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NOTE

ZONING FOR LAND USERS AND NOT LAND USE

> The "nuclear family" arrangement is no longer the only model of family life in America. The realities of present-day urban life allow many types of non-traditional families. In any event, the best description of a family is a continuing relationship of love and care, and an assumption of responsibility for some other person.[1]

City of Cleburne v. Cleburne Living Center, 105 S. Ct. 3249 (1985).

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1. *In re* Adult Anonymous II, 88 A.D.2d 30 (1st Dept. 1982).

In July, 1980, Jan Hannah purchased a house in Cleburne, Texas, intending to lease it to Cleburne Living Centers, Inc. (C.L.C.), for the operation of the first group home[2] for the mentally retarded in Cleburne.[3] It was contemplated that the home would house thirteen mildly to moderately retarded adults.[4] The home would be operated by C.L.C. in compliance with all applicable statutes, codes and

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2. A group home family is usually composed of approximately six to ten members and one or more surrogate parents or staff members. The group functions as a single housekeeping unit, sharing responsibilities, meals and recreational activities.

The intention is for group home members, like members of a natural family, to develop ties in the community. In addition, surrogate parents are often specially trained to help residents overcome their needs. Benjamin Gailey, *Group Homes and Single Family Zoning*, 4 ZONING AND PLANNING L. REP. 97, 97-98 (Feb. 1981) [hereinafter cited as Gailey].

For purposes of this note a broad definition of group home, being a residence licensed by the state that "[p]rovides a family living environment including supervising and personal care necessary to meet the physical, emotional and social needs of the residents" is employed. FLA. STAT. § 393.063(13) (1985).

Group homes are also referred to as community residences, family homes and foster care facilities. *See* Note, *Group Homes and Deinstitutionalization: The Legislative Response to Exclusionary Zoning*, 6 VT. L. REV. 510 (1981).

Although group homes for various client populations such as the mentally ill, foster children and rehabilitating criminals will be discussed, they are primarily outside the scope of this note. The primary emphasis of this note is to discuss the plight of the "Developmentally Disabled."

Developmentally disabled commonly refers to persons with some handicap which is manifest to a degree of incapacity rendering necessary assistance in daily activities. Typically included would be mental retardation, blindness, deafness and some specific diseases like epilepsy.

FLA. STAT. § 393.063(6) (1985) describes a developmental disability as "a disorder or syndrome which is attributable to retardation, cerebral palsy, autism, epilepsy, or spina bifida and which constitutes a substantial handicap that can reasonably be expected to continue indefinitely." Note, the mentally retarded are commonly included in the definition of developmentally disabled in some states. *See, e.g.*, FLA. STAT. § 393.063(6) (1985).

3. Cleburne Living Center, Inc. v. City of Cleburne, 726 F.2d 191, 193 (5th Cir. 1984). The Fifth Circuit noted that no group homes or hospitals for the mentally retarded existed in Cleburne at the time it heard the case. The closest facility available for the mentally retarded was located in Keene, Texas, approximately fifteen minutes away by automobile. *Id.* at 193.

4. *Id.* at 193. The house was situated on a 16,068 square foot lot and totalled 2,700 square feet. *Id.* at 202. It also had four bedrooms and two baths, with a half bath to be added. The house was located across the street from a junior high school which itself had thirty mentally retarded students. Abutting the house, which was situated on a corner lot, was a two story apartment building and a dentist's office was located on an adjacent corner. Cleburne Living Center, Inc. v. City of Cleburne, No. CA-3-80-1576-F, slip op. at 6 (N.D. Tex. Oct. 4, 1982) *reprinted in* Appendix, City of Cleburne's Petition For Writ of Certiorari To The United States Court of Appeal For The Fifth Circuit, Sept. 22, 1984 [hereinafter cited as Appendix].

The U.S. Supreme Court commented favorably upon the location of the home noting that "[it] . . . was specifically located near a park, a school, and a shopping center so that its residents would have full access to the community at large." City of Cleburne v. Cleburne Living Center, 105 S. Ct. 3249, 3266 n.5 (1985).

ordinances.[5]

Residents of the home were to receive twenty four hour supervised care and, in addition, the staff would also teach residents such basic skills as "kitchen management, maintenance, personal budgeting, meat preparation, academics related to independent living . . . and the use and enjoyment of leisure activities."[6] The residents would have jobs in the community and in a work activity center.[7]

The home was inspected and approved by the appropriate state agencies.[8] Cleburne City officials determined, however, that under the city's zoning regulations, the home would constitute a home for the "feeble-minded," and as such, could not be located in an "Apartment House District" without first obtaining a special use permit.[9] If ap-

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5. *Cleburne*, 726 F.2d at 193. C.L.C. intended to operate the home as a Level I Intermediate Care Facility for the Mentally Retarded(ICF/MR). An ICF/MR is a medicaid funded program regulated and administered at the federal level by the Department of Health and Human Resources. *See* 42 C.F.R. §§ 442.400 -.516 (1984). An ICF/MR is regulated and administered by the Texas Department of Mental Health and Retardation at the state level. The State of Texas has adopted all federal ICF/MR requirements. *Compare* 9 Tex. Reg. 2139-60 (1984) with 42 C.F.R. §§ 442.400-.516 (1984). *See* Connor, *Zoning Discrimination Affecting Retarded Persons*, 29 J. URB. & CONTEMP. L. 67, 67 n.2 (1985).

6. *Cleburne*, 726 F.2d at 193. The residents would also be taught how to read classified ads in order to find jobs and housing. Id.

7. *Id.*

8. Amicus Curiae Brief for the State of Texas and The Texas Department of Mental Health and Mental Retardation at 2, City of Cleburne v. Cleburne Living Center, 105 S. Ct. 3249 (1985) [hereinafter cited as Amicus Brief].

9. Appendix, *supra* note 4, at 5. The home was located in an R-3 "Apartment House District" which allowed such uses as apartment houses or multiple dwellings, boarding and lodging houses, fraternity or sorority houses and dormitories, apartment hotels and hospitals, sanitariums, nursing homes or homes for the convalescent or aged other than for the insane or feebleminded or alcoholics or drug addicts. *Cleburne*, 105 S. Ct. at 3252-53 n.3.

Section 16 of Cleburne's zoning ordinance specified the uses for which a special use permit was required. These included "[h]ospitals for the insane or feebleminded, or alcoholic or drug addicts, or penal or correctional institutions." *Id.*

Had the structure and proposed group use of the home been the same in every respect except for the mental retardation of its potential residents, the group home use would have been permitted under the city's zoning ordinance.

A special use permit is a form of administrative relief which allows a landowner to use his property in a manner permitted by the zoning ordinance provided that the applicant demonstrates compliance with all standards and criteria that are set forth in the legislation. The terms "special use", "special exception", and "conditional use" are often used interchangeably by local governments to designate a special use permit. The governmental body, be it a board of adjustment and appeals, planning commission or other public body, is generally authorized to prescribe conditions in order to regulate the proposed use. These conditions must be designed to ensure the nature, actual operation, and physical layout of the use conforms to the requirements of the ordinance. The inclusion of special permit uses in the zoning ordinance has generally been held to be tantamount to a finding that such uses are in harmony with the general zoning plan and will not have an adverse impact upon the community.

proved, the special use permit would be valid for only one year and would require annual renewal.[10] In addition, a precondition of the permit was the receipt of the consent of all property owners located

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However, a permit is required in these cases because of the possibility that the permitted use might be incompatible with the existing zoning in the area. Special use permits are often confused with variances, however, the essential distinction is that a variance authorizes a landowner to establish or maintain a use which is *prohibited* by the zoning regulations. A variance is authorized where the literal enforcement of its terms would result in an unnecessary hardship. State zoning enabling acts and local zoning laws generally require an applicant for a variance to demonstrate the existence of unique circumstances compelling his request in order to be excused from the restraints of the ordinance. In addition, the burden of proof on a variance petitioner is much heavier because he must show that he cannot put his property to any reasonable use, while on the other hand, the applicant for a special use permit need only demonstrate that the proposed use is *permitted* by the ordinance subject only to conditions attached to its use in order to minimize any possible adverse impacts on the surrounding area. *See generally* 6 P. ROHAN, ZONING AND LAND USE CONTROLS, §§ 44.01[2]-[4] (1986) [hereinafter cited as P. ROHAN].

In practice, many, if not most zoning ordinances, fail to state clear standards by which an applicant will know what he must conform to and by which the local government should also be guided in its evaluation of the special use permit application. Many zoning boards fail to explicitly state the findings on which they base their decisions. Such practices enable communities to deny approval on a case-by-case basis for uses they may not like or to behave in other arbitrary, capricious and illegal ways. M. MESHENBERG, THE LANGUAGE OF ZONING, A GLOSSARY OF WORDS AND PHRASES, 32 (American Society of Planning Officials, Planning Advisory Service Rep. No. 322, Nov. 1976) [hereinafter cited as M. MESHENBERG].

A special use permit may only be denied when the facts demonstrate that a proposed use is likely to be incompatible with the surrounding neighborhood. A use is incompatible, and thus inappropriate, if its nature or physical appearance is not in harmony with the character of the neighborhood, the proposed use has a likelihood of increasing crime, decreasing safety or increasing traffic generation; reduces surrounding property values; or the group home operator fails to adequately assure that he will conduct the use in a proper manner. Although these may be considered legitimate reasons in denying a permit, available research demonstrates that group homes do not create these adverse effects. Lauber, (Draft Paper) *Toward A Sound Zoning Treatment of Group Homes For the Developmentally Disabled*, 49 (Apr. 15, 1985) [hereinafter cited as Lauber].

The majority view holds that the responsibility for considering requests for special use permits is administrative, rather than legislative in nature. An exception to this rule states that when a local governing body reserves to itself in the zoning ordinance the power to grant special use permits, its action on the application is a legislative function. This distinction is important because a legislative determination is granted a presumption of validity by the courts upon review, while an administrative ruling must be made in the context of certain procedural safeguards including the requirements of an adjudicatory hearing and written findings of fact, with reversal more likely in the courts. 6 P. ROHAN, *supra* note 9, at § 44.02[2][a], 44-24-25. *But see* Alachua County v. Eagle's Nest Farms, Inc., 473 So. 2d 257 (Fla. 1st DCA 1985) (court held denial of special use permit was administrative and not legislative since special use permit was more analagous to special exception rather than rezoning although denial was made by legislative body). *See infra* text accompanying notes 95-123 for a discussion of the special use permitting process.

10. *Cleburne*, 105 S. Ct. at 3252-53 n.3.

within two hundred feet of the property to be used.[11]

In July, 1980, C.L.C. applied for the special use permit with the City, seeking to operate the group home as a "Residential Care Facility for Mentally Retarded Adults."[12] Both the City Planning and Zoning Commission and the City Council conducted public hearings on C.L.C.'s special permit; the City Council thereafter voted to deny the application.[13]

Because Cleburne's zoning ordinance lacked any specific guidelines regarding the issuance of a special permit,[14] the City Council based its decision on the following seven factors: the attitude of a majority of owners of property located within two hundred feet of the group home site; concern for the fears of elderly residents of the neighborhood; the size of the home and the number of people to be housed; concern over the legal responsibility of C.L.C. for any actions which the mentally retarded might take; the location of a junior high school directly across the street from the proposed group home site; the home's location in a five hundred year flood plain; and in general, C.L.C.'s presentation before the City Council.[15]

Upon exhaustion of all administrative remedies, C.L.C. sued the City and various officials for injunctive relief and damages in Federal District Court.[16] C.L.C. contended that the City's actions violated both the equal protection and due process rights of its potential residents, as well as other statutory and constitutional provisions.[17]

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11. *Id.*

12. Appendix, *supra* note 4, at 5.

13. *Cleburne*, 726 F.2d at 194. It is interesting to note that a responsible city staff member acknowledged that a boarding house for paroled felons or delinquent youths might be a permitted use in the R-3 zoning district and thus, unlike C.L.C., would not be required to undergo the special use permit application and review process. Amicus Brief, *supra* note 8, at 2.

14. The Fifth Circuit noted that "[t]he Cleburne ordinance ha[d] no guidelines at all." *Cleburne*, 726 F.2d at 199 n.13.

"Whether zoning ordinances such as the City's which provide no guidelines whatsoever regarding [the] issuance of a permit, which include incomprehensible use classifications, and which refer to mentally retarded persons as 'feebleminded' are constitutional is a question the federal courts are unlikely to see very often." Respondent's [C.L.C.'s] Brief in Opposition to the City of Cleburne's Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit at 5, City of Cleburne v. Cleburne Living Center, 105 S. Ct. 3249 (1985) [hereinafter cited as CLC Brief].

15. *Cleburne*, 726 F.2d at 194.

16. *Id. See also* Appendix, *supra* note 4, at 16.

17. Appendix, *supra* note 4, at 16-22.

The claims that C.L.C. argued before the district court and the court of appeals were that Cleburne's Zoning Ordinance was constitutionally invalid both on its face and as applied since it discriminated against the mentally retarded and in so doing, denied their rights to equal

C.L.C. also alleged that the zoning ordinance was both vague and ambiguous since the ordinance failed to provide specific guidelines for the issuance of a special permit.[18] Thus, C.L.C. felt that the denial of the permit exceeded the legitimate exercise of the City's police power since it bore no rational relationship to the public health, safety,

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protection of the laws, freedom of association and travel, further the ordinance and the denial of the special use permit violated an antidiscrimination provision of the Federal Revenue Sharing Act, 31 U.S.C.A. § 6716(b)(2) (1983) because the denial of the permit violated the act. (C.L.C. argued that the zoning function of the City Council was a "program or activity" subject to the nondiscrimination provisions of that Act pertaining to "otherwise qualified handicapped individuals"). In addition the City violated the due process clause of the fourteenth amendment because the City's ordinance and its decision to deny the permit bore no rational relationship to the public health, safety, morals and general welfare and the ordinance was unconstitutionally vague. *Cleburne*, 726 F.2d at 194-95 & n.4; Appendix, *supra* note 4, at 16-22.

The Fifth Circuit rejected the statutory argument noting that the evidence demonstrated that the City Council had not used federal funds to finance their zoning activities, and it never addressed the due process claim. *Id.* The statutory and due process challenges were not raised by C.L.C. on appeal to the U.S. Supreme Court. *See Cleburne*, 105 S. Ct. at 3253 n.5.

18. *Id. See also* CLC Brief, *supra* note 14, at 7. The City alleged in its brief that the objectives (although no standards were set out in the ordinance) of the special use permit requirement in the zoning ordinance were:

1. to avoid undue concentrations of population;
2. to lessen congestion in the streets;
3. to ensure safety from fire and other dangers; and
4. to protect the health, safety and welfare of the City's population — in particular
   a. to protect the serenity of existing neighborhoods,
   b. to protect neighbors from harm; and
   c. to protect the mental retardates themselves by providing an appropriate living environment.

Cleburne, 726 F.2d at 200 (citing Brief of Appellees (City of Cleburne) at 21-24).

In its examination of each of the City's stated objectives of the ordinance, the Fifth Circuit found that a sufficiently close relationship was lacking between the objectives and the ordinance's means of achieving them. For example: (1) the ordinance had no relevance to achieving avoidance of "undue concentrations of population" and "lessen[ing] congestion in the streets" since the same house with a similar number of residents would be considered a permitted use "by right" under the ordinance as long as the residents were not mentally retarded; (2) the ordinance did not control traffic as the City failed to demonstrate that the mentally retarded drive more automobiles or tend to receive more visitors than non-retardates; the City failed to support the claim that the ordinance protected the serenity of the . . . neighborhood." The City did, however, produce one incident wherein a mentally retarded person caused a disruption when he removed mail from a neighbor's mailbox and later returned it. However, the incident did not even occur in Cleburne. In addition, an expert witness testified at the trial that such erratic behavior was just as possible in normal children. The City did not make it clear as to whether or not the mentally retarded would cause the dangers themselves or whether they would require special city services in the event of an accident, and the City failed to prove that the mentally retarded had a greater propensity than other persons to start fires or cause hazards. Finally, the court found that there were less restrictive, more appropriate alternatives available that the City Council could use, such as requiring a specific number of resident caretakers per occupant or by setting occupancy limits in their ordinance. *Cleburne*, 726 F.2d at 200-01.

morals or general welfare.[19]

The trial court upheld the ordinance both as written and as applied.[20] The court applied the minimum level of judicial scrutiny and found that the ordinance was rationally related to the City's legitimate interests in "the legal responsibility of C.L.C. and its residents," the safety and fears of the City's residents in the surrounding neighborhood, and the large number of retardates who would reside in the C.L.C. home.[21]

On appeal, the Fifth Circuit Court of Appeal reversed, and held that Cleburne's "standardless requirement of a special use permit for [only] group homes for the mentally retarded is both vastly overbroad and vastly underinclusive."[22] The court found that Cleburne's zoning ordinance was unconstitutional both on its face and as applied.[23] Subsequently, the City filed a writ of certiorari with the Supreme Court of the United States.[24] The Supreme Court granted certiorari[25] and affirmed in part and reversed in part.[26] HELD: The

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19. Appendix, *supra* note 4, at 18.

20. *Cleburne*, 105 S. Ct. at 3253. Although the First District court upheld the ordinance under the rational basis standard of review, which is highly deferential to the legislative process, the court reached the following conclusions in support of group homes and the mentally retarded in its findings of fact: Cleburne's zoning ordinance selectively discriminated against the "insane or feebleminded"; both the City Council's and the Planning and Zoning Commission's votes in denial of the special use permit were "motivated primarily by the fact that the residents of the home would be persons who are mentally retarded"; and "[g]roup homes currently are the principal community living alternatives for persons who are mentally retarded. The availability of such a home in communities is an essential ingredient of normal living patterns for persons who are mentally retarded, . . . each factor that makes such group homes harder to establish operates to exclude persons who are mentally retarded from the community"; and "[p]ersons who are mentally retarded historically have been subjected to exclusion from the political process and have been isolated in remote, stigmatizing living arrangements." Appendix, *supra* note 4, at 8, 16.

21. *Cleburne*, 105 S. Ct. at 3253.

22. *Cleburne*, 726 F.2d at 200.

23. *Cleburne*, 105 S. Ct. at 3253-54.

A motion for rehearing and a petition for rehearing en banc were both denied. Cleburne Living Center, Inc. v. City of Cleburne, 735 F.2d 832 (5th Cir. 1984) (per curiam), with 6 of the 15 voting judges dissenting from the Fifth Circuit's denial of a rehearing en banc. *Id.* at 832-34 (Garwood, J., dissenting); *Id.* at 834-35 (Higginbottam, J., specially concurring in the dissent).

24. *Cleburne*, 105 S. Ct. at 3254.

25. *Id.* The State of Texas and the Texas Dept. of Health and Mental Retardation argued in their brief that:

> [It is] the public policy of the State of Texas [to encourage] the establishment of group homes for the mentally retarded in normal residential neighborhoods. [T]he exercise of local zoning powers to exclude . . . group homes from normal residential neighborhoods frustrates State public policy.
>
> To preserve the equal protection remedy . . . which is congruent with State pol-

Court of Appeals erred in holding that the ordinance was unconstitutional on its face but was correct in finding the ordinance invalid as applied.[27] The Court employed minimum scrutiny and found that the record did not reveal "any rational basis for believing that [C.L.C.'s proposed] group home would pose any special threat to the City's legitimate interests."[28] Thus, the Court found that Cleburne's zoning

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> icy and State interests, it is not necessary for [the Supreme Court] to reach the question of whether the mentally retarded constitute a "quasi-suspect class" requiring heightened scrutiny. Even under the more lenient "rational basis test," the challenged City ordinance must fall. The discriminatory distinction which [the] ordinance creates, between group homes for the mentally retarded and [other] multiple occupant residential facilities for other special needs populations (such as elderly nursing home residents and tubercular sanitarium patients) does not rationally advance any valid governmental objective which under Texas law, a municipality may serve through its zoning powers. [T]he City has never identified any adverse impact on the surrounding property that rationally could serve to distinguish the mentally retarded from the aged nursing care patients, sanitarium or other permitted hospital clientele, or other permitted residents.

