AMERICAN BAR ASSOCIATION

DISCUSSION EDITION

Zoning for Community Homes

serving Developmentally Disabled Persons

- statutory survey
- model statute

prepared by the Developmental Disabilities State Legislative Project of the ABA Commission on the Mentally Disabled

DEVELOPMENTAL DISABILITIES STATE LEGISLATIVE PROJECT

Advisory Board

Project Staff

Director
Bruce Dennis Sales

Assistant Director
Richard Van Duizend

Associate Director
D. Matthew Powell

Research Assistant
Randi G. Lewis

This publication is part of a series of reviews of state legislation and model statutes for states, prepared and disseminated by the Developmental Disabilities State Legislative Project, a project of the ABA Commission on the Mentally Disabled. The project is funded in part by Grant #54-P-71162/3 from the U.S. Department of Health, Education and Welfare Developmental Disabilities Office. The content herein does not necessarily represent the policy of the Department of Health, Education, and Welfare nor may the content be construed to represent the policy of the American Bar Association unless specifically adopted as such.

Washington, D.C. September 1978

Zoning for Community Homes

serving Developmentally Disabled Persons

- statutory survey
- model statute

Erratum: The inside front cover should give credit to Robert J. Hopperton, Associate Professor of Law at the Universtiy of Toledo College of Law, who, as project consultant, had primary responsibility for drafting the model statute. .....

Development Of Model Legislation And Legislative Reports On All Major Subject Matter Areas Affecting Developmentally Disabled Children And Adults

The Developmentally Disabled Assistance and Bill of Rights Act of 1975 (P.L. 94-103) establishes an ambitious and new national priority for furtherance of services to, rights of, and protections for our developmentally disabled population. Its provisions for comprehensive planning, federal financial aid, fostering of training and improved service techniques, program coordination and evaluation and, perhaps most significant, protection of the rights of developmentally disabled persons will require significant new initiatives in state legislation and implementing regulations if the ultimate goals of this pioneering effort are to be realized and, indeed, if states are to fully establish their compliance with the requirements for continued participation in the P.L. 94-103 programs.

At the same time national leadership in this field, as exemplified by the 1976 "Century of Decision" Report of the President's Committee on Mental Retardation,[1] and the evolving positions of national "consumer," citizen action and professional associations, has shown an increased appreciation of the need for careful and constructive law reform as a precondition for achievement of the goals of "normalization," "least restrictive service settings," maximization of habilitation services, and restoration of citizenship and legal rights. These rights are not only incorporated in P.L. 94-103 but are rapidly establishing themselves as the accepted "reform wisdom" in our approach to assisting developmentally disabled persons. In addition, an explosion in court litigation on behalf of develop mentally disabled and mentally ill persons[2] has produced a number of constitutionally mandated principles (e.g... right to habilitation, right to be free of harm, right to public education, right to vote, right to anti-discriminatory zoning laws, right to due process and legal representation in decisions to institutionalize) that literally beg for statutory articulation and "fine tuning" if they are to be assured full and uniform implementation and achieve a level of comprehensiveness and clarity often not attainable through a succession of litigated cases focused on specific factual situations or settings. Yet, it appears that very little national guidance exists for the enormous mission of state legislative improvement that lies ahead.

The American Bar Association's Commission on the Mentally Disabled has initiated the Developmental Disabilities State Legislative Project with the objectives of safeguarding the rights of develop mentally disabled citizens and assuring them equal access to quality services, consistent with the philosophy and program of P.L. 94-103 and other pertinent federal enactments through the identification, development, and dissemination of model state legislation and reports that review existing state legislation in this area. This project, funded by a three year grant from the United State's Department of Health, Education and Welfare's Developmental Disabilities Office, is advised by a sixteen member Board representing eleven national organizations: American Association on Mental Deficiency, James D. Clements, M.D.; American Bar Association Commission on the Mentally Disabled, Gunnar Dybwad, Ph.D.; American Bar Association Family Law Section, Dennis Haggerty, Esq.; American Bar Association Young Lawyers Section, Bruce D. Sales, J.D., Ph.D.; American Psychological Association, Serena Stier, Ph.D.; Council for Exceptional Children, Alan Abeson, Ed.D.; Epilepsy Foundation of America, Ann Britton, Esq.; Mental Health Law Project, Paul R. Friedman, Esq.; National Association for Retarded Citizens, Brian McCann, Ph.D.; National Center for Law and the Handicapped, Lawrence A. Kane, Jr., Esq.; President's Committee on Mental Retardation, Delores Norley-van Dyk, M.P.A.; National Society for Autistic Children, Sheridan Neimark, Esq.; United Cerebral Palsy Associations, David Deitz, Esq.; and Members-at-Large, Thomas Conlan. Esq. and Michael Kindred, Esq. The project is directed by Bruce Dennis Sales, JD., Ph.D., a professor of psychology and law at the University of Nebraska-Lincoln.

Models and reports will be directed to all concerned with legislative reform on behalf of develop mentally disabled persons: program officials, service deliverers, citizen advocacy groups, professional associations, national, state and local lay groups, civic organizations, bar committees, legislative committees, law reform and public interest law offices, state and local "decision makers, and perhaps most importantly, the State Planning Councils" established under P.L. 94-103.

It is hoped that the products of this project: (a) will help assure that any legislation advanced is well conceived and can draw on the best thinking, most advanced concepts, and outstanding work products from other states; (b) will save considerable time and money for individual states who would otherwise have to duplicate efforts to assure that their own formulations were sound; and (c) will assure that states have before them all options available in their effort to determine the direction that is optimal and best fits local conditions.

In a very real sense, a test of the project and measure of its results and benefits will be the number of "have not" states that become "have" states in important legislative areas. No enactment, of course, will be or can hope to be solely

(or even primarily) attributable to the project. Legislative success is a matter of local responsibility and commitment and depends on a great deal more than the availability of sound models and guidance in the drafting of legislation. Nevertheless, it is hoped that this project will substantially aid each state in their local efforts.

As noted above, the project will cover all major subject matter areas relevant to developmental disabilities law. These include such things as advocacy, guardianship, zoning, special education, personal and civil rights, standards for habilitation and care, criminal justice issues, and architectural barriers. The model laws will contain a long form version with commentary on each section of the act and alternative versions to particular sections where these options may be appropriate to a particular state's needs. In addition, a short form version is provided for many of these model laws.

The reviews of existing state legislation for each topic are intended to aid the reader in understanding what currently exists legislatively in this area and the issues that are addressed within each of these state statutes. In some cases, a 50 state review is not reported on although all 50 states were reviewed in making the analysis. The reason for this procedure is that many states have identical or nearly identical provisions, and knowing this fact, would not help the reader in understanding the alternative approaches in different states. Finally, it should be noted that the reports are not meant to be detailed but rather highlight the important provisions in presently enacted legislation. This format should be maximally useful to the reader interested in comparing alternative approaches while, at the same time, providing a valuable resource for further research in the relevant legislation.

The model laws and state legislative reports will be issued serially as they are produced. It is hoped that this series will accomplish its goals and help states achieve their needed reforms. We welcome comments on the model laws and legislative reports as you receive them. Submit comments to the Developmental Disabilities State Legislative Project, American Bar Association, 1800 M Street, N.W., Washington, D.C. 20036.

Judge Joseph Schneider
Vice-Chairman,
ABA Commission on the
Mentally Disabled
and
Chairman, Developmental
Disabilities
State Legislative Project
Advisory Board

FOOTNOTES

[1] President's Committee on Mental Retardation. *Mental Retar dation: Century of Decision* 58-67, 133-46(1976) and *The Mentally Retarded Citizen and the Law* (Kindred et al., eds. 1976). See *also* A. Stone, *Mental Health and the Law: A System in Transition* 119-44 (1975).

[2] For a perspective on the volume and variety of currently active litigation in this field, see Friedman and Beck. *Mental Retardation and the Law - A Report of Current Court Cases,* prepared for the Presidents Committee on Mental Retardation and DHEW Assistant Secretary for Human Development (intermittent publication series — 1974-1976)

[3] See, *e.g.. Education of All Handicapped Children Act of 1975.* **Pub. L. No. 94-142, 20 U.S.C. §401** (Supp. V 1975) (major **federal** support of public education); *Rehabilitation Act of 1973,* §§503. 504, 20 US.C §§794-992 (Supp. V 1975) (prohibiting discrimination against handicapped persons in federally supported programs).

