

# Exclusion of the Mentally Handicapped: Housing the Non-Traditional Family

## I. INTRODUCTION

For many years California has accepted responsibility for the care of its mentally handicapped citizens. The primary method of discharging this responsibility has been to place mentally handicapped persons in large state-run institutions. More recently, however, there has been an increased emphasis upon placing mentally handicapped persons in small community located living groups, commonly called family care homes. The purpose of this local community care is to facilitate "normalization." "Normalization" means "making available to the mentally retarded patterns and conditions of everyday life which are as close as possible to the norms and patterns of the mainstream of society."<sup>1</sup> The process of normalization can best be achieved by allowing mentally handicapped persons to live in residential areas, particularly single-family dwelling zones.

One of the major obstacles to the development of facilities for local care of the mentally handicapped is restrictive zoning ordinances. Restrictive ordinances often inhibit the establishment of family care homes in more affluent communities.<sup>2</sup>

The Lanterman-Petris-Short Act (LPS Act)<sup>3</sup> is California's major legislation in the area of mental health. Sections 5115 and 5116 of the LPS Act deal with the zoning barriers to community care of the mentally handicapped. These sections mandate that mentally handicapped persons be allowed to live in "family care homes" in *all* residential zones in the state, including areas zoned exclusively for single-family dwellings.

This article will examine the mandate of sections 5115 and 5116 in light of developing judicial interpretations of the phrase "single-

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<sup>1</sup>Bengt Nirje, *The Normalization Principle and Its Human Management Implications* at 181, in *CHANGING PATTERNS IN RESIDENTIAL SERVICES FOR THE MENTALLY RETARDED* (Kugel ed., pub. by President's Committee on Mental Retardation, 1969).

<sup>2</sup>Ross and Chandler (California Association for the Retarded), *Zoning Barriers to Normalization* at 29, (soon to be published by the President's Committee on Mental Retardation) [hereinafter cited as Ross].

<sup>3</sup>Lanterman-Petris-Short Act, CAL. WELF. & INST. CODE § 5000 *et seq.* (West 1972) [hereinafter cited as LPS Act].

family dwelling." The resistance of chartered cities to the application of these sections will also be explored. There are several possible exclusionary techniques which may be used to circumvent the mandate of the LPS Act and similar legislation in other states. This article will cover two of these techniques: the claiming of superiority of chartered cities' municipal powers over state legislation and strictly phrasing zoning ordinances.

## II. LEGISLATIVE HISTORY OF THE LPS ACT: SECTIONS 5115 AND 5116

Traditionally, mental health legislation has been of the *parens patriae* type. *Parens patriae* legislation has a two-fold concern: (1) the exercise of a state's police power to protect society and (2) the exertion of state authority to protect individuals who are unable to protect themselves.<sup>4</sup> In trying to perform this two-fold role in the mental health area, government entities have generally been more diligent in protecting society. Consequently the goal of protecting helpless individuals has been subjugated to the point that normalization is often impeded.

The Lanterman-Petris-Short Act, passed in 1969, is California's major mental health legislation. Implementing legislation passed at about the same time includes the Short-Doyle Act<sup>5</sup> which funds the LPS Act and the Lanterman Mental Retardation Services Act<sup>6</sup> which provides state services to the mentally retarded through a system of regional centers.

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<sup>4</sup>Green, *California's New Mental Commitment Legislation: Is it Legally Sufficient?* 6 CAL. WEST. L. REV. 146, 148 (1969-1970).

<sup>5</sup>Short-Doyle Act, CAL. WELF. & INST. CODE § 5600 *et seq.* (West 1972). Section 5600 on title and purpose reads as follows:

This part shall be known and may be cited as the Short-Doyle Act. This part is intended to organize and finance community health services for the mentally disordered in every county through locally administered and locally controlled community mental health programs. It is furthermore intended to better utilize existing resources at both the state and local levels in order to improve the effectiveness of necessary mental health services; to integrate state-operated and community mental health programs into a unified mental system; to ensure that all mental health professions be appropriately represented and utilized in such mental health programs; to provide a means for participation by local governments in the determination of the need for and the allocation of mental health resources; to establish a uniform ratio of local and state government responsibility for financing mental health services and to provide a means of allocating state mental funds according to community needs. It is furthermore intended to provide a means of reimbursing local governments for certain services to the mentally retarded and persons afflicted with alcoholism which counties may elect to provide.

<sup>6</sup>Lanterman Mental Retardation Services Act, CAL. HEALTH & SAFETY CODE § 38100 *et seq.* (West 1973).

Sections 5115 and 5116 were added to the LPS Act in 1970.<sup>7</sup> They were introduced as A.B. 2406 by Assemblyman Frank Lanterman in response to a March 1970 report of the Assembly Select Committee on Mentally Ill and Handicapped Children. The report stated:

One of the major obstacles to the development of local facilities for mentally disordered children — as well as other handicapped groups — is restrictive zoning ordinances which prohibit the establishment of residential treatment programs in many communities throughout the state.