Amicus Brief, *supra* note 8, at 2-3.

26. *Cleburne*, 105 S. Ct. at 3260.

27. *Id.* The majority opinion was joined by Chief Justice Burger and Justices Powell, Stevens, Rehnquist, and O'Connor. Justice Stevens wrote a concurring opinion in which Chief Justice Burger joined. Justice Marshall, joined by Justices Brennan and Blackmun, wrote an opinion concurring in the judgment in part and dissenting in part. It is noted that although the Supreme Court and the Fifth Circuit both held that the ordinance was unconstitutional *as applied* to C.L.C., their "as applied" decisions had a major difference: the Fifth Circuit found the City's equal protection violation in its *denial* of a permit to C.L.C., whereas the Supreme Court noted that the violation was by the City *requiring* a permit in the first place when other multiple dwelling uses were not required to do so. *See Leading Cases*, 99 HARV. L. REV. No. 1, 120, 161 (Nov. 1985).

28. *Cleburne*, 105 S. Ct. at 3259. *See* Stewart, *A Growing Equal Protection Clause*? 71 A.B.A.J. 108 (Oct. 1985); Connor, *Zoning Discrimination Affecting Retarded Persons*, 29 J. URB. & CONTEMP. L. 67 (1985), for a review and discussion of the *Cleburne* decision.

The U.S. Supreme Court has established three tests for determining whether governmental conduct satisfies the equal protection requirements of the fourteenth amendment. The first test, often called strict scrutiny, applies whenever the challenged discrimination intentionally impairs a fundamental right or burdens a suspect class. In order to determine if a class is suspect, the Court will inquire whether it is a discrete and insular minority, a prior victim of purposeful unequal treatment or discrimination, a politically powerless group or whether its characteristics are immutable or unrelated to the matters which they are discriminated against. Under this strict standard, the legislation must be necessary to substantially further a compelling governmental interest. The Court has to date recognized three suspect classes that trigger strict scrutiny: race, national origin, and alienage. The second test, called intermediate or heightened scrutiny, has been utilized by the Court in cases where there has been a difference in treatment based on gender, illegitimacy, and illegal alien status. This test prohibits a difference in treatment unless it is substantially related to achieving an important governmental interest. The third and least demanding test, which the *Cleburne* majority indicated it was applying, is the deferential rational basis or minimum scrutiny test. Under this standard of review, legislation will be upheld if the Court can find it to be rationally related to some legiti-

ordinance deprived the C.L.C. residents of equal protection of the laws.[29]

The *Cleburne* decision is significant for several reasons. In this case, the Supreme Court insisted it was applying the same deferential rational basis test traditionally granted social and economic legislation. Thus, *Cleburne* stands as precedent for courts using a form of case-by-case, heightened scrutiny for all legislative classifications as they are applied — especially those involving a local government's zoning regulations.

Second, the *Cleburne* decision indicates that there may, in fact, exist rational reasons for treating group homes differently based upon their specific clientele. Any varied treatment, however, requires standards and criteria to be provided in the zoning ordinance. Thus, *Cleburne* should serve as an impetus for local governments to revise any standardless zoning regulations and resolve complex empirical and policy questions regarding the recent phenomena of group homes.

Third, *Cleburne* is significant from the perspective of zoning procedure because, for the first time, the Supreme Court has established a precedent for determining which party must carry the burden of proof in the special use permit process. Moreover, this case sets forth a clear rule: when a local government objects to the issuance of a special use permit, it must demonstrate with a high degree of probability, and with a substantial basis in fact, that a proposed spe-

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mate state objective. *See* Note, *Constitutional Law: Activating the Middle Tier After Plyler v. Doe: Cleburne Living Center v. City of Cleburne*, 38 OKLA. L. REV. 145 (1985) for an analysis of the Supreme Court's equal protection tests and how they are applied. *See also* Shaman, *Cracks in The Structure: The Coming Breakdown of the Levels of Scrutiny*, 45 OHIO ST. L.J. 161 (1984); Seeburger, *The Muddle of the Middle Tier: the Coming Crisis in Equal Protection*, 48 Mo. L. REV. 587 (1983); Gunther, *Foreward: In Search of Evolving Doctrine on a Changing Court; A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

29. *Cleburne*, 105 S. Ct. at 3260. It is noted that Texas enacted a statute after the *Cleburne* case was heard by the Supreme Court (effective Sept. 1, 1985) which provided that "family homes" were now permitted uses in all residential districts in the state. However, they could not house more than six disabled persons. *See id.* at 3254 n.7.

The Court's approach to their equal protection analysis is significant in that, although six justices signed the majority opinion, two Justices, Stevens and Burger, indicated their lack of agreement by offering a separate concurrence offering their own position. They rejected the existence of two or three levels of judicial scrutiny and favored instead a continuum of various scrutinies depending upon the specific circumstances of each individual group under consideration. Grouping these two Justices with the three dissenters who would have ruled that the ordinance was invalid on its face and that heightened scrutiny was warranted, five of the Supreme Court Justices are on record disputing the Court's equal protection analysis in this case. *See infra* notes 218-37 and accompanying text.

cial use will adversely affect the health, safety and welfare of the community.

Finally, *Cleburne's* greatest significance lies in the fact that it places a national focus on the typical problems and barriers that group homes face in their efforts to establish themselves in single-family areas. On one hand, group home advocates believe that the service dependent person has the same rights as a "normal" person to live in single-family residential areas, especially in view of the desirable goal of "normalization." Conversely, opponents believe that local residents have a right to be secure in their property and that they deserve the harmonious, orderly neighborhood which they expected when they purchased their property. Opponents view group homes as mini-institutions or as pseudo-correctional facilities. They believe that group homes will cause overcrowding, declining property values, and increases in criminal activity, thus disrupting the stability and solitude of their quiet single-family neighborhoods. The *Cleburne* case, accordingly, demonstrates the fact that although the theories of "normalization" and "deinstitutionalization" have been accepted as valid concepts for over thirty years, the implementation of these concepts continues to be undermined by community and local government resistance.

This note is a general examination of the various methods by which local governments and individuals attempt to exclude group homes from their communities. It will discuss possible defenses to such action, focusing on exclusionary zoning practices and restrictive definitions of "family" which are the primary weapons in a local government's arsenal in response to perceived threats from group homes. The growing legislative approach to removing the zoning barrier in the United States will then be discussed. Finally, the Florida treatment of group homes will be explored. The creation of state-wide zoning legislation as a vehicle to implement Florida's legislatively adopted policies of "normalization" and "deinstitutionalization," and a proposed structure of constructive statutory change will be offered.

I. GROUP HOMES: A HISTORY OF FRUSTRATION

As demonstrated by the *Cleburne* decision, a relatively new and controversial area of zoning litigation involves the placement of group homes in single-family zoning districts.[30] The catalyst for such litiga-

30. Gailey, *supra* note 2, at 97.

tion has been the conflict between two competing interests: the right of the homeowners to be secure in their property, and the right of those who are not capable of living alone to reside in the community with the rest of the citizens. Group homes encompassing such different uses as homes for the developmentally disabled, mentally and physically handicapped, treatment centers for the mentally ill, foster care, halfway houses for convicted felons, the aged, and drug and rehabilitation centers are seldom welcomed by communities with open arms.[31] In the past, the American model for residential care of service dependent persons[32] such as the mentally retarded has been the large, over-crowded, impersonal custodial institution.[33]

Since the middle of the nineteenth century, large institutions served as a method to shield the "normal" person from the anxiety, discomfort and displeasure he felt in the presence of the handicapped or mentally ill, while "salving [the] nation's conscience with the assurance that institutions were really "schools" run for the benefit of the retarded by professional experts."[34] These institutions became warehouses for society's unfortunate citizens who were believed to be incapable of developing and coping with the outside world.[35] This misconception led the public to believe that these "abnormal" persons had to remain in institutions for their entire lives.[36]

In response to a realization that large institutions were not beneficial to their residents and had a detrimental effect, a new approach to the treatment of these residents, called "normalization"[37], was

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31. *Id.* at 98.

32. The term "service dependent" refers to a group that is served by group homes or other residential care facilities on either a short-term or long-term basis. These include, but are not limited to, the aged, foster children, drug and alcohol abusers, juvenile delinquents, prison preparolees, the emotionally disturbed and the mentally ill, mistreated or abused children, and abused women. Some of these groups include persons who need assistance in order to readjust to society following institutionalization or incarceration. Others may need only temporary shelter in a supportive family-like atmosphere. However, they commonly share the fact that they are individuals who are unable to live completely independently and who depend on the services furnished by their group residence or supplied by other sources in the community in order to adjust. Lauber, *supra* note 9, at 70 n.244.

33. Disabled Citizens In the Community: Zoning Obstacles and Legal Remedies, Vol. 3 No. 2 Amicus 30 (Mar./Apr. 1978).

34. Halpern, *Introduction*, 31 STAN. L. REV. 545, 546 (1979).

35. *See* Friedman, THE RIGHTS OF MENTALLY RETARDED PERSONS, 15 (1976) (American Civil Liberties Handbook) [hereinafter cited as Friedman].

36. *Id.*

37. *See* B. NIRJE, "*The Normalization Principle*," in PRESIDENT'S COMMITTEE ON MENTAL RETARDATION, CHANGING PATTERNS IN RESIDENTIAL SERVICES FOR THE MENTALLY RETARDED 231 (R. Kugel and A. Shearer eds. 1976) [hereinafter cited as CHANGING PATTERNS].

promulgated. This approach called for the movement away from large institutions through reintegration and treatment in the community.[38] Under the "normalization" principle, service dependent persons would be placed in an environment that more closely approximated "the patterns of life and conditions of everyday living which are as close as possible to the regular circumstances and ways of society."[39] The residential model currently receiving the most support from experts who favor "normalization" is the community based group home facility.[40]

Notwithstanding the professional, judicial, and legislative authority favoring the group home concept, insufficient numbers of group homes are currently available to serve the needs of persons not requiring institutionalization.[41] Public opposition and local zoning regulations that effectively exclude or restrict group homes from single-family residential areas have been significant factors in impeding the "normalization" process.[42] Ironically, it is the single-family residential zoning district which provides the very setting that a group home needs to accomplish its goals of "normalization" and "deinstitutionalization".[43]

It is noted that without exposure to the community, normalization is very unlikely to occur. Group living facilities that are geographically and socially isolated from the surrounding community result in less independent behavior and development of social competency than facilities in which residents are geographically or socially integrated. E. BUTLER and A. BJAANES, "*Activities and the Use of Time by Retarded Persons in Community Care Facilities*" in OBSERVING BEHAVIOR: THEORY AND APPLICATION IN MENTAL RETARDATION 379 (G. Sackett ed. 1978).

38. Comment, *Exclusionary Zoning And Its Effects On Group Homes In Areas Zoned For Single Family Dwellings*, 24 U. KAN. L. REV. 677, 679-80 (1976) [hereinafter cited as *Exclusionary Zoning*].

39. CHANGING PATTERNS, *supra* note 37, at 231.

40. Note, *A Review of the Conflict Between Community-Based Group Homes For the Mentally Retarded and Restrictive Zoning*, 82 W. VA. L. REV. 669 (1980).

41. *Developmental Disabilities State Legislative Project of the ABA Comm'n on the Mentally Disabled, Zoning for Community Homes Serving Developmentally Disabled Persons* (1974) *reprinted in* 2 MENTAL DISABILITY L. REP. 794, 795 (1978) [hereinafter cited as ABA Project]. *See infra* note 246 and accompanying text.

42. *Id.* at 795. *See e.g.*, Sullivan v. City of Pittsburgh, 620 F. Supp. 935 (W.D. Pa. 1985) (court citing *Cleburne*, 105 S. Ct. 3249, held that public opposition which delayed placement of residential alcoholic treatment center in community was insufficient cause for denial of conditional use permit by City Council); Special Children's Village, Inc. v. City of Baton Rouge, 472 So. 2d 233 (La. App. 1st Cir. 1985) (city zoning ordinance required discretionary endorsement of majority of residents within 1000 foot radius of group home); Grefkowicz v. Metropolitan Dade County, 389 So. 2d 1041 (Fla. 3d DCA 1980) (court held that testimony from property owners surrounding group home for elderly that home would have adverse impact on community was valid consideration for denial of special use permit).

43. Lauber, *supra* note 9, at 34-35. Deinstitutionalization is defined as "reducing the popu-

Opposition is based upon such fears as increased crime,[44] declining property values,[45] reduction of the ad valorem tax rolls,[46] addi-

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lation of institutions. It is a process of removing a person from the institution and placing the individual in his or her own home or other living quarters while at the same time making provisions for any necessary community services and other support systems." *Guidelines for Zoning and Special Community Housing*, A1-1 (Dep't of Health and Rehabilitative Services for the State of Florida (Pamphlet 10-1 July 1, 1983) [hereinafter cited as HRS Pamphlet]. *See infra* note 239 for legislation supporting the normalization and deinstitutionalization concepts.

44. Lauber, *supra* note 9, at 52-54. For example, in *J.W. v. City of Tacoma*, 720 F.2d 1126 (9th Cir. 1983), the Ninth Circuit reversed the denial of a special use permit application where the record failed to indicate that the former mental patients who were to occupy a group home had any history of violent or criminal behavior and that the zoning hearing examiner who conducted the hearing on the permit had no valid basis in fact in believing that the residents would pose a threat to the community. The court ruled that it was highly likely that Tacoma's zoning ordinance distinguished group homes for former mental patients from other group homes on the basis of prejudice, and archaic and stereotypic notions; in the absence of fact, concerns based upon prejudice against a class of persons was an insufficient reason to justify a zoning restriction.

One study conducted in Virginia demonstrates that the developmentally disabled are no more prone to criminal activity than the normal or non-handicapped. This study found a crime rate of O.8 percent for 4,538 developmentally disabled persons living in residential communities versus the 4 to 6 percent rate for the entire United States for 1976-78. PEGGY GOULD, REPORT ON THE INCIDENCE OF CLIENT CRIME WITHIN COMMUNITY BASED PROGRAMMING 7 (1979), *cited in* Lauber, *supra* note 9, at 54 n.202. *Also, see* Lauber, *supra* note 9, at 53-55, notes 201-203 for additional authorities substantiating the view that the developmentally disabled do not pose a criminal threat to the community.

45. Lauber, *supra* note 9, at 56-59. *See e.g.*, Sullivan v. City of Pittsburgh, 620 F. Supp. 935 (W.D. Pa. 1985) (court found insufficient evidence in record of City Council proceedings to substantiate Council's denial of conditional use permit because council feared reduction of property values and overdevelopment of neighborhood would be result of placement of group home for recovering alcoholics in community).

A substantial body of research conducted during the last fifteen years has found that group homes have no effect on property values of surrounding residences, they do not affect the turnover rate of property and produce no adverse physical, economic, or social impacts on the surrounding neighborhood. Lauber, *supra* note 9, at 57 & n. 215.

One recent study indicated that not only did group homes for the mentally retarded not have a negative impact on property values, but that property values may increase along with the value of other neighborhood housing. 9 MENTAL AND PHYSICAL DISABILITY L. REP. 309 (July/Aug. 1985) (citing Wagner and Mitchell, *Group Homes and Property Values: A Second Look* (unpbl. report: Metropolitan Human Services Commission, Columbus, Ohio 1980)).

Several courts have also observed that neighbors fears of diminished property values have no factual basis. *See, e.g.*, Society for Good Will to Retarded Children, Inc. v. Cuomo, 572 F. Supp. 1300, 1340-41 (E.D.N.Y. 1983), *rev'd on other grounds*, 737 F.2d 1239 (2d Cir. 1984); J. T. Hobby and Son, Inc. v. Family Homes of Wake County, Inc., 302 N.C. 64 (N.C. 1981), 274 S.E.2d 174 (1981). The North Carolina Court referred to a study by the National Association of Realtors, which found that property values had increased, not decreased in areas where group homes were placed. And in *Northwest Residence, Inc., v. City of Brooklyn Center*, 352 N.W.2d 764 (Minn. App. 1984), the Minnesota court ordered a city council to issue a special use permit for a group home for the mentally ill, relying in part on research by the Minneapolis Planning Commission, which found no decrease in property values unless there were five such facilities within one block.

tional traffic,[47] failure of the group home operator to properly maintain his facility,[48] and undesirable conduct by the group home's residents themselves.[49] Voluminous research has proven these fears are unfounded and arise from an "irrational prejudice" toward the residential composition of the group home. Nonetheless, they serve as a heavy stigma and are thus a major impediment upon the placement of group homes in residential areas.[50]

Across the United States, the activities of local governments in the last few years demonstrate that they will undoubtedly rely on exclusionary zoning laws and restrictive covenants to frustrate efforts to establish group homes.[51] As long as each local government retains

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It is interesting to note that a lawsuit has recently been filed against a Connecticut tax review board challenging the reduction of property taxes on nine homes because they were located near a halfway house for former psychiatric patients in Greenwich, Conn. The suit charges the tax review board with illegal discrimination under state and federal law and the Connecticut and U.S. Constitutions. *See The Effects of Group Homes on Property Values*, 9 MENTAL & PHYSICAL L. REP. No. 4, 309 (July/Aug. 1985).

46. HRS Pamphlet, *supra* note 43, at 11.

47. Lauber, *supra* note 9, at 55-56. Group homes do not ordinarily tend to generate more traffic than does a single-family home or an apartment. Rarely does a developmentally disabled person drive, they are usually transported by the house parents or staff who are unlikely to have more cars than the occupants of nonhandicapped households in the community. Although relatives of group home residents may visit, their effect is no different than when surrounding residents have guests or throw a party. *Id.* at 55-56.

48. *Id.* at 60-62. Studies on the effects of group homes that examined how well they are maintained all indicate that group homes are well cared for and that their appearance is as good as or slightly better than that of surrounding properties. General Accounting Office, Analysis of Zoning and Other Problems Affecting the Establishment of Group Homes for the Mentally Disabled 2 (Aug. 17, 1983) [hereinafter cited as GAO Analysis]; Julian Wolpert, Group Homes for the Mentally Retarded, An Investigation of Neighborhood Property Impacts (New York State Office of Mental Retardation and Developmental Disabilities Aug. 31, 1978); L. Dolan and J. Wolpert, Long Term Neighborhood Property Impacts of Group Homes for Mentally Retarded People 13 (Woodrow Wilson School Discussion Paper Series, Princeton University, No. 1982) (all cited in Lauber, *supra* note 9, at 61 n.221).

49. GAO Analysis, *supra* note 48, at 10, 56. *See also* Lauber, *supra* note 9, at 52-56. Lauber, *supra* note 9, at 42-43 indicates the above mentioned reasons set forth in notes 44-49 and accompanying text are why group homes are opposed.

For an overview of specific studies which show all of these fears to be unsubstantiated, see Lauber, *supra* note 9, at 44-62.

For an overview of community reactions to group homes in the residential neighborhoods, see *Ohio Association for Retarded Citizens, Community Reaction to Deinstitutionalization*, 2 RECAP ON DEVELOPMENTAL DISABILITIES 18 (Mar. 1979).

50. ABA Project, *supra* note 41, at 795-96; *See generally* Comment, *Can The Mentally Retarded Enjoy "Yards That Are Wide*?" 28 WAYNE L. REV. 1349 (1982) [hereinafter cited as *"Yards That Are Wide*?"].

