (App. Div. 1976).

331. Glennon Heights, Inc. v. Central Bank & Trust, 658 P.2d 872 (Colo. 1983); Zubli v. Community Mainstreaming Assoc., Inc., 102 Misc. 2d 320, 423 N.Y.S.2d 982 (Sup. Ct. 1979), *aff'd*, 74 A.D.2d 624, 425 N.Y.S.2d 263 (App. Div. 1980).

332. Glennon Heights, Inc. v. Central Bank & Trust, 658 P.2d 872 (Colo. 1983); Nichols v. Tullahoma Open Door, Inc., 640 S.W.2d 13 (Tenn. Ct. App. 1982).

- Fifth amendment claims by neighbors of group homes have been rejected because the neighboring property was not physically invaded nor was the use directly restrained.[333]

333. Zubli v. Community Mainstreaming Assoc., Inc., 102 Misc. 2d 320, 423 N.Y.S.2d 982 (Sup. Ct. 1979), *aff'd*, 74 A.D.2d 624, 425 N.Y.S.2d 263 (App. Div. 1980).