Because local treatment for children is preferable to care in remote facilities and because many local jurisdictions have chosen to ignore their responsibilities to foster the growth of such resources, it is proposed that the State Legislature declare its intent in this area by passing legislation to prevent local communities from discriminating against handicapped persons through restrictive zoning practices.<sup>8</sup>

In its introductory form on April 3, 1970, A.B. 2406 did not restrict local controls of zoning. It provided that:

Notwithstanding any other provision of law, a city or county zoning ordinance shall be applicable to a proposed use of property for facilities for the mentally or physically handicapped.<sup>9</sup>

After being referred to the Committee on Health and Welfare the bill was returned and amended to read as follows:

A state-authorized, certified, or licensed family care, foster home, or group home serving six or fewer mentally disordered or otherwise

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<sup>7</sup>The sections presently read in part as follows:

Section 5115: . . . mentally and physically handicapped persons are entitled to live in normal residential surroundings and should not be excluded therefrom because of their disability.

. . . the use of property for the care of six or fewer mentally disordered or otherwise handicapped persons is a residential use of such property for the purposes of zoning.

Section 5116: Pursuant to the policy stated in section 5115, a state-authorized, certified, or licensed family care home, foster home, or group home serving six or fewer mentally disordered or otherwise handicapped persons or dependent and neglected children, shall be considered a residential use of property for the purposes of zoning if such homes provide care on a 24-hour-a-day basis. Such home shall be permitted use in all residential zones, including, but not limited to, residential zones for single-family dwellings. Nothing in this paragraph shall be construed to prohibit any city or county from requiring a conditional use permit in order to maintain any home pursuant to the provisions of this paragraph; provided no conditions shall be imposed on other similar dwellings in the same zones unless such additional conditions are necessary to protect the health and safety of the residents.

<sup>8</sup>Ross, *supra* note 2, at 29.

<sup>9</sup>A.B. 2406, Cal. Legislature (April 3, 1970).

handicapped persons, shall be considered a *family* for the purposes of zoning.<sup>10</sup> (emphasis added)

On June 29, 1970 it was again amended:

A state-authorized, certified, or licensed family care, foster home, or group home serving six or fewer mentally disordered or otherwise handicapped persons, shall be considered a *residential use of property* for the purposes of zoning.<sup>11</sup> (emphasis added)

One may question why the word "family" was replaced by the phrase "residential use of property." A possible explanation is that the word "family" is ambiguous. As will be shown *infra*, it is susceptible to undesirable interpretations. The word "family" may have been used originally as a contradistinction to business or commercial use of land. With the substituted phrase "residential use of property" this contradistinction becomes clearer. Furthermore, when one thinks of residential areas, one thinks of an area populated by families.

Through July 1970, A.B. 2406 made no mention of an intent to supersede local zoning laws. As will be demonstrated *infra*, the existence of such an intent is crucial to the bill's applicability to chartered cities.

In the August 13, 1970 version, section 5115 took a new form, and the skeleton of section 5116 was introduced. In relevant parts they read as follows:

Section 5115(a): It is the policy of this state . . . that mentally and physically handicapped persons are entitled to live in normal residential surroundings and should not be excluded therefrom because of their disability.

(b): . . . it is necessary to establish the statewide policy that the use of property for the care of six or fewer mentally disordered or otherwise handicapped persons is a residential use of such property for the purposes of zoning.

Section 5116: Pursuant to the policy stated in section 5115, a state-authorized, certified, or licensed family care, foster home or group home serving six or fewer mentally disordered or otherwise handicapped persons, shall be considered a residential use of property for the purposes of zoning *and the provisions of this section shall be applicable to chartered cities as well as general law cities.*<sup>12</sup>

Slightly revised, A.B. 2406, including the emphasized language was adopted by the Assembly. However, the Senate amended A.B. 2406 by deleting the emphasized language, though it left in a statement that the policies expressed therein should apply statewide.

Unfortunately, as passed in 1970, section 5116 had its escape

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<sup>10</sup> A.B. 2406, Cal. Legislature (June 5, 1970).

<sup>11</sup> A.B. 2406, Cal. Legislature (June 29, 1970).

<sup>12</sup> A.B. 2406, Cal. Legislature (August 13, 1970).

valves. As the number of family care home operator applicants increased, cities and counties became more active in obstructing the LPS Act. Still playing their *parens patriae* role, cities and counties continued the practice of utilizing their police power to protect society in contrast to protecting handicapped individuals. As a result, family care homes were often limited to multiple-dwelling zones. It was argued that the requirements of sections 5115 and 5116 were met as long as family care homes were permitted in some residential zone.<sup>13</sup>

Assemblyman Lanterman was quick to respond to such arguments. In a letter dated November 6, 1972, Mr. Lanterman wrote:

Unfortunately, several instances were brought to my attention where the intent of that law [sections 5115 and 5116] was being circumvented. In a few communities, family care and foster homes were excluded from single-family zones (R-1) on the basis that my law only required that such homes be allowed in *some* residential neighborhoods, not necessarily R-1.