51. ABA Project, *supra* note 41, at 795-96. Private restrictive covenants that require a home to used and/or constructed exclusively for a single family are often utilized by neighborhoods and realtors in the same way that local governments use single family zoning and restric-

broad discretion to admit or exclude group homes, there is little incentive to change this pattern.[52] Local decision making regarding the placement and location of group homes permits and potentially encourages exclusionary and undesirable results.[53] Thus, the residents of the neighborhoods where group homes attempt to locate and local governments' exclusionary zoning practices present the greatest obstacles to group homes.[54]

A. Zoning in General

As demonstrated by the *Cleburne* decision, zoning is the process by which a local government legally controls the use that may be made of property and the physical configuration of development upon tracts of land within its jurisdiction. Most often, a zoning ordinance establishes zoning districts which divide the jurisdiction into four major areas: residential, commercial, industrial, and special.[55]

In the landmark case of *Village of Euclid v. Ambler Realty Co.*,[56] the constitutionality of zoning was first upheld by the U.S. Supreme Court. The Court was confronted with the issue of whether a zoning ordinance that divided a municipality into different zones for different uses, and imposed building restrictions which resulted in the reduction of property values, constituted a taking of property without due process of law.[57] The Court stated that such ordinances are presumed valid so long as they reasonably relate to the public health, safety, morals or general welfare. Further, the Court emphasized that

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tive definitions of family to maintain single-family oriented neighborhoods. *See generally "Yards That Are Wide?", supra* note 50, at 1372-77; Bogin, *Group Homes For Persons With Handicaps: Recent Developments In The Law*, 5 W. NEW ENG. L. REV. 423, 429 (1983) [hereinafter cited as Bogin] for a discussion of restrictive covenants.

52. ABA Project, *supra* note 41, at 796.

53. *Id.*

54. *Id. See generally* Gailey, *supra* note 2; *"Yards That Are Wide?", supra* note 50 for a discussion of group home implementation obstacles.

55. 1 P. ROHAN, *supra* note 9, at § 1.02[1], 1-6.

Within each zoning district, there may be variations in the type of permitted uses; for example, a residential district provides for both multi-family and single-family housing. Since zonings inception, one of its most important applications has been to provide for exclusively residential zones, and in particular, to establish single-family residence districts in which other uses are prohibited. 2 RATHKOPF, THE LAW OF ZONING AND PLANNING, § 17A.01, 17A-2 (4th ed. 1986) [hereinafter cited as RATHKOPF].

56. 272 U.S. 365 (1926). *See also* Nectow v. City of Cambridge, 277 U.S. 183 (1928) (Supreme Court held zoning ordinance which prevented reasonable use of 100 foot strip of land zoned residential unconstitutional as applied).

57. 272 U.S. at 367.

"if the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control."[58] Shortly after the *Euclid* decision, the Court invalidated a zoning ordinance that it deemed unnecessarily and unreasonably restrictive.[59] Although the Court cautioned that "legislatures may not under the guise of the police power, impose restrictions that are unnecessary and unreasonable upon the use of private property or the pursuit of useful activities",[60] local governments are obviously afforded great latitude and discretion in the application of their zoning laws.

While the power to zone is typically authorized by state constitutions, most zoning ordinances are drafted and implemented on the local level.[61] Procedurally, zoning ordinances are quite similar; however, they can differ substantively in both their scope and application. This diversity produces non-uniformity in the application of local zoning regulations and promotes the anomalies of exclusionary and unfavorable zoning.[62]

Generally, exclusionary zoning is a method used by a local government whereby it either fails to provide a zoning district for a particular use, or specifically forbids the use.[63] Unfavorable zoning exists when a zoning ordinance does not specifically prohibit a use but fails to mention it at all.[64] Some local governments have abused the broad discretion their zoning powers provide and have passed and enforced

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58. *Id.* at 388.

59. Washington *ex rel.* Seattle Title Trust Co. v. Roberge, 278 U.S. 116, 121 (1928).

60. *Id.* at 121. In *Blitch v. City of Ocala*, 142 Fla. 612, 195 So. 406 (1940) the Florida Supreme Court set forth the following constitutional limitations on a local governments zoning power:

> [T]hey must not (1) infringe the constitutional guarantees of the nation or state by (a) invading personal or property rights unnecessarily or unreasonably, (b) denying due process of law, or (c) equal protection of the laws, or (d) impairing the obligations of contracts; (2) must not be inconsistent with the general laws of the state, including the common law, equity and public policy, unless exceptions are permitted; (3) must not discriminate unreasonably, arbitrarily or oppressively, and (4) must not constitute a delegation of legislative or executive or administrative power.

Id. at 407.

61. 1 P. ROHAN, *supra* note 9 at § 1.02[4], 1-21-22.

> While zoning authority in the broad sense is founded on the police power, it is generally held that municipalities and counties have no inherent power to zone except as such power has been delegated to them by the state legislature. This authorization is generally found in enabling statutes, municipal charters or in the state constitutions.

Id. See also, Comment, *Zoning and Group Homes for the Mentally Retarded - Boon or Bust?* 7 OHIO N. L. REV. 64, 68 (1980) [hereinafter cited as *Boon or Bust*].

62. *Boon or Bust, supra* note 61, at 68.

63. *See generally* 1 P. ROHAN, *supra* note 9, at § 2.01[1]-[2].

64. *Boon or Bust, supra* note 61, at 68.

exclusionary and unfavorable zoning laws to exclude group homes from their communities.[65]

B. Group Homes and Local Zoning Controls

Because the concept of group home living is a relatively recent phenomenon, most zoning ordinances fail to mention them at all.[66] A 1974 survey[67] indicated that less than 23 percent of 400 communities surveyed provided for group homes of any size in their zoning ordinances.[68] Often they are only permitted when local zoning officials try to force group homes into definitions of uses they may remotely resemble, such as a nursing home, boarding home, medical or psychiatric facility or home for the feebleminded.[69]

Although each local government adopts its own local zoning ordinance to fit its unique needs, there are generally three basic methods whereby local zoning regulations allow group homes.[70] These include the permitted use,[71] the special use[72] (as was the situation in *Cleburne*) and the use of zoning ordinances that include a specific definition of "family."[73]

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65. *Id.* As previously mentioned, the motivation for using such tactics is fear of increased crime, fear of resulting decline in property values, prejudice, ignorance and the like. *See supra* notes 44-50 and accompanying text. *See also* Friedman, *supra* note 35, at 108-109; 1 P. ROHAN, *supra* note 9, at § 3.05[6].

66. Lauber, *supra* note 9, at 33. *See e.g.*, zoning codes in effect as of June 1, 1986 for the City of Temple Terrace, Fla.; City of St. Petersburg Beach, Fla.; City of South Pasadena, Fla.; City of Oldsmar, Fla.; *and* Town of Bay Harbor Islands, Fla.

67. D. Lauber and F. Bangs, Jr., *Zoning for Family and Group Care Facilities* 1, 12 (American Society of Planning Officials, Planning Advisory Service Rep. No. 300, Mar. 1974) [hereinafter cited as Lauber and Bangs].

68. A zoning ordinance provides for group homes by defining the group homes and including group homes as a permitted use or special use in at least one zoning district.

69. Lauber, *supra* note 9, at 33-34. *See e.g.*, *Cleburne*, 105 S. Ct. 3249 (city classified group home for thirteen mentally retarded persons as home for the "feebleminded" pursuant to a zoning ordinance adopted in 1947); City of College Park v. Flynn, 248 Ga. 222, 282 S.E.2d 69 (1981) (city classified group home for twelve mentally disabled persons as nursing home under zoning ordinance).

70. Lauber, *supra* note 9, at 35-36.

71. A permitted use is a use of land by right that the zoning ordinance specifically authorizes in a particular zoning district. A permitted use, also known as a "use of right," is one where local officials can issue a permit to construct or occupy a structure on the basis of an application alone, without further referrals or review at a public hearing. M. MESHENBERG, *supra* note 9, at 32.

72. *See supra* note 9 and accompanying text. *See also infra* notes 95-115 and accompanying text.

73. *See generally* 2 RATHKOPF, *supra* note 55, at §§ 17A.01-17A.03. When a zoning ordinance does not provide for group homes, some courts have required local governments to allow

1. Permitted use

A permitted use is a use of land expressly authorized by the zoning ordinance in a particular zoning district.[74] Of the few communities that do expressly provide for group homes, the majority of them do not allow group homes in single-family districts, and manipulate the definition of family to frustrate proponents' efforts.[75] However, these communities often allow group homes in commercial, institutional, or multi-family districts.[76]

When a local government classifies a group home as a permitted commercial use under its local zoning ordinance, this arguably results in its exclusion from the residential district that it needs in order to function most effectively.[77] This commercial classification is generally the result of group home opponents, who contend that group homes are in fact businesses since they carry the indicia of a business such as an operating license, employees, collection of rent and income to the operator from contracts with state or federal agencies.[78] The ex-

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group homes in single-family districts under the zoning ordinances definition of family. One commentator notes that although a group home functions similar to a family and is a residential use, zoning ordinances should treat it explicitly as a permitted or special use. Absent such treatment, and when there are no precise standards to govern the dispersal of group homes, a court's interpretation of the word "family" can inadvertently lead to an overconcentration of homes for special populations creating an institutional environment contrary to the normalizing that the group home concept seeks to accomplish. Lauber, *supra* note 9, at 36 n.132.

74. See *supra* note 71 for definition of permitted use.

75. *See generally Exclusionary Zoning, supra* note 38, at 685-93.

76. 1 P. ROHAN, *supra* note 9, at § 3.05[6], 3-242-243. *See also* ABA Project, *supra* note 41, at 796.

When a local government classifies a group home as an institution, the owner of the facility and/or the Department of Health and Rehabilitative Services (HRS) is required to incur great expense that is not ordinarily necessary for a typical group home, such as a sprinkler system, wide hallways, added hardware and other more restrictive building requirements. When it is deemed in the best interest of the residents, HRS will require and often pay for the inclusion of these and other items for the protection of the group home residents. HRS Pamphlet, *supra* note 43, at 13.

77. ABA Project, *supra* note 41, at 796. *See also* Note, *Zoning For The Mentally Ill: A Legislative Mandate*, 16:3 HARV. J. LEG. 853, 857, 870 (1979).

78. *"Yards That Are Wide?", supra* note 50, at 1362, 1377; HRS Pamphlet, *supra* note 43, at 13.

See, e.g., Jackson v. Williams, 714 P.2d 1017 (Okla. 1985) (group home opponents contended home for five handicapped women was commercial use since home would be operated by board of non-profit organization rather than by a head of household); Omega Corp. of Chesterfield v. Malloy, 319 S.E.2d 728 (Va. 1984) (group home for mentally retarded adults established with state loans and resident's rent subsidized by federal government classified by court as non-residential, institutional business use); Good Neighbor Care Center v. Little Canada, 357 N.W.2d 159 (Minn. App. 1984) (group home opponents contended that home for four elderly persons was commercial use in violation of residential zoning classification); Nichols v. Tul-

clusion of a commercial enterprise from a residential district because of its inherent land use incompatibility has been a traditionally legitimate purpose of zoning and restrictive covenants.[79] Group home advocates argue that the test of group home compatibility in residential districts should be different, and ask whether the home has a negative impact on the surrounding neighborhood.[80] If no negative impact is produced, there is no real justification for prohibiting a group home from a residential district by giving it a commercial classification.[81] Additionally, while living in a commercial zoning district rather than in a single-family neighborhood may place group home residents closer to a few normalizing activities, such as shopping and work, the "normalization" theory holds that living in a residential neighborhood offers a vastly more normalizing environment.[82]

Most importantly, classification of group homes as commercial uses frequently results in the creation of ghettos of group homes,[83] particularly in larger urbanized areas.[84] Group homes are excluded from the "better" neighborhoods by well-organized and politically powerful community opposition or exclusionary zoning practices. They are therefore forced to take the path of least resistance and locate in poor, politically weak, residential neighborhoods in transition, or business or institutional zones.[85] This results in an overconcentration of group housing or a "ghettoization" effect.[86] "Ghettoiza-

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lahoma Open Door, Inc., 640 S.W.2d 13 (Tenn. App. 1982) (group home opponents contended group home for handicapped was commercial use because funded by state and federal government and residents used social security income to pay rent); Jayno Heights Landowners Ass'n v. Preston, 85 Mich. App. 443, 447, 271 N.W.2d 268, 269 (1978) (group home for six elderly women was a commercial enterprise because they paid for domestic employees as well as rent).

However, for an unusual decision supporting group homes as a residential use see *City of College Park v. Flynn*, 248 Ga. 222, 282 S.E.2d 69 (1981), where a group home for twelve disabled persons was considered a non-conforming use of property as a single-family home in a commercial district. However, the home was allowed to continue as a non-conforming use.

79. *See "Yards That Are Wide?", supra* note 50, at 1377. *See also* 1 P. ROHAN, *supra* note 9, at § 3.02[2][a], 3-67-68.

80. HRS Pamphlet, *supra* note 43, at 13.

81. *Id.*

82. *See supra* notes 37-39 and accompanying text.

83. ABA Project, *supra* note 41, at 796. Without a mandatory state preemptive law that would override local zoning controls and permit group homes in single-family neighborhoods, an overdevelopment of group homes in certain communities has occurred. This could have been avoided through improved cooperation between local governments and human service professionals. HRS Pamphlet, *supra* note 43, at 11.

84. ZONING NEWS 1 (American Planning Assoc., Jan. 1986). [hereinafter cited as ZONING NEWS].

85. ABA Project, *supra* note 41, at 796.

86. *Id.*

tion" then becomes the basis for a new form of institutionalization — great numbers of group homes bunched together in certain areas of a city so that they are the dominant feature of the area.[87] Group home residents situated in neighborhoods with hundreds of other service dependent persons cannot receive the benefit from daily interactions with typical community residents.[88] Such concentrations therefore alter the character of the area and undermine the very purpose that normalization seeks to promote. Overconcentrations also provoke negative reactions from residents of the impacted areas which further discourage other communities from accepting group homes, for fear that such overconcentrations may also occur in their communities.[89] In some cases, overconcentrations effectively frustrate community redevelopment plans and discourage even small developers from improving properties in neighborhoods that appear to be dominated by group homes.[90]

Despite the attempts by local zoning authorities to exclude group homes from residential areas by arguing that they are a commercial use,[91] the courts have as a general rule rejected this argument.[92] The

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87. *Id.*

88. ZONING NEWS, *supra* note 84, at 3.

89. ABA Project, *supra* note 41, at 796. A demonstration of this ghettoization effect occurred in Minneapolis in the early 1970's. The city's Sixth Ward had a total of 45 group homes, halfway houses and special residential facilities, and the West Seventh neighborhood had 21 homes within a two-block area. ZONING NEWS, *supra* note 84, at 3.

A 1983 study by the U.S. General Accounting Office reported that more than a third of all group homes for the developmentally disabled were located within two blocks of another group home or institution. GAO Analysis, *supra* note 48, at 19.

90. ZONING NEWS, *supra* note 84, at 3.

91. HRS Pamphlet, *supra* note 43, at 13. *See, e.g.*, Blevins v. Barry-Lawrence County Ass'n for Retarded Citizens, 707 S.W.2d 407 (Mo. 1986) (court held group home for eight mentally retarded residents was not commercial use violative of restrictive covenant that required all residences to be used for single-family purpose); Jackson v. Williams, 714 P.2d 1017 (Okla. 1985) (court held non-profit group home for five mentally handicapped women was not commercial use since primary purpose of home was not profit of operator); City of Livonia v. Dep't of Social Services, 378 N.W.2d 402 (Mich. 1985) (court held non-profit adult foster care home was not incompatible commercial use in residential zoning district); Beverly Island Ass'n v. Zinger, 317 N.W.2d 611 (Mich. App. 1982) (court held for-profit child day care home was residential and not commercial use in light of states overriding policy in favor of day care homes); Malcolm v. Shamie, 290 N.W.2d 101 (Mich. App. 1980) (non-profit group home for five mentally retarded women receiving government financial support held not commercial use); *But see* Jayno Heights Landowners Ass'n v. Preston, 85 Mich. App. 443, 271 N.W.2d 268 (1978) (home for six elderly women a commercial use and therefore violative of single-family restrictive covenant); Seaton v. Clifford, 24 Cal. App. 3d 46, 100 Cal. Rptr. 779 (1972) (court held since group home for six mentally retarded residents bore indicia of commercial enterprise because it had license, employees and income it violated single family residential covenant).

92. Bogin, *supra* note 51, at 429.

judicial trend is to allow them to be established in single-family residential areas.[93] One court concluded that group homes should be afforded residential, not commercial status because "[t]he residents interact and live as a family whether the management is by a for-profit corporation, a non-profit corporation, a religious group, or a governmental unit."[94]

2. *Special Use*

The most prevalent method by which a group home is allowed in a single-family zoning district is through the grant of a special use permit.[95] A special use is also considered a permitted use, unless the zoning authority determines that according to the standards in the zoning ordinance the use would be incompatible with the uses expressly permitted in that particular zoning district.[96] The special use permit is intended to offer flexibility on the part of zoning officials in the application of their zoning ordinance, and recognizes that it is unreasonable to restrict certain activities to limited districts. Rather, it is believed that the special use should be allowed anywhere or prohibited anywhere depending upon the effect the activity will "foreseeably" have on an existing or planned development in a particular locale.[97] For example, the zoning ordinance may designate a district for single-family use but provide that a hospital or school may be permitted upon a finding that such use would serve the public interest. However, the use is subject to specific conditions relating to hours of operation, parking, landscaping, etc., that would protect the interest of nearby residents.

In theory, once all the conditions are met by the applicant, the special use permit must be issued.[98] In practice, however, this is not

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93. *Id.*

94. Costley v. Caromin House, 313 N.W.2d 21, 25 (Minn. 1981).

95. Lauber, *supra* note 9, at 37. The American Society of Planning Official's 1974 Survey indicated that zoning ordinances in only 23 percent of city's survey defined "group home" (or a synonym) or listed it as a permitted or special use. Lauber and Bangs, *supra* note 67, at 12. *See supra* note 9, and accompanying text for a description of the special use permit. *See, e.g., Cleburne*, 105 S. Ct. 3249 (1985) (special use permit required for group home for the "feeble-minded").

96. D. MANDELKER, LAND USE LAW, § 6.48, 173-74 (1982).

97. 3 R. ANDERSON, AMERICAN LAW OF ZONING, § 19.01, 358 (2d. ed. 1976) [hereinafter cited as R. ANDERSON]. 6 P. ROHAN, *supra* note 9, at § 44.01[2], 44-4-6. Problematic land uses such as childcare centers, communications towers, group homes, funeral homes, utility plants and airports are examples of special uses.

98. 3 R. ANDERSON, *supra* note 97, at § 19.16, 419; L. DAVIDSON & M. MCCONNELL, 1 FLOR-

always the case, and the special use permit has become a favorite tool of local governments in their efforts to exclude group homes.[99] Most zoning regulations that provide for special uses furnish only vague, highly subjective standards for evaluating a special use permit application.[100] Others create an extremely burdensome permit process specifically designed to impede the placement of group homes.[101] It is also apparent that in deciding whether to grant a special use permit, most zoning boards fail to explicitly state their basis or "findings of fact" upon which they base their decisions.[102]

This defective procedure presents difficulties to the group home operator seeking a permit and forces him to challenge local zoning authorities that are vested with unbridled discretion regarding issuance of permits.[103] Vague standards and broad discretion enable local

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IDA ZONING LAW, Ch. 2, at 5 (1980 & Mar. 1986 supp.) [hereinafter cited as FLORIDA ZONING].

99. Gailey, *supra* note 2, at 98.

100. M. MESHENBERG, *supra* note 9, at 32.

> The typical standards for the issuance of a special permit usually include: (1) that the use must be in harmony with the intent and purpose of the local government's zoning law and comprehensive plan; (2) that the use will not adversely affect the health, safety and welfare of the community; (3) that the use will not seriously depreciate surrounding property values; (4) that the use must be a matter of public need or convenience; (5) that the use will not contribute toward an overburdening of municipal services; and (6) that it will not cause traffic, parking, population density or environmental problems.

