

A STATE LEGISLATIVE STRATEGY FOR ENDING EXCLUSIONARY ZONING OF COMMUNITY HOMES

*ROBERT J. HOPPERTON**

I. INTRODUCTION

Since 1970, seventeen states¹ have passed legislation ending or curtailing exclusionary zoning of community homes² for developmentally disabled persons.³ The most remarkable aspect of this trend is

* Associate Professor of Law, University of Toledo. B.A., Baldwin-Wallace, 1963; M.A., University of Toledo, 1969; J.D., Ohio State University, 1972.

1. ARIZ. REV. STAT. ANN. §§ 36.581-582 (Supp. 1979); CAL. WELF. & INST. CODE §§ 5115-5116 (Supp. 1979); COLO. REV. STAT. §§ 27-10.5-133, 30-28-115 (1973 & Supp. 1978); IDAHO CODE §§ 67-6530 to 6532 (Supp. 1979); MD. ANN. CODE art. 59a, § 20C (Supp. 1979); MICH. STAT. ANN. § 5.2963(16a) (Supp. 1979); MINN. STAT. ANN. §§ 252.28, 462.357(7)(8) (West Supp. 1979); MONT. REV. CODE ANN. §§ 11-2702.1-2 (Supp. 1977); N.J. STAT. ANN. §§ 30:4C-2(m)-26 (West Supp. 1979); N.M. STAT. ANN. § 3-21-1.C (1978); OHIO REV. CODE ANN. § 5123.18 (Page Supp. 1979); R. I. GEN. LAWS § 45-24-22 (Supp. 1978); S.C. CODE § 87-11 (Supp. 1978); TENN. CODE ANN. § 13-2402 (Supp. 1979); VT. STAT. ANN. tit. 24, § 449(d) (Supp. 1979); VA. CODE § 15.1-486.2 (Supp. 1979); WIS. STAT. ANN. § 59.97(15) (West Supp. 1979).

2. A variety of terms, such as "group home," "foster home," and "community residence" have been used to describe community-based residential facilities serving developmentally disabled persons. For purposes of this Article the generic term "community home" is used.

3. This trend is analyzed and summarized and a model state zoning statute is presented in a recent survey of community homes serving developmentally disabled persons. DEVELOPMENTAL DISABILITIES STATE LEGIS. PROJECT OF THE ABA COMM'N ON THE MENTALLY DISABLED, *Zoning for Community Homes Serving Devel-*

that over one third of the states have implemented land use policies concerning community homes.⁴ State legislatures have done this by limiting, in some instances very significantly, local zoning control.⁵ Moreover, some of the most forceful legislation has been enacted in constitutional home rule states such as Ohio.⁶

This trend sharply contrasts with the modest results achieved in combating exclusionary zoning relating to low- and moderate-income housing.⁷ Fair housing advocates have secured adoption of only one piece of state legislation, the Massachusetts Anti-Snob Zoning Act.⁸ One reason for this result may be that fair housing advocates, unlike proponents of favorable zoning for community homes, express little confidence in legislative solutions to exclusionary zoning barriers.⁹

opmentally Disabled Persons: Statutory Survey and Model Statute (1978), reprinted in 2 MENTAL DISABILITY L. REP. 794 (1978) (R. Hopperton principal author) [hereinafter cited as ABA PROJECT]. See Lippincott, *A Sanctuary for People: Strategies for Overcoming Zoning Restrictions on Community Homes for Retarded Persons*, 31 STAN. L. REV. 767 (1979).

4. There are other significant features of this trend. First, statutes dealing with zoning for community homes fit the pattern of the "quiet revolution" described and analyzed by Bosselman and Callies. F. BOSSELMAN & D. CALLIES, *THE QUIET REVOLUTION IN LAND USE CONTROL* (1971). The legislation fits their "common theme—the need to provide some degree of state or regional participation in the major decisions that affect the use of our increasingly limited supply of land." *Id.* at 1. This is so even at a time when some commentators are suggesting that the "quiet revolution" has ended or perhaps has never begun. See *Is the Quiet Revolution Changing Direction*, 31 LAND USE L. & ZONING DIG., No. 5 at 3 (1979); *Beltman Panel Reviews Quiet Revolution*, PLANNING, June, 1979, at 9.

The "quiet revolution" as it relates to community homes has not been confined to a particular type of state or region of the country. Unlike the environmentally oriented legislation which has been the core of Bosselman and Callies' "quiet revolution," this legislation has been enacted in states of every description and region, not just in states possessing dramatic and threatened natural resources such as the San Francisco Bay, the Maine Coast, or the Green Mountains.

5. In six states, Arizona, Minnesota, Ohio, Rhode Island, Tennessee, and Vermont, smaller community homes (for six or fewer residents in Arizona, Minnesota, Rhode Island and Vermont, and for eight or fewer residents in Ohio and Tennessee) are treated as "permitted uses." See ABA PROJECT, at 2 n.15; note 3 and accompanying text *supra*. Thus, the developer of a home can locate it as a matter of right, without having to meet any special local conditions or standards. In effect, local control over these homes is removed.

6. See OHIO CONST. art. XVIII, § 3. For a discussion of constitutional home rule, see text accompanying notes 87-101 *infra*.

7. See N. WILLIAMS, 2 AMERICAN LAND PLANNING LAW 608 (1974) and D. MOSKOWITZ, EXCLUSIONARY ZONING LITIGATION 1 (1977).

8. MASS. ANN. LAWS ch. 40B §§ 20-23 (Law Co-op 1979).

9. See, e.g., D. MOSKOWITZ, *supra* note 7, at 372: "So long as there are definite

In addition, such advocates have failed to develop and implement an effective strategy for litigation in this field.¹⁰ Recently, there has been a major attempt to develop a litigative strategy regarding low- and moderate-income housing.¹¹ There is, however, little evidence of successful implementation.¹²

Thus, the remarkable success of proponents of state community home legislation indicates that they have developed and are implementing an effective approach to combat exclusionary zoning. The purpose of this Article is to discuss the strategy used to achieve adoption of state zoning legislation in Ohio,¹³ and to recommend a strategy that can be effectively used to achieve the same results in the thirty-three states that have not yet enacted such legislation.

Ohio is an appropriate example for this purpose because few states present more formidable challenges. Ohio is a constitutional home rule state.¹⁴ The Ohio judiciary has a strong pro-municipal tradition.¹⁵ The state legislature has historically taken a hands-off approach to local land use decision-making¹⁶ and its state municipal league is known for its ability to defeat measures that would limit local authority.¹⁷ Thus, the strategy adopted and successfully ex-

fiscal advantages to be derived from exclusionary zoning and genuine environmental concerns, which are supported by such social and racial prejudices as exist anyway, only an ignorant optimist would expect much voluntary change."