Table of Contents

INTRODUCTION

Normalization

Important progress has been achieved in recent years toward providing humane habilitative programming for develop mentally disabled persons. This goal requires that these individuals not be warehoused in large, traditional institutions but rather be afforded the opportunity to live in community-based residential settings. This approach is called "normalization" — the principle of providing the "patterns of life and conditions of everyday living which are as close as possible to the regular circumstances and ways of life of society."[1] According to the principle, disabled persons, if unable to live with their families, should reside in homes of normal size, located in normal neighborhoods that provide opportunities for normal societal integration and interaction.[2] Such community living permits develop mentally disabled persons to reach their human potential and to become contributing, productive members of society. It also enables them to participate in generic services, to receive training for employment, to be employed, and in many cases to become part of the taxpaying public rather than an enormous strain on the public treasury.[3]

The progress of recent years towards "normalization" has been the result of efforts on many fronts.[4] Developmental disability experts have increasingly advocated community-based care and habilitation. Equally important steps have been achieved through: (1) judicial decrees requiring that placement in less restrictive settings than institutionalization be considered prior to commitment;[5] (2) recent Federal legislation calling for increased community habilitation of developmentally disabled persons;[6] and (3) state legislative enactments providing for humane care for these persons.[7]

Notwithstanding the weight of professional, judicial, and legislative authority favoring community-based treatment, insufficient numbers of community homes[8] are currently available to serve develop mentally disabled persons who are not in need of institutionalization. Although this lack of residential facilities is attributable to many causes, a very significant factor has been local zoning regulations which effectively exclude or restrict community homes from residential areas.

Zoning in General

Zoning is a type of land use control deriving from public legislative bodies and is most often implemented at the local level. It is the most important and prevalent land use control in the United States and serves the function of regulating land uses by separating commercial and industrial districts from residential districts of the community. The establishment of industry or places of business is normally prohibited in districts designated as residential.[9]

Types of Ordinances Restricting Community Homes

The activities of local communities in the last few years demonstrate beyond question that many, for whatever reasons, will do whatever they can by means of exclusionary zoning laws and practices to frustrate efforts to establish commu-

---

[1] B. Nirje, "The Normalization Principle," in *Changing Patterns in Residential Services for the Mentally Retarded* 231 (R. Kugel & A. Shearer eds. 1976).

[2] *Id.* at 232.

[3] See *generally* M. Kindred, Written Testimony submitted to Ohio General Assembly in support of Substitute Senate Bill 71 (June 15, 1977), and J. Chandler and S. Ross, Jr., "Zoning Restrictions and the Right to Live in the Community," in *The Mentally Retarded Citizen and the Law* 313 (M. Kindred ed. 1976).

[4] See *generally* ABA Commission on the Mentally Disabled, "Community-Based Mental Health Treatment: Impact of Zoning Development," *Clearinghouse Rev.* 356 (Aug. 1977).

[5] *E.g., Wyatt* v. *Stickney,* 344 F.Supp. 373 (M.D. Ala. 1972), *aff'd sub nom. Wyatt* v. *Aderholt,* 503 F.2d 1305 (5th Cir. 1974); *Suzuki* v. *Quisenberry,* 411 F.Supp. 1113 (D. Hawaii 1976).

[6] *E.g.,* Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. §§6001-6081 (Supp. V 1975).

[7] *E.g.,* COLO. REV. STAT. §§27-10.5-101 to 123 (Supp. 1976); FLA. STAT. ANN. §393.13 (West Supp. 1978); NEB. REV. STAT. §§83-1, 141 (Reissue 1976); OHIO REV. CODE ANN. §§5123.67 to .99 (Page Supp. 1977).

[8] A variety of terms, such as "group homes," "foster homes," and "community residences" have been used to describe community-based residential facilities serving develop mentally disabled persons. For purposes of this commentary, the generic term "community homes" has been used. The Act uses the term "family home" to define a particular type of community home covered by the Act. See the Model Act, Section 3, Definitions, *infra* at

[9] N. Williams, 1 *American Land Planning Law,* ch. 16, at 327-43 (1974) [hereinafter cited as N. Williams],

nity homes.[10] Some localities specifically exclude such homes from single-family residential districts which are the neighborhoods most desirable for community homes.[11] More frequently a political subdivision excludes these homes through its definition of "family." The most restrictive type of definition is similar to the one found in *Village of Belle Terre* v. *Boraas*[12] in which the village defined "family" by limiting the persons authorized to live on the premises to those who were related by blood, marriage, or adoption, with no more than a specified number of unrelated persons.[13] These local devices usually result in a political subdivision having no community homes.[14]

Elsewhere, political subdivisions designate community homes as a "conditionally permitted use"[15] in some residential areas, or as a business use or as a boarding house thus limiting them to commercial zones,[16] or, finally, as a use allowed only in areas where hospitals and nursing homes are permitted.[17] These types of restrictions frequently result in the creation of ghettos of community homes, particularly in larger center cities. Such a concentration occurs because the only districts open to community homes are transitional and politically weak residential neighborhoods or business or institutional zones. This ghettoizing leads to the creation of a new form of institutionalization — large numbers of community homes in certain areas of a city so that the homes become the dominant feature of a residential neighborhood.[18] These concentrations change the character of neighborhoods and undercut the very purposes behind "normalization." Further, they provoke justified, negative reactions on the part of neighborhoods where the community homes are impacted, and strengthen the resolve of other communities to avoid admitting community homes for fear that such concentrations will occur in their communities.[19]

Local Discretion and Exclusionary Zoning: The Remedy — State Legislation

As long as each political subdivision retains broad discretion to admit or exclude community homes, there is little incentive for admitting them. On the contrary, there is strong incentive for political subdivisions to exclude or restrict such homes because, under present circumstances, if one community acts in a progressive, constructive manner to permit community homes, there is a high probability that it will become a magnet for large numbers of homes. This occurs because operators have nowhere else to establish much needed residences. Once this rush to one city occurs and officials in other political subdivisions perceive the phenomenon, their conviction to exclude community homes is reinforced.

One thing then has become abundantly clear: local decision-making on the location of community homes allows for and potentially encourages exclusionary and undesirable results. If the community homes concept is to succeed, it must do so across an entire state as a result of state legislation that is not subject to the veto of political sub-

---

10 Planning bodies in several political subdivisions have been sufficiently concerned about property values to conduct research on the question of the effect of community facilities on property values in residential neighborhoods. In none of these studies were the researchers able to verify any significant impact of such facilities upon property values. See *generally The Social Impact of Group Homes: A Study of Small Residential Service Programs in First Residential Areas,* prepared for the Green Bay, Wis. Plan Commission, prepared by Eric Knowles and Ronald K. Baba (June 1973); *The Influence of Halfway Houses and Foster Care Facilities Upon Property Values,* or City of Lansing, Mich., Planning Dept. (Oct. 1976); *The Effect of Siting Group Homes on the Surrounding Environs,* (White Plains, N.Y.) by Stuart Breslow (Nov. 1976); Michael Dear, "Impact of Mental Health Facilities on Property Values," 13(2) *Community Mental Health Journal* 150 (1977).

11 R. Hopperton, *Zoning for Community Homes: A Handbook for Local Legislative Change,* 3 (Ohio State University Law Reform Project 1975).

12 416 U.S. 1 (1974).

13 See *supra* note 11. Comment, "Exclusionary Zoning and its Effect on Group Homes in Areas Zoned for Single Family Dwellings," 24 *Kan. L. Rev.* 677, 683 (1976).

14 In some areas apartment buildings and duplex homes are increasingly being utilized in the placement of developmentally disabled persons. One reason for this development is that the use of multiple family dwelling units by small numbers of developmentally disabled persons living independently can many times avoid zoning obstacles that face community homes located in free-standing single-family dwelling units because local definitions of "family" permit only up to three, four, or five unrelated persons to live together. A second reason may be that apartments and duplexes are a dominant form of housing in a given area and therefore provide a ready source for community living opportunities regardless of local zoning laws. No value judgment is offered on the question of the use of free standing single-family homes versus apartments or duplexes. It should be said, nevertheless, that (1) a "family home" is defined for purposes of this Act as requiring "supervision in a family environment . . .," and (2) apartments are usually used for developmentally disabled persons capable of independent living without supervision in a family environment. In this latter case, as already indicated, zoning restrictions are a significantly lesser problem, and for this reason such apartment and duplex living arrangements are not treated in this Act.