6 P. ROHAN, *supra* note 9, at § 44.03[1], 44-42-43.

101. Lauber, *supra* note 9, at 41-42.

102. *Id.* at 36 n.131. A local zoning authority is required to issue written findings of fact when considering a special use permit application so that, upon review, the court can determine whether the applicant's permit violated any of the conditions required by the authority in order for the permit to be granted. 6 P. ROHAN, *supra* note 9, at § 44.02[2][d], 44-32.

103. *Id. See e.g.*, *Cleburne*, 105 S. Ct. 3249 (1985); Sullivan v. City of Pittsburgh, 620 F. Supp. (W.D. Pa. 1985); 15192 Thirteen Mile Rd. v. City of Warren, 593 F. Supp. 147 (E.D. Mich. S.D. 1984) (special use permit requirements for adult bookstore which allowed improper degree of discretion on part of local zoning officials held unconstitutional). The *Warren* Court stated that "[f]or there to be an effective permit requirement, a municipality must provide narrowly drawn, objective reasonable and definite standards to guide the administrative officials." *Id.* at 156.

Unlike administrative or quasi-legislative boards who must support their decision to deny a special use permit with written findings of fact which demonstrate by competent, substantial evidence that the proposed use does not meet the standards set forth in the ordinance and would have an adverse impact on the community, some courts hold that when a local legislative body reserves to itself the power to grant special use permits, the standard used to determine whether it has abused its discretion in denying a special use permit and/or variance is the "fairly debatable" test. *See e.g.*, Nance v. Town of Indialantic, 419 So. 2d 1041 (Fla. 1982); Marell v. Hardy, 450 So. 2d 1207 (Fla. 4th DCA 1984); Sarasota County v. Purser, 476 So. 2d 1359 (Fla. 2d DCA 1985), *rev. denied*, 486 So. 2d 597 (Fla. 1986). *But see* Alachua County v. Eagle's Nest Farms, Inc., 473 So. 2d 257 (Fla. 1st DCA 1985) (court held that denial of special

governments to deny approval on a case-by-case basis for uses they do not like.[104] These standards also allow local governments to behave in other arbitrary, capricious, and illegal ways.[105]

The current state of land use laws has established that such bases for denial as those set forth by opposing landowners are improper.[106] As a result, appellate courts have reversed the denial of special use permits that were based solely on neighborhood opposi-

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use permit by legislative board was administrative and that fairly debatable test was inappropriate, legislative body was subject to test requiring competent, substantial evidence that applicant did not meet standards set forth in ordinance and that special use would have adverse impact on public interest).

The fairly debatable standard was set forth in *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), where the U.S. Supreme Court stated, "if the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control." *Euclid* at 365. The rule has been interpreted to mean that "[i]f the application of a zoning classification [or decision] to a specific parcel of property is reasonably subject to disagreement, that is if the application is fairly debatable, then the application of the ordinance by the Zoning authority should not be disturbed by the courts." Davis v. Sails, 318 So. 2d 214, 217 (Fla. 1st DCA 1975). The purpose of the rule is to allocate decision making authority over zoning matters between the legislative body and the judiciary. Zoning is a legislative function and so long as the action is kept within the bounds of the police power, the judiciary will not intrude into the legislature's domain. To combat the fairly debatable rule, a property owner must have an extremely strong case. The reason is that since zoning classifications are intended to benefit the public as a whole, a single individual should only be able to escape the impact of such ordinances if they do not fit within constitutional limits. JUERGENSMEYER & WADLEY, FLORIDA ZONING - ATTACKS AND DEFENSES, § 4-2, (1980) [hereinafter cited as JUERGENSMEYER].

Under the fairly debatable rule the burden is upon the party seeking relief from the decision to deny the special use permit to show that the decision was not fairly debatable. This burden of proof is met when a landowner proves that a zoning action was unconstitutional since courts are reluctant to sit as super zoning boards. Thus, if a landowner challenging a zoning action proves the legislative action invalid by a mere preponderance of the evidence, it remains fairly debatable that the ordinance is valid and the action will be sustained. 5 FLORIDA ZONING, *supra* note 98, Ch. 5, § 5.04.

104. M. MESHENBERG, *supra* note 9, at 32. *See e.g.*, Horizon Concepts, Inc. v. City of Balch Springs, Case No. 85-1411 slip op. (5th Cir. May 16, 1986) (court held city's denial of special use permit for manufactured housing based on standards such as preservation of property values and prevention of overdevelopment not set forth in ordinance was sufficient basis to deny permit). Citing *Cleburne*, 105 S. Ct. 3249, the *Horizon* Court stated that " '[m]ere negative atitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding' are not an adequate basis for a zoning ordinance." However, the court determined that the City's ordinance was not vague and had "laid a firm foundation" to guide the board of adjustment. Further, since a board of adjustment's denial of a "variance" was entitled to "the deference due a state statute", the city's denial of the special use permit should be upheld under the rational basis test. *Id.*

105. M. MESHENBERG, *supra* note 9, at 32.

106. Lauber, *supra* note 9, at 45. *But see* Feigenbaum v. City of Cleveland, Case No. 50075, slip op. (Ohio App. Jan. 30, 1986) (court held that testimony from neighbors surrounding adult foster care home for disabled veterans that indicated group home would have a damaging effect on neighborhood was sufficient evidence to justify denial of special use permit).

tion, prejudice against the condition or class of group home residents, or a group home operator's prior zoning violations.[107] Standards intended to guide zoning authorities in their special permit review process tend to vary from jurisdiction to jurisdiction.[108] However, as a general rule, no matter how vague or inadequate or how specific an ordinance's special use standards may be, the burden of proof is placed upon the applicant to demonstrate that his proposed use will comply with the ordinance requirements.[109] An exception exists when local governments have included vague, non-specific, or non-objective requirements with respect to special uses into their ordinance, as exemplified by the ordinance in the *Cleburne*[110] case. Under these circumstances, courts have not treated such general provisions as part of the threshold persuasion burden of the applicant.[111] Once a special use permit applicant has demonstrated that his proposed use is permitted by the ordinance and that it will conform to all required standards, the zoning authority has an affirmative duty to grant the permit.[112] If, however, the zoning authority chooses to oppose the issuance of the permit, the burden of going forward with rebuttable evidence then shifts to the authority.[113] The zoning authority must then prove that the proposed use will be detrimental to the health, safety and welfare of the community and will not comply with the ordinance's requirements.[114] If a zoning authority then denies the

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107. Lauber, *supra* note 9, at 45. *See e.g.*, *Cleburne*, 105 S. Ct. 3249 (1985) (court held "mere negative atitudes, or fear unsubstantiated by factors which are properly cognizable in a zoning proceeding, are not permissible bases for treating a home for the mentally retarded differently from apartment houses, multiple dwellings, and the like.") *Id.* at 3259; Sullivan v. City of Pittsburgh, 620 F. Supp. 935 (W.D. Pa. 1985); J.W. v. City of Tacoma, Wash., 720 F.2d 1126 (9th Cir. 1983).

108. *See generally* 6 P. ROHAN, *supra* note 9, at § 44.03[1]; 3 R. ANDERSON, *supra* note 97, at §§ 19.11-15; 3 RATHKOPF, *supra* note 55, at § 41.09.

109. A special use is granted a presumption of validity that it will promote the general welfare of the community, therefore there exists no initial burden on the part of the applicant to affirmatively demonstrate that his requested special use will benefit the community at large. 6 P. Rohan, *supra* note 9, at § 44.02[2][b]; *See also* 3 R. ANDERSON, *supra* note 97, at § 19.12; 3 RATHKOPF, *supra* note 55, at § 41.10; SCHNIDMAN, ABRAMS & DELANEY, HANDLING THE LAND USE CASE § 9.20.2 (1984) [hereinafter cited as LAND USE CASE].

110. 105 S. Ct. 3249 (1985).

111. 6 P. ROHAN, *supra* note 9, at § 44.02[2][b], 44-28.

112. *Id.* at § 44.02[2][e], 44-35-36; LAND USE CASE, *supra* note 109, at § 9.20.2. *See e.g.*, Odham v. Petersen, 398 So. 2d 875 (Fla. 5th DCA 1981) *modified*, 428 So. 2d 241 (Fla. 1983); Rural New Town, Inc. v. Palm Beach County, 315 So. 2d 478 (Fla. 4th DCA 1975).

113. 6 P. ROHAN, *supra* note 9, at § 44.02[2][b], 44-29-30; LAND USE CASE, *supra* note 109, at § 9.20.2.

114. *Id.* at § 44.02[2][b], 44-29; LAND USE CASE, *supra* note 109, at § 9.20.2.

permit, and its findings of fact are unsupported by substantial, competent, material evidence available on the record, it has committed an abuse of discretion and its decision will generally not be upheld by the courts.[115]

3. *"Family" Use*

When a local zoning ordinance does not specifically provide for group homes as either a permitted or special use, the proponent of a group home may ask local officials to allow the home in a single-family district under the zoning ordinance's definition of "family." Before 1960, zoning ordinances either included loose definitions of family (such as a "single-family household") or no definitions at all.[116] Many communities were therefore often obligated to accept into their single-family areas groups of persons which did not comport with the average citizen's idea of a family.[117] However, in the 1960's, many communities began to look for a different regulatory approach in light of the drastic social and economic changes which were occurring.[118] No longer was the traditional single-family dwelling primarily used by nuclear families with children.[119] The increased cost

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115. *Id. See generally* 3 RATHKOPF, § 41.11[2][a]. *See e.g.*, Coastal Ready-Mix Concrete Co. v. Board of Comm'rs, 299 N.C. 620, 265 S.E.2d 379 (1980) (when an applicant produces competent evidence tending to establish existence of facts and conditions which the ordinance requires for the issuance of a special use permit, prima facie he is entitled to it).

116. Netter & Price, *Zoning and the Nouveau Poor* 171, 173 (49 J. AMERICAN PLANNING ASSOC. No. 2, Spring 1983) [hereinafter cited as *Nouveau Poor*].

117. 2 RATHKOPF, *supra* note 55, § 17.A01, 17A-2-3.

118. *Id. See also Nouveau Poor, supra* note 116, at 173. *See generally* Sternlieb & Hughes, *The Evolution of Housing and its Social Impact*, 41 URB. LAND, No. 12 (1982); STERNLIEB, HUGHES & HUGHES, DEMOGRAPHIC TRENDS AND ECONOMIC REALITY: PLANNING AND MARKETS IN THE '80S (1982); COLEMAN & RAINWATER, SOCIAL STANDING IN AMERICA: NEW DIMENSIONS OF CLASS (1978).

119. Ziegler, *Single Family Zoning And The New Neighborhoods: Emerging Due Process and Equal Protection Issues* 50, 7 ZONING AND PLANNING L. REP. No. 7 (July/Aug. 1984) [hereinafter cited as Ziegler].

The nuclear family has decreased at an amazing rate over the last fifteen years. This trend lends obvious support against zoning ordinances requiring families to be related by blood or marriage and for the acceptance of group homes in what are now primarily non-nuclear single family areas. Single unit homes in busy urban and suburban areas are now unlikely to be occupied primarily by nuclear families with children. Married couples with children now only comprise 29 percent of all households which is less than one-half of all owner occupied housing units. Recent census data indicates that non-family households are increasing greater than ten times the rate of married couple households and more than five times as fast as all types of family households. *Id. See also generally* Crawford, *Whither The Single-Family Zoning District?* 5 ZONING AND PLANNING L. REP. No. 6 (June 1982) [hereinafter cited as Crawford].

While there are no national figures on which type of definition of family is used, a 1983

of housing, the high rate of divorce, the decline in family size, and the increasing number of non-married young persons all contributed to this steady erosion of the exclusive single-family district.[120]

Faced with a general economic and social upheaval and the desire to preserve their existing lifestyles, local governments responded by restricting their expansive definitions of family in order to keep out newcomers whose lifestyle included "non-traditional" families, and who were typically non-voters outside of the political mainstream.[121] As a result, the modern definition of "family" includes persons related by blood or marriage, or a specified, restricted number of unrelated persons living together as a single household.[122] Obviously, this definition excludes those in need of a group home environment and presently serves as a major obstacle to the placement of group homes in single-family zoning districts.[123]

C. *Belle Terre* and *Moore*

Two Supreme Court decisions provide support for the exclusion of group homes from areas designated for "family" uses. The U.S. Supreme Court's decision in *Village* of *Belle Terre v. Boraas*[124] posited that group homes may legally be excluded from single-family zoning districts. In *Belle Terre*, six unrelated college students lived in a house that had been leased to them. The students shared expenses and used a common cooking facility.[125] Under the Village's zoning ordinance, however, the definition of "family" was specifically restricted to persons related by blood, marriage, or adoption, or not more than two unrelated persons living together as a single housekeeping unit.[126] The Court upheld the ordinance as a legitimate legis-

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study of thirty jurisdictions in the Seattle, Washington area found among the ordinances surveyed that nine allowed no unrelated persons. Of the 21 that allowed unrelated persons to constitute a family, two did not impose a limit on the number of unrelated residents, while one limited families to four, ten to five unrelated persons, five to six unrelated persons and three to eight unrelated persons. Lauber, *supra* note 9, at 63-64 n.224 (citing RITZDORF-BROZOVSKY, *Impact of Family Definitions in American Municipal Zoning Ordinances* 106 (1983) (University of Washington, unpublished dissertation)).

120. *See generally* Ziegler and Crawford, *supra* note 119.

121. NOUVEAU POOR, *supra* note 116, at 173. The 1960's meant hippies and their communes, student activists, anti-war demonstrators and "free love"; people whose way of life was perceived as a threat to the stability of a community. *Id.*

122. *See generally* 2 RATHKOPF, *supra* note 55, at §§ 17A.01-05.

123. *Id. See also* ABA Project, *supra* note 41, at 796; Gailey, *supra* note 2, at 98.

124. 416 U.S. 1 (1974).

125. *Id.* at 2-3.

126. One or more persons related by blood, adoption, or marriage, living and cooking

lative land use decision.[127] The Court found that the zoning ordinance, which required a legal or biological relationship among household members, was rationally related to a permissible state objective.[128] Thus, the court rejected the constitutional challenge and applied a minimum level of scrutiny.[129]

Citing a previous opinion, the Court stated that, in two instances, a zoning ordinance might offend either the equal protection clause or the due process clause.[130] One example is the exclusion or segregation by race which would make the ordinance immediately suspect.[131] Another is when a "philanthropic home for children or for old people" must receive the written consent of two-thirds of surrounding landowners before it could be legally operated.[132] Regarding this "home", the Court held the consent requirement unconstitutional because surrounding owners could "withhold consent for selfish reasons or arbitrarily and may subject the [petitioner] to their will or caprice."[133]

The Court further noted that the home at issue "was not shown by its maintenance and construction to work any injury, inconvenience, or annoyance to the community."[134] This broad language, although only dictum, could have broad implications relative to the zoning difficulties faced by group homes: while a city could define "family" to exclude homes with more than two unrelated persons, a group home should be allowed if it does not "work any injury, incon-

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together or as a single-housekeeping unit exclusive of household servants. A number of persons but not exceeding two (2) living and cooking together as a single-housekeeping unit though not related by blood, adoption, or marriage shall be deemed to constitute a family.

Village of Belle Terre, N.Y., Building Zone Ordinance, art. 1, § D-1.35a, *cited in A Review Of The Conflict Between Community-Based Group Homes For The Mentally Retarded And Restrictive Zoning*, 82 W. VA. L. REV. 669, 675 (1980).

127. 416 U.S. at 8.

128. *Id. See supra* note 28.

129. *Id.* Writing for the majority, Justice Douglas commented that:

A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs. . . . The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessing of quiet seclusion and clean air make the area a sanctuary for people. *Id.* at 9.

130. *Id.* at 6.

131. *Id.*

132. *Id.*

133. *Id.* at 7.

134. *Id.*

venience or annoyance to the community."[135]

In *Moore v. City of East Cleveland*,[136] the Supreme Court again considered an ordinance defining "family." In *Moore*, the local government attempted to regulate consanguinity under an extremely restrictive ordinance that prohibited a grandchild from residing in the same single-family household with his grandmother, his uncle, and the uncle's child (first cousin).[137] After Mrs. Moore was arrested and subsequently convicted for violating the ordinance, she brought suit, challenging its constitutionality.[138] Writing for a plurality of the Court, Justice Powell explained that the City's interest in preventing overcrowding, minimizing traffic and parking congestion, and avoiding an undue financial burden on the local school system did not justify infringing upon the living arrangements of blood relatives.[139] The Court held that the city violated the substantive due process clause by intruding into the internal structure of a family and classifying family patterns because marriage and family life were fundamental rights.[140]

There are four significant elements in *Moore*'s facts that probably would prevent the Court's substantive due process analysis from being applied to all group homes housing unrelated persons.[141] First, the residents were closely related by bloodline and were a typical "extended family" living arrangement, which is quite common among minorities and lower income families. Second, an ordinance that precluded a sixty-three year old grandmother from living with her son and two grandchildren was exceedingly restrictive. Third, Mrs. Moore was criminally and not civilly prosecuted. Fourth, although there was insufficient evidence to support a discrimination claim under the equal protection clause, the Moore family was black and race has been designated a suspect class.[142]

The legacy of *Moore* and *Belle Terre* is that local governments can define "family" in their zoning and housing ordinances, but can-

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135. *Id.*

136. 431 U.S. 494 (1977).

137. *Id.* at 496.

138. *Id.* at 497.

139. *Id.* at 499-500.

140. *Id.* at 503-06. The Court noted that family zoning could not attempt to limit family households to a narrowly defined nuclear family pattern since the choice in one's family matters extended beyond the parent-child and husband-wife relationship and encompassed the "extended family" as well. *Id.*

141. "*Yards That Are Wide*?", *supra* note 50, at 1371-72.

142. *Id.* at 1371-72. *See supra* note 28 *and infra* notes 344-49 and accompanying text.

not go so far as to prevent persons related by blood or marriage from living together. *Moore* may have created slight support for the placement of group homes in single-family districts, but the *Belle Terre* decision upholding strict definitions of family is still a significant barrier at the Federal level.[143]

D. Group Homes Permitted by Other Methods

Despite the *Belle Terre* decision, permitting communities to define "family" as persons related by blood, marriage, or adoption, and to specifically limit the number of unrelated persons, state courts may impose more stringent limitations on local government efforts to restrict cohabitation. State courts are free to interpret provisions of their own state constitutions more strictly than parallel provisions found in the United States Constitution.[144] Consequently, an increasing number of courts, sympathetic to the group home movement, have not found *Belle Terre* to be controlling and have permitted group homes to locate in single-family zoning districts under various theories.[145]

Some courts have permitted group homes under an expanded definition of "family."[146] Decisions from these courts focus on the use to which the dwelling is put rather than the relationship between its residents. These courts hold that zoning ordinances or restrictive covenants requiring a familial relationship among household members will not be literally interpreted.[147] As long as the unrelated group home residents function as a traditional family, are small in number,

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143. 2 RATHKOPF, *supra* note 55, at § 17A.05[2][a], 17A-24-25; Gailey *supra* note 2, at 98; LAND USE CASE, *supra* note 109, at § 9.13.4. *See infra* notes 144-45 and accompanying text. *See e.g.*, Palm Beach Hospital, Inc. v. West Palm Beach, 2 MENTAL DISABILITY L. REP. 18 (S.D. Fla. 1977) (court citing *Belle Terre* upheld strict definition of family that had effect of excluding group home for ten retarded males from single-family area).

Notwithstanding his dissent in *Belle Terre* where he acknowledged violations of right to privacy and freedom of association, Justice Marshall still agreed that noise, traffic and density were legitimate concerns of the city. He also agreed that an ordinance limiting occupancy to two or three adults per household could be legally sound. 416 U.S. 1, 10-20 (1974) (Marshall, J., dissenting). Thus, in light of *Moore's* factual distinctions and *Belle Terre's* recognition of a strict definition of family as a valid exercise of the police power, any argument to be made for the placement of six service dependent persons in a group home under these cases has little potential for success.