10. See N. WILLIAMS, *supra* note 7, at 608.

11. See D. MOSKOWITZ, *supra* note 7 and accompanying text.

12. See N. WILLIAMS, 3 AMERICAN LAND PLANNING LAW 1-84 (Supp. 1978); Rose, *Exclusionary Zoning in the Federal Courts*, 2 ZONING & PLAN. L. REP. 137-41 (May 1979).

13. The Ohio legislation is Amended Substitute Bill 71 which became OHIO REV. CODE ANN. § 5123.18 (Page Supp. 1979) [hereinafter cited as S.B. 71]. See note 1 and accompanying text *supra*. For the text of S.B. 71, see Appendix B *infra*.

14. See note 6 and accompanying text *supra*. See also text accompanying notes 87-101 *infra* for a discussion of the political problems presented in a constitutional home rule state.

15. See, e.g., *Village of Struthers v. Sokol*, 108 Ohio St. 263, 265-68, 140 N.E. 519, 520-21 (1923); *Youngstown v. Evans*, 121 Ohio St. 342, 344-45, 168 N.E. 844, 945 (1929), *Village of W. Jefferson v. Robinson*, 1 Ohio St. 2d 113, 115, 205 N.E.2d 382, 384-85 (1965).

16. For an article recommending an activist, rather than a hands-off approach by the Ohio legislature regarding exclusionary zoning of low- and moderate-income housing, see Simmons, *Home Rule and Exclusionary Zoning: An Impediment to Low- and Moderate-Income Housing*, 33 OHIO ST. L. JOUR. 621, 637-38 (1972).

17. See text accompanying note 95 *infra*.

cuted in Ohio addresses the range of strategic problems that face advocates contemplating community home legislation in other states.

II. BASIC GOALS

A. *Normalization*¹⁸

The basic goal of state legislation for community homes is humane, rehabilitative treatment in community based, residential settings. This deinstitutionalized approach to the treatment of developmentally disabled persons¹⁹ is called normalization. Normalization refers to 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 in society."²⁰ According to this 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" integration and interaction.²¹ Such community living permits developmentally disabled persons to become productive members of society. It also enables them to participate in generic services, to receive training for employment, to maintain jobs in the community, and in many cases to become part of the taxpaying public rather than an enormous strain on the public treasury.²²

As a result of efforts on many fronts,²³ there has been significant

18. This discussion of normalization is adapted from ABA PROJECT, *supra* note 3, at 1.

19. Developmental disability is defined in the ABA PROJECT, *supra* note 3, at 13, as follows:

"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.

20. Nirje, *The Normalization Principle*, in *CHANGING PATTERNS IN RESIDENTIAL SERVICES FOR THE MENTALLY RETARDED* 231 (R. Kugel, A. Shearer eds. 1976).

21. *Id.* at 232.

22. See generally Chandler & Ross, *Zoning and the Right to Live in the Community*, in *THE MENTALLY RETARDED CITIZEN AND THE LAW* 305 (M. Kindred ed. 1976).

23. See generally ABA Commission on the Mentally Disabled, *Community-Based*

progress in recent years towards normalization. Developmental disability experts increasingly have advocated community-based care and habilitation. Equally important steps have been achieved through: 1) judicial decrees requiring that placement in settings less restrictive than institutions be considered prior to commitment;²⁴ 2) recent federal legislation calling for increased community habilitation for developmentally disabled persons;²⁵ and 3) state legislative acts providing for humane care for these persons.²⁶

B. *Barriers to Normalization*

Notwithstanding the professional, judicial, and legislative authority favoring community-based treatment, insufficient numbers of community homes are currently available to serve developmentally disabled persons. Although this lack of residential facilities results from several causes, a significant factor is local zoning regulations²⁷ which effectively exclude or restrict community homes from residential areas.²⁸

Mental Health Treatment: Impact of Zoning Development, 11 CLEARINGHOUSE REV. 356 (1977).

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

25. *E.g.*, Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. §§ 6001-6081 (1976).

26. *E.g.*, COLO. REV. STAT. §§ 27-10.5-101 to 135 (Supp. 1978); FLA. STAT. ANN. § 393.13 (West Supp. 1978); NEB. REV. STAT. §§ 83-1,141 to 1,146 (1976); OHIO REV. CODE ANN. §§ 5123.67 to .99 (Page Supp. 1979).

27. Other factors also exist. In Ohio, for example, lack of funding and general administrative inertia were problems. Officials in the Ohio Department of Mental Health and Mental Retardation frequently cited zoning as a barrier that excused departmental delays in overcoming funding and administrative obstacles. In effect, they said, "Let's solve the zoning problem and then we will move on other fronts."

When community home proponents pointed out, however, that the department could overcome zoning barriers by using state-owned community homes that would enjoy governmental immunity from local zoning regulations, these department officials summarily rejected the suggestion as "political suicide" due to the controversial nature of the zoning for community homes issue. They felt that reaction to that type of department action would be so strong that department budgets might be gutted in the state legislature.

28. In Ohio, for example, prior to passage of S.B. 71, approximately one percent of the more than 930 cities and villages in the state provided favorable zoning treatment to homes. *See* R. HOPPERTON, ZONING FOR COMMUNITY HOMES: A HANDBOOK FOR LOCAL LEGISLATIVE CHANGE (Ohio State University Law Reform Project, 1975) [hereinafter cited as ZONING HANDBOOK].

The principal land use barrier to normalization, then, is the local zoning ordinance. Exclusionary techniques are numerous but the most prevalent device relating to community homes is the narrow definition of "family."²⁹ An example is the definition of family used in the ordinance at issue in *Village of Belle Terre v. Boraas*.³⁰ *Belle Terre* defined "family" to limit the number of persons authorized to live on the premises of a single-family dwelling to those related by blood, marriage, or adoption, with no more than a specified number of unrelated persons. This narrow definition of "family" usually results in a municipality having no community homes. Other devices, however, such as specific exclusions of community homes and "conditionally permitted uses,"³¹ are used by municipalities to exclude or to severely restrict such homes.³²

While the "conditionally permitted use" appears to offer the advantage of permitting at least some homes, unfortunate consequences frequently accompany its utilization. Municipalities may designate community homes as a "conditionally permitted use" that is permitted only in certain transitional residential areas. They also may designate community homes as a business use or as a boarding house and limit them to commercial zones. Finally they may designate them as a use allowed only in areas where hospitals and nursing homes are permitted. Such restrictions frequently result in the creation of ghettos of community homes, particularly in larger center cities.³³ Such a concentration occurs because the only districts open to

29. *Id.* at 3.