15 A "conditionally permitted use" is a land use authorized in a particular zoning district only if certain requirements or standards are met and only after approval is given by the local zoning appeals board or other public body. The terms "conditional use," "special use," "special use permit," and "special exception" are other terms often used by political subdivisions to designate a "conditionally permitted use." "Conditionally permitted uses" are sometimes confused with "variances" which are granted normally only to relieve a particular hardship arising from application of a zoning ordinance. Finally, a "permitted use" is to be contrasted with a "conditionally permitted use." The former is a use by right specifically authorized in a particular zoning district. See M. Meshenberg, *The Language of Zoning* (American Society of Planning Officials, Planning Advisory Service Report No. 322, Nov. 1976).

16 See J. A. Chandler and S. Ross, Jr., "Zoning Restriction and the Right to Live in the Community," in *The Mentally Retarded Citizen and the Law* 313 (M. Kindred ed. 1976).

17 *Id.* at 314.

18 See "Crackdown Planned on Homes for Mentally Ill," *Dayton Journal Herald.* (Dayton, Ohio) April 13, 1978, at 9.

19 *Id.*

divisions.[20] Uniform state requirements, superseding parochial, local legislative and administrative actions will open up desirable neighborhoods for placement of community homes on an equitable basis and will remove principal reasons (e.g., overconcentration of such homes in one area) for excluding such homes.[21]

Significantly, state legislation limiting ing authority is not unprecedented. In fact states have already enacted such statute of these states recognized that zoning re which exclude or restrict community home state problem, not a local one, that must be dressed at the state level.[23]

REVIEW OF RECENT STATE LEGISLATION

As indicated in the previous section, state legislation limiting local discretion to exclude community homes is not novel. Sixteen states have enacted statutes mandating in various ways and to various degrees the location of community homes in residential areas. These recent state enactments exhibit several common characteristics: each statute identifies, and most define, the type of community home treated; each designates the type of population served and all but one specify the number of residents permitted in community homes; each identifies the type of zone/s in which they will be permitted; most require state licensing of the homes; most indicate whether local zoning authorities can impose any additional cc not specified in the state law;[24] and appro half list dispersal requirements. (See Chart

General Approaches to Limiting Local Distance

Rhode Island's brief zoning statute deal the residents of community homes (all must six or fewer) as a "family" and waives all lov-ing requirements pertaining to them. Tennessee establishes community home eight or fewer) as single family residences ing purposes.[25] Thus, in both of these

[20] The Ohio experience prior to passage of SB 71, legislation of the sort contemplated by this Act, is instructive. Major efforts aimed at breaking down zoning barriers facing community homes were undertaken by various reform groups at the local level in 1975 and 1976. The Ohio Association for Retarded Citi zens formed a special zoning subcommittee of its Legal and Governmental Affairs Committee. The Ohio Developmental Dis abilities Planning and Advisory Council and the Law Reform Project at the Ohio State University, College of Law, jointly undertook the development, publication, and distribution of zoning handbooks aimed at local legislative change. See R. Hopperton, *Zoning for Community Homes: A Handbook for Local Legislative Change,* and *Zoning for Community Homes: A Handbook for Municipal Officials,* (Ohio State University Law Reform Project 1976). In addition, various ad *hoc* zoning com mittees were established in communities around the state. At the time these efforts were undertaken, approximately six Ohio political subdivisions permitted community homes for devel-qpmentally disabled persons in some manner (usually condi tionally). After approximately one year of intensive efforts, only five more communities had reformed their zoning regulations to permit community homes (again, usually on a conditional basis). Thus, notwithstanding a major investment of time and resources only *eleven* of Ohio's over 930 municipal corpora tions specifically allowed community homes for devel-opmentally disabled persons. In numerous communities in the state, reform efforts were met by flat rejection or interminable delays. One community tightened its zoning ordinance to close a possible loophole that could have permitted a community home. Increasingly, the response given by cities for not reform ing their local zoning regulations was, "If we allow one com munity home, we will be deluged by others." It became obvious to concerned groups and individuals in Ohio that no amount of time or effort would result in any significant number of Ohio's political subdivisions voluntarily admitting community homes. As a consequence, Ohio reform organizations led by the Ohio Association for Retarded Citizens and the Law Reform Project concluded that state-wide legislation constituted the only an swer to local zoning barriers.

Substitute Senate Bill 71 was drafted, introduced, and passed overwhelmingly by the Ohio General Assembly (OHIO REV. CODE ANN. §5123.18 (Page Supp. 1977), effective October 31, 1977). For discussion see "Review of Recent State Legislation."

[21] See Chart on *State Zoning Laws Regulating Community Facilities for Developmentally Disabled Persons [*here in after cited as *Chart], infra,* at

[22] *Id.*

[23] Additionally, state courts have increasingly providing active and informed judicial review of local legislation-ing or excluding community homes. These cases, when down exclusionary regulations and practices, are v marized in the recent concurring opinion of Mr Stevens in *Moore* v. *East Cleveland,* 431 U.S. 494 (1977 Mr. Justice Stevens states

> In well-reasoned opinions, the courts of linois, New York, New Jersey, California, Conn< ticut, Wisconsin and other jurisdictions have p mitted unrelated persons to occupy single family residences notwithstanding an ordinance prohibit-ing, either expressly or implicitly, such occupancy
>
> The state decisions have upheld zoning on nances which regulated the identity, as opposed to the number, of persons who may comprise household only to the extent that the ordinance require such households to remain non-transient single-housekeeping units. [Footnotes omitted *Id.* at 516-17, 519.

Both Mr. Justice Stevens and Mr. Justice Powell, writing court, indicate the legitimacy of zoning regulations directed specifically at typical zoning problems show adequate parking and overcrowding of physical streets Both indicate, however, that those problems can be ad specifically and not directed toward restricting certain from living in a single-housekeeping unit. Mr. Justice also reviews state judicial opinions in which group ar-rangements and community homes have not received fa treatment. See *also* Comment, *supra* note 13, for an i review of state case law regarding community homes.

[24] *E.g.,* architectural design and site layout.

[25] As will be seen in the Model Act, the approaches take
Rhode Island and Tennessee are not recommended licensure of such homes is needed to insure appropriate of care for residents. Moreover, the Rhode Island creates unjustifiable reverse discrimination by exec.
community homes from zoning requirements (e.g., parking restrictions) that apply to all other dwellings zone. The State of Maryland appears to have attempted community homes very much like Rhode Island. The provision is contradictory, however, ("Although the group home is exempt from any local zoning rule or regulated
public group homes may not be located in any area when critically prohibited by the local zoning law.") and there effect of this provision has yet to be determined.

smaller community homes are treated as "permitted uses"[26] which means that the operator of a home can locate it as a matter of right, without having to meet any special local conditions or standards. Thus, local discretion regarding the zoning of these homes is removed.

Like the above two states, Arizona, Minnesota, Ohio and Vermont also establish the smaller community homes (in Arizona, Minnesota and Vermont six or fewer; in Ohio eight or fewer) as "permitted uses" in all residential zones. In addition, these four states require state licensing of community homes. Therefore, these statutory provisions create a most favorable setting for the establishment of smaller community homes because local discretion regarding these homes is removed and state licensing is required. Larger state-licensed community homes in Arizona, Minnesota and Ohio, however, are treated as "conditionally permitted uses" and may be required to meet certain requirements or standards imposed by a political subdivision. The Wisconsin approach is similar to Arizona, Minnesota, Ohio and Vermont except that community homes in that state are subjected to annual review by a political subdivision.

The statutes of California,[27] Colorado, Michigan, and Montana[28] declare that smaller state-licensed community homes for handicapped persons are residential uses for zoning purposes in all residential zones. Political subdivisions, however, may treat these state-licensed homes as "conditionally permitted uses" and require them to meet special requirements or standards. Thus, smaller state-licensed community homes in these states receive essentially the same treatment as the larger state-licensed community homes in Arizona, Minnesota and Ohio. This means that significant local control is retained by a political subdivision.

The statute of South Carolina declares that community homes are to be construed as natural families for local zoning purposes, but then establishes a very unusual procedure that gives political subdivisions the right to object to the location of a community home. The state agency may then appeal the political subdivision's objection to the State Budget and Control Board. If that Board does not decide the state agency appeal within a specified time, however, the objection of the political subdivision controls and the establishment of the community home is prevented.

In Virginia, a very general statute also allows significant local discretion, but does require that political subdivisions provide community homes in "appropriate residential zoning districts." The Virginia statute, however, does not define "appropriate residential zoning districts," but it does include a strong policy statement encouraging and promoting community homes. Another general statute has been passed in New Jersey prohibiting political subdivisions from discriminating between children of normal single-family homes and children living in community homes.[29] Unfortunately discrimination is not defined, thus leaving its full strength undetermined. Finally, New Mexico's statute, though similar to those of California, Colorado, Michigan, and Montana, differs in one very important respect — New Mexico does not require political subdivisions to treat community homes as residential uses. Instead, such treatment is left to the discretion of the local community.