I view this practice as a deplorable and calculated effort to defeat the very clear intent of A.B. 2406. In order to insure that no potential legal loopholes can be used in the future to discriminate against the handicapped living in normal residential surroundings, I introduced and attained passage of A.B. 1856 . . . .<sup>14</sup>

A.B. 1856, effective in March 1973, expanded section 5116. It added the following paragraph:

Such homes *shall be permitted use in all residential zones, including, but not limited to residential zones for single-family dwellings.* Nothing in this paragraph shall be construed to prohibit any city or county from requiring a conditional use permit in order to maintain any home pursuant to the provisions of this paragraph provided no conditions shall be imposed on such homes which are more restrictive than those imposed on other similar dwellings in the same zones unless such additional conditions are necessary to protect the health and safety of the residents.<sup>15</sup> (emphasis added)

It is interesting to note that in an earlier form, A.B. 1856 had said that “[s]uch [family care] homes shall be a permitted use in at least one residential zone for single-family dwellings.”<sup>16</sup> Perhaps the reason for the change in wording was the fear that local governments would feel they had complied with section 5116 if they allowed family care homes in only *one* single-family residential zone and in no other zones.

Sections 5115 and 5116 now provide a legal tool to combat exclusionary zoning. However, the flexibility and applicability of zoning

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<sup>13</sup>Ross, *supra* note 2, at 31.

<sup>14</sup>*Id.* at 31-32.

<sup>15</sup>CAL. WELF. & INST. CODE § 5116 (West Supp. 1974).

<sup>16</sup>A.B. 1856, Cal. Legislature (March 15, 1972).

laws — including the LPS Act provisions — often turn upon the local government involved. This problem, as will be discussed *infra*, is particularly apparent in the case of chartered cities.

### III. OVERVIEW OF EXISTING ZONING LEGISLATION AND LICENSING PROCEDURE

An overview of the existing zoning legislation and licensing procedure is helpful in understanding the problems encountered in effectuating sections 5115 and 5116 of the LPS Act.

In addition to a foundation for zoning in the police power of the United States Constitution,<sup>17</sup> most states have either enabling legislation or direct constitutional provisions which grant local government the power to zone for the general welfare. In order to achieve statewide uniformity, enabling statutes usually establish minimum procedural zoning requirements. Within these limits, local units are generally given wide discretion.

California's Enabling Act can be found in sections 65800-65907 of the Government Code.<sup>18</sup> The intention of the Enabling Act is "to provide only a minimum of limitation in order that counties and cities may exercise the maximum degree of control over local zoning matters."<sup>19</sup> A California case, *Scrutton v. Sacramento County*,<sup>20</sup> has found the Enabling Act to be a standardizing limitation over local zoning practices rather than a specific grant of legislative authority.<sup>21</sup> An important provision of the Enabling Act is Government Code section 65803 which precludes the application of certain state zoning provisions to chartered cities.

California's constitutional home rule provisions join the Enabling Act and the state's police power as legal bases for zoning. While the Enabling Act and police power bases are addressed to all cities, the California Constitution is of particular concern to chartered cities. The home rule provisions allow chartered cities (and chartered counties to a lesser degree) to "make and enforce all ordinances and regulations in respect to municipal affairs, subject only to restrictions and limitations provided in their several charters and in respect to other matters they shall be subject to general laws."<sup>22</sup> City charters . . . with respect to municipal affairs shall supersede all laws inconsistent therewith."<sup>23</sup>

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<sup>17</sup> *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

<sup>18</sup> CAL. GOV'T. CODE § 65800 *et seq.* (West Supp. 1974).

<sup>19</sup> CAL. GOV'T. CODE § 65800 (West Supp. 1974).

<sup>20</sup> 275 Cal. App. 2d 412, 79 Cal. Rptr. 872 (1969).

<sup>21</sup> 275 Cal. App. 2d at 417, 79 Cal. Rptr. at 876 (1969).

<sup>22</sup> "General Law" may be defined as follows: "A general law is a law which affects all of the people of the state or all persons or things of a particular class." 82 C.J.S. *General Law* § 162. This definition is not a talisman but one to keep in mind while reading this section.

<sup>23</sup> CAL. CONST. art. XI, § 5(a).

The combined effect on chartered cities of Government Code section 65803 and constitutional home rule provisions upon the process of normalization is discussed *infra*.

Licensing regulations<sup>24</sup> are another set of laws which are relevant in examining obstacles to normalization. Health and Safety Code section 1320<sup>25</sup> states that a state-issued license is required for the operation of a family care home. Sections 1330-1335 enumerate the basic declarations which a family care home operator applicant must make: *e.g.*, type of facility, capacity, and location.

Health and Safety Code section 1314 covers the relationship of local regulations to licensing. It states:

The provisions of this chapter shall not prevent local authorities of any county, city or city and county, within the reasonable exercise of the police power, from adopting rules and regulations, by ordinance or resolution, prescribing standards of sanitation, health and hygiene for institutions, boarding homes, and other places for the reception or care of persons or for facilities for the reception and care of mentally disordered or incompetent persons, not in conflict with the provisions of this chapter or the rules and regulations of minimum standards adopted by the department hereunder, and requiring a local health permit to maintain or conduct any such boarding home or institution within such county, city or city and county.<sup>26</sup>

This section presents opportunities for cities and counties to frustrate the purpose of sections 5115 and 5116 of the LPS Act by

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<sup>24</sup>There are both advantages and disadvantages to having a licensing statute. The basic advantage is uniformity in physical structure. Though uniformity may be desirable, the licensing right which accompanies such uniformity may not be in the best interest of the mentally handicapped. When licensing is a right rather than a privilege administrative discretion becomes less. Though discretion is subject to abuse, many of those who have worked with community services have an instinctual feeling for the type of family home operator that would be most beneficial for the mentally handicapped. With less discretionary power it is feared that the quality of family home operators will decrease. Once an applicant has met the enumerated requirements a license is granted.