144. 2 RATHKOPF, *supra* note 55, at § 17A.05[2][b][i], 17A-25-26.

145. *See generally id.* at § 17A.05[a]-[d].

146. *Id.* at § 17A.05[2][b][i], 17A-25-26.

147. *Id.* at § 17A.05[2][b][i]. *See e.g.*, City of White Plains v. Ferraioli, 34 N.Y.2d 300, 313 N.E.2d 756, 357 N.Y.S.2d 449 (1974); Berger v. State, 71 N.J. 206, 364 A.2d 993 (1976).

and adult supervision is stable, they will be considered a family.[148] In doing so, the courts have generally considered the specific use of the group home and have extended protection from restrictive zoning and covenants to certain types of group homes, such as those for the developmentally disabled.[149] However, the courts have been reluctant to characterize other types of group homes, such as prison halfway houses and drug rehabilitation centers, as families.[150]

Courts have also permitted group homes to locate in single-family districts under the doctrine of overriding or preemptive state policy.[151] Mainstreaming service dependent persons occurs under this theory when a state expressly or impliedly manifests an intent to occupy the field of establishing group homes to the exclusion of all other governmental bodies.[152] Legislative intent to preempt local zoning regulations has been found where state authorization and policies, funding legislation, and general constitutional provisions provide for the care of service dependent persons.[153] Overriding intent has also been found where state legislation explicitly provides for the place-

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148. Gailey, *supra* note 2, at 101; LAND USE CASE, *supra* note 109, at § 9.14.1.

149. 2 RATHKOPF, § 17A.05[2][b][i], 17A-25. *See generally* 1 P. ROHAN, *supra* note 9, at § 3.05[6]. For example, in *City of White Plains v. Ferraioli*, 34 N.Y.2d 300, 313 N.E.2d 756, 357 N.Y.S.2d 449 (1974), the court upheld the right of a married couple to care for ten foster children in an area restricted to families of related individuals. The court found the object of the zoning ordinance was to control the type of housing and the mode of living, and not the biological relationship of the persons involved. The court distinguished the case from *Belle Terre*, indicating that the group home is not a temporary living arrangement as was the situation involving six college students in *Belle Terre*. The intention of the group home, the court held, was to have its residents "remain and develop ties in the community. The purpose is to emulate the traditional family and not to introduce a "different lifestyle"." 34 N.Y.2d at 305, 313 N.E.2d at 758, 357 N.Y.S.2d at 452. The court further stated 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 or transient living, it conforms to the purpose of the ordinance." 34 N.Y.2d at 305-306, 313 N.E.2d at 758, 357 N.Y.S.2d at 453.

150. 2 RATHKOPF, *supra* note 55, at § 17A.05[2][a], 17A-25. Courts have been reluctant to characterize group homes for service dependent groups such as drug addicts, the mentally ill, prison parolees and alcoholics as families because, unlike the developmentally disabled, their condition is not immutable. They are viewed as responsible for their condition and are not like the developmentally disabled who are considered powerless, dependent persons that the state needs to protect. They carry a moral stigma and are perceived as a threat to the values that single-family zoning is trying to protect. The general public is also more likely to be receptive to group homes that lack a moral stigma and that pose less of a perceived threat to the community. Lauber, *supra* note 9, at 72-73.

151. 2 RATHKOPF, *supra* note 55, at § 17A.05[2][b][ii], 17A-29-36; LAND USE CASE, *supra* note 109 at § 9.13.5.

152. Gailey, *supra* note 2, at 100.

153. LAND USE CASE, *supra* note 109, at § 9.13.2.

ment of group homes in single-family zoning districts.[154] Thus, under this theory, if a local government's zoning ordinance is found to hinder or conflict with state policy or intent that supports the establishment of group homes, the courts will hold it invalid.[155] However, the state statute or policy itself must be reasonable or the courts will not preempt local zoning regulations.[156]

Another approach courts have used to allow the placement of group homes that fail to qualify generically as a family in single-family zoning districts is the governmental immunity theory.[157] When a group home is operated by a state agency, or when a privately or publicly owned group home contracts with, or is funded by a state agency, it may be entitled to the same immunity from local zoning regulations that a state is entitled to.[158] Although there is no set criterion for determining the existence or scope of governmental immunity from local zoning regulations, courts generally look for evidence that the legislature intended for a particular state agency to enjoy immunity from local regulations.[159] In states where group home operators can claim immunity, the state mandate may be so clear that immunity may be automatic.[160] However, where it is difficult to determine if the legislature intended for a particular state agency to be immune, immunity may be determined by a balancing of interests test.[161]

Under this test, the courts balance a number of factors, such as the nature and scope of the agency seeking immunity, the type of land use under consideration, the degree to which the public interest would be served, the effect that local land use regulations have upon the proposed group home, and the impact upon legitimate local interests.[162] The courts will hold that a group home is immune from local

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154. *Id.*

155. Gailey, *supra* note 2, at 100.

156. LAND USE CASE, *supra* note 109, at § 9.13.2.

157. *See generally* 2 RATHKOPF, *supra* note 55, at § 17A.05[2][b][ii], 17A-29-36. For a review and discussion of the governmental immunity theory, see Note, *Governmental Immunity From Local Zoning Ordinances*, 84 HARV. L. REV. 869 (1971); Polisky, *New Approaches To Governmental Immunity From Zoning Regulations*, 1 ZONING AND PLANNING L. REP. No. 6 (Apr. 1978).

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id. See e.g.*, City of Temple Terrace v. Hillsborough Ass'n for Retarded Citizens, Inc., 332 So. 2d 571 (Fla. 2d DCA 1975), *aff'd*, 332 So. 2d 610 (Fla. 1976). *See infra* text accompanying notes 293-312 for a discussion of *Temple Terrace*.

zoning regulations when the public interest in providing the group home outweighs the local government's interest in enforcing its zoning regulations.[163]

The most prevalent and successful method of facilitating group home placement in single-family districts is through the state legislative approach.[164] As of January, 1986, twenty seven states had responded to the needs of service dependent individuals by enacting legislation that permits group homes to be located in single-family residential areas.[165] Under this approach, states have enacted statutes that either revoke or curtail exclusionary local zoning controls.[166] Except in Ohio,[167] courts have upheld such statutes as constitutional, generally on the basis that they bear a substantial relation to a valid state purpose and that they embody a subject of such statewide concern that preemptive legislation is warranted.[168]

The twenty seven statutes already in effect are far from identical, although they emanate from the same purpose — to mainstream service dependent persons into optimum living conditions. These statutes vary from the type and size of the group homes permitted, to how much discretion remains with the local government.[169] Nonetheless, they possess several common characteristics such as: defining group homes; declaring that for zoning purposes, group homes meeting the statutory definition are acceptable single-family uses of property; identifying the type of group home permitted; indicating the number and characteristics of the residents; identifying the appropriate zoning treatment; indicating whether additional regulations may be imposed by local governments; imposing one of several separation or dispersal methods by which the number and location of group homes may be controlled in order to prevent an overconcentration of group homes;[170] requiring state licensing of group homes; and provid-

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163. Gailey, *supra* note 2, at 100.

164. *Id.* at 98-99.

165. ZONING NEWS, *supra* note 84, at 3.

166. 2 RATHKOPF, *supra* note 55, at § 17A.05[2][c], 17A-36-37; Gailey, *supra* note 2, at 98-99.

167. Garcia v. Siffrin Residential Ass'n, 63 Ohio St. 2d 259, 407 N.E.2d 1369 (1980), *cert. denied*, 450 U.S. 911 (1981) (court invalidated state statute requiring that group homes be allowed to locate in single-family zoning districts as an unreasonable limit on local government police power).

168. LAND USE CASE, *supra* note 109, at § 9.13.3.

169. *See generally "Yards That Are Wide?", supra* note 50, at 1378-89; ZONING NEWS, *supra* note 84.

170. *See supra* notes 84-90 and accompanying text.

ing procedures involving notice to the affected community, a public hearing and a negotiation process or post-establishment community review.[171]

E. Recent Cases

Prior to the *Cleburne* decision, which primarily focused on the status of mentally retarded persons rather than on the concepts of "single-family residence" or "family", efforts to persuade the Supreme Court to review *Belle Terre* in light of the group home phenomena were unsuccessful. For example, at its October, 1984 session, the Court denied certiorari for group home cases wherein appellate courts had reached diametrically opposing conclusions.[172]

In the first case, *Macon Association for Retarded Citizens v. Macon-Bibb County Planning and Zoning Commission*,[173] opponents of allowing group homes in single-family districts were supported in their position. In *Macon-Bibb*, the Georgia Supreme Court held that group homes for five mentally retarded persons and two surrogate parents were not permissible uses within single-family zoning districts because the residents of such homes did not meet the local zoning regulations restrictive definition of "family."[174] Finding that nothing on the face of the ordinance's definition of "family" discriminated against the mentally retarded, the court concluded that the definition withstood minimal equal protection scrutiny under *Belle Terre*.[175]

By asserting that the Court's refusal to hear the case for want of a substantial federal question constituted a decision on the merits, group home opponents can argue that *Belle Terre* is valid, controlling precedent in group home cases.[176] In addition, the Supreme

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171. *See generally "Yards That Are Wide?"*, *supra* note 50, at 1378-89. *See also* ZONING NEWS, *supra* note 84, at 3; 2 RATHKOPF, *supra* note 55, at § 17A.05[2][c]; Note, *Zoning For The Mentally Ill: A Legislative Mandate*, 16:3 HARV. J. LEG. 853, 886-88 (1979); ABA Project, *supra* note 41 for a review of the characteristics of various preemptive state statutes.

172. Macon Ass'n for Retarded Citizens v. Macon-Bibb County Planning and Zoning Comm'n, 314 S.E.2d 218 (Ga. 1984), *cert. denied*, 105 S. Ct. 57 (1984); Crane Neck Ass'n v. New York City Long Island County Services Group, 61 N.Y.2d 154, 472 N.Y.S.2d 901 (Ct. App. 1984), *cert. denied*, 105 S. Ct. 60 (1984).

173. 314 S.E.2d 218 (Ga. 1984), *cert. denied*, 105 S. Ct. 57 (1984).

174. *Macon-Bibb*, 314 S.E.2d at 221.

175. *Id.*

176. The City of Cleburne argued in its reply brief seeking writ of certiorari to the U.S. Supreme Court that the Fifth Circuit's decision in *Cleburne* was in direct conflict with *Macon-Bibb* because the Fifth Circuit employed a middle tier level of scrutiny in its equal protection

Court specifically indicated in a footnote in the *Cleburne* case that *Macon-Bibb* had no controlling effect on *Cleburne*.[177] The Court stated that although Macon-Bibb's zoning ordinance excluded group homes because they exceeded the number of unrelated persons under the ordinance's definition of family, the ordinance did not discriminate against the retarded.[178] Thus, the Court noted that since Macon-Bibb's ordinance included a restrictive definition of family similar to *Belle Terre's*, it too was constitutionally valid.[179] The Court's rationale indicates that *Belle Terre* may be applied to a group home situation and jurisdictions with similar restrictive ordinances may zone out group homes provided that their ordinances are applied within a sound constitutional framework.

The Supreme Court also turned down an appeal of a New York decision in which group home proponents were victorious. In *Crane Neck Association v. New York City Long Island County Services Group*,[180] the New York Court of Appeals held that a restrictive covenant which required a single family dwelling to be used and constructed for one single family could not bar a group home for mentally disabled adults.[181] Although the court stated that the home for the retarded was not used as a "single family dwelling" unit as required by the covenant, the court ruled that the covenant could not be enforced because to do so would subrogate the "consistent, une-

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analysis in striking down Cleburne's ordinance, whereas the Georgia Supreme Court upheld Macon-Bibb's ordinance under a rational basis analysis. Further, the City of Cleburne opined that *Macon-Bibb* was almost a direct parallel to *Cleburne*, therefore, citing *Hicks v. Miranda*, 422 U.S. 332 (1975), the Supreme Court's refusal to hear the *Macon-Bibb* case for want of substantial question constituted a decision on the merits. Reply Brief For Petitioners. (City of Cleburne) at 1-2, City of Cleburne v. Cleburne Living Center, 105 S. Ct. 3249. However, the Supreme Court has frequently reiterated that the "denial of a writ of certiorari imports no expression upon the merits of the case, as the bar has been told many times." United States v. Carver, 260 U.S. 482, 490 (1922). "A simple order denying a petition for writ of certiorari is not designed to reflect the Court's views as to the merits of the case or as to its jurisdiction to hear the matter." R. STERN & E. GRESSMAN, SUPREME COURT PRACTICE 353 (5th ed. 1978) [hereinafter cited as SUPREME COURT PRACTICE]. *See also* J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 34 (2d ed. 1983) [hereinafter cited as NOWAK].

177. 105 S. Ct. at 3254 n.8. "*Macon-Bibb* . . . [dismissed] for want of a federal question, . . . has no controlling effect on [the *Cleburne*] case." *Id.*

178. *Id.*

179. *Id.* "In *Village of Belle Terre v. Boraas* . . . we upheld the constitutionality of a[n] . . . ordinance [similar to Macon-Bibb's] and the Georgia Supreme Court in *Macon-[Bibb]* specifically held that the ordinance did not discriminate against the retarded." *Id.*

180. 61 N.Y.2d 154, 460 N.E.2d 1336, 472 N.Y.S.2d 901 (Ct. App. 1984), *cert. denied*, 105 S. Ct. 60 (1984).

181. 61 N.Y.2d at 167, 460 N.E.2d at 1343, 472 N.Y.S.2d at 909.

quivocal" public policy in New York favoring deinstitutionalization through the establishment of group homes.[182]

Since the primary emphasis in the *Cleburne* decision was whether the mentally retarded should be designated a suspect class warranting heightened equal protection scrutiny and not whether community housing in the context of ordinances and restrictive covenants could properly exclude group homes by restricting neighborhoods to single-family uses, *Macon-Bibb* and *Crane Neck* presented the Court with its first opportunity to address the issue. The Court's refusal to hear the above cases is in keeping with its historic reluctance to review local land use decisions.[183] It also affirms the strong presumption of legislative validity and deference the Court has granted local legislative enactments.[184] As a general rule the Court is more likely to grant certiorari to reverse rather than to affirm a decision.[185] Thus, if *Macon-Bibb* and *Crane Neck* are viewed within this context, the Court's denial of certiorari indicates that absent a constitutional violation involving a suspect class or fundamental right, which the right to housing is not,[186] states are free to regulate group

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182. 61 N.Y.2d at 163, 460 N.E.2d at 1340, 472 N.Y.S.2d at 906.

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

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

183. Prior to the 1974 *Belle Terre* decision, the most recent zoning case the Court heard was *Nectow v. City of Cambridge*, 277 U.S. 183 (1928), forty six years earlier. *See also* LAND USE CASE, *supra* note 109, at § 1.7.2; EXCLUSIONARY ZONING, *supra* note 38, at 682.

184. "The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." *Cleburne*, 105 S. Ct. at 3254 (citations omitted). *See also* Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); Village of Belle Terre v. Boraas, 416 U.S. 1 (1974); Village of Arlington Heights v. Metropolitan Housing Corp., 429 U.S. 252 (1976); Williamson Planning Comm'n v. Hamilton Bank, 105 S. Ct. 3108 (1985); MacDonald, Sommer & Frates v. Yolo County, 54 U.S.L.W. 4782 (U.S. June 25, 1986).

185. SUPREME COURT PRACTICE, *supra* note 176, at 359.

186. In *Belle Terre*, 416 U.S. 1, the Supreme Court held that the right to housing was not sufficiently important to warrant fundamental right status, and thus did not rate strict scrutiny if found to be prejudiced.

> The Supreme Court has never found that there is any right to government assistance to secure adequate housing or other forms of shelter. [T]he Court has not subjected governmental actions which might burden persons' abilities to find adequate private housing to any standard of review above the rationality test of the due process and equal protection guarantees. Of course, if these laws involve the use of suspect classifications or burden fundamental rights they will be subjected to the strict scrutiny

homes in any manner they choose.

II. THE CLEBURNE COURT'S ANALYSIS

The *Cleburne* case presented the Supreme Court with its first opportunity to review the denial of a special use permit for a group home. The Court held that Cleburne's zoning ordinance was valid on its face, but that it was invalid as applied.[187] Writing for a six-person majority,[188] Justice White prefaced his remarks by stating that, as a general rule, legislation is presumed valid and will be upheld if the classification established by a statute is rationally related to a legitimate state interest.[189] He further stated that social or economic legislation "allows the states wide latitude" and that the Constitution recognized that even "improvident decisions" will eventually be corrected through the democratic process.[190] After discussing the various equal protection tests the Court utilizes in their review of legislative classifications and their correlative levels of scrutiny, Justice White determined that Cleburne's zoning ordinance should only be subject to minimum scrutiny.[191]

Justice White then observed, however, that the general rule is inapplicable when a legislative classification involves race, alienage or national origins since these factors are seldom relevant to the achievement of any legitimate state interest.[192] Classifications such as

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standard of review.

NOWAK, *supra* note 176, at 825.

However, in *Cleburne*, 105 S. Ct. 3249, Justice Marshall noted that "the right to 'establish a home' has long been cherished as one of the fundamental liberties embraced by the Due Process Clause." *Id.* at 3266 (Marshall, J., dissenting).

The Court considers a right to be fundamental only if the right is explicitly or implicitly guaranteed by the Constitution. *See* Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 33 (1973) (education not found to be among rights explicitly protected by Constitution). In addition to those rights explicitly identified in the Constitution, the Court has found other implicit fundamental rights. *See* Kramer v. Union Free School Dist., 395 U.S. 621, 626 (1969) (the right to vote); Zablocki v. Redhail, 434 U.S. 374, 383 (1978) (the right to marry); Williams v. Rhodes, 393 U.S. 23, 30-31 (1968) (the right to freedom of association); Shapiro v. Thompson, 394 U.S. 618, 629-30 (1969) (the right to interstate travel).

187. *Cleburne*, 105 S. Ct. at 3260.

188. The majority opinion was joined by Chief Justice Burger and Justices Powell, Stevens, Rehnquist, and O'Connor. Justice Stevens wrote a concurring opinion in which Chief Justice Burger joined. Justice Marshall, joined by Justices Brennan and Blackmun, wrote an opinion concurring in the judgment in part and dissenting in part.

189. *Cleburne*, 105 S. Ct. at 3254.

190. *Id.*

191. *Id.* at 3255-58.