[26] See *supra* note 15.

[27] The validity of the California statute (CALIF. WELF. AND INST. CODE §§5115-5116) was upheld in *City of Los Angeles* v. *California Department of Health,* No. 116571 (Cal. Super. Ct. October 24, 1975), 1 *Mental Disability L. Rep.* 26.

> In its complaint, filed March 5, 1975, the city [of Los Angeles sought, inter alia, an injunction prohibiting the State Department of Health and other defendants from licensing community care facilities in areas where such facilities would violate the Los Angeles Planning and Zoning Code.
>
> Los Angeles maintained that as a chartered city, it was not subject to State regulation or control with regard to municipal affairs, and that its regulation of land-use through zoning requirements constituted "municipal affairs." Thus the city argued that it was entitled to exclude community care facilities from single family and certain other residential zones. In other words, the city contended that it was exempt from the California Welfare and Institutions Code (§§ 5115 and 5116), which requires that community care facilities serving six or fewer persons on a 24-hour non-medical basis be permitted in all residential zones, including single family areas.
>
> The California Department of Health argued in its answer, filed April 17, 1975, that the sections of the State code pertaining to community care facilities "embody a subject of statewide concern and said provisions must prevail over local ordinances which might otherwise be deemed appropriate municipal action."
>
> In granting the defendants' motion for summary judgment, the court declared that it was not necessary to decide the matter on constitutional grounds, since under the California code, "a state authorized, certified, or licensed family or group home serving six or fewer mentally disordered or otherwise handicapped persons [must] be considered a residential use of property" and such a use must be permitted in all residential zones in the city of Los Angeles. The court thus declared invalid and void those provisions of the Los Angeles Planning and Zoning Code prohibiting family and group homes in residential areas.

1 *Mental Disability L. Rep.* 26-27 (1976). See *infra,* note 34.

[28] The Supreme Court of Montana upheld that state's statute (MONT. REV. CODES ANN. §§11-2702.1-.2 (Supp. 1977)) that exempts community homes for developmental disabled persons serving eight or fewer residents from local exclusionary zoning requirements. State ex. *rel. Thelen* v. *City of Missoula,* No. 13192 (Mont. Sup. Ct., Dec. 8, 1975), 543 P.2d 173, 1 *Mental Disability L. Rep.* 27 (1976).

[29] The validity of the New Jersey Statute (N.J. STAT. ANN. §30:4C-26 and §40:5533.2 (West Supp. 1977)) was sustained in *Berger* v. Sfafe *of New Jersey,* 71 N.J. 206, 364 A.2d 993 (1976), 1 *Mental Disability L. Rep.* 214 (1976).

Characteristics of Residents

Fifteen states limit the types of residents who may live in community homes, with seven states (Arizona, Colorado, Montana, New Mexico, Ohio, Vermont, and Virginia) specifically including develop mentally disabled persons. In addition, the following states define developmental disabilities: the Colorado statute defines develop mentally disabled persons as those persons having cerebral palsy, multiple sclerosis, mental retardation, autism, or epilepsy; according to the New Mexico law, a developmental disability is a disability attributable to mental retardation, cerebral palsy, autism, or neurological dysfunction, that requires treatment or habilitation similar to that provided to persons with mental retardation. Ohio's legislation covers disabilities that originate before the person becomes 18 years dd and can be expected to continue indefinitely, consitute a substantial handicap to the person's ability to function normally in society, or are attributable to mental retardation.

Persons having other kinds of disabilities are covered in four of these seven states' statutes, as well as in the nine remaining states. The categories in the various states include mentally disabled, mentally retarded, mentally ill, handicapped, physically handicapped, children and persons in need of supervision and care. (Obviously mental retardation is a type of developmental disability, but the states of Maryland, Minnesota, Rhode Island and Tennessee use that term apparently to exclude other types of developmental disabilities.) Unlike other states, Wisconsin does not limit the types of residents who may live in community homes.

Licensing and Dispersal Requirements

State licensing or other recognition of community homes is mandatory in thirteen of the sixteen statutes. The specific licensing authority is indicated in the chart whenever referred to by statute. Provisions in seven states prohibit the issuance of a license for operating a community home if the proposed location would result in an excessive concentration of such homes in an area. Also, six states specifically require that a certain distance be maintained between community homes in order to ensure dispersal of such homes within a political subdivision. These provisions attempt to ensure the effectiveness of the de-institutionalization process by avoiding the creation of a so-called community home ghetto or district.

STATE STATUTE CHART

State Zoning Laws Regulating Community Facilities
For Developmentally Disabled Persons

STATE	TYPE OF COMMUNITY FACILITY	RESIDENTS		ZONE IN WHICH PERMITTED	CONDITIONAL USE PERMITS ALLOWED	STATE LICENSING OF FACILITY		DISPERSAL OF FACILITIES REQUIRED
		No.	Type			Required	Licensor	
ARIZONA Act of June 7, 1978, Ch. 198 §37 (H.B. 2426) (Effective Dec. 1, 1978)	Residential facility	6 or fewer 7 or more	Developmentally disabled persons	Single family Multiple family[1]	No Yes[2]	Yes	Dept. of Economic Security	1200 ft. required between residential facilities
CALIFORNIA Welf. & Inst. Code §§5115-5116 (Deering Supp. 1977)	Family care home Foster home Group home	6 or fewer	Mentally disordered or otherwise handicapped persons, or dependent and neglected children	Single family	Yes	Yes	Not specified	Not specified
COLORADO Rev. Stat. §§27-10.5-133 (Supp. 1976), 30-28-115 (Supp. 1976)	Group home	8	Developmentally disabled persons	Single family	Yes	Yes	Dept. of Health	750 ft. required between facilities
MARYLAND No. 1343, amending Art. 59A, Ann. Code (1972 Replacement Vol. and 1977 Supp.)	Public group home Private group home	4-8	Mentally retarded persons	[3] All Residential zones	No[4]	Yes Yes[5]	Sec. of Health and Mental Hygiene Director of Mental Retardation Administration	Not specified
MICHIGAN Acts of Jan. 3, 1977 Pub. L. Nos. 394-396	Residential facility	6 or fewer	Persons in need of supervision or care	Single family	Yes	Yes	Director of Dept. of Services	1,500 ft. (3,000 ft. in cities over one million population) required unless permitted by local ordinance
MINNESOTA Stat. Ann. §§252.28 (West Supp. 1977), 462.357 (West Supp. 1977)	Group home Foster home Residential facility	6 or fewer 7-16	Mentally retarded or physically handicapped persons	Single family Multiple family	Not specified Yes	Yes	Commissioner of Public Welfare	300 ft. required between facilities unless conditional use permit is granted

STATE	TYPE OF COMMUNITY FACILITY	RESIDENTS		ZONE IN WHICH PERMITTED	CONDITIONAL USE PERMITS ALLOWED	STATE LICENSING OF FACILITY		DISPERSAL OF FACILITIES REQUIRED
		No.	Type			Required	Licensor	
MONTANA Rev. Codes Ann. §§112702.1-.2 (Supp. 1977)	Community residential facility: group, foster or other home	8 or fewer	Developmentally disabled or handicapped persons	Single family	Yes	Yes	Dept. of Health and Environmental Science; Dept. of Social and Rehabilitative Services	Not specified
NEW JERSEY Stat. Ann. §§30:4C-2(m),-26 (West Supp. 1977)	Group home	12 or fewer	Children	[6]	Not specified	[7]	[7]	Not specified
NEW MEXICO Act of April 7, 1977, ch. 279 §20 (to be codified in Stat. Ann. §14-20-1)	Community residences	10 or fewer	Mentally ill or developmentally disabled persons	Single family	Not specified	Yes	Not Specified	Not specified
OHIO Act of Aug. 1, 1977, Amended Substitute S.B. No. 71 (to be codified in Rev. Code Ann. §5123.18 [Page])	Family home Group home	8 or fewer 9-16	Developmentally disabled persons	Single family Multiple family	Where such ordinance in effect prior to 6/15/77 Yes	Yes	Chief of Division of Mental Retardation and Developmental Disabilities	Not specified Limitation on excessive concentration of facilities permitted
RHODE ISLAND Act of May 13, 1977, ch. 257 (to be codified in Gen. Laws 45-24-22)	Any type of residence	6 or fewer	Retarded children or adults	[8]	Not specified	No	—	Not specified
SOUTH CAROLINA Act of April 4, 1978; H.B. 2121 Amendments to Act 653 of 1976 and 1976 Code §44-21-525, §44-17-10	Community residential facility	9 or fewer	Mentally handicapped persons	Single family[9]	Not specified	Yes	Dept. of Mental Health & Dept. of Mental Retardation	No excessive concentration of community residential facilities
TENNESSEE 1978 Tenn. Pub. P.C. 863 (H.B. 777)	Community home	8 or fewer	Mentally retarded or physically handicapped persons	Single family[10]	Not specified	Not specified	Not specified	Not specified