30. 416 U.S. 1 (1974).

31. 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 often used by political subdivisions to designate a "conditionally permitted use." "Conditionally permitted uses" are sometimes confused with "variances" which are normally granted 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 N. MESHENBERG, *THE LANGUAGE OF ZONING, A GLOSSARY OF WORDS AND PHRASES* (American Society of Planning Officials, Planning Advisory Service Report No. 322, 1976).

32. ZONING HANDBOOK, *supra* note 28, at 3.

33. "Facilities that are found for deinstitutionalized people are typically located in high population density, low income neighborhoods in which large houses can be converted inexpensively to community residences. These neighborhoods may be further burdened when the lack of supervision or treatment threatens to convert alterna-

community homes are transitional and politically weak residential neighborhoods, or business or institutional zones. The 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. These concentrations change the character of the 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.³⁴

C. *Favorable Zoning Treatment*

The overall goal of the strategy presented in this Article is to improve the quality of life of developmentally disabled persons. To reach this goal, a secondary goal, that of favorable zoning treatment³⁵ for community homes in localities throughout a state, must be achieved. This favorable treatment potentially can be accomplished through several means: 1) litigation that would achieve judicial invalidation of exclusionary zoning;³⁶ 2) local legislation that would amend exclusionary zoning ordinances so as to permit community homes;³⁷ or 3) state legislation that would limit the zoning power of municipalities so as to prevent the exclusion or severe restriction of community homes.³⁸

III. ALTERNATIVE APPROACHES TO FAVORABLE ZONING TREATMENT

A. *Litigation*

Proponents of normalization and favorable zoning treatment for

tive care facilities into what one writer has termed the ‘new back wards’” (footnotes omitted). Kressel, *The Community Residence Movement: Land Use Conflicts and Planning Imperatives*, 5 N.Y.U. REV. OF L. & SOC. CHANGE 137, 139 (1975). See Crackdown Planned on Homes for the Mentally Ill, Dayton Journal Herald, April 13, 1978, at 9, col. 1.

34. ABA PROJECT, *supra* note 3, at 2.

35. As used in this Article, “favorable zoning treatment” means state or local governmental permission to locate community homes in appropriate residential districts.

36. See text accompanying notes 39-47 *infra*.

37. See text accompanying notes 48-54 *infra*.

38. See text accompanying notes 55-64 *infra*.

community homes have tried the three above-mentioned approaches at various times to overcome local zoning barriers. Community home advocates have used the first approach, that of challenging exclusionary devices through litigation, with some success in a few states.³⁹ Numerous variables can nevertheless affect the likelihood of success through litigation:⁴⁰ 1) the specific language of the local zoning ordinance;⁴¹ 2) the standing of the community home operator to bring suit;⁴² 3) the exhaustion of administrative remedies;⁴³ 4) the strength of the presumption of validity given by state courts to local legislation;⁴⁴ and 5) whether the state is or is not a constitutional home rule state.⁴⁵ These variables make it difficult to predict the success of litigation in a given state, much less generally throughout the

39. *E.g.*, *Hessling v. City of Broomfield*, 563 P.2d 12, 14 (Colo. 1977); *Oliver v. Zoning Comm'n*, 31 Conn. Supp. 197, 205, 326 A.2d 841, 845 (C.P. 1974); *Little Neck Community Ass'n v. Working Org. for Retarded Children*, 52 App. Div. 2d 90, 94-95, 383 N.Y.S.2d 364, 367 (App. Div. 1976); *Incorporated Village of Freeport v. Association for the Help of Retarded Children*, 94 Misc. 2d 1048, 1049, 406 N.Y.S.2d 221, 223 (Sup. Ct. 1977); *Living Resources Corp. v. Burns*, 91 Misc.2d 919, 921, 398 N.Y.S. 2d 928, 929 (Sup. Ct. 1977). The courts have extended the definition of "family" to include other non-related groups as well. *E.g.*, *State ex rel. Ellis v. Liddle*, 520 S.W.2d 644, 650-52 (Mo. App. 1975) (foster home with 10 children); *Berger v. State*, 71 N.J. 206, 222, 364 A.2d 993, 1001 (1976) (home for multi-handicapped preschool children); *City of White Plains v. Ferraioli*, 34 N.Y.2d 300, 305-06, 313 N.E.2d 756, 758-59, 357 N.Y.S.2d 449, 452-53 (1974) (foster home with 10 children). *But see Palm Beach Hosp., Inc. v. West Palm Beach*, 2 MENTAL DISABILITY L. REP. 18 (S.D. Fla. 1977) (10 retarded males deemed not a single family for zoning purposes).

40. For a discussion of judicial responses to zoning issues relating to community homes, see Kressel, *supra* note 33, Lippincott, *supra* note 3, and Comment, *Exclusionary Zoning and Its Effect on Group Homes in Areas Zoned for Single Family Dwellings*, 24 KAN. L. REV. 677 (1976).

41. *See* Kressel, *supra* note 33, at 148-49.

42. For a discussion of standing in both federal and state courts re: exclusionary zoning and low- and moderate-income housing, see D. MOSKOWITZ, *supra* note 7, at 17-63.

43. *See, e.g.*, R. ANDERSON, 4 AMERICAN LAW OF ZONING 340-44 (1977).

44. For an illuminating discussion of presumption of validity in zoning cases, *see generally* 1 N. WILLIAMS, *supra* note 7, at 103-76.

45. In New York, local zoning restrictions on community homes have been declared invalid because they hindered an overriding state law and policy favoring community residences. In contrast, such a result would have been almost inconceivable in Ohio prior to passage of S.B. 71. No previous articulation of the policy of normalization would have benefited a community home litigant because the statute would not have met the very difficult and specialized tests established by the Ohio Supreme Court in its interpretations of the constitutional home rule provision. *See* cases cited in note 15 *supra*. Therefore the articulated state policy would not have been found by Ohio courts to supersede the local restriction. *See* text accompanying note 97 *infra*.

United States. In addition, questions of expense and morale also can become critical to community home proponents and operators when litigation occurs.⁴⁶

In Ohio, proponents of normalization and favorable zoning treatment for community homes concluded, after reviewing the above-mentioned factors,⁴⁷ that the chances for success through a litigative strategy were, at best, problematic. As a consequence, litigation was viewed in Ohio as a resort to be undertaken only if legislative initiatives failed.