Several years ago, before the decentralization of administrative control, family care home applicants were approved by the Department of Health, Community Services Division. There was a pervasive atmosphere of trust and coordination between the operators and the Department. With such a relationship satisfactory placements and continued benefits for the mentally handicapped were almost always assured. This is not to say that licensing will impede such accomplishments. But something is usually sacrificed in the process of bureaucratization and standardization. Interview with Marcell Axton and Jane Johnson, Department of Health, Community Services, Sacramento, California, February 14, 1974 [hereinafter cited as Interview with Axton and Johnson].

<sup>25</sup>Section 1310 provides that:

No person shall establish, conduct or maintain in this state any facility without first obtaining a license therefor as provided in this chapter and no political subdivision of the state, or other governmental agency within the state shall establish, conduct or maintain in this state any hospital without first obtaining a license therefor as provided in this chapter.

<sup>26</sup>CAL. HEALTH & SAFETY CODE § 1314 (West Supp. 1973).

authorizing local standards of sanitation, health and hygiene as prerequisites to obtaining a family care home license. It is possible that the local requirements could be made so strict that most family care home operator applicants would be unable to meet them. For example, the cost of renovating a home to meet local fire safety regulations may be prohibitive. Moreover, the resale value of the house after it ceases to be a family care home may have decreased because of these renovations.<sup>27</sup>

An in-depth discussion of solutions to the problems raised by Health and Safety Code section 1314 is beyond the scope of this article. However, possible solutions include state subsidization of the cost of complying with local health and safety regulations and the amendment of section 1314 to require compliance with state rather than local regulations.

#### IV. CIRCUMVENTION OF THE LPS ACT BY CHARTERED CITIES

Although the LPS Act can be hailed as an indication of the state's increased *parens patriae* role on behalf of the mentally handicapped, it would be myopic to think that an invulnerable act was passed. Zoning problems continue to plague those trying to implement the LPS Act. Local zoning is often ineffective or obstructive. Furthermore, chartered cities have questioned whether the zoning sections of the LPS Act apply to them.

The previous section of this article referred to the constitutional home rule provisions and Government Code section 65803 which preclude application of certain state zoning statutes to chartered cities. These provisions, plus several court decisions supporting chartered cities' powers in different contexts,<sup>28</sup> have enabled chartered cities to proffer cogent yet vulnerable arguments against the application of the LPS Act to them.

Chartered cities may argue that zoning is a municipal affair and as such is governed by the city charter. In municipal affairs, the city charter supersedes all inconsistent state laws.<sup>29</sup> Under this argument, if sections 5115 and 5116 of the LPS Act are inconsistent with local zoning ordinances, the local ordinances prevail. "Municipal affairs" has been defined as the "internal business affairs of the municipality."<sup>30</sup> A matter of statewide concern cannot be a municipal affair.<sup>31</sup>

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<sup>27</sup>Interview with Axton and Johnson, *supra* note 24.

<sup>28</sup>*Bishop v. City of San Jose*, 1 Cal. 3d 56, 81 Cal. Rptr. 465, 460 P.2d 137 (1969) [labor problem case].

<sup>29</sup>CAL. CONST. art. XI, § 5(a).

<sup>30</sup>*City of Walnut Creek v. Silveira*, 47 Cal. 2d 804, 811, 306 P.2d 453, 456 (1957).

<sup>31</sup>*City of Pasadena v. Charleville*, 215 Cal. 384, 10 P.2d 745 (1932).

There are two overlapping doctrines to consider in examining the chartered cities' argument: the "general law" doctrine and the preemption doctrine. If either is found applicable, the chartered cities' powers are either precluded or limited in a given area.

According to the "general law" doctrine, a general law whose subject matter is of statewide concern will prevail over local ordinances which would otherwise be deemed appropriate municipal action.<sup>32</sup> Even though the general law may prevail, there is an allowance for municipal action which is supplementary in nature and not in conflict with provisions of the general law.<sup>33</sup>

In classifying a state enactment as general law,<sup>34</sup> legislative intent is very important. The legislative history of sections 5115 and 5116 of the LPS Act can be used as an indication of the legislative intent. The August 13, 1970 version of A.B. 2406<sup>35</sup> is indicative of an intent to supersede local zoning laws. Although the bill did go through one more amendment and specific language as to its applicability to chartered cities was dropped, the policy statement did remain. Furthermore, the continued post-1970 attempts to clarify sections 5115 and 5116 seem to show dissatisfaction with the continued attempts by any city to circumvent the mandate of the LPS Act. Thus, the legislative history of sections 5115 and 5116 and the wording of the Act make it clear that protective zoning for the mentally handicapped is a matter of state concern. Chartered cities should not be allowed to use their charters as a barrier to the operation of the LPS Act and normalization.

The preemption doctrine applies when a state occupies an entire field of public concern. When a field is preempted by state law, the local laws are superseded. In addition to the basic test of intent, a field is deemed preempted when:

- (1) the subject matter has been so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern; (2) the subject matter has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local actions; . . .<sup>36</sup>

Applying this test to the LPS Act reveals its preemptive nature.