STATE	TYPE OF COMMUNITY FACILITY	RESIDENTS No.	RESIDENTS Type	ZONE IN WHICH PERMITTED	CONDITIONAL USE PERMITS ALLOWED	STATE LICENSING OF FACILITY Required	STATE LICENSING OF FACILITY Licensor	DISPERSAL OF FACILITIES REQUIRED
VERMONT Act of March 24, 1978, H. 698 (to be codified in Stat. Ann. tit. 24 §4409(d)	Community care home or group home	6 or fewer	Developmentally disabled or physically handicapped	Single family	Not specified	Yes	Not specified	1,000 ft. required between facilities
VIRGINIA Code §15.1-486.2 (Supp. 1977)	Family care home, foster home, group home,	Not specified	Mentally retarded and other developmentally disabled persons	Appropriate private residential districts	Yes	Not specified	—	Yes
WISCONSIN Signed into law March 21, 1978; Ch. 205, Laws of 1977	Child welfare agency Group foster home for children Adult residential facility	8 or fewer[11] 9-15 16 or more	All children or adults	All residential zones	[12] None Permit required for 1 or 2 family zones Permit required for all residential zones	Yes	Dept. of Health and Social Services	[13] 2,500 ft. distance, and density limit of the greater of 25 or 1% of population in municipality or aldermanic district for class 1-4 cities

[1] Residential facilities of 7 or more residents are a permitted use in any zone in which residential buildings of similar size, containing rooms provided for compensation, are a permitted use.

[2] Conditional use permits allowed only if no conditions are imposed on such facilities which are more restrictive than those imposed on similar dwellings in the same zone.

[3] The statute is somewhat confusing: "Zoning classifications. Although the public group home is exempt from any local zoning rule or regulation, public group homes may not be located in any area prohibited by the local zoning law. However, for the purposes of the mental retardation law, and zoning, the public group home conclusively shall be deemed a single family residential use, permitted in all residential zones __ " §19B(b)(5)

[4] Group homes shall not be subject to a special exception or conditional use permit or procedure different from those required for a single family dwelling in the same zone.

[5] Certificate of approval required.

[6] No municipality shall enact an ordinance governing single-family use of land which discriminates between children who are members of single families and children who are placed in group homes.

[7] Must be recognized as group home by Department of Institutions and Agencies in accordance with state rulesand regulations.

[8] Residents are considered a family, and all requirements pertaining to local zoning are waived.

[9] While the South Carolina statute provides that community homes are to be treated as natural families for county or municipal zoning purposes , it also gives the political subdivision the right to object to a proposed location. This objection is made to the State Budget and Control Board, and that Board must make a decision on the objection, if appealed by the state agency, within a given time period. If no decision is made by the Board within the time period, then the political subdivision's objection controls and the location of the community home is prevented.

[10] Group homes of 8 or fewer residents are considered single family residences.

[11] A private, licensed foster home for four or fewer children is permitted, without space or density limits, in all residential areas.

[12] The municipality may annually review the effect of any community facility and may order it to close unless special zoning permission is obtained. The order is subject to judicial review.

[13] The municipality may, at its discretion, agree to increase the density limit or decrease the dispersal distance.

MUNICIPAL HOME RULE

The Problem

Although not specifically mentioned in the review of existing legislation, another issue warrants consideration — municipal home rule. It is a system of powers, including zoning powers, conferred upon municipalities by a state constitutional provision[30] in approximately forty states.[31] Home rule greatly insulates municipalities from state legislative action of the sort contemplated by this Act. For this reason, a crucial technical question must be correctly answered if this proposed Act is to avoid potential constitutional infirmities; that is: what language must be used in the Act to ensure that it does not violate a state's constitutional home rule provision?

Because various municipal home rule systems differ in content, interpretation and effect, no general discussion can adequately treat all of the individual provisions. For example, both Ohio[32] and California[33] are constitutional home rule states, and both have adopted, as indicated above, state legislation that limits local zoning authority with regard to community homes. Although the language of the constitutional home rule provisions of the two states is similar, judicial interpretation of these two provisions varies significantly.[34] Therefore, statutory language to satisfy home rule requirements in these two states had to be significantly different. In California, the Code[35] established a state-wide policy that the use of property as a community home for handicapped persons is to be considered a residential use. This simple pronouncement met California home rule requirements. In Ohio, however, the Revised Code[36] licenses individual operators of community homes for develop mentally disabled persons in order to meet the tests set up by the Ohio Supreme Court's interpretation of the home rule provision. The important point to be made is that because of differing home rule requirements, that which is effective in California would have met early and complete failure in Ohio.

The Solution

What then is necessary to ensure a correct answer to the problem posed by municipal home rule? In each state where efforts are undertaken to gain passage of this proposed Act, proponents should do the following:

1. Determine if the state is a municipal home rule state (See note 31);

2. If it is, then obtain professional legal advice on what particular legislative language require ments must be met as a result of state judicial in terpretation of the municipal home rule provision in the state constitution;

3. Ensure that the necessary language is incor porated in appropriate ways and at appropriate places into the proposed act;

4. Prepare answers and testimony for use in the legislative process that will provide a clear dem-

---

[30] See *generally* R. Anderson, 1 *American Law of Zoning* 2d, §§2.14-18(1977).

[31] "Provisions of some sort for home rule are contained pres ently in constitutions of forty states. . . ."

See Alas. Const, art. X; Ariz. Const, art. XIII, §§2-3; Cal. Const, art. XI, §§35-37; Colo. Const, art XX; Conn. Const, art. X; Fla. Const, art. XIII 1(g), 2(b); Ga. Const, art. XV; Hawaii Const, art. VII, §2; Idaho Const, art. XII, §2; III. Const, art. VII, §6; Iowa Const, art. III, §40; Kan. Const, art. XII, §5; La. Const, art. V I; Me. Const, art. VIII-A; Md. Const, arts. XI-A, XI-E, XI-F; Mass. Const, art. of amend. II; Mich. Const, art. VII, §§2, 22; Minn. Const, art. XI, §3; Mo. Const, art. VI, §18(a)-(s), 19-19(a); Mont. Const, art. XI, §§5-6; Neb. Const, art. XI, §§2-5; Nev. Const, art. VIII, §8; N.H. Const, pt. I, art. XXXIX; N.M. Const, art. X, §6; N.Y. Const, art. IX; N.D. Const, art. VI, §130; Ohio Const, art. XVIII; Okla. Const, art. XVIII, §3-4; Ore. Const, art. XI, §2; Pa. Const, art. IX; §2; R.I. Const, art. of amend. XXVIII; S.C. Const, art. VIII, §11; S.D. Const, art. IX, §2; Tenn. Const, art. XI, §9; Tex. Const, art. XI, §5; Utah Const, art. XI, §5; Wash. Const, art. XI, §§10-11; W. Va. Const, art. VI, §39(a); Wis. Const, art. XI, §3; Wyo. Const, art. XIII, §1.

K. Vanlandingham, "Constitutional Municipal Home Rule Since the AMA (NLC) Model," 17 *William and Mary L Rev.* 1, 4 n.9 (1975).

[32] Ohio Const, art. XVIII, §3.

[33] Cal. Const, art. XI, §7.

[34] For Ohio, see *Village of Struthers* v. *Sokol,* 108 Ohio St. 263, 140 N.E. 519 (1923); *Youngstown* v. *Evans,* 121 Ohio St. 342, 168 N.E. 844 (1929); and *Village of West Jefferson* v. *Robinson,* 1 Ohio St. 2d 113, 205 N.E.2d 382 (1965). For California, see *In Re Porterfield,* 28 Cal.2d 91, 168 P.2d 706 (1946); *Johnston* v. *Board of Sup'rs of Martin County,* 31 Cal. 2d 66, 187 P.2d 686 (1947); *Oakland Raiders* v. *City of Berkeley,* 65 Cal. App. A.3d 623, 137 Cal. Rptr. 648 (1976). See *also City of Los Angeles* v. *California Department of Health, supra* note 26.

[35] CAL. WELF. AND INST. CODE §§5115-5116 (Deering Supp. 1978).