B. *Local Legislative Reform*

A second approach to removing zoning barriers is local legislative action. Proponents of favorable zoning have suggested to local legislative bodies—such as city councils, boards of township trustees, and county commissioners—that local zoning ordinances be amended to provide favorable zoning treatment for community homes. For example, proponents might ask a city council to amend its definition of “family” to specifically include community homes, or that community homes be added to the list of permitted uses in residential districts, or, that community homes, at least, be established as a conditionally permitted use or special exception⁴⁸ in residential districts.⁴⁹

In Ohio, concerted efforts were undertaken to break down zoning barriers at the local level during 1975 and 1976. The Ohio Association for Retarded Citizens (OARC) formed a Zoning Sub-Committee of its Legal and Governmental Affairs Committee. The Ohio Developmental Disabilities Planning and Advisory Council and the Law Reform Project at The Ohio State University College of Law jointly

46. Lippincott, *supra* note 3, at 772.

47. In Ohio, a team of law students in the Civil Law Practicum at The Ohio State University College of Law prepared a lengthy and detailed memorandum assessing the opportunities for successful litigation by an Ohio non-profit corporation providing residential services to developmentally disabled persons. The conclusions of the memo relating to the factors mentioned in the text were very pessimistic and convinced proponents that success through litigation was unlikely. Confidential Memorandum Concerning Zoning Law as it Relates to Plans by the Association for the Developmentally Disabled to Locate Family Care Homes in District VI. (August 2, 1976) (unpublished paper).

48. *See* note 31 *supra*.

49. For an article recommending a local legislative approach, see Kressel, *supra* note 33.

undertook the development, publication, and distribution of zoning reform handbooks⁵⁰ aimed at local legislative change.⁵¹ In addition, various ad hoc zoning committees were established in communities around the state. At the time these efforts were undertaken, six Ohio municipalities specifically permitted⁵² community homes for developmentally disabled persons in some manner, usually conditionally. After more than one year of intensive efforts, only five more communities had amended their zoning regulations to specifically permit community homes, in each case on a conditional basis.⁵³

The Ohio experience speaks eloquently about the improbability of local legislative success. Notwithstanding a major investment of time and resources only eleven of Ohio's nearly 940 municipal corporations specifically allowed community homes for developmentally disabled persons. In numerous communities in the state, reform efforts were flatly rejected or interminably delayed. Concerned groups and individuals in Ohio eventually realized that no amount of time or effort would result in any significant number of local governments voluntarily admitting community homes.⁵⁴ Consequently, Ohio reform organizations led by OARC concluded that state legislation constituted the only answer to local zoning barriers.

C. State Legislative Reform

State legislation varies in scope and technique. The most prevalent

50. See R. HOPPERTON, ZONING FOR COMMUNITY HOMES: A HANDBOOK FOR MUNICIPAL OFFICIALS (Ohio State University Law Reform Project, 1975) [hereinafter cited as HANDBOOK FOR MUNICIPAL OFFICIALS].

51. The Ohio Municipal League, at the request of the Law Reform Project at Ohio State University, cooperated in the preparation of the zoning handbooks by offering technical advice, by providing a cover letter from its Executive Director in the handbook for municipal officials, see text accompanying note 71 *infra*, and by distributing this handbook to its membership.

52. "Specifically permitted" means that the municipality explicitly allowed "community homes," "group homes," "family homes," or "licensed residential facilities" serving developmentally disabled persons. In other words, the city took specific action to recognize and include such homes as some type of permitted or conditionally permitted use in the text of its zoning ordinance. The term "specifically permitted" does not include treatment of "community homes" etc., by a city under general administrative flexibility devices such as variances, special exceptions, etc. See notes 57 and 114 *infra*.

53. ABA PROJECT, *supra* note 3, at 3 n.20.

54. At the rate of local change achieved in Ohio in 1975 and 1976, it would have taken proponents between 300 and 400 years to obtain favorable zoning treatment in all of the state's more than 930 municipalities.

and effective approach taken by states that have already enacted legislation declares community homes to be a residential use that is a permitted (as opposed to a conditionally permitted)⁵⁵ use in all residential districts of the state.⁵⁶ This type of state legislation prevents municipalities from excluding these homes.

There are forceful arguments favoring the state-type legislative approach. First, it avoids most of the disadvantages of the litigative and local legislative approaches.⁵⁷ Variables relating to success of litigation such as language of the local ordinance, standing, exhaustion, and presumption of validity are not present and no expensive and protracted litigation is required.⁵⁸ In addition, the vagaries of local legislative processes are sidestepped.⁵⁹ More important, however, are the strong affirmative reasons for state legislation. As long as each political subdivision retains broad discretion to admit or exclude community homes, there is no incentive for admitting them. On the contrary, there are strong incentives for political subdivisions to exclude 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 these 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 phenomena, their conviction to exclude community

55. See note 31 *supra*.

56. See ABA PROJECT, *supra* note 3, at 4.

57. Enactment of state legislation does not end the possibility of litigation. As expected by proponents in Ohio, S.B. 71 was soon challenged by two municipalities, Canton and Columbus. In *Garcia v. Siffrin Residential Assoc.*, No. 4968 (Ohio App., March 7, 1979) the Ohio Court of Appeals of Stark County reversed a common pleas court opinion that found S.B. 71 in violation of the Ohio constitutional home rule provision (Article XVIII, Sec. 3, *infra* note 93). The court of appeals found S.B. 71 to be constitutional because it was a "general law, within the meaning of Art. XVIII, Sec. 3 and because the Canton zoning ordinance was in "conflict" with S.B. 71.

In *Columbus v. Rhodes*, No. 79-AP-214 (Ohio App., Oct. 9, 1979) the Franklin County Court of Appeals found that the Columbus zoning treatment of community homes "is exempt from the provisions of subsections (B) and (E) of R.C. 5123.18 by virtue of subsection (G) . . ." the "grandfather clause" of S.B. 71. *Id.* at 8. The court did not reach the constitutional home rule issue regarding S.B. 71.

For a discussion of the Ohio constitutional question raised by these cases, see note 97 *infra*.