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<sup>32</sup>Professional Fire Fighters, Inc. v. City of Los Angeles, 60 Cal. 2d 276, 292, 32 Cal. Rptr. 830, 840, 384 P.2d 158, 168 (1963).

<sup>33</sup>Pipoly v. Benson, 20 Cal. 2d 366, 370, 125 P.2d 482, 485 (1942).

<sup>34</sup>See *supra* note 22.

<sup>35</sup> . . . a state authorized, certified, or licensed family care, foster home or group home serving disordered or otherwise handicapped persons, shall be considered a residential use of property for the purposes of zoning and the provisions of this section shall be applicable to chartered cities as well as general law cities. A.B. 2406, Cal. Legislature (August 13, 1970).

<sup>36</sup>*In re Hubbard*, 62 Cal. 2d 119, 128, 41 Cal. Rptr. 393, 399, 396 P.2d 809, 815 (1964).

Examination of the LPS Act and related legislation, *e.g.*, Short-Doyle Act,<sup>37</sup> shows a detailed scheme covering the care of the mentally handicapped. The legislative history indicates the high degree of state concern for the needs of such persons. The Legislature's constant revisions to achieve a specificity which cannot be circumvented lend support to the argument that such legislation has high priority in California. Thus it can be said that the field has been preempted because of full coverage of the mental health area by state law and the paramount state concern shown by the state legislation.

In *DeFoe v. San Francisco City Planning Commission*,<sup>38</sup> the one case brought under the LPS Act which reached an appellate court, arguments of preemption and the applicability of sections 5115 and 5116 were proffered against a chartered city. Plaintiffs in *DeFoe* are mentally retarded children and licensed family care home operators. San Francisco's planning code allows the housing of up to six mentally retarded children in certain residential areas, excluding R-1 and R-1-D, which are the most restrictive residential zones. The family care home operator plaintiffs had received permission from the City Zoning Administrator to care for only two children in these zones. Due to an Administrative Code change<sup>39</sup> in the time between the filing of the case and the court of appeals hearing, the chartered city argument was not decided and the case was remanded to the trial court.

"Municipal affairs" can mark either a distinct sphere within which independent home rule is exercised or it can be a sphere of power shared concurrently with other government levels in which the municipal legislation is superior to conflicting state or federal legislation.<sup>40</sup> When "municipal affairs" is understood as being part of a shared sphere of power, many subjects of government concern become mixed in nature, *i.e.*, they are both of municipal and general interest. In such a situation, if there is doubt as to whether the local legislation or the state legislation is superior, the decision should be resolved in favor of state authority.<sup>41</sup> As such, the effect would be preemption based upon necessity to avoid uncertainty and confusion which might arise with continued dual regulation.<sup>42</sup>

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<sup>37</sup>See *supra* note 5.

<sup>38</sup>1 Civil No. 30789, Cal. Ct. of Appeal, 1st App. Dist., Div. Two (May 30, 1973).

<sup>39</sup>The change involved the elimination of section 40, paragraph (k) of Title 9 of the ADMINISTRATIVE CODE. That section had required that a family care home operator applicant must obtain written zoning clearance or other satisfactory evidence of proper zoning before a license would be issued.

<sup>40</sup>Sandalow, *The Limits of Municipal Power Under Home Rule: A Role for the Courts*, 48 MINN. L. REV. 643, 665-66 (1963-64).

<sup>41</sup>*Abbott v. City of Los Angeles*, 53 Cal. 2d 674, 681, 3 Cal. Rptr. 158, 163, 349 P.2d 974, 979 (1960).

<sup>42</sup>53 Cal. at 682, 3 Cal. Rptr. at 163, 349 P.2d at 979 (1960).

## V. SINGLE-FAMILY DWELLINGS

Uniformity of building structure characterizes each of the several types of residential zones commonly found in a community. The strictest zone is usually labelled "R-1" and reserved for single-family dwellings. "R-2" through "R-5" generally denote in ascending order two-family dwellings to apartment house zones.

Section 5116 of the LPS Act specifically provides protection for family care home operators seeking to establish care groups in single-family dwelling zones. It states that a family care home "shall be a permitted use in all residential zones, including, but not limited to residential zones for single-family dwellings."<sup>43</sup> Because of the specificity of section 5116 it is improbable that any California court would construe the term "single-family dwelling" as used in local zoning ordinances to exclude family care homes. However, the issuance of special exceptions, variances and conditional use permits are other possible means of circumventing the mandate of the LPS Act. A family care home may also be subject to a business classification and excluded from residential areas for that reason. The use of private covenants has been the most surprising method of circumvention.<sup>44</sup> In-depth discussions of these problems, however, is beyond the scope of this article.<sup>45</sup>

Although in California the possibility of excluding a family care home from residential zones on the basis that it is not technically a "family" residence is remote, a discussion of the judicial interpretation of the phrase "single-family dwelling" is included because of its potential use in other states as an exclusionary device. No other state has yet adopted a mental health program as extensive as California's LPS Act. The potential use of the phrase "single-family dwelling" to obstruct the implementation of other states' normalization legislation will become real should these states fail to adopt an ordinance which specifically defines the phrase "single-family dwelling."<sup>46</sup> It is not premature to state that legislation like the LPS Act is likely to be passed in other states, in light of an endorsement of the policy of integrating the mentally handicapped into the community by the President's Committee on Mental Retardation.<sup>47</sup>

In utilizing several residential zoning classifications, cities have been successful in manipulating the interpretation of the word

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<sup>43</sup> See *supra* note 7.