[36] OHIO REV. CODE ANN., §5123.18 (Page Supp. 1977).

onstration of (a) an understanding of the home rule problem and (b) an appropriate approach to solving that problem.

In general, the home rule problem is one of form, not substance. Once the proper means of limiting local zoning power has been determined in a given state, the technical problem of home rule can be readily solved.

SUMMARY OF THE PROPOSED ACT

The overall goal of this Act is to improve the quality of life of all develop mentally disabled persons by guaranteeing them the benefits of living in normal residential communities. The principal means to achieve this goal is a state-imposed statutory limitation upon the zoning power of a state's political subdivisions. This limitation prevents local communities from using their zoning power to exclude community homes for develop mentally disabled persons[37] and is achieved by establishing the community home as a "permitted use" for zoning purposes in all residential districts throughout this state (See section 4 of the Act).

While the narrowly drawn limitation on local zoning power is the principal implementation device, this Act also utilizes four other important means to achieve its ends:

1. It ensures appropriate care and habilitation, as well as decent, safe and adequate housing for develop mentally disabled persons through the es tablishment of a state licensing program for com munity homes in the state administrative depart ment serving the develop mentally disabled popu lation. State administrative supervision based on licensing regulations can provide the necessary tools and sanctions in one agency with state level authority to ensure that community homes are well-run and residents well-treated. State licensing also insulates the regulatory process for commu nity homes from strong local political pressures (See subsection 5(a) (i)-(iii));

2. The Act ensures that the present problem of over-concentration of community homes in certain types of areas will be avoided by giving the appropriate state agency responsibility for prevention. State-imposed dispersal requirements, achieved through state administration of the licensing system, can achieve direct, uniform, and coordinated supervision of community home locations. Various specific techniques are available to implement density control and avoid impaction and are appropriate for administrative regulations. It is important that these controls be exercised uniformly at the state level rather than at the local level to prevent attempts at indirect exclusion of large numbers of community homes by political subdivisions (See subsection 5(a) (i));

3. Appropriate safeguards and procedural rights are provided to political subdivisions to permit ap propriate local regulation and to reduce or avoid local resistance or hostility to community homes (See subsections 5(a) (iii)-(iv), 5(b), 5(c));

4. The Act is also designed to prohibit exclusion of community homes by private agreement. This measure is included because evidence is ac cumulating in states that have already passed legislation similar to this Act that community homes now face a new obstacle: private restrictive covenants specifically prohibiting such homes[38] (See section 6).

In summary, the Act is a narrowly drawn effort to balance the need to facilitate location of community homes with legitimate local neighborhood concerns about health, fire and safety regulations, and the desire of local communities to be heard regarding the development of such homes in their neighborhoods.[39]

---

[37] This limitation on local zoning powers is likely to be a controversial issue in most states. Yet, it is negligible compared to the overriding importance of implementing state policies and programs to guarantee the right to humane care and habilitation and the right to live in a community setting for develop mentally disabled persons. In addition, the proposed limitation is minimal in comparison to the vast range of zoning powers enjoyed by cities, townships, villages, and boroughs of the various states throughout the country. Moreover, given the unique nature and significance of these rights it is also important to note that such state action regarding zoning should in no way be viewed as the precursor of any broad inroads into the area of local land use regulation.

Thus, the title of this Act accurately describes its thrust: first and foremost, it is state legislation designed to advance important rights of develop mentally disabled persons and only secondarily is it a bill which imposes a limitation of local zoning power. This emphasis is important to remember when efforts are undertaken to achieve political support for the legislation.

[38] See *Berger* v. State *of New Jersey* 71 N.J. 206, 364 A.2d 993 (1976) and *Adams* v. *The Toledo City Plan Commission,* No. 77-1198 (Lucas Co., Ohio Ct. of Common Pleas Dec. 7, 1977) holding that use of residential dwellings as community homes for mentally disabled children was not in conflict with private covenants. See *also* J. Morales, Missoula, MT. letter to M. Kindred, Sept. 28, 1977.

For a case which held that a foster home for mentally re tarded children was in violation of a private restrictive coven ant, see *Bellarmine Hills Association* v. *The Residential Systems Co.,* No. 77-156161 C2 (Oakland Co., Mich. Aug. 25, 1977).

[39] Sections 5 and 6 of the Act are carefully and purposefully patterned after Sections 4 and 5 of the Mental Health Law Pro ject's zoning legislation draft for homes serving the mentally handicapped. The MHLP materials are thoughtfully designed and well-drafted. While the coverage and approach of the MHLP legislation is somewhat different, its general purposes are virtually identical to those of this Act. Thus, it is recom -

The text of the Act appears in **bold type.** Comments on statutory provisions appear in standard type. Alternatives to the text appear in *italics.* The comments explain the Act. They are intended to assist the user in interpreting the Act and in drafting an act for a particular state from this model act. The alternatives suggest other approaches which might be considered.

---

mended that persons interested in zoning law reform with regard to community homes review both sets of materials carefully.

The differences between this Act and the MHLP draft legislation are:

(1) This Act includes a title clause; the MHLP draft does not.

(2) This Act is designed to serve the "develop mentally dis abled person"; the MHLP draft serves the "mentally handi capped person."

(3) This Act defines "developmental disability"; the MHLP draft does not define either this term or "mental handicap."

(4) In order to assign appropriate responsibilities to state of ficers, this Act defines "director" [of developmental disabili ties]; the MHLP draft does not define any analogous term or official.

(5) This Act defines "permitted use" in order to make the zoning treatment for "family homes" as explicit and clear as possible.

(6) This Act defines "political subdivision" to provide a means of dealing with municipal home rule problems.

(7) This Act establishes a state licensing system for commu nity homes. As indicated above, licensing is of fundamental importance to the protection of community home residents, to the effectiveness of density control provisions, and to the avoidance of local political pressures.

(8) This Act establishes a procedure for notifying the govern ing body of the political subdivision in which a family home is to be located.

MODEL STATUTE*

AN ACT TO ESTABLISH THE RIGHT TO LOCATE COMMUNITY HOMES FOR DEVELOPMENTALLY DISABLED PERSONS IN THE RESIDENTIAL NEIGHBORHOODS OF THIS STATE-

Section 1. Title

This act shall be known as the "Location Act for Community Homes for Developmentally Disabled Persons."

COMMENT. None necessary.

Section 2. Statement of Purpose

The general assembly declares that it is the goal of this act to improve the quality of life of all develop mentally disabled persons and to integrate develop mentally disabled persons into the mainstream of society by ensuring them the availability of community residential opportunities in the residential areas of this state. In order to implement this goal, this act should be liberally construed toward that end.

COMMENT. The goal of this Act is to assist in improving the quality of life of develop mentally disabled persons within this state by fully integrating them into the community in which they live. The intent of the Act is to achieve this goal by removing local obstacles that prevent the establishment of community homes serving develop mentally disabled persons in residential neighborhoods.

Section 3. Definitions

As used in this act:

(1) "Developmental Disability" means a disability of a person which:

(a)(i) is attributable to mental retardation, cerebral palsy, epilepsy, or autism;

(ii) is attributable to any other condition found to be closely related to mental retardation because such condition results in similar impairment of general intellectual functioning or adaptive behavior to that of mentally retarded persons or requires treatment and services similar to those required for such persons; or

(iii) is attributable to dyslexia resulting from a disability described in clause (i) or (ii) of this paragraph; and

(b) has continued or can be expected to continue indefinitely.

COMMENT. This Act adopts the definition of "developmental disability" contained within the Developmental Disabilities Assistance and Bill of Rights Act, Pub. L. 94-103, 42 U.S.C. §§6001-6081 (Supp. V 1975), except that the requirements that the disability originate before the person reaches eighteen and that the disability constitute a substantial handicap have been deleted. The reason for the first of these two deletions is that the class of persons fitting within the category of develop mentally disabled has been expanded since adults who become disabled and otherwise fit the definition of develop mentally disabled may also need community-based residential services. Adults can develop epilepsy, mental retardation or cerebral palsy from a number of sources, including trauma and disease. The reason for the second deletion is that the purpose of the federal definition is to target certain populations for intensive federal support, whereas the purpose of this Act's definition is to enable all develop mentally disabled persons who need community-based residential services to be able to obtain them regardless of whether they have a substantial handicap.

The definition adopts a categorical approach rather than a functional one. Thus, the disability must be caused by one *or* more of the conditions described in paragraph (a). In addition, the condition contained in paragraph (b) must also be met for the disability to qualify as a developmental disability.