58. See text accompanying notes 39-47 *supra*.

59. See text accompanying notes 48-54 *supra*.

homes is reinforced.⁶⁰

Local decision-making regarding community homes guarantees undesirable results. Either communities exclude such homes entirely or, at best, they permit them conditionally in a few zones which can lead to ghettos and impaction.⁶¹

In contrast, uniform, state-wide requirements can supersede parochial, local action, provide for anti-impaction devices (dispersal requirements), and open up desirable neighborhoods throughout a state on an equitable, fair-share basis. If the normalization and the community home concepts are to succeed they can do so only across an entire state as a result of state legislation that is not subject to the veto of political subdivisions.⁶²

For these reasons, proponents of community homes in Ohio concluded that state legislation was the only realistic approach to achieve early and meaningful success in combating local exclusionary zoning. To this end, proponents drafted state legislation, S.B. 71,⁶³ designed to locate community homes in all residential districts in the state. Proponents then developed and implemented the legislative strategy discussed in section V of this Article. Later, the bill became one of the key examples of state legislation used to draft the American Bar Association's Model State Zoning Statute.⁶⁴

IV. MODEL STATE ZONING LEGISLATION

Zoning is deemed critical to developmentally disabled persons by the American Bar Association Commission on the Mentally Disabled as well as the Commission's Advisory Board of the Developmental Disabilities State Legislative Project. As a result, the ABA Commission on the Mentally Disabled commissioned the preparation of the Model State Zoning Statute⁶⁵ (presented in Appendix A) with the hope that such legislation:

- (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

60. ABA PROJECT, *supra* note 3, at 2.

61. *Id.*

62. *Id.* at 3.

63. *See* note 13 *supra*. For the text of S.B. 71, see Appendix B.

64. ABA PROJECT, *supra* note 3.

65. *Id.*

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.⁶⁶

In addition, Judge Joseph Schneider, the Vice Chairman of the Commission and the Chairman of the Advisory Board, offered the following perspective:

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 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.⁶⁷

This Article goes a significant step beyond the Model State Zoning Statute by laying out a legislative strategy to achieve passage of legislation based on the Model Statute in each of the thirty-three states which still lack limitations on local exclusionary zoning.

V. A STRATEGY FOR STATE LEGISLATION: SEVEN KEY ELEMENTS

A. *Identification and Preparation of Policy Arguments*

1. Proponents' Policy Goals

An obvious first step in a successful legislative strategy is identification and clear understanding of one's own policy goals. Once this is done an advocate can effectively and confidently develop a legislative strategy tailored to, and consistent with, his goals.

In Ohio, normalization had for some time been a primary objective of OARC. For instance, this organization lobbied vigorously and effectively for S.B. 336, Ohio's institutional rights legislation,⁶⁸ the underlying policy of which was normalization. Members of OARC perceived, however, that more than institutional rights legislation was needed to implement this policy goal. Evidence indicated that local zoning had become a major barrier. As an organization, OARC con-

66. *Id.* at Introduction.

67. *Id.*

68. OHIO REV. CODE ANN. § 5123.67-.99 (Page Supp. 1978). This legislation passed the Ohio General Assembly in 1974 and became effective July 1, 1975.

cluded that state zoning legislation to address the zoning barriers was necessary so that normalization could proceed.⁶⁹ OARC and other proponents then developed the legislative strategy to pass zoning legislation discussed in this Article.

2. Opponent's Policy Goals

Legislative advocates frequently do not carefully study the policy goals of opponents. This is a fatal mistake; no matter how skillfully a legislative advocate presents his side he may, nevertheless, fail if legislators are not convinced that the advocate's policy should prevail over the opponents'. If the substance, and also the strengths and weaknesses of the opponent's basic position are understood, however, they can be countered effectively.

Previous experience had taught proponents of state zoning legislation that the Ohio Municipal League, the lobbying organization for Ohio cities and villages, would be their principal opponent.⁷⁰ The League had no particular quarrel with community homes, but it opposed any zoning reform except one voluntarily enacted by an individual municipality. The executive director of the League clearly articulated this position in his cover letter to municipalities that was included in *Zoning for Community Homes: A Handbook for Municipal Officials*:

As many of you know, recent trends in the treatment of mentally retarded and developmentally disabled persons have had effects on local zoning across the state. It is the announced policy of the state of Ohio to promote deinstitutionalization of many mentally retarded persons and their assimilation into the ordinary life of the communities in which they live.

In some Ohio municipalities the community-based residence facilities that house the mentally retarded are already afforded favorable zoning treatment, while in many others local zoning ordinances do not provide for such homes.

It goes without saying that the League position is that policy questions relating to the zoning of community-based residence facilities for the mentally retarded are *matters for local decision-making processes*. However, when a municipality resolves to ac-

69. See text accompanying notes 55-64 *supra*.

70. As the author of handbooks on local zoning change for community homes, e.g., *ZONING HANDBOOK*, *supra* note 28; *HANDBOOK FOR MUNICIPAL OFFICIALS*, *supra* note 50, this writer developed a first-hand knowledge of the League viewpoint regarding state versus local zoning legislation for community homes.

commodate such facilities, many technical, legal and drafting questions can arise.

With this in mind, an Ohio Municipal League Task Force, composed of representative municipal officials have worked with the Law Reform Project at the Ohio State University Law School to develop acceptable solutions to the technical problems related to community-based residence facilities such as family care homes and group homes. We feel that the zoning techniques discussed in this pamphlet are sound, balanced, and take into consideration the needs of both neighbors and the community at large. We recommend your consideration and utilization of the suggested approaches if your municipality decides to provide favorable zoning treatment to such homes.⁷¹

Obviously, the League did not advocate warehousing of mentally retarded and developmentally disabled persons. It merely wanted to protect local control over zoning matters. The League considered this concept critical to the needs and self-interest of Ohio cities and villages.

Recognizing that the basic policy of the League was local control, proponents prepared their policy arguments in favor of S.B. 71. Their task was a formidable one, partly because of the political strength of the Ohio Municipal League. Veteran State House observers in Columbus suggested that proponents should expect early defeat. These observers correctly pointed out the League's remarkable track record of defeating legislative and constitutional proposals that would limit local control.⁷² The "bottom-line" was that the League possessed the political clout in the state capitol to defeat any legislative proposal it opposed.

Proponents' efforts to pass S.B. 71, introduced on February 8,

71. HANDBOOK FOR MUNICIPAL OFFICIALS, *supra* note 50, at inside front cover (emphasis added).

72. See text accompanying note 17 *supra*, and note 95 *infra*; OHIO CONSTITUTIONAL COMMISSION, FINAL REPORT, 311-14 (June 30, 1977); OHIO CONSTITUTIONAL REVISION COMMISSION, LOCAL GOVERNMENT COMMITTEE PROCEEDINGS Vol. 6, 2992-95, 3010-32, 3033-46 (1973-74). Both the FINAL REPORT and the LOCAL GOVERNMENT COMMITTEE PROCEEDINGS demonstrate the influence of the Ohio Municipal League in defeating attempts to amend the constitutional home rule provision.