<sup>44</sup> *Seaton v. Clifford*, 24 Cal. App. 3d 46, 100 Cal. Rptr. 779 (1972).

<sup>45</sup> See Ross, *supra* note 2, for a discussion. There are not detailed law review articles on the various techniques. However, during the 1973 Regular Session, the California Legislature, in A.B. 2262 authorized a study which is to be completed by the end of March 1974.

<sup>46</sup> Interview with Roger King and Gerald Ross Adams, Cal. Legislative Counsel, Sacramento, Cal., October 1973.

<sup>47</sup> See *supra* note 1.

“family” when applied to various associational groups. When an ordinance is very specific like the one involved in the Illinois communal-living group case of *City of Des Plaines v. Trottnner*<sup>48</sup> there is little room for interpretation. There the ordinance provided that “a ‘family’ consists of one or more persons each related to the other by blood (or adoption or marriage), together with such relatives’ respective spouses, who are living together in a single dwelling and maintaining a common household. A ‘family’ includes any domestic servants and not more than one gratuitous guest residing with said ‘family’.”<sup>49</sup> In *Trottnner* the complaint alleged that four unrelated men were sharing a house in a single-family resident district in violation of the zoning ordinance. Because of the explicitness of the ordinance it either had to be applied literally or held invalid. The court found the ordinance invalid. In support of its decision, the court said:

The General Assembly has not specifically authorized the adoption of zoning ordinances that penetrate so deeply as this one does into the internal composition of a single housekeeping unit. Until it has done so, we are of the opinion that we should not read the general authority that it has delegated to extend so far.<sup>50</sup>

A more encompassing definition of “family” is found in the Palo Alto ordinance in the communal-living case of *Palo Alto Tenants Union v. Morgan*.<sup>51</sup> The ordinance<sup>52</sup> provides that a “family” is “one person living alone, or two or more persons related by blood, marriage, or legal adoption, or a group not exceeding four persons living as a single housekeeping unit.”<sup>53</sup> The result in the case was a decision permitting the application of a zoning ordinance to exclude a communal group from the community.

In *Palo Alto Tenants Union* the group had claimed that their fundamental First Amendment association right was being denied. They also claimed a fundamental interest in being equally protected in zoning schemes. The court noted that fundamental interests can be abridged “only if the state demonstrates an overwhelming interest that can be served by no alternative means.”<sup>54</sup> However, the court found that the right of an unrelated group to live under the same roof was not a fundamental interest protected by the Constitution.

The court did find that the state has an interest in promoting the traditional family. The traditional family was distinguished from the

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<sup>48</sup>34 Ill. 2d 432, 216 N.E.2d 116 (1966).

<sup>49</sup>34 Ill. 2d at 432, 216 N.E.2d at 117 (1966).

<sup>50</sup>34 Ill. 2d at 432, 216 N.E.2d at 120 (1966).

<sup>51</sup>321 F. Supp. 908 (N.D. Cal. 1970).

<sup>52</sup>For a discussion of judicial tactics and the constitutionality of zoning ordinances see Ross, *supra* note 2, at 45-52.

<sup>53</sup>321 F. Supp. at 909 (N.D. Cal. 1970).

<sup>54</sup>*Id.* at 911.

voluntary family which is "voluntary, with fluctuating memberships who have no legal obligations of support or cohabitation."<sup>55</sup> The court also emphasized the emotional aspect of the traditional family which helps in creating its cohesive nature. Furthermore, the court accepted the rationale that such groups were not excluded from other residential zones as a justification for exclusion from the R-1 zone.

Another reason advanced in *Palo Alto Tenants Union* for discriminating against unrelated cohabiting persons was that the restrictions on non-traditional families furthered the zoning goal of controlled population density. However, although the ordinance limited the non-traditional family size to four people, there was no numerical limit on a traditional family occupying the same house. Regarding the challenge to this inconsistency, the court responded that the absence of a numerical limit on the traditional family was an "exception" to the goal of population control. The court also stated that noise and traffic will increase with the presence of a communal dwelling. Lastly, an economic rationale for excluding such groups was accepted by the court. The court stated that a substantial rent-restructuring might occur which would economically preclude the traditional family from living in R-1 zones.<sup>56</sup>

If the arguments of *Palo Alto Tenants Union* are generally accepted in defining the term "family" in any R-1 zoning ordinance, the effect will be felt by mentally handicapped persons not protected by a statute as specific as section 5116 of the LPS Act. Though the residents of a family care home are unrelated, like the residents in a communal setting, the former are living together in an effort to achieve normalization. In spite of the strong arguments in *Palo Alto Tenants Union* against the presence of communal-living groups in R-1 zones, those arguments should not be applied to the distinguishable unrelated living group found in a family care home because the important goal of normalization would be impeded.

Many of the arguments against a communal-group living in single-family dwelling residential areas are in practical terms inapplicable to a family care home. In addition, arguments in favor of a communal group's right to live in the better areas of a community are particularly cogent when applied to the mentally handicapped group.