ALTERNATIVE. Some states may wish to expand the coverage of this Act to include homes which serve other disabled persons since exclusionary measures against any type of community home should not be sanctioned. On the contrary, expansion of this legislation to encompass the licensing and operation of community homes for all groups receiving some form of treatment, care, habilitation, or supervision is desirable. Yet, expansion of the statute may bring increased resistance to the Act's passage. Where this is the case, the passage of the Act as currently drafted is strongly recommended. The Act will significantly enhance exist-

---

* Robert J. Hopperton, Associate Professor of Law at the University of Toledo College of Law, had primary responsibility for drafting the model statute.

ing developmental disability programs and eliminate the serious and justifiably attacked problem of over-concentration of community homes in certain areas. Finally, it will provide valuable experience which will be beneficial to drafters and supporters of a broader statute.

(2) "Developmentally Disabled Person" means a person with a developmental disability.

COMMENT. None necessary.

(3) "Director" means the director of developmental disabilities (or appropriate state official).

COMMENT. As can be seen from the chart, various state departments and officials are given responsibility for licensing community homes in the states that have already passed legislation similar to this Act — in Colorado, the Department of Health; in Michigan, the Director of Social Services; in Minnesota, the Commissioner of Public Welfare; in Montana, the Department of Health and Environmental Science and the Department of Social and Rehabilitation Services; and in Ohio, the Chief of the Division of Mental Retardation and Developmental Disabilities. Because the most appropriate official to have licensing authority can vary from state to state, this determination is best made after a review of the administrative structure in each state.

(4) "Family Home" means a community-based residential home licensed by the director that provides room and board, personal care, habilitation services, and supervision in a family environment for not more than [six (6)] developmentally disabled persons.

COMMENT. The term "family home" is designed to include only smaller community-based residences as opposed to institutions such as hospitals and schools. By definition these homes are licensed by the state to ensure responsible supervision, density controls, and other requirements designed to protect both residents and neighbors. (See subsection 5(1) of the Act.) By including only smaller homes, the Act encourages community-based residences that are most nearly like normal family arrangements. Moreover, the limitation to six residents makes optimum living arrangements such as single bedrooms for some or all residents more possible. In addition, since the "family home" is treated as a "permitted use" in all residential zones, this limitation encourages maximum compatibility with residential densities.

ALTERNATIVE. Some states may wish to consider raising the maximum size of the family home, for example, to not more than eight residents. The decision as to the upper limit of residents for the smaller community homes is best left to a determination based on financial (e.g., appropriate size to ensure economic feasibility of the home) programmatic and political considerations in each state.

(5) "Permitted Use" means a use by right which is authorized in all residential zoning districts.

COMMENT. "Permitted use" is defined so as to make completely clear the intent of the Act, i.e., to eliminate the exclusion and restriction of family homes. Thus a political subdivision could no longer restrict a family home by treating it as a "conditionally permitted use." *(See supra* notes 15 and 26 and COMMENT to section 4 *infra.)*

(6) "Political Subdivision" means a municipal corporation, township, or county.

COMMENT. In order to implement the limitation on local zoning power that is the primary means of this Act, it is necessary to define the subordinate political units of a state. Since some variations in terminology occur from state to state, it is recommended that the official names of political subdivisions be identified, i.e., municipal corporations, townships, boroughs, villages, etc., and then used appropriately.

Section 4. Permitted Use for Family Homes

A family home is a residential use of property for the purposes of zoning and shall be treated as a permitted use in all residential zones or districts, including all single-family residential zones or districts, of all political subdivisions. No political subdivision may require that a family home, its owner, or operator obtain a conditional use permit, special use permit, special exception, or variance.[40]

COMMENT. Generally, under the zoning ordinances of political subdivisions, real estate development by private parties proceeds as a matter of right. There are exceptions, however, to this general framework; when a given use is treated as a conditional use, special use, or special exception, the owner is not entitled to proceed until permission is received from the local zoning authority. Frequently, it is difficult to determine what standards guide local discretion in such matters. For this reason, this Act establishes the family home as a "permitted use" in all residential districts of the state. (See note 15 *supra.)* This entitles an owner/operator to develop such a home as a matter of right, not subject to local discretion,[41] and thus this provision is the key section of the act.

Section 5. Licensing Regulations and Density Control for Family Homes

(1) For the purposes of safeguarding the health and safety of develop mentally disabled persons and avoiding over-concentration of fam-

---

[40] See *supra* note 15.

[41] N. Williams, *supra* note 3, at 330.

ily homes, either along or in conjunction with similar community-based residences, the director or the director's designee shall inspect and license the operation of family homes and may renew and revoke such licenses. A license is valid for one year from the date it is issued or renewed although the director may inspect such homes more frequently, if needed. The director shall not issue or renew and may revoke the license of a family home not operating in compliance with this section and regulations adopted hereunder. Within one hundred eighty (180) days of the enactment of this act, the director shall promulgate regulations which shall encompass the following matters:

COMMENT. This section establishes a state licensing system for family homes which will help assure that develop mentally disabled persons living in the community will have not only decent, safe, and adequate housing, but also sufficient care and habilitation. In addition, state licensing will help prevent existing neighborhoods from losing their essential residential characteristics because of over-concentration of family homes and similar facilities. The responsibility for promulgating regulations to ensure compliance with this section lies with the Director.

(a) Limits on the number of new family homes to be permitted on blocks, block faces, and other appropriate geographic areas taking into account the existing residential population density and the number, occupancy, and location of similar community residential facilities serving persons in drug, alcohol, juvenile, child, parole, and other programs of treatment, care, supervision, or rehabilitation in a community setting;

COMMENT. This paragraph requires that licensing and operation of family homes be conditioned on considerations of statistical and compositional factors in the existing community. Establishing guidelines for determining when the density of family homes in the community is reaching a critical or excessive level will be an essential, but difficult task. See D. Lauber and F. Bangs, *Zoning for Family and Group Care Facilities* (American Society of Planning Officials, Planning Advisory Service Report No. 300, March, 1974) which suggests reasonable limits on minimum floor area, minimum lot area, and number of facilities per block, block face, and neighborhood. See *also* R. Hopperton, *Zoning for Community Homes: a Handbook for Local Legislative Change* (Ohio State University Law Reform Project, 1975). These sources are recommended as a starting point for the Director.

(b) Assurance that adequate arrangements are made for the residents of family homes to receive such care and habilitation as is necessary and appropriate to their needs and to further their progress towards independent living;

COMMENT. A major criticism of many of the deinstitutionalization programs has been the lack of services for persons discharged from institutions. This provision, together with paragraph (c) below, will afford develop mentally disabled persons protection by requiring the Director to adopt regulations which will assure that develop mentally disabled residents receive services that they need in the family home and in their advancement towards independent living.

These subsections should be worded consistently with any existing legislation which places licensing authority in a state department.

(c) Protection of the health and safety of the residents of family homes, provided that compliance with these regulations shall not relieve the owner or operator of any family home of the obligation to comply with the requirements or standards of a political subdivision pertaining to building, housing, health, fire, safety, and motor vehicle parking space that generally apply to single family residences in the zoning district; and provided further that no requirements for business licenses, gross receipt taxes, environmental impact studies or clearances may be imposed on such homes if such fees, taxes, or clearances are not imposed on all structures in the zoning district housing a like number of persons;

COMMENT. Paragraph (c) permits political subdivisions to impose ordinary, general requirements regarding building, housing, health, fire, and safety code provisions and off-street parking requirements on family homes so long as they do not exceed standards applied to single family homes in the same area. Similarly, the second provision prohibits local fees, taxes, and environmental impact clearance procedures on family homes from exceeding those imposed on residential structures of similar capacity in the same area. Political subdivisions could not, for example, demand payment of business taxes. They could, however, where not otherwise forbidden, demand payment of local property taxes at the same rate applied to single-family dwellings in the neighborhood.[42]

Conceivably, some political subdivisions may attempt to subvert the intent of this paragraph through discriminatory local non-zoning regulations. If such attempts succeed, it may be necessary to propose statutory limitations on those regulations.

(d) Procedures by which any resident of a residential zoning district or the governing body of a political subdivision in which a family home is, or is to be, located may petition the director to deny an application for a license to operate a

[42] See MHLP, *supra* note 39.

family home on the grounds that the operation of such a home would be in violation of the limits established under paragraph (1)(a) of this section;

COMMENT. The paragraph, together with subsection 2 below, assures that political subdivisions and local residents have the means to inform the Director of violations of the density controls in the state licensing regulations that might occur if an additional family home were to be established in a particular neighborhood. Local involvement will facilitate the identification and avoidance of potential problems. The only objections, however, which can be raised are those which would violate the Director's regulations regarding the number of other, similar facilities, their occupancy and the population of the area. To further ensure the quality of family homes and adherence to regulatory standards, subsection (1) mandates annual inspections and permits the Director to make additional ones.