192. *Id.* at 3255.

these, he noted, will therefore be subject to strict scrutiny by the Court and will be upheld only if the state can demonstrate that they are necessary for the achievement of a compelling state interest.[193]

Having determined the appropriate standard of review, the Court used that standard in assessing the constitutionality of Cleburne's zoning ordinance as applied.[194] Justice White concluded that, if the Court found the requirement that C.L.C. obtain a special use permit unconstitutional, then there would be no need to determine whether the special use permit provision was invalid on its face.[195] In other words, he found that the issue presented to the Court was "whether the city may never insist on a special use permit for the mentally retarded in an R-3 zone."[196] Citing three first amendment cases,[197] the Court justified its as applied approach as "the preferred course of adjudication since it enables courts to avoid making unnecessarily broad constitutional judgments."[198]

The Court addressed the validity of Cleburne's zoning ordinance and inquired whether C.L.C. had been deprived of equal protection of the laws as a result of the required special use permit.[199] Justice White also noted that other multiple dwelling facilities located within the same zoning district were not subject to the same requirement.[200] The Court indicated that although the proposed residents of the C.L.C. home were mentally retarded, this difference was irrelevant unless the mentally retarded constituted a threat to the city's legitimate interests in a way that other permitted multiple dwelling uses, such as boarding houses and hospitals, would not.[201] Finding that C.L.C.'s proposed group home would not pose a special threat to the city's interest, the Court held that the ordinance was invalid as applied.[202]

The Court found that none of the seven reasons the city advanced in its denial of the special use permit was legitimate. Discussing the City Council's concern for the prejudice of the neighbors sur-

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193. *Id.*
194. *Id.* at 3258.
195. *Id.* at 3258.
196. *Id.* at 3258.
197. *Id.* (citing Brockett v. Spokane Arcades, Inc., 105 S. Ct. 2794 (1985); United States v. Grace, 461 U.S. 171 (1983); and NAACP v. Button, 371 U.S. 415 (1963)).
198. *Id.*
199. *Id.* at 3258-59.
200. *Id.*
201. *Id.* at 3259.
202. *Id.*

rounding C.L.C.'s home, the Court found such concerns "[were] not a permissible [basis] for treating a home for the mentally retarded differently from apartment houses, multiple dwellings, and the like."[203] Further, the City Council's objections to the proximity of the facility across the street from a junior high school was not a legitimate reason, because thirty mentally retarded students already attended the school.[204] The City's fear that students might harass C.L.C.'s residents and the denial of a special use permit based upon such "vague, undifferentiated fears" would have allowed the city to "validate what would otherwise be an equal protection violation."[205]

The City Council's objection to the C.L.C. home's location within a five hundred year flood plain was also not legitimate, because the concern with the possibility of flooding could not logically be based on a distinction between the C.L.C. home and other multiple dwelling facilities.[206] The Court noted that uses such as nursing homes, hospitals or sanitariums that did not require a special use permit were also permitted within the same zoning district and would be subject to the same flood potential.[207] In addition, the Court indicated that the same could be said of the City Council's expressed doubts regarding the legal responsibility of C.L.C. for the actions of its residents.[208] If there was no concern about the legal responsibility of other permitted uses, such as boarding and fraternity houses, the Court found it difficult to believe that groups of retarded residents could pose any different or special hazard.[209]

The Court also opined that the City Council's concern about the size of the C.L.C. home relative to the number of its residents was unreasonable.[210] The Court found that there would not be a restriction on the number of persons who could reside in the C.L.C. home if it were for example, a boarding house, fraternity house, dormitory or other similar uses.[211] The Court further analyzed this density issue, posing the question of whether or not it was "rational to treat the mentally retarded differently" and apply a density regulation that

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203. *Id.*
204. *Id.*
205. *Id.*
206. *Id.*
207. *Id.*
208. *Id.*
209. *Id.*
210. *Id.* at 3259-60.
211. *Id.* at 3260.

other groups were not required to adhere to.[212] The Court found that the record failed to reveal any justification for denying the group home site because of the potential occupants' characteristic of retardedness.[213]

Since the C.L.C. residents had satisfied all state and federal requirements for group housing in the community, and in addition would meet the legal square-footage-per-person requirements for its type of facility, the City never justified its position that other persons could live in crowded conditions, but the mentally retarded could not.[214] Similarly, discussing the city's position that its zoning ordinance was aimed at avoiding "concentration[s] of population and lessening congestion of the streets", fire hazards, and neighborhood disruption, the Court noted that the City's concerns failed to explain why multiple dwelling facilities could freely locate in the area without a special use permit.[215] Finally, the Court reasoned that the City Council's requirement of a special use permit for C.L.C. was based upon "an irrational prejudice against the mentally retarded, including those who would occupy the [C.L.C.] facility and who would live under the closely supervised and highly regulated conditions expressly provided for by state and federal law."[216] Thus, the Court held the ordinance invalid as applied to C.L.C.[217]

In a concurring opinion, Justice Stevens criticized the Court for utilizing a tiered model of equal protection analysis.[218] He repeated a view expressed in a previous opinion,[219] that the Court's prior decisions have not delineated any clearly defined equal protection standards.[220] He also noted that the Supreme Court's cases have set forth a continuum of responses to various classifications which have been explained "by terms ranging from 'strict scrutiny' at one extreme to 'rational basis' at the other."[221] He stated that this tiered model "does not describe a completely logical method of deciding cases" and that a single "rational basis" standard can explain the Court's

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212. *Id.*
213. *Id.*
214. *Id. See supra* note 5 and accompanying text.
215. *Cleburne*, 105 S. Ct. at 3260.
216. *Id.*
217. *Id.*
218. *Id.* at 3260-61 (Stevens, J., concurring).
219. *Id.* at 3261 & n.4 (quoting Craig v. Boren, 429 U.S. 190, 212 (1976) (Stevens, J., concurring)).
220. *Id.* at 3260-61.
221. *Id.* at 3261.

equal protection decisions.[222] This standard, he said, was not met by the city because it had required the special use permit in response to "the irrational fears of neighboring property owners" rather than for the protection of the C.L.C. residents.[223] He thus joined the opinion of the Court.

Justice Marshall, also writing separately, concurred with the majority insofar as it held the ordinance unconstitutional.[224] However, he dissented from the Court's reasoning and its "narrow, as-applied remedy."[225] He first argued that the Court, despite its alleged application of a minimum scrutiny test, was in reality using "precisely the sort of probing inquiry associated with heightened scrutiny."[226] Justice Marshall noted that the Court concluded that legitimate concerns for fire hazards or the peacefulness of the neighborhood surrounding C.L.C. did not justify singling them out for to bear the burden of such concerns, when similar permitted uses posed the same threats.[227] However, he remarked that under the traditional rational basis test the Court would not have: objected to the ordinance's failure to regulate other types of group homes; sifted through the record to determine whether policy decisions were factually supported; or placed the burden on the legislature to prove that its classification was reasonable.[228] He also argued that the Court's refusal to admit that it was employing the rational basis test rather than heightened scrutiny was such an aberration of the rational basis minimum scrutiny test that it created a precedent for both the Supreme Court and lower courts to subject economic and commercial classifications to this searching form of rational basis review.[229] Furthermore, the Court's failure to state the factors which justify this form of "second order" rational basis analysis left "no principled foundation for determining when more searching inquiry is to be invoked", effectively leaving lower courts "in the dark" as to what level of scrutiny should be used in their future decisions.[230]

Justice Marshall then remarked that subjecting economic and

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222. *Id.*
223. *Id.* at 3262.
224. *Id.* at 3263.
225. *Id.* at 3263 (Marshall, J., dissenting).
226. *Id.* at 3264. Justice Marshall stated that "Cleburne's ordinance surely would be valid under the traditional basis test." *Id.* at 3263.
227. *Id.*
228. *Id.* at 3264.
229. *Id.* at 3265.
230. *Id.*

social classifications to such a probing review under the "rational basis" test was a "small and regrettable step back toward the days of *Lochner v. New York*."[231] Justice Marshall indicated his belief that the exclusion of group homes from the community deprived the retarded residents of what gives humans "freedom and fulfillment — the ability to form bonds and take part in the life of [a] community."[232] Lastly, he criticized the Court for invalidating the city's ordinance as applied instead of on its face.[233]

Justice Marshall found that the issue confronting the Court was not whether "the city may never insist on a special use permit for the mentally retarded in an R-3 zone . . . ."[234] He felt that the issue was "whether the city may require a permit pursuant to a blunderbuss ordinance drafted many years ago to exclude all the 'feeble-minded,'."[235] He then insisted that if the city desired to exclude the mentally retarded from certain zoning districts, the appropriate means would be to enact a new ordinance "carefully tailored to the exclusion of some well defined subgroup of retarded people in circumstances in which exclusion might reasonably further legitimate city purposes."[236] Justice Marshall concluded that Cleburne's ordinance should be updated with explicit standards that would provide certainty to special use permit applicants and administrative officials to avoid shifting the responsibility to the courts to "confront complex policy and empirical questions" more appropriately addressed by a legislative solution.[237]

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231. *Id.* (citing *Lochner*, 198 U.S. 45 (1905)). What the Court implied by this statement is that *Lochner* exemplified the problem the Supreme Court experienced between 1900 and 1937. During this period, state and national government enacted an ever increasing amount of legislation regulating the economic and social life of Americans. Concerned with this perceived over-regulation, many Supreme Court justices felt obligated to protect the free enterprise system embodied in the concept of laissez-faire. Thus, they would uphold some laws which they deemed necessary for health and safety, but on the other hand were also determined to fully protect freedom of contract and liberty in the free market place. As a result, these justices, as exemplified by the *Lochner* majority, were willing to use not only the substantive due process concept, but in addition, the commerce clause, the contract clause, and the equal protection clause to invalidate laws that they perceived to infringe upon free enterprise. Because of this inherent tension between historically sustaining legislation that was within constitutional limits and protecting the free enterprise system, the Court during this period was known for its erratic, non-uniform approach to the legislation it reviewed. NOWAK, *supra* note 176, at 438.

232. *Cleburne*, 105 S. Ct. at 3266.

233. *Id.* at 3272-73.

234. *Id.* at 3273.

235. *Id.* at 3273.

236. *Id.*

237. *Id.*

III. THE GROUP HOME IN FLORIDA

In the 1970's and 1980's a great deal of legislation was enacted in support of the concepts of "deinstitutionalization"[238] and "normalization".[239] Despite this legislation, however, the implementation of

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238. *See supra* note 43.

239. *See supra* notes 37-39 and accompanying text.

Supportive legislation includes the following: The Developmentally Disabled Assistance and Bill of Rights Act, 42 *U.S.C.* § 6010 (1976) provided in part that:

> Congress makes the following findings respecting the rights of persons with developmental disabilities:
>
> (1) Persons with developmental disabilities have a right to appropriate treatment, services and habilitation for such disabilities.
>
> (2) The treatment, services, and habilitation for a person with developmental disabilities should be designed to maximize developmental potential of the person and should be provided in the setting that is least restrictive of the person's personal liberty.
>
> (3) The Federal Government and the States both have an obligation to assure that public funds are not provided to any institutional or other residential program for persons with developmental disabilities that—(A) does not provide treatment, services, and habilitation which is appropriate to the needs of such persons; or (B) does not meet . . . minimum standards. . . . Section 6010 was amended in 1978 to add the following: "The rights of persons with developmental disabilities described . . . [above] are in addition to any constitutional or other rights otherwise afforded to all persons."

42 *U.S.C.* § 6010 (Supp. III 1979);

The Florida Legislature created a departmental goal in the "Health and Rehabilitative Services Reorganizational Act", FLA. STAT. §§ 20.19(1)-(23) (1975), to "prevent or reduce inappropriate institutional care by providing for community-based care, home based care, or other forms of less intensive care." FLA. STAT. § 20.19(1)(d) (1975);

In the "Retardation Prevention and Community Services Act," FLA. STAT. § 393.061 (1977), the Florida Legislature declared that the

> greatest priority shall be given to the development and implementation of community based residential placements . . . for the retarded and other developmentally disabled which will enable [them] to achieve their greatest potential for independent and productive living, which will enable them to live in their own homes or in facilities located within their own communities, and which will permit clients to be diverted or removed from unnecessary institution[s]. . . .

FLA. STAT. § 393.061 (1977).

FLA. STAT. § 760.23 (1983), Discrimination in the Sale or Rental of Housing, provides in part that "[i]t is unlawful . . . to refuse to sell or rent . . . [or] refuse to negotiate for the sale or rental or otherwise make unavailable or deny a dwelling to any person because of race, color, national origin, sex, handicap, or religion."; *See also* 42 U.S.C.A. § 3604 (West 1977).

Florida's State Comprehensive Plan, FLA. STAT. §§ 187.101-.201 (1985) also sets forth several goals and policies promoting deinstitutionalization and normalization through the use of community based facilities; see also FLA. ADMIN. CODE § 9J-5.010(3)(b)(4) (Supp. Feb. 1986) (Housing Element), which requires that all local governments provide specific objectives in their housing elements which provide for "adequate sites in residential areas or areas of residential character for group homes and foster care facilities licensed or funded by the Florida Department of Health and Rehabilitative Services."

these concepts through the use of group homes failed, because local governments were unwilling to integrate group homes into their residential communities.[240] In response to such resistance, the Florida legislature proposed a preemptive statute in 1985 which mandated the placement of group homes for people with "special living needs"

But see, Pennhurst State School Hospital v. Halderman, 451 U.S. 1 (1981), wherein the United States Supreme Court held that there was no right to appropriate treatment in the least restrictive environment created by the Developmental Disabilities Assistance and Bill of Rights Act of 1975, 42 U.S.C. § 6000 et. seq. (1976 ed. & Supp. III) and that the congressional purpose of the Act was the "encouragement of state [deinstitutionalization] programs." *Id.* at 27.

240. Florida's Local Government Comprehensive Planning Act (LGCPA) (codified at FLA. STAT. ch. 75-257, 1975 Fla. Law §§ 163.3161-.3211 (1985)), was amended in 1980 requiring all local governments to revise the housing elements of their comprehensive plans in order to provide "adequate sites for future housing . . . for group homes and foster care facilities." The intent of this amendment was to entitle the "elderly, dependent children, physically disabled and nondangerous mentally ill . . . to the benefits of living in normal [single famiiy] residential communities" so that these persons could receive treatment and care "in the least restrictive setting possible." Ch. 80-154, 1980 Fla. Laws amending FLA. STAT. § 163.3177 (6)(f) (codified at FLA. STAT. § 163.3177 (6)(f) (1980). It is interesting to note that the preamble to the above amendment specifically indicated that local governments must provide sites for group homes in their comprehensive plans in *single family* and other residential areas, thus effectively adhering to the recognized theory that service dependent persons should locate in traditional single family areas as they emulate and function as a single family. However, the preamble, although not law, defines the scope of the act and was never codified in the statute, which only required the "provision of adequate sites for future housing . . . for group home facilities, with supporting infrastructure and community facilities. . . ." *Id. See* Finn v. Finn, 312 So. 2d 726 (Fla. 1975) (discussion of the legal significance of a statute's preamble).

The result of this 1980 amendment was at the end of a five year implementation period only fifty out of a total of four hundred and sixty local governments had followed the law and amended their plans. Even in areas where plans had been amended, there was not necessarily a positive relationship between what the plan said and to what extent the local zoning ordinance actually allowed group homes. *Group Homes For The Elderly: How Zoning Affects Their Availability* 3 (Staff Rep. of the Tampa Bay Regional Planning Council (1985)). *See also* preambles to Fla. HB 1174 (1985), and Fla. CS for SB 1099 (1985). These preambles also state that group and foster care homes warrant preemptive legislation because "over the years, many attempts to establish foster and group homes within community neighborhoods have resulted in costly delays, inappropriate siting or failure, and . . . over 30 states have recognized the need for some form of legislation to overcome exclusionary zoning ordinances and regulations." *Id.*

It is also noted that the 1980 amendment discussed above was not the bill originally proposed but was a committee substitute, CS for SB 584 (1980). The original bill, (Fla. HB 1097 (1980)), if enacted would have effectively preempted local government controls over group and foster homes by identifying them as permitted uses by right authorized in all residential zoning districts. This bill ultimately died on the calendar.

The Florida Department of Health and Rehabilitative Services (HRS) has authority to license group and foster homes pursuant to Florida Statutes. HRS currently licenses or certifies such facilities as group homes, foster homes, child caring agencies, alcoholism and drug abuse centers, Adult Congregate Living Facilities (ACLFs), and spouse abuse centers. *See generally* HRS Pamphlet, *supra* note 43 for an overview of HRS's authority and its zoning recommendations for group and foster homes.

in single-family zoning districts throughout the state.[241] The statute also voided as against public policy all restrictive covenants that permitted residential use of property but prohibited the use of foster or group homes.[242] The bill was vehemently opposed by the Florida League of Cities, who summarized the opposition's position by stating that: "Zoning is a purely local matter and any state intrusion in this area would substantially weaken the purpose of zoning for compatible land uses."[243] Furthermore, "[i]t is incomprehensible to us that the state is prepared to disrupt the quality of neighborhoods throughout the Cities to overcome society's neglect to adequately treat and house such unfortunate people."[244]

This preemptive legislation failed, leaving the situation in the same unsatisfactory state as before.[245] The failure of local govern-

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241. Fla. HB 1174 (1985) (died in messages); Fla. CS for SB 1099 (1985) (laid on table in Senate).

People with special living needs includes "all persons who have been determined by the Department of Health and Rehabilitative Services to be in need of, and appropriate for placement in, community residential living facilities [such as group and foster homes]. . . ." Fla. HB 1174, Sec. 2 (1985) at 4 subsection paragraph (g); Fla. CS for SB 1099, sec. 2 (1985) at subsection (1) (1) paragraph (g).

It is noted that Fla. HB 1174 (1985) identified foster homes having no more than five residents and group homes having no more than eight residents as permitted uses in all residential zoning classifications. Fla. SB 1099 (1985) also included identical provisions, but was later altered in CS for SB 1099 (1985) to identify group and foster homes as permitted uses in multi-family zoning classifications only.

242. Fla. HB 1174, sec. 2 (1985) at 5-6, subsection (6); CS for SB 1099, sec. 2 (1985) at 5-6, subsection (6).

243. *See generally* 3 *Florida League of Cities Viewpoint Mandated Placement of Group Homes in Single Family Residential Neighborhoods* No. 2 (Apr. 19, 1985), for an in-depth discussion of why the League of Cities was opposed to Fla. HB 1174 (1985) and Fla. SB 1099 (1985).

244. *Id.* The League also stated that municipal residents "fear [that] their property values and quality of life will deteriorate and that traffic will increase"; and "[m]any . . . group homes are operated for profit, and the state should not deny city governments the authority to determine zoning for private business operations"; and "[s]ingle-family neighborhoods should not be a last-resort experiment for the state to overcome the inhumane treatment at institutions stemming partially from the state's failure to provide adequate funding." *Id.*

245. The Senate was only willing to allow group and foster homes to the extent that they were permitted uses in multi-family zoning districts, reserving their placement in single-family zoning districts to the discretion of local governments. *See* Fla. CS for SB 1099 (1985). On the other hand, the House demanded group home placement in single-family districts and refused to compromise their position. *See* Fla. HB 1174 (1985). This resulted in the death of the proposed legislation due to a lack of action. Information obtained in telephone conversation with Walter Schoenig, former president of Florida Association For Retarded Citizens, and current chairperson of Pinellas-Pasco Housing Coalition, (Apr. 10, 1986).

Although the House approved the bill by a 63 to 53 vote, a motion to amend the bill was subsequently made to keep group homes out of single-family zoning districts and was approved

ments to provide for the placement of group homes has resulted in a denial of group home care for over 75,000 service dependent persons who remained unnecessarily institutionalized.[246] Thus, for these reasons the 1985 Legislature was compelled to attempt to enact a preemptive statute.

A. Common Methods of Exclusion in Florida

Florida case law up to this date emphasizes the courts' willingness to exclude group homes. Thus, an overview of how group homes are denied placement in residential areas, and not how they are permitted, is warranted. The most common methods utilized by communities to exclude group homes from their single-family neighborhoods are exclusionary zoning,[247] restrictive covenants,[248] and commercial use classification.[249] State preemptive statutes, like the recent failed effort in Florida,[250] have been instrumental in overcoming these exclusionary techniques.[251]

1. Exclusionary Zoning

Exclusionary zoning to preclude the placement of group homes can be accomplished through restrictive definitions of the term "family" in zoning ordinances which classify certain areas for residential use.[252] These ordinances exclude all households of unrelated persons, including group homes with service dependent residents.

In a 1977 Florida decision, *Palm Beach Hospital, Inc. v. West*

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by a majority of the House. However, a two-thirds vote was needed to pass a change on a bill's final reading, thus the motion failed. The House did however approve a last minute amendment which prohibited the establishment of group homes from within one quarter mile of one another. Barnes, House Passes Bill Making It Easier To Start Residential Group Homes, *St. Petersburg Times*, Apr. 30, 1985.