Another constitutionally-based challenge by a voluntary unrelated housekeeping unit was *Boraas v. Village of Belle Terre*.<sup>57</sup> Though the

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<sup>55</sup>*Id.*

<sup>56</sup>*Id.* at 912-13.

<sup>57</sup>476 F.2d 806 (2d Cir. 1973). Because of the conflict between *Palo Alto Tenants Union*, which was affirmed in the Ninth Circuit on November 13, 1973 (No. 71-1656), and *Boraas*, the latter was granted review. 42 U.S.L.W. 3213 (U.S. Oct. 13, 1973). The Supreme Court reversed *Boraas*. 42 U.S.L.W. 4475 (U.S. April 1, 1974).

United States Supreme Court in reversing *Boraas* did not cite *Palo Alto Tenants Union*, it did adopt many of that court's arguments for holding adversely to a communal group. In the context of evaluating a communal group's right to live in a single-family dwelling zone, the arguments of noise, traffic, property devaluation, and absence of a fundamental right to live under the same roof<sup>58</sup> were given added strength by the Supreme Court's decision. However, as will be shown in the following discussion, the merits of the Court of Appeals decision in *Boraas* are worthy of endorsement in the family care home situation where a state objective of normalization of the mentally handicapped has been expressed.

In *Boraas* six students shared a six-bedroom house. They challenged a local ordinance<sup>59</sup> similar to the Palo Alto ordinance on equal protection grounds. Circuit Court Judge Mansfield reversed the District Court's decision denying preliminary injunctive relief against enforcement of the ordinance. The court found that the promotion of the traditional family unit is not a legitimate goal for the exercise of the state's police power. It felt that compelled compliance with prevailing ideas of lifestyle was inappropriate. The court concluded this argument by stating that "[s]uch social preferences, however, while permissible in a private club, have no relevance to public health, safety, or welfare."<sup>60</sup>

Other considerations affected the court's decision. In regard to control of population density, the court noted that means other than exclusionary zoning can be used to attain such an objective. Limits could be placed upon the number of occupants in a house or the ratio of persons to bedrooms or the number of bedrooms in a dwelling. These methods of controlling population density would be rational and would not discriminate against unrelated groups.<sup>61</sup> Regarding noise and traffic, the Court of Appeals' response was that "if a problem of excessive automobiles existed, it could be met simply by restricting the number of cars per dwelling unit, regardless of the relationship of its occupants."<sup>62</sup> Lastly, the court found no evidence that rental structure is affected by collective living groups.<sup>63</sup> As population density control may be achieved by means other than

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<sup>58</sup>42 U.S.L.W. 4477 (U.S. April 1, 1974).

<sup>59</sup>BUILDING ZONE ORDINANCE OF THE VILLAGE OF BELLE TERRE, ART. I § D-1.35a (June 8, 1970) as quoted in *Boraas*, 476 F.2d at 809 (2d Cir. 1970): A "family" is defined as "one or more persons related by blood, adoption or marriage, living and cooking together as a single housekeeping unit . . . [A] number of persons 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."

<sup>60</sup>476 F.2d at 815 (2d Cir. 1973).

<sup>61</sup>*Id.* at 817.

<sup>62</sup>*Id.*

<sup>63</sup>*Id.* at 816.

excluding a class of people from the community, similarly other means are available to control rent inflation. Rent control would be the most expedient control method.<sup>64</sup>

In his dissent to the Supreme Court decision, Justice Marshall emphasized the associational interests of the non-traditional family. Though his was the dissenting view, his arguments are of prophetic importance as the question of exclusionary zoning and normalization enters the realm of judicial evaluation. Justice Marshall said:

Zoning officials properly concern themselves with the *uses* of land — with, for example, the number and kind of dwellings to be constructed in a certain neighborhood or the number of persons who can reside in those dwellings. But zoning authorities cannot validly consider *who those persons are* . . . .<sup>65</sup> (emphasis added)

Hopefully, this view will command the assent of a majority of the Supreme Court when it faces a case in which the excluded persons are mentally handicapped.

A California case which preceded even *Palo Alto Tenants Union* was *Brady v. Superior Court of San Mateo County*.<sup>66</sup> *Brady* involved two students who shared a single dwelling. In interpreting a zoning ordinance, the *Brady* court elaborately defined each word in the phrase “single-family dwelling.” The court found that the phrase means “an individual or a group of persons who are living on the premises as a single housekeeping unit.”<sup>67</sup> Care was taken to note that a definition does not require that members of the household be related by blood or marriage.<sup>68</sup>

The court in *Palo Alto Tenants Union* distinguished *Brady* by pointing to the exactness of the language in the Palo Alto ordinance. Yet conceding that the ordinance in *Brady* was less specific, the language and logic of *Brady* have force in the family care home context. A single housekeeping unit and the cohabitation of unrelated individuals is the very essence of a family care home. There is a danger that courts in other states will apply the rationale of the *Palo Alto Tenants Union* case and the Supreme Court decision in *Boraas* to less specific zoning ordinances to the detriment of a living group of mentally handicapped persons. If the policy arguments of rent, noise, and population control in the anti-communal living group cases are applied without balancing them against the policy supporting integration of the mentally handicapped into the community, both the general public and the mentally handicapped will suffer.