(2) All applicants for a license to operate a family home shall apply to the director for the license and shall file a copy of the application with the governing body of the political subdivision having jurisdiction over the zoning of the land on which the family home is to be located. All applications must include population and occupancy statistics reflecting compliance with the limits established pursuant to paragraph (1)(a) of this section.

COMMENT. This section establishes a step-by-step application procedure and provides for notification to the political subdivision that a family home may be located within its jurisdiction. Notification allows the political subdivision to make comment under the procedures adopted by the Director under paragraph (1)(a).

(3) The Director may not issue a license for a family home until the applicant has submitted proof of filing with the governing body of the political subdivision having jurisdiction over the zoning of the land on which such a home is to be located, a copy of the application at least thirty (30) days prior to the granting of such a license, and any amendment of the application increasing the number of residents to be served at least fifteen (15) days prior to the granting of a license.

COMMENT. This section prevents licensure of a family home until timely and sufficient notice has been provided to the political subdivision.

(4) In order to facilitate the implementation of paragraph (1)(a), the director shall maintain a list of the location, capacity, and current occupancy of all family homes. The director shall ensure that this list shall not contain the names or other identifiable information about any residents of such home and that copies of this list shall be available to any resident of this state and any state agency or political subdivision upon request.

COMMENT. This section also facilitates the implementation of the provisions that prevent overconcentration of family homes within the neighborhoods of a state. The required list is limited to the population and other statistical information required in paragraph (1)(a), information relevant to the concerns of governmental entities and private citizens in preventing over concentration of homes.

Section 6. Exclusion by Private Agreement Void

Any restriction, reservation, condition, exception, or covenant in any subdivision plan, deed, or other instrument of or pertaining to the transfer, sale, lease, or use of property which would permit residential use of property but prohibit the use of such property as a family home for developmentally disabled persons shall, to the extent of such prohibition, be void as against the public policy of this state and shall be given no legal or equitable force or effect.[43]

COMMENT. This section is designed to void private agreements whenever they are used to deny develop mentally disabled persons the benefits of living in normal residential units.[44] Because this section is designed to void already existing, as well as future, private agreements that exclude family homes, some opponents may raise questions of due process, retroactivity, or impairment of obligation of contract. Such objections are not well-founded. One state, Wisconsin, has already passed legislation similar to section 6 dealing with community homes.[45] Other states, e.g., New York and Texas, have enacted statutory provisions similar to section 6 voiding private agreements that prohibit the sale, lease, or use of real property on the basis of race, religion, or national origin.[46] While there is no case law as yet interpreting the Wisconsin, New York, or Texas statutes, case law in other states indicates that provisions voiding already existing contracts for the sale of stock[47] and for the rental of property[48] have been found valid.[49]

---

[43] *Id.* at §5 and Comment to §5.

[44] See *supra* note 38.

[45] 1977 Wis. Laws, Ch. 205, §2 [to be codified in WIS. STAT. §46.03 (22)(d)l.

[46] See N.Y. General Obligations Law §5-331 (McKinney 1978) and TEX. REV. CIV. STAT. ANN. art. 1293a (Vernon Supp. 1978).

[47] *Massillon Savings and Loan Co.* v. *Imperial Finance Co.,* 114 Ohio St. 523, 151 N.E. 645 (1926).

[48] *Industrial Development & Land Co.* v. *Goldschmidt,* 56 Cal. App. 507, 206 P.134 (1922).

[49] See *also Home Building & Loan Ass'n.* v. *Blaisdell* 290 U.S. 398(1934).

Care should be taken to conform the language of this section to existing subdivision control statutes.

Section 7. Severability of Sections

If any section, subsection, paragraph, sentence, or any other part of this act is adjudged unconstitutional or invalid, such judgment shall not affect, impair or invalidate the remainder of this act, but shall be confined to the section, subsection, paragraph, sentence, or any other part of this act directly involved in the controversy in which said judgment has been rendered. COMMENT. None necessary.

THE ABA COMMISSION ON THE MENTALLY DISABLED

The ABA Commission on the Mentally Disabled is a 17 member interdisciplinary body established in 1973 to initiate, on behalf of the Association, a public service program to foster improvements in the nation's mental disability system. The Commission operates five action projects, all supported by private foundation or government funds: the **Mental Disability Legal Resource Center** (publishes the *Mental Disability Law Reporter* and provides technical support to those involved in mental disability law change), the **Developmental Disabilities State Legislative Project** (produces model laws, including this document), the **Bar Activation/Bar Funding Program** (encourages state and local bar associations to work for mental disability system reform and awards modest project grants for legal services projects in the field), and the **Pennsylvania Mental Health Advocacy Project** (provides institutional legal services in three Pennsylvania state hospitals and is planning for a statewide system of such services).

Commission activities have also included submission of *amicus* briefs in leading Supreme Court cases on mental disability commitments, drafting of ABA policy positions on restrictive zoning laws regarding community group homes and on implementation of nondiscrimination rights of the mentally disabled, submission of testimony at congressional hearings on rights of the mentally disabled, and generally attempting to involve the nation's lawyers in this critical field.

The Commission's current members are:

John H. Lashly (Chairman)
Attorney
St. Louis, Missouri

Joseph Schneider (Vice Chairman)
Judge, Circuit Court of Cook County
Chicago, Illinois

Mildred Mitchell-Bateman
Chairman, Department of Psychiatry
Marshall University Huntington,
West Virginia

Bertram S. Brown, M.D.
Assistant Surgeon General
U.S. Public Health Service
Rockville, Maryland

Thomas Bryant, M.D.
Drug Abuse Council
Washington, D.C.

James D. Clements
Director
Georgia Retardation Center
Atlanta, Georgia

Gregory Ft. Dallaire
Director, Evergreen Legal Services
Seattle, Washington

Hayden H. Donahue
Director of Mental Health
State of Oklahoma
Norman, Oklahoma

Gunnar Dybwad
Gingold Professor of Human
Development Brandeis
University Waltham,
Massachusetts

Charles R. Halpern
Visiting Professor of Law Stanford
University Law School Palo Alto,
California

Jonas Robitscher
Henry R. Luce Professor of Law and the
Behavioral Sciences Emory
University Law School Atlanta,
Georgia

Bruce D. Sales
Director, Law-Psychology Program
University of Nebraska Lincoln,
Nebraska

Saleem A. **Shah**
Chief, Center for Studies of Crime and
Delinquency
National Institute of Mental Health
Rockville, Maryland

McNeill Smith
Attorney and State Senator
Greensboro, North Carolina

Harold Visotsky
Chairman, Department of Psychiatry
Northwestern University Medical School
Chicago, Illinois

William L. Webb, M.D.
Memphis Mental Health Institute
Memphis, Tennessee

Helen Wright
Past President
National Association for Mental Health
Washington, D.C.

Adrian M. Foley, Jr.
(Board of Governors Liaison)
Attorney
Newark, New Jersey

Additional information on the Commission and its projects may be obtained by inquiry sent to:

ABA Commission on the Mentally Disabled
1800 M Street, N.W.
Washington, D.C. 20036

To Readers Wishing to Submit Comments:

This publication is one of a series of legislative reviews and model statutes in the field of developmental disabilities. The reviews and statutes for each subject area will be released serially as they are produced. It is hoped that they will be a valuable research and drafting tool and will initiate thoughtful consideration of the issues in each subject area.

We welcome you to respond to these work projects with your comments and suggestions. Please identify as specifically as you can the section(s) and subsection(s) of the review or statute upon which you are commenting. Submitted comments will appear in supplements which will be published for each topic. Because of limited space, the project reserves the right to edit the comments. Full consideration will be given to the need for an equitable and representative presentation of comments. Prompt submission is requested. It is suggested that submissions not exceed 1,000 words per subject area.

The reviews and statutes in the series will be combined and updated in a final supplement which will include comments. They will then be released as a compendium at the end of the project.

Submit your comments, questions or suggestions to the Development Disabilities State Legislative Project, American Bar Association, 1800 M Street, N.W., Washington, D.C. 20036.

Subjects In This Model Statute Series:

Advocacy
Zoning for Community Residences
Anti-discrimination
Education
Environmental Barriers
Guardianship
Criminal Justice Issues
Right to Services/Rights in Residential Facilities
Personal and Civil Rights in the Community
Admission to Services

ABA Commission on the Mentally Disabled
1800 M Street, N.W.
Washington, D.C. 20036
(202)331-2246