246. Walker, Effort To Delay Creation of Group Homes Defeated, *Tampa Tribune*, Apr. 25, 1985 at 4B. Out of this total, 45,000 persons are developmentally disabled and 30,000 are runaway juveniles. *Id.* It is interesting to note that both FLA. STAT. § 393.15(3) (1985) and FLA. ADMIN. CODE § 10F-5.03(4)(g) (1984) require that a group home must demonstrate that it is operating in compliance with a local government's zoning regulations in order to be eligible for loans under a Group-Living Home Trust Fund designed to encourage the establishment of group homes.

247. *See supra* notes 63, 79 and accompanying text.

248. *See supra* notes 51, 79, 149 and accompanying text.

249. *See supra* notes 77-94 and accompanying text.

250. *See supra* notes 164-71, 240-46 and accompanying text.

251. *See supra* notes 164-71 and accompanying text. *See infra* note 280.

252. *See supra* notes 116-48 and accompanying text.

Palm Beach,[253] a federal district court refused to permit a group home for the mentally retarded to operate within a single-family district. The group home housed ten retarded males under the supervision of two sets of houseparents. However, the City's zoning ordinance prohibited more than five unrelated persons from living together in a single-family dwelling. The plaintiff argued that the ordinance violated the residents fourteenth amendment right to equal treatment of the laws and attacked the ordinance both facially and as applied.[254]

The court rejected this argument by relying on *Belle Terre* and concluded that the ordinance was constitutional since it was rationally related to the legitimate state objective of developing a family-oriented atmosphere in various sections of a district. Further, the ordinance was not designed to discriminate against the mentally retarded, but was designed to exclude groups of persons on the basis of size.[255]

In *Carroll v. City of Miami Beach*,[256] a small group of adherents to a religious order desired to use a home where they would live together as a "family" and "single housekeeping unit" under the terms of the City's ordinance.[257] The ordinance defined "family" as "[o]ne or more persons occupying premises and living as a single housekeeping unit as distinguished from a group occupying a boarding house, a lodging house or hotel. . . ."[258] The city alleged that the proposed use was not that of a single family within the common meaning of the word family.[259] The religious order claimed that the only difference between themselves and any other family was the religious dress that they would wear.[260] The court found that the city was bound by the

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253. 2 MENTAL DISABILITY L. REP. 18 (S.D. Fla. 1977).

254. *Id.* The equal protection clause of the Fourteenth Amendment provides that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. Amend. XIV, § 1.

255. 2 MENTAL DISABILITY L. REP. 18 (S.D. Fla. 1977). *See also* Farrell v. City of Miami, 587 F. Supp. 413 (S.D. Fla. 1984) (court citing *Belle Terre* held that ordinance that restricted employees for home occupation to family members residing on premises and defined family as two or more persons related by blood or marriage or no more than five unrelated persons was constitutional because it clearly furthered a permissible state objective by limiting commercial uses in order to protect the residential character of the neighborhood).

256. 198 So. 2d 643 (Fla. 3d DCA 1967). *See also* Ocean's Edge Development Corp. v. Town of Juno Beach, 430 So. 2d 472 (Fla. 4th DCA 1983).

257. *Carroll*, 198 So. 2d at 644.

258. *Id.*

259. *Id.*

260. *Id.*

terms of its ordinance and that there was "no requirement that they be related by consanguinity or affinity."[261] The court ruled in favor of the religious order and also recommended that if the city desired a different meaning for its ordinance, it should do so legislatively.[262]

At issue in *Fox v. Town of Bay Harbor Islands*,[263] was whether a zoning ordinance that permitted the occupancy of lower floors of apartment buildings by families only under specific circumstances was a valid exercise of the Town's police power.[264] The ordinance required that to be permitted such occupancy, the head of the family must be in "charge of maintenance and supervision duties exclusively for that [apartment] building."[265] In *Fox*, the city informed the defendant who occupied the ground floor residence that his residing there was in violation of the zoning ordinance. The defendant applied for and was denied a zoning variance and then sued the Town.[266] He alleged that insofar as the ordinance required that a ground floor apartment be occupied only by a person, and his family—(wherein the person must be responsible for maintenance of the entire building)—either bore no substantial relationship, or it in no way promoted the public health, safety, morals or general welfare.[267]

The court agreed with the defendant, stating that "zoning ordinances are much less suspect when they focus on the use than when they command inquiry into who are the users."[268] Finding that the ordinance's requirement of identifying the person who would occupy the ground floor apartment did not have "the slightest bearing on" the health, safety, and morals or welfare of the general public, the court reversed the trial court's decision.[269]

Applying the *Fox* court's analysis to a group home situation would provide a favorable argument for group home proponents.

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261. *Id.*

262. *Id.* at 645.

263. 450 So. 2d 559 (Fla. 3d DCA 1984).

264. *Id.* at 560.

265. *Id.*

266. *Id.*

267. *Id.* at 561.

268. *Id.* (citing City of Santa Barbara v. Adamson, 27 Cal.3d 123, 133, 610 P.2d 436, 441-42, 164 Cal. Rptr. 539, 544-45 (1980)). In *Adamson*, the court held that a restrictive definition of family in a zoning ordinance that precluded twelve unrelated individuals from living in a single-family zoning district violated right of privacy expressly guaranteed by California Constitution. *Accord* Halifax Area Council v. City of Daytona Beach, 385 So. 2d 184, 187 (Fla. 5th DCA 1980).

269. *Fox*, 450 So. 2d at 561.

Under *Fox*, the court will not look at the composition of a dwelling unit's residents to determine the validity of a zoning ordinance, but will determine its appropriateness under a substantial relation test. In addition, a zoning ordinance that focuses its regulation solely upon the users instead of the land use will be presumed suspect, and will not be granted a presumption of validity. Therefore, *Fox* holds that a residential dwelling occupied by a group of service dependent individuals cannot be excluded based upon their unique characteristics.

Thus, the cumulative effect of *Belle Terre, West Palm, Carroll* and *Fox* is that Florida's local governments can use a restrictive definition of "family" in their zoning ordinances which may exclude group homes from single-family districts. However, they cannot prevent persons related by blood or marriage from living together; they are bound by the definitions of "family" as set forth in their zoning ordinances. Furthermore, they cannot exclude residents from a residential dwelling based upon their identity or other distinguishable characteristic(s).

2. *Commercial Use Classification*

As previously discussed,[270] when a local government classifies a group home as a commercial use under its zoning ordinance, this results in its exclusion from the residential district that it needs in order to function most effectively.[271] Although American courts have generally rejected the argument that group homes constitute a commercial use,[272] the leading Florida case on this matter holds that group homes are in fact commercial uses. In *Grefkowicz v. Metropolitan Dade County*,[273] the Third District Court of Appeal was faced with the issue of whether a city's board of adjustment correctly classified a group home for the aged as a commercial use, resulting in its exclusion from a single-family zoning district.[274] Although the group home was a permitted special use under the residential classification,[275] the court upheld the exclusion on the ground that the proposed home was incompatible and non-conforming use of residential

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270. *See supra* notes 77-94 and accompanying text.
271. ABA Project, *supra* note 41, at 796.
272. *See supra* notes 92-94 and accompanying text.
273. 389 So. 2d 1041 (Fla. 3d DCA 1980).
274. *Id.* at 1042.
275. *Id.*

property.[276] Thus, under *Grefkowicz*, a group home can be classified as an incompatible commercial intrusion in a residential area and can be denied a special use permit based on its commercial status.

3. *Restrictive Covenants*

Another and more direct way that neighborhoods control the uses of property in their immediate vicinity is through "private zoning" in the form of restrictive covenants.[277] These covenants serve basically the same purpose as zoning—to perpetuate the existence of quiet, peaceful residential areas by excluding incompatible commercial, industrial and high density uses. Similar to zoning, covenants have been traditionally enforced by the courts based on the great importance of permitting private landowners to be secure in their property.[278] Although covenants have sometimes been successful in excluding group homes from residential neighborhoods,[279] state preemptive statutes and overriding state interest in the placement of group homes have generally rendered such covenants ineffective.[280]

Even though not a case involving group homes, *Franklin v. White Egret Condominium, Inc.*,[281] lends support to the proposition that group homes should not be excluded by a strict interpretation of the term "family" as set forth in a private restrictive covenant. In *White Egret*, the defendant purchased a condominium and conveyed an undivided one-half interest to his brother, who had a child under twelve years old.[282] However, the declaration of condominium prohibited ownership by more than one family and disallowed children under the age of twelve as permanent residents.[283] The plaintiff-condominium association won a judgment in the trial court which voided

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276. *Id.* at 1042-43.

277. *See supra* note 79 and accompanying text.

278. J. CRIBBET, PRINCIPLES OF THE LAW OF PROPERTY 357 (2d ed. 1975). *See also generally* R. POWELL, THE LAW OF REAL PROPERTY, Ch. 60 (1986).

279. *See e.g.*, Omega Corp. of Chesterfield v. Malloy, 319 S.E.2d 728 (Va. 1984); Jayno Heights Landowner's Ass'n v. Preston, 85 Mich. App. 443, 271 N.W.2d 268 (1978).

280. As of January, 1986, twenty seven states have enacted some form of preemptive legislation that effectively overrides local zoning controls and restrictive covenants and allows for the placement of group homes. ZONING NEWS, *supra* note 84, at 2.

See e.g., Crane Neck Ass'n v. New York City Long Island Group, 61 N.Y.2d 154, 460 N.E.2d 1336, 472 N.Y.S.2d 901 (Ct. App. 1984), *cert. denied*, 105 S. Ct. 60 (1984); McMillan v. Iserman, 327 N.W.2d 559 (Mich. App. 1982).

281. 358 So. 2d 1084 (Fla. 4th DCA 1977), *aff'd*, 379 So. 2d 346 (Fla. 1979).

282. *White Egret*, 358 So. 2d at 1086.

283. *Id.*

the deed transfer and the defendant appealed.[284] In finding for the defendant, the court stated that "[e]ven if one were to consider that the defendants constitute two separate families, the use to which they put the apartment was that of a single family dwelling."[285] Thus, under *White Egret*, a group home proponent could effectively void a restrictive covenant that required a biological or legal single family arrangement by arguing that the home would be used in a single family manner by a group of unrelated persons specifically structured to emulate a traditional single family.

In *Pomerantz v. Woodlands Section 8 Association, Inc.*,[286] homeowners, who had a baby, challenged the validity of a covenant in their deed to property in an adult subdivision prohibiting permanent residents under the age of sixteen. The homeowners based their challenge on equal protection and due process grounds.[287] The defendant homeowners' association filed a complaint seeking injunctive relief, which was granted by the circuit court.[288] On appeal, the Fourth District Court relied upon sociological and psychological studies presented by experts for the Association who claimed that, due to the unique characteristics and lifestyles of adults, the age restriction was reasonable.[289] Citing *Belle Terre* and *White Egret*, the court agreed with the expert testimony, finding that the sociological conditions and changing psychological needs that occur through the aging process warranted the design and maintenance of a community that did not have the usual characteristics of a traditional family environment. Thus, the circuit court's decision was affirmed.[290] The result of *Pomerantz* is that a restrictive covenant which excludes a certain portion of the population based upon age in an attempt to further the desires of a community can be valid. The general effect of the rationale in *Pomerantz* is that, absent an impairment of a fundamental right or burdening a suspect class, group homes can effectively be excluded from residential communities that are designed to appeal to and accomodate specific types of residents.

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284. *Id.* at 1085.

285. *Id.* at 1087.

286. 479 So. 2d 794 (Fla. 4th DCA 1985). *See also* Metropolitan Dade County Fair Housing & Employment Board v. Sunrise Village Mobile Home Park, Inc., 485 So. 2d 865 (Fla. 3d DCA 1986) (age restrictive covenant upheld as legitimate means to provide for retirement community).

287. *Pomerantz*, 479 So. 2d at 794.

288. *Id.*

289. *Id.* at 795.

290. *Id.* at 795-96.

B. Recent Developments

In light of the state's strong "normalization" policies,[291] the need for statewide reform is demonstrated by Florida's inconsistent and sketchy case law treatment, and the lack of response on the part of Florida's local governments in designating group home sites as mandated by the 1980 amendment to the Local Government Comprehensive Planning Act.[292]

1. Temple Terrace

City of Temple Terrace v. Hillsborough Association for Retarded Citizens,[293] is the only Florida Supreme Court case to directly address the group home dilemma. In *Temple Terrace*, an intergovernmental conflict between a local government and the State of Florida was at issue. The Second District Court of Appeal considered a violation by the Hillsborough Association for Retarded Citizens of the City of Temple Terrace single-family zoning ordinance.[294] Under a contract with the Division of Retardation of the Department of Health and Rehabilitative Services, the Association had purchased and was operating a short term respite care facility for retarded children, without having obtained the zoning approval of the city.[295] The city and several surrounding residents sought to enjoin the operation of the center.[296] The trial court held that, even though the facility was being operated in violation of the city's zoning ordinance, the ordinance could not be enforced since by contracting with a state agency to carry out a state function, the Association "stood in the shoes of the State of Florida."[297] Thus, like the state, the Association was immune from local municipal zoning ordinances.

The Second District reversed and remanded, finding that the trial court had incorrectly applied the superior sovereign test whose

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291. *See supra* note 239 and accompanying text.

292. *See supra* note 240 and accompanying text.

293. 322 So. 2d 571 (Fla. 2d DCA 1975), *aff'd*, 332 So. 2d 610 (Fla. 1976). For a review and analysis of the *Temple Terrace* decision see Note, *State Immunity From Zoning: A Question of Reasonableness*, 31 U. MIAMI L. REV. 191 (1976); *Immunity Of State And State Related Activities From Local Municipal Zoning Regulations: Florida Focus*, 28 U. FLA. L. REV. 800 (1976); *Protecting Municipalities Against Unnecessary State Infringement: The Unrealized Wake of the Municipal Home Rule Powers Act and Temple Terrace*, 3 NOVA L. J. 119 (1979).

294. *Temple Terrace*, 322 So. 2d at 573.

295. *Id.*

296. *Id.*

297. *Id.*

basic premise is that a local government does not have the power to restrict the functions of a superior governmental unit, such as the state.[298] Recognizing that the trial court's decision was well reasoned, the court nevertheless adopted the balancing of interests test, whereby the governmental unit seeking to use land either contrary to or not provided for by the zoning regulations of the host local government, has the burden of proving that the public interest favoring the proposed use outweighs the detriment to the zoning plans of the host government.[299] The court stated that this was the fairest of all tests and that it permitted "a case by case determination which takes into consideration several factors" such as the need for the proposed use, alternative locations for the facility, and the effect upon the host local government's zoning plan and the like.[300]

The court reversed the trial court and the state appealed.[301] The supreme court affirmed the district court's opinion and adopted it as its own.[302] In doing so, the court noted that an ancillary benefit would result: the requirement that state agencies seek local approval for non-conforming uses would require the handling of zoning disputes through administrative means (such as a zoning appeals board or board of adjustment), rather than by forcing a city into costly litigation to resolve every zoning disagreement.[303] The court also indicated that in future cases when intergovernmental zoning conflicts occur, administrative proceedings must be exhausted before the parties may take the dispute to court.[304] Although the courts will be available "to review the balance struck in administrative proceedings," the balancing of interests process is to take place at the local administrative level.[305]

In theory, the supreme court's solution appears to offer an equitable approach to resolving the conflict between two competing interests; local governments, who under strong home rule principles desire exclusive control of their own land use scheme, versus the state, whose programs and policies are designed to meet the essential needs

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298. *Id.* at 579.

299. *Id.*

300. *Id.* at 576, 579.

301. *Id.* at 579.

302. City of Temple Terrace v. Hillsborough Ass'n for Retarded Citizens, Inc., 332 So. 2d 610, 612 (Fla. 1976). *See also* Op. Atty. Gen., 075-207 (July 15, 1975).

303. *Temple Terrace*, 332 So. 2d at 612.

304. *Id.* at 613.

305. *Id.* at 613 n.5.

of all of its citizens. However, in offering its solution, the court failed to recognize one of the fundamentals of Florida zoning law; absent the enactment of a specific local or special act, an administrative or quasi-legislative zoning board of appeals is not empowered to grant a use variance under the terms of its zoning ordinance.[306] It can only permit a use specifically provided for in its zoning ordinance.[307] This prohibition against the granting of a use variance had even been codified as an optional Florida Statute at the time of this case, but has recently been repealed by the 1985 legislature.[308]

A use variance is generally frowned upon in most states because of its great potential for disrupting a community, and the perception that it allows an administrative board to amend its local zoning ordinance, which is a power that should be vested in the local legislative body.[309] A use variance is in effect a "pro tanto" rezoning amendment.[310] In order to obtain the non-conforming use, the state or one

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306. "Under no circumstances . . . shall the board of adjustment grant a variance to permit a use not generally or by special exception permitted in the zoning district involved or by any use expressly or by implication prohibited by the terms of the ordinance in the zoning district." FLA. STAT. § 163.225(6)(d) (1983). *See also* Rhodes, *Variances*, 380 FLA. BAR J. (June 1983); Juergensmeyer, *supra* note 103, at § 7-3; 6 P. ROHAN, *supra* note 9, at § 43.01[2][a], 43-7; 3 RATHKOPF, *supra* note 55, at § 38.01; 2 R. ANDERSON, *supra* note 97, at § 14.04, 599-600 (1968 & 1985 Supp.); LAND USE CASE, *supra* note 109, at § 1.3.6. *See also* Clarke v. Morgan, 327 So. 2d 769 (Fla. 1975) (Florida Supreme Court upheld the constitutionality of a statute authorizing a board of adjustment to grant use variances because meaningful standards were included in ordinance to guide the board in acting upon the permit application); Appeal of Kenney, 374 N.W.2d 271 (Minn. 1985) (court held board of adjustment was authorized by statute to grant use variance).

307. 6 P. ROHAN, *supra* note 9, at § 43.01[2][a], 43-7; LAND-USE CASE, *supra* note 109, at § 1.3.6.

308. Optional County and Municipal Planning for Future Development Act of 1969, FLA. STAT. § 163.170(8) (1969). "The provisions of [the Optional Act] do not apply unless there is an enactment by [the local government] to be bound by [their] provisions. . . ." Grefkowicz v. Metropolitan Dade County, 389 So. 2d 1041, 1042 (Fla. 3d DCA 1980).

The optional state statute indicated that a variance could only be granted for relief from height, area and size of structure, or size of yards and open spaces as set forth in a local government's zoning regulations. It did not allow an administrative board of adjustment and appeals or zoning board the authority to grant a change in use. However, this use restriction was modified by a later provision, and use variances have been approved. R. BOYER, FLORIDA REAL ESTATE TRANSACTIONS, § 38-06[b], 38-35-37 (1985).

FLA. STAT. § 163.170(8) was repealed by laws 1985 c. 85-55, 19, eff. Oct. 1, 1985. Although FLA. STAT. § 163.225 was for some reason repealed, it is submitted that the requirements of subsections (2)(b) of the statute continue to be utilized by local governments as part of their own zoning ordinances in order to fulfill the standards that boards of adjustment must follow. FLORIDA ZONING, *supra* note 98, Ch. 2 at 4.

309. *See supra* note 306.

310. JUERGENSMEYER, *supra* note 103 at § 7-3; Hillsborough County v. Twin Lakes Mobile Home Village, Inc., 153 So. 2d 64 (Fla. 2d DCA 1962).

of its agencies must petition the local legislative body for a rezoning since it does not, contrary to the court's reasoning, have the opportunity for redress through an administrative appeals board.[311] As a result, a non-conforming use or use not provided for under a local zoning ordinance proposed by a state agency can effectively be excluded from a community under the "fairly debatable rule,"[312] if the agency seeks a rezoning amendment. However, in a situation where a zoning appeals board desires to allow a non-conforming use of property by a state agency under the balancing of interests test, it could not legally do so unless a use variance is specifically authorized by local legislation. Thus, in reality, the courts are the only forum whereby a state may have its non-conforming use permitted by the balancing of interests test, and not at the local administrative level as the supreme court believed. Therefore, even with substantial state policies supporting the "deinstitutionalization" and "normalization" of service dependent persons through the use of group homes licensed by the state, group homes may be excluded by local governments unless expressly allowed by local zoning ordinances or by preemptive legislation that mandates their placement in residential areas.