Applying a strict definition of the word “family” in the mentally handicapped living group context, the general public will eventually

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<sup>64</sup>*Id.* at 817.

<sup>65</sup>42 U.S.L.W. 4479 (U.S. April 1, 1974).

<sup>66</sup>200 Cal. App. 2d 69, 17 Cal. Rptr. 242 (1962).

<sup>67</sup>200 Cal. App. 2d at 77, 19 Cal. Rptr. at 246 (1962).

<sup>68</sup>*Id.*

feel the repercussions. Low and moderate income families in multiple dwelling zones will find unrelated groups moving only into their neighborhoods. Thus while the suburbanite lives in his strict R-1 zone, the less wealthy will find themselves in increasingly congested areas. Exclusion of the mentally handicapped from R-1 zones on the basis that they are not a "family" may result in the institutionalization of those who cannot find a place within the increasingly congested multiple-dwelling zones.

Examination of several other trial court decisions reveals that the possibility of exclusion and congestion is likely to be an obstacle to normalization. There have been cases both favorable and unfavorable to the right of mentally handicapped persons to live in R-1 residential zones. These cases do not have detailed opinions susceptible to in-depth analyses. However, advocates of family care homes should be aware of them, particularly in light of the Supreme Court's decision in *Boraas*, which renders unviable any arguments based on analogy to cases involving other types of communal living groups. In the Ohio case of *Driscoll v. Goldberg*<sup>69</sup> the plaintiffs were residents of a "single-family dwelling" neighborhood who sought an injunction to preclude the sale and use of property for a group home for the mentally retarded. A motion for an injunction was rejected by the trial court.

In *Boyd v. Gateways to Better Living, Inc.*<sup>70</sup> a preliminary injunction was issued to prevent further construction of a group home. The Youngstown, Ohio ordinance restricted the number of unrelated persons sharing a dwelling to five persons. Respondents had argued that state preemption precluded application of the local ordinance. They also had asserted that their First Amendment rights would be violated if the ordinance was applied.

In the Wisconsin case *Browndale International, Ltd. v. Board of Adjustment*<sup>71</sup> the court restricted group homes for emotionally disturbed children to certain residential and agricultural sites. There was an unsuccessful appeal to the Wisconsin Supreme Court.

These non-California cases are indications of the manner in which other localities are responding to their responsibility to care for the mentally handicapped. These out-of-state trial court decisions are indicative of the potential dangers of a strict interpretation of the

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<sup>69</sup>Case No. 72-CI-1248 (Mahoning County Ct. of Common Pleas) as cited in Friedman, *Analysis of the Principal Issues and Strategies in Zoning Exclusion Cases* at 1103, in B.J. ENNIS & P.R. FRIEDMAN, *LEGAL RIGHTS OF THE MENTALLY HANDICAPPED*, Vol. II (Practising Law Institute 1973, the Mental Health Law Project) [hereinafter cited as FRIEDMAN].

<sup>70</sup>Case No. 73-CI-531 (Mahoning County Ct. of Common Pleas) as cited in FRIEDMAN, *supra* note 69, at 1104.

<sup>71</sup>Case No. 135-488 (Cir. Ct. of Dane County) as cited in FRIEDMAN, *supra* note 69, at 1104.

word "family" in "single-family dwelling" zoning ordinances.

In this section of the article, an analogy between the unrelated communal groups' right to live in R-1 residential zones and a similar right for the mentally handicapped has been discussed. There are few authoritative cases directly concerned with the right of mentally handicapped persons to enter R-1 zones. In view of the United States Supreme Court's decision in *Boraas*, it appears that the normalization proponent's best tactic is now to emphasize the distinct values served by family care homes as opposed to other types of communal living groups.

## VI. CONCLUSION

As a number of California's institutions for mentally handicapped persons are closed,<sup>72</sup> places for these people must be found. The state does not intend to abdicate its *parens patriae* role toward these people. Hence California has passed the Lanterman-Petris-Short Act and supportive legislation. It would be against state and federal policy to allow local government to frustrate any exercise of state legislative power aimed at the facilitation of normalization.

The role of courts will increase daily as advocates of normalization legislation seek to enforce its mandates. Although all the techniques by which mental health legislation will be attacked have not been presented in this article, two major ones have been exposed. Local and state courts can serve the interests of all members of society if they balance the policy objectives proffered by the general public and by advocates for the mentally handicapped in establishing an operative definition of "single-family dwelling."

The chartered city problem may be resolved if there is a realization by the courts that in spite of the strength and sanctity of zoning as a traditionally municipal affair, blind adherence to such tradition will work in derogation of normalization legislation like the LPS Act. Courts will fail in their duty to the mentally handicapped and other dependent persons if cognizance is not taken of the state intent expressed in the LPS Act.

*Elizabeth Hong*

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<sup>72</sup>CALIFORNIA ASSEMBLY INTERIM COMMITTEE ON WAYS AND MEANS, SUB-COMMITTEE ON MENTAL HEALTH SERVICES, A REDEFINITION OF STATE RESPONSIBILITY FOR CALIFORNIA'S MENTALLY RETARDED (Assembly Interim Committee Reports 1963-65, vol. 21, #10).