For a demonstration of the influence of the League in defeating an amendment to the public institutions provision of the Ohio Constitution, Article VII, § 1 that would have provided "least restricted alternative" language, see OHIO CONSTITUTIONAL REVISION COMMISSION, 'WHAT'S LEFT COMMITTEE' PROCEEDINGS, Vol. 9, 4931-58 (1976). The League opposed such language because it "presents a zoning problem for our membership." *Id.* at 4944-47.

1977,⁷³ led to its passage by the Ohio Senate on May 17, 1977 by a 26-5 vote,⁷⁴ and the Ohio House of Representatives on July 6, 1977 by an 87-9 vote.⁷⁵ The governor of Ohio signed the bill on August 1, 1977.⁷⁶ Given the perceived political strength of the League, such lopsided results were startling. The first critical step contributing to these results consisted of two parts: identification of the League's basic policy goal and subsequent preparation of arguments to counter it.

3. Substance of Proponents' Policy Arguments

Anticipating intensive opposition to S.B. 71, proponents prepared the following points in response to the League's policy of local control:

- (1) that S.B. 71 would indeed limit local control (proponents decided to concede forthrightly that they advocated a limitation of local control);⁷⁷
- (2) that this limitation was, nevertheless, absolutely essential to the implementation of an important and legislatively articulated goal;⁷⁸
- (3) that the developmentally disabled population, to be benefited by the limitation on local control, was needy and deserving of concern and assistance because it had been a victim of long-standing prejudice;⁷⁹
- (4) that local zoning as a public control was permissible only as a restriction on *uses* of land; that, in effect, it was being utilized in the case of community homes to discriminate against a certain type of *person*; and that, therefore, this unfair utilization justified the limitation on local control;⁸⁰
- (5) that the limitation on local zoning control was narrow, no broader than necessary—it applied only to community

73. *Legislative Status Sheet*, 112th General Assembly, Feb. 3, 1978 at 16.

74. *Ohio Senate Journal*, May 17, 1977 at 431.

75. *Ohio House Journal*, July 6, 1977 at 1300.

76. *Legislative Status Sheet*, *supra* note 73.

77. The principal limitation in S.B. 71 was the establishment by the state legislature of community homes as a "permitted use." Political subdivisions no longer had authority to treat them in any way other than the one the legislature had prescribed by statute.

78. See text accompanying notes 85-86 *infra*.

79. See Lippincott, *supra* note 3, at 769-70.

80. See *Vickers v. Township Comm. of Gloucester Tp.*, 37 N.J. 232, 252, 181 A.2d 129, 140 (1962) (Hall, J., dissenting).

- homes serving developmentally disabled persons, one out of literally hundreds of types of land uses;
- (6) that, despite the limitation on local control, S.B. 71 contained important safeguards for municipalities and neighbors;⁸¹
 - (7) that this one narrow limitation was not the first domino in a broad campaign to erode local control;⁸² and
 - (8) that if impaction and overconcentration of community homes was to be prevented, only a regulatory scheme with a state-wide approach could be effective.⁸³

In effect, proponents isolated the two principal policy issues of normalization and local control and structured their legislative campaign for S.B. 71 on that basis. This produced an effective articulation of proponents' policy goals as well as a sensitivity to the values behind local control, the policy goal of opponents. It also dictated the drafting of a bill which limited local control only to the extent necessary and provided significant protections for municipalities to replace the loss of local authority over community homes.⁸⁴ On this basis, Ohio legislators were able to conclude that normalization should, under these circumstances, prevail over local control.

The critical first step in a legislative strategy is to identify and to understand the policy goals of both proponents and opponents. Once this is accomplished, the other elements of a successful strategy logically follow.

81. Examples of safeguards included in S.B. 71 to help protect municipalities and neighbors were 1) a detailed state licensing and inspection system, 2) a means to notify local officials and neighbors of the planned location of a community home and an opportunity to comment to the Director of the Department of Mental Health and Mental Retardation, 3) the authorization for municipalities to treat "group homes" (community homes with nine to sixteen residents) as conditionally permitted uses, and 4) a requirement that insures the dispersal and prevents the overconcentration of "family homes" (community homes with eight or fewer residents). See Appendix B.

82. Municipal officials frequently contended that if S.B. 71 was enacted, home rule and local control in Ohio soon would be destroyed. In response to this claim, proponents cited to state legislators the League's remarkable success in defeating proposals to limit local power. See note 95 *infra*. The League's legislative record suggested that even if S.B. 71 passed municipalities would in no way be defenseless. In effect, proponents tried in this way to turn municipal strength and past success into an argument in favor of S.B. 71.

83. See text accompanying notes 60-62 *supra*.

84. See note 81 *supra*.

B. *Legislative Articulation of the Normalization Policy*

A successful legislative advocate must effectively articulate his policy goal to legislators. This task is greatly facilitated if other influential organizations espouse similar goals. Moreover, if the state legislature is one of the organizations that already has articulated the policy goal, then the advocate enjoys an enormous advantage.

In Ohio, OARC had adopted and advocated normalization as a policy goal prior to its efforts to achieve passage of S.B. 71. OARC had strongly supported prior institutional rights legislation⁸⁵ for mentally retarded persons which also had no normalization as its basic policy goal. Section 5123.67(D) of the Ohio Revised Code, the purpose clause of S.B. 336, read as follows: "To maximize the assimilation of mentally retarded persons into the ordinary life of the communities in which they live." The principal draftsman of S.B. 336, Professor Michael Kindred, intended this section to serve as more than merely the purpose clause of that bill; its second function was to be the legislative articulation of the policy of normalization that would be useful in passing the state zoning legislation. Thus, when proponents of S.B. 71 in 1977 presented their arguments in favor of normalization and the limitation of local control, they pointed out that the Ohio General Assembly had already fully embraced normalization as a guiding policy in developmental disability and mental retardation programs. This point greatly strengthened proponents' policy arguments, inasmuch as they were advocating the enunciated policy of the Ohio legislature as well as their own policy goal.⁸⁶

Proponents in other states are advised to seek a legislative articulation of normalization prior to introduction of a state zoning bill, and

85. See note 68 *supra*.

86. An example of these arguments is presented in the following quote from written testimony presented by Professor Kindred to the Ohio House of Representatives on June 15, 1977:

This state policy was best articulated in S.B. 336, which passed the Legislature in 1974 with nearly unanimous support from both parties. Section 5123.67 sets the policy of that legislation: this policy has been further supported by passage of H.B. 1215 last year and by the allocation of substantial state funds to support the development of community residential programs.