C. Preemptive Legislation: A Failure in Florida

The concept of state legislation limiting local zoning authorities is not new. Twenty seven states have thus far enacted preemptive legislation that effectively overrides local zoning controls.[313] Unfortunately, Florida is not among them. Florida again had the opportunity to enact preemptive legislation at its 1986 session in the form of Senate Bill 87.[314] This bill, if enacted, would have required that, by the end of 1986, every Florida municipality have designated one or more residential zoning districts where five or fewer unrelated handicapped persons who had a developmental disability[315] and who did not require twenty four hour-a-day care could live in the same residence.[316]

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311. *See supra* note 306. *See e.g.*, Hillsborough County v. Twin Lakes Mobile Home Village, Inc., 153 So. 2d 64 (Fla. 2d DCA 1962); City of Miami Beach v. Breit Bay, Inc., 190 So. 2d 354 (Fla. 3d DCA 1966), *cert denied*, 200 So. 2d 809 (Fla. 1967).

312. See cases cited *supra* note 103.

313. ZONING NEWS, *supra* note 84, at 2.

314. Fla. SB 87 (1986). Proposed by Senator Johnson, Senate Bill 87 died in HRS Committee of the Senate on June 7, 1986. Source: Telephone conversation with Legal Information Division of the Florida Legislature, June 12, 1986.

315. *Id.*

316. *Id.*

The bill would also have granted local governments the authority to establish zoning criteria for group homes.[317] Further, the bill would have required that these criteria be "reasonably related to the protection of the public health, safety, and welfare"[318], and residences could not be required to be greater than 2,500 feet from one another.[319]

Although it sought a uniform statewide solution, this bill offered a very weak approach toward solving the group home implementation problem. First, it established opportunities for the placement of group homes for the developmentally disabled, but ignored other service dependent populations, such as the aged, foster children and the mentally ill. Second, it granted government officials far too much discretion in the placement of group homes. Under this bill, a local government was free to dictate exactly what residential zoning district(s) would permit group homes. Thus, a local government could have effectively complied with the law by designating a zoning district in a transitional or blighted area, and with no minimum dispersal requirement set forth in the bill — a great potential for a "ghettoization" effect existed.[320] Also, in allowing local governments to select the zoning district instead of identifying group homes as permitted uses in all residential districts, local government zoning authorities may have excluded them from the single-family districts which group homes need in order to function most effectively. Finally, the statute's employment of broad and undefined concepts, such as "public health, safety and welfare" review standards like those used by the City of Cleburne, would have forced the group home operator to challenge the vast discretionary authority and vague standards most zoning regulations employ.

In order to logically and thoughtfully implement the state's goals of "deinstitutionalization" and "normalization," Florida's only alternative is the adoption of a preemptive statute. State legislation is the most effective means of providing necessary group homes because it is not subject to the veto power of each local government. Such a statute should seek to balance the needs of both the service dependent, who desires to live in a family setting in the community, and private property owners, who seek to live in a normal, peaceful and undisturbed manner. This can be accomplished by including the fol-

317. *Id.*
318. *Id.*
319. *Id.*
320. *See supra* notes 83-90 and accompanying text.

lowing in Florida's preemptive legislation:[321]

> (1) mandate that smaller group homes roughly the size of a large family (for example six persons) are permitted as of right in all residential districts since they function as a traditional single family and would have no greater impact than that of a family of similar size; require that all group homes having more than six residents receive special or conditional use permits from the host local government. Since these homes exceed the size of all but the largest family, local governments should be allowed to subject them to greater scrutiny. These larger homes should, however, be permitted as of right in all multi-family areas. However, to avoid the arbitrary exclusion of group homes under this process, the state should establish objective performance standards that local governments must follow in their evaluation of each home. An appellate review process should also be provided by the state which, upon finding an arbitrary denial of a special use permit, conditional use permit, special exception or variance may override the local government's decision and mandate the home's placement in the community;
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> (2) dispersal requirements based on the ratio of group homes to the density of the population instead of an arbitrary distance between group home stipulation. This would effectively avoid an overconcentration of group homes in any particular area, while at the same time maintaining the single-family character of the neighborhood and providing the living environment that normalization seeks. In addition, it more equitably distributes the social costs of having group homes across the entire population than does an artificial distance or spacing requirement between group homes;
>
> (3) a limitation on the type of inhabitant in the group home until the normalization theory has been well accepted by the public, or a requirement that all group homes for service dependent persons having a history of antisocial or violent behavior undergo the special use process, regardless of the size of the proposed group home;
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> (4) a requirement that no zoning ordinances or restrictive covenants may exclude group homes. Restrictive covenants in any deed or subdivision that would allow for residential use of property but would ban group home use should be voided as against public policy;

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321. *See generally* ABA Project, *supra* note 41; "*Yards That Are Wide*?", *supra* note 50; 2 RATHKOPF, *supra* note 55, at § 17A.05[2][c]; Lauber, *supra* note 9, at 85-99; ZONING NEWS, *supra* note 84; Note, *Zoning For The Mentally Ill: A Legislative Mandate*, 16:3 HARV. J. LEG. 853 (1979); Hopperton, *A State Legislative Strategy For Ending Exclusionary Zoning Of Community Homes*, 19 URB. L. ANN. 47 (1980) for various characteristics of and recommendations for preemptive statutes.

(5) that no parking, landscaping, building, fire, health, safety or other regulation may be applied to group homes any differently than all residences under a local government's jurisdiction;

(6) all group homes must be licensed by the state to ensure that a high degree of quality of service and standards are provided to the residents. This also enhances the legitimacy of the home to the public and ensures that its right to a peaceful environment is being protected;

(7) provide a formal complaint mechanism for the public when the group home is perceived to be a threat to the health, safety or welfare of the community. If, after an investigation by the state, violations are found, a formal hearing may be held whereby the state may impose sanctions; and

(8) require that group home operators consider the proximity of the group home to community facilities for shopping, religious worship, recreation, employment and education in their selection of a group home site.[322]

In conclusion, now recognized as one of the nation's fastest growing states, Florida needs to provide a uniform approach in its goal of seeking the "normalization" of its service dependent persons, especially the aged.[323] This cannot be accomplished on an ad hoc litigative basis, nor can it be left to the discretion of parochial local government interests. In order to allow our service dependent persons to participate in the mainstream of society, a strong, uniform preemptive statute must be enacted, and not one that is like Senate Bill 87 of 1986, weak, and highly deferential to home rule.

IV. CLEBURNE'S IMPACT: A CRITICAL ANALYSIS

Although the Court did not find Cleburne's zoning ordinance unconstitutional on its face,[324] it noted that the ordinance was of the

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322. *Id.*

323. As of April 1, 1982 persons aged 65 and over totalled 1,797,114 or 17.3 percent of Florida's total population. 1984 FLORIDA STATISTICAL ABSTRACT, 19 (Bureau of Economic and Business Research, Univ. of Fla.). Population projections indicate that this number is expected to increase to 2,917,870 or 19.5 percent by the year 2000. *Id.* at 21.

Over the last two decades Florida has captured over one fourth of all interstate migrants over age 60 and it currently leads the entire United States in the proportion of its residents age 65 or above. AGING AMERICA: TRENDS AND PROJECTIONS, 30-31 (1985-86 ed.) (Report prepared by U.S. Senate Committee on Aging).

324. *Cleburne*, 105 S. Ct. at 3260. The Court stated that "[t]his is the preferred course of adjudication since it enables courts to avoid making unnecessarily broad constitutional judgments." (citing Brockett v. Spokane Arcades, Inc., 105 S. Ct. 2794 (1985); United States v. Grace, 461 U.S. 171 (1983); and NAACP v. Button, 371 U.S. 415 (1963).

overly broad, vague, standardless genre representative of those commonly found throughout the states.[325] The Court was incorrect in not finding Cleburne's ordinance unconstitutional on its face. By not finding the ordinance unconstitutional, the Court left a problem unsolved. Outdated ordinances of this type give a zoning authority broad discretion and great latitude for abuse in their interpretation and application of the ordinance.[326]

The Court avoided the issue of the facial invalidity of the ordinance by stating that, if the City's requirement for a special use permit deprived C.L.C. of the equal protection of the laws, then it was not necessary to decide whether the special use permit provision is invalid.[327] The effect of this position is that local governments may continue to utilize overly broad, standardless zoning ordinances that grant them enormous discretion under the public health, safety, welfare, and morals standard.[328]

The Court should have agreed with the three Justices who would have struck the ordinance down on its face.[329] These dissenters, in

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325. *Cleburne*, 105 S. Ct. at 3273 (Marshall, J., dissenting). *See supra* notes 9, 99-105 and accompanying text.

326. *Id.* Justice Marshall described Cleburne's zoning ordinance as "a blunderbuss ordinance drafted many years" which relegated future special use permit applicants "to the standardless discretion of low-level officials . . . ." *Cleburne*, 105 S. Ct. at 3273 (Marshall, J., dissenting).

327. *Id.* at 3258.

328. *See supra* notes 100-05 and accompanying text.

329. Justice Marshall, joined by Justices Brennan and Blackmun, wrote an opinion concurring in the judgment in part and dissenting in part. *Cleburne*, 105 S. Ct. at 3263. Although six justices signed the majority opinion, two Justices, Stevens and Burger, indicated their lack of agreement by offering their own opinion. They rejected the existence of two or three levels of scrutiny and instead favored a continuum of various scrutinies depending upon the specific circumstances of each classification. Grouping these two Justices with the three dissenters who would have ruled that Cleburne's zoning ordinance was unconstitutional on its face and that heightened scrutiny was the appropriate standard of review, five of the Supreme Court Justices are on record disputing the Court's equal protection analysis in this case. This lack of agreement may possibly be a catalyst for lower courts to apply an equal protection analysis less than heightened scrutiny, but more probing than the rational basis traditionally used in reviewing legislative classifications. A lower court after *Cleburne* may also be motivated to look more closely at a local government's expressed or implied justifications than it has in the past in order to ensure that the proposed legislation was rationally related to a legitimate state interest. *See* 9 *Mental & Physical L. Rep.* No. 4, 242-43 (July/Aug. 1985).

An example of this more probing "as applied" scrutiny under the rational basis standard occurred in *Sullivan v. City of Pittsburgh*, 620 F. Supp. 935 (W.D. Pa. 1985). In *Sullivan*, the court, citing *Cleburne*, 105 S. Ct. at 3249, held that a legislative decision by a city council which denied a conditional use permit for a group home was invalid for lack of evidence and that the council's decision was based upon "unfounded fear, speculation and prejudice." *Sullivan*, 620 F. Supp. at 944. In addition, the court held that the application of Pittsburgh's zoning ordinance

light of the substantial case law previously discussed, correctly agreed that upholding the ordinance relegated future special use permit applicants "to the standardless discretion of low-level officials who have already shown an all too willing readiness to be captured by the 'vague, undifferentiated fears,' of ignorant or frightened residents."[330] Invalidating the ordinance on its face would have placed the responsibility on the City to refine and update their ordinance, enacting one more narrowly tailored with legitimate, recognizable standards.[331]

Under *Cleburne*, the country's highest court affirmed some generally recognized special use permit rules regarding burdens of proof.[332] Cleburne's ordinance provided no guidelines for either the applicant or the City Council in their review and decision.[333] In recognition of this, the Court did not charge C.L.C. with the initial burden of persuasion in coming forward and proving its compliance with the ordinance.[334] Rather, the Court placed this burden upon the City, and, since the city was opposed to the issuance of the permit, it was obligated to come forward with competent, material, and substantial evidence to prove that the C.L.C. group home would have a detrimental effect upon the community.[335]

The Court thoroughly analyzed the City's reasons and supporting evidence in their resolution of denial, and found that it lacked any rational relationship to the City's legitimate governmental interest; thus the City abused its discretion by withholding the permit.[336] The Court then invalidated the zoning ordinance as applied, since the City not only failed to meet its burden of proof by coming forward with sufficient, supportable evidence, but also based application

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violated the conditional use permit applicant's right to equal protection of the laws. *Id.* at 945. *But see* Shelton v. City of College Station, 780 F.2d 475 (5th Cir. 1986) (court citing *Cleburne* upheld denial of variance by administrative zoning board of adjustment under rational basis test). The *Shelton* court stated that "we have plainly and consistently held that zoning decisions are to be reviewed by federal courts by the same constitutional standards we employ to review statutes enacted by the state legislatures." *Id.* at 479. Further, "implicit in [*Cleburne*] was the Court's acceptance of the principles that the legislature or other governing body need not express all its purposes when it acts and that the defendant in a constitutional case need not prove the legislative purpose as a historical fact." *Id.* at 484.

330. *Cleburne*, 105 S. Ct. at 3273.

331. *Id.*

332. *See supra* notes 112-15 and accompanying text.

333. *Cleburne*, 105 S. Ct. at 3273. The Fifth Circuit also noted that "[t]he Cleburne ordinance ha[d] no guidelines at all." *Cleburne*, 726 F.2d at 199 n.13.

334. *See supra* notes 109-12 and accompanying text.

335. *See supra* notes 113-15 and accompanying text.

336. *Cleburne*, 105 S. Ct. at 3259.

of the ordinance on an irrational prejudice against the group home's constituents — the mentally retarded.[337]

The Court also affirmed and created new national standards involving special use permits, especially those pertaining to group homes having a service dependent clientele. *Cleburne* has had a far-reaching effect on the special use permitting process. It establishes a national standard for the proposition that under a typically broad, overinclusive, standardless zoning ordinance, the zoning authority and/or opposing citizenry, and not the applicant must carry the initial burden of proof in demonstrating its opposition.[338] Further, a zoning authority's discretionary decision for denial will no longer be given such a strong presumption of validity, but must reasonably explain its action by competent, substantial, material evidence sufficiently supported by the record.[339] After *Cleburne*, zoning authorities are required to have clear, rational reasons (supported by factual evidence and not speculation or irrational prejudice) if they desire to treat group homes differently than other residential uses;[340] because in cases involving zoning and/or special use permits for group homes housing service dependent persons, the Supreme Court will use a more probing "as applied" examination of a zoning ordinance. All standards, reasons, and supportive evidence relating to a zoning decision will be reviewed with a higher degree of scrutiny than traditionally utilized in previous zoning cases.[341] This will ensure that the zoning authority's actions bear a rational relationship to a legitimate governmental purpose. Finally, recognizing that legislative actions will no longer enjoy a presumption of validity and that the application of the "fairly debatable rule"[342] has been relaxed in local zoning matters, in light of the more probing rational basis review now employed by the Court, the Court has in effect reversed the former roles and burdens of the parties. Local government must now be the party to prove that it is "fairly debatable" that a substantial relationship

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337. *Id.* at 3260.

338. *See supra* notes 109-15 and accompanying text.

339. *See e.g.*, Sullivan v. City of Pittsburgh, 620 F. Supp 935 (W.D. Pa. 1985).

340. The Court emphasized the requirement that a zoning authority must have clearly articulated reasons supported by competent evidence in its zoning decision if it is to be upheld under its probing analysis of all of the city's proferred reasons for denying C.L.C.'s permit application. *Cleburne*, 105 S. Ct. at 3259-60.

341. *Id.* See supra notes 183-84 for other notable U.S. Supreme Court zoning cases.

342. *See supra* note 103; *see generally* Mandelker, *Reversing the Presumption of Constitutionality in Land Use Litigation: Is Legislative Action Necessary?*, 30:3 J. URB. & CONTEMP. L. 5 (1986).

between the application of the ordinance and a valid exercise of the police power exists in order to prevail — and no longer must the applicant prove that it is not.[343]

In *Cleburne*, the Court refused to subject the City's zoning ordinance to heightened or strict scrutiny under the equal protection clause, because it did not affect a fundamental right and was not based upon a suspect classification.[344] The Court found that the mentally retarded potential group home residents failed to possess any of the three indicia of suspectness that the Burger Court has historically recognized.[345] These indicia of "immutable characteristic[s], determined solely by the accident of birth,"[346] "a history of purposeful unequal treatment"[347] and disabilities, and "a position of political powerlessness,"[348] were all found to be lacking in the mentally retarded;[349] thus, the zoning ordinance only warranted minimum scrutiny. In light of *Cleburne*, the application of these indicia to such typical group home residents as ex-convicts, drug offenders, alcoholics, foster children and the aged, offers little possibility that these groups would be found to be either suspect or quasi-suspect. *Cleburne* therefore provides little assistance to the cause of such groups' efforts to integrate into residential areas. *Cleburne* also reaffirmed the Court's position that housing is not a fundamental right.[350] Therefore other service dependent groups such as ex-convicts and the aged are affected by the Court's decision as well, as this pronouncement was not limited by the Court to the mentally retarded.

What remains of equal protection after *Cleburne* is not certain. However, the picture is not necessarily disheartening for disabled persons and other service dependent groups. The opinion demonstrates that the mentally retarded or any other similar group can suc-

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343. *Id. See also* LAND USE CASE, *supra* note 109, at § 9.13.2 which sets forth the general rule regarding burdens of proof.

344. *Cleburne*, 105 S. Ct. at 3253, 3258. The Court noted in the statement of facts that Cleburne's zoning ordinance "withheld a benefit which, although not fundamental, was very important to the mentally retarded." *Id.* at 3253. *See supra* note 186 and accompanying text.

345. Shaman, *Cracks in the Structure: The Coming Breakdown of Levels of Scrutiny*, 45 OHIO ST. L.J. 161, 175-76 (1984). See also *Cleburne*, 105 S. Ct. at 3255-58 for an analysis of the indicia of suspectness.

346. Frontiero v. Richardson, 411 U.S. 677, 686 (1973).

347. San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 28 (1973).

348. *Id.*

349. *Cleburne*, 105 S. Ct. at 3255-58.

350. *See supra* notes 186, 344 and accompanying text.

ceed under the rational basis test. A conventional application of the rational basis test would have sustained Cleburne's zoning ordinance and the City Council's action, since this highly deferential test involves almost no scrutiny.[351] However, the Court scrutinized each of the City's stated reasons for their denial, as they have in cases involving quasi-suspect classes.[352] The language of the majority, concurring, and dissenting opinions also leaves room for cautious optimism that the Court has heightened equal protection for every class of persons, including the service dependent.

V. CONCLUSION

Cleburne exemplifies the fact that, although the concept of mainstreaming our service dependent citizens back into a normal environment is lauded by many, local governments and fearful communities effectively preclude their placement. In order to effectuate a policy of "deinstitutionalization," the rights and needs of local governments, communities and service dependent persons must be balanced. Although the courts have demonstrated a willingness to interpret zoning regulations and restrictive covenants to provide for group homes in residential areas, this is a costly, time consuming approach that encourages group home opponents to make their regulations increasingly restrictive. In light of this opposition, it is up to state legislators to implement their state's policies by enacting legislation which will override local resistance to facilitate these policies.

Although the State of Florida has been given authority to implement state and federal policy favoring "normalization" for its service dependent persons, the strength of its commitment has been curtailed by local governments' exclusionary zoning practices and restrictive covenants which exclude group homes. In order to overcome these barriers, Florida must enact a law that will allow group homes to be established in any residential zoning district.

Mark Bentley

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351. *Cleburne*, 105 S. Ct. at 3263. *See also* Stewart, *A Growing Equal Protection Clause?* 71 A.B.A.J. 108, 112 (Oct. 1985); Connor, *Zoning Discrimination Affecting Retarded Persons*, 29 J. URB. & CONTEMP. L. 67, 71-72, 78-80 (1985).

352. *Cleburne*, 105 S. Ct. at 3259-60, 3263.