At its base, this well-articulated state legislative and administrative policy is founded on constitutional principles. These principles are very simply that persons may not be needlessly segregated from the community, that they may not be placed in dehumanizing warehouses, and that they have a right to placement in the least restrictive setting suitable to their needs.

then, of course, to exploit it in their lobbying efforts. If proponents are fortunate enough to already have such a provision enacted in their state, they should take full advantage of the leverage it provides in lobbying for their state zoning legislation.

C. *Strategy Considerations in Constitutional Home Rule States*

Forty states are constitutional home rule states.⁸⁷ Constitutional home rule is a major impediment to state zoning legislation because it operates to restrain the authority of a state legislature to limit local control over regulations such as zoning.⁸⁸ Because constitutional home rule can be an important obstacle to state legislation limiting local zoning authority, any strategy to achieve state community home legislation in the forty constitutional home rule jurisdictions must carefully deal with this problem.⁸⁹

Home rule has, in reality, two different aspects. First, it is a political concept connoting local autonomy or local control over political matters, such as self-determination of means and goals without interference by the legislature or other agencies of state government. Second, home rule is a constitutional doctrine that actually distributes power between state and local governments. In this second aspect, home rule is a grant of power through a constitutional provision in certain substantive and procedural areas; it is, in effect, a means of

87. Forty state constitutions contain some sort of home rule provision. *See* ALASKA CONST. art. X; ARIZ. CONST. art. XIII, §§ 2-3; CAL. CONST. art. XI, §§ 3, 5-7; COLO. CONST. art. XX; CONN. CONST. art. X; FLA. CONST. art. VIII, §§ 1(g), 2(b); GA. CONST. art. XV; HAWAII CONST. art. VII, § 2; IDAHO CONST. art. XII, § 2; ILL. CONST. art. VII, § 6; IOWA CONST. art. III, § 39A; KAN. CONST. art. XII, § 5; LA. CONST. art. VI, §§ 4-6; ME. CONST. art. VIII, pt. 2, § 1; MD. CONST. arts. XI-A, XI-E, XI-F; MASS. CONST. amend. LXXXIX, § 235; MICH. CONST. art. VII, §§ 2, 22; MINN. CONST. art. XII, § 4; 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. 1, 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; OR. 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. *See generally* Vandalingham, *Constitutional Municipal Home Rule Since the AMA (NLC) Model*, 17 WM. AND MARY L. REV. 1 (1975).

88. For a discussion of the barriers home rule poses to state legislation aimed at combating exclusionary zoning of low- and moderate-income housing, see Simmons, *supra* note 16.

89. *See* ABA PROJECT, *supra* note 3, at 9-11.

implementing the political concept of local control.⁹⁰

In Ohio, the distinction between home rule in the constitutional sense and home rule in the political sense dictated important strategy considerations. Proponents decided that the two aspects of home rule should be handled as separate issues. When S.B. 336, Ohio's institutional rights bill for mentally retarded persons,⁹¹ was first introduced into the Ohio General Assembly it included language that indicated that favorable zoning treatment for community homes was of "state-wide concern."⁹² This language was borrowed from the California state zoning legislation passed in 1970,⁹³ and community home proponents had hoped that it would solve the community home zoning problem in Ohio.

These hopes were not well-founded. While the California and Ohio constitutional home rule provisions are somewhat similar, the judicial interpretations in the two states vary significantly. Although "state-wide concern" language was constitutionally acceptable in a California statute, it creates a potential constitutional problem in an Ohio statute.⁹⁴ The importance of avoiding constitutional objections

90. See Sandalow, *The Limits of Municipal Power Under Home Rule: A Role for the Courts*, 48 MINN. L. REV. 643, 644-45 (1963-64).

91. See note 68 *supra*.

92. See note 94 *infra*.

93. CAL. WELF. & INST. CODE §§ 5115-5116 (West 1972 & Supp. 1978).

94. Article XVIII, § 3, Ohio's constitutional home rule provision reads: "Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws." The two clauses of this provision have led to two different types of state legislation to limit local power in Ohio. Historically, the Ohio Supreme Court upheld limitations on local power only when a statute complied with the second clause and met the highly specialized and pro-municipal definitions that the court adopted for "conflict" in *Village of Struthers v. Sokol*, 108 Ohio St. 263, 140 N.E. 519 (1923), and for "general law" in *Village of West Jefferson v. Robinson*, 1 Ohio St. 2d 111, 205 N.E.2d 382 (1965).

On occasion the court deviated from its strong pro-municipal position and suggested that the first clause of Article XVIII, § 3 also provides a means to limit local power. See, e.g., *Beachwood v. Board of Elections of Cuyahoga County*, 167 Ohio St. 369, 148 N.E.2d 921 (1958). Some commentators have advocated this "statewide concern" approach. See Simmons, *supra* note 16. Other commentators and municipal advocates have criticized this "statewide concern" approach because it would greatly facilitate statutory limitations on local authority. See, e.g., Vaubel, *Of Concern to Painesville—Or Only to the State: Home Rule in the Context of Utilities Regulation*, 33 OHIO ST. L. J. 257 (1972); Vaubel, *Municipal Home Rule in Ohio*, 3 OHIO N. L. REV. 3 (1975). For the reaction of the Ohio Municipal League, see text accompanying note 95 *infra*.

in Ohio lobbying efforts on behalf of the state zoning bill is demonstrated by the following experience communicated by a key advocate of the Ohio institutional rights legislation.

I can tell you from my recollection, however, that S.B. 336, as submitted by Senator O'Casek had a section that closely tracked the California language. It got removed from the bill under the circumstances below.

You asked me how the language that was intended to override local zoning obstacles to small homes for the mentally retarded came to be deleted from S.B. 336.

I was in the middle of some fairly lengthy testimony before the Senate Sub-Committee considering the bill. Senator Paul Matia was Chairman and Senators Oliver O'Casek and Buzz Lukens completed this sub-committee. All of a sudden the door of Room D opened and Senator Matia asked me if he could interrupt me for a moment and announced he had just noticed John Gotherman of the Ohio Municipal League enter the room. He asked Mr. Gotherman if he had any brief comments he wished to make on S.B. 336. Mr. Gotherman replied that the League had serious objections to the language in question on policy grounds and that they also felt that the language would *transgress the Ohio constitution*.

A few minutes later the language was out of the bill. I do not recall the intervening exchange precisely. To the best of my recollection, however, Senator Matia asked me if this language was crucial to the rest of the bill and indicated that he thought it would cause *serious trouble for the bill*. I indicated the issue was severable from the other portions of the bill and that he would be willing to deal with the issue in separate legislation in order to insure smooth and speedy passage of S.B. 336. Mr. Gotherman smiled and departed.

Mr. Gotherman later told me that he had not seen the language himself, but that *Senator Matia had called it to his attention*.⁹⁵ [emphasis added]

What had happened? Because the state zoning provision in S.B. 336 had used the term "state-wide concern," it caused "serious trouble," i.e., a potential constitutional issue. The League, therefore, had a political argument of decisive weight—that proponents had drafted an unconstitutional bill. As long as that attack could be made, the policy issues of normalization versus local control would never get a fair hearing.

95. Letter from Michael Kindred to Robert Hopperton (Nov. 21, 1978).

In Ohio it was necessary to draft a state zoning bill as well as a lobbying strategy that would avoid this type of devastating attack in the legislature.⁹⁶ The strategy adopted was first to isolate the constitutional and policy aspects of home rule, then to solve the constitutional problem by conforming S.B. 71 to the Ohio Supreme Court's interpretations of the Ohio constitutional home rule provision regarding acceptable ways to limit local police power,⁹⁷ and finally to battle with the League solely on the policy aspects of normalization versus local control.⁹⁸

The strategy worked effectively in Ohio because it removed constitutional home rule as a lobbying weapon. The veteran state house observers who predicted early and decisive defeat for state zoning

96. ABA PROJECT, *supra* note 3, at 9-11.

97. In drafting S.B. 71, proponents concluded that any bill that was to avoid the devastating political attack that the League could direct at a "state-wide concern" bill (such as one drafted to limit local power based on the first clause of Article XVIII, § 3) would have to be written to comply with the second clause of Article XVIII, § 3. In other words, it would have to meet the pro-municipal, specialized tests for "conflict" and "general law" adopted by the Ohio Supreme Court. *See* note 94 *supra*. S.B. 71 was so drafted. It met the "conflict" test because it permitted the community homes that local ordinances prohibited and it met the "general laws" test because it was a licensing statute which by Ohio Supreme Court definition constituted a "general law." *See* Village of West Jefferson v. Robinson, 1 Ohio St. 2d 113, 205 N.E.2d 382 (1965). For a discussion of "statewide concern" and "conflict with general law" approaches to state limitation of local power in Ohio, see Simmons, *supra* note 16; Vaubel, *supra* note 94.

Tactically, what the proponents did at this point was to draft both a "statewide concern" version and a "conflict with general law" version of Ohio's state zoning legislation. Proponents then took these two versions to the chief counsel of the League and said that they intended to get state zoning legislation introduced. Proponents asked the chief counsel which version the League favored. The chief counsel replied that the League would be strongly opposed to both versions on policy grounds but the "conflict with general law" version would be preferable because it would not raise the constitutional home rule problem that the "state wide concern" version posed. The proponents had alerted the League to the coming introduction of state zoning legislation, but they had received, in return, informal acceptance of the constitutionality of the "conflict with general law" version.

Later, a critical point in the lobbying process was reached when the chief counsel of the League in an April 5, 1977 memo to the chairman of the Education and Health Committee of the Ohio Senate stated: "We have worked with Professor Hopperton on the *legal aspects* of the bill as they relate to the *home rule powers* and believe they have been resolved by the bill or can be resolved during the legislative process." (Emphasis in original.) After the chief counsel's memo, no legislators raised constitutional objections of the sort Senator Matia had raised regarding S.B. 336. *See* text accompanying note 95 *supra*.

98. *See* text accompanying notes 68-84 *supra*.

legislation⁹⁹ (due in large part to the ability of the League to use the constitutional aspect of home rule as a lobbying weapon) had not anticipated a bill that solved the constitutional issue. Thus, the political attack based on "unconstitutionality" was avoided and principally because of this factor the final votes in favor of S.B. 71 were overwhelmingly favorable.¹⁰⁰

The Ohio experience demonstrates that constitutional home rule is not an insurmountable obstacle to state zoning legislation as long as a sound strategy is adopted. That strategy is to separate home rule into its two aspects, then to address the constitutional dimension of home rule through a careful and legally sound means of limiting local authority, and finally, having isolated the policy issues, to persuasively advocate normalization.¹⁰¹

D. *Demonstrate How Local Zoning Frustrates Normalization*

Most legislative efforts pit laudable policy goals against each other. Laudable goals such as environment versus jobs, energy independence versus control of inflation, or, as in the case of state zoning legislation, normalization versus local control, frequently compete in legislative battles. To be successful in a legislative effort, however, more than a laudable goal is needed. The effective advocate must show why his laudable policy goal should supersede that of his opponents. This need was demonstrated in Ohio, where legislators, after hearing the initial arguments on both sides of S.B. 71 said, in effect, fine, we understand the goal of assimilation of the developmentally disabled into the ordinary life of the communities in the state; we know that we have already adopted that goal in previous statutes; we recognize that the League is not contending that the bill is unconstitutional;¹⁰² *but is it really needed?* Must the General Assembly take the extraordinary step of limiting local control over this type of land use decision in order to implement normalization?

In response to this question, proponents prepared the fourth element of their legislative strategy—a demonstration to legislators that local zoning ordinances defeated efforts to achieve normalization. Proponents showed legislators a balanced sample of zoning ordi-

99. See text accompanying note 77 *supra*.

100. See text accompanying notes 94-95 *supra*.

101. See text accompanying notes 68-84 *supra*.

102. See note 97 *supra*.

nances from around the state. The zoning ordinances spoke for themselves; either through specific exclusions of community homes or, more often, through narrow definitions of "family" virtually every ordinance excluded or severely restricted these homes. Proponents also showed legislators that in one Ohio city that formerly permitted community homes through a broad definition of family, the city council amended the definition of "family" to exclude the homes.¹⁰³ These points demonstrated in an abstract way that local zoning blocked normalization.

Ironically, the same point was presented to state legislators by local officials who testified against S.B. 71. One mayor testified that his city had the absolute right to exclude homes for developmentally disabled persons and that the Ohio General Assembly should stay out of local affairs. That mayor unwittingly became a real-life example of what proponents of S.B. 71 argued was an abuse of local zoning powers. Proponents frequently cited his testimony to state legislators when asked if local zoning was indeed a major barrier to normalization.

Obviously, proponents of state zoning legislation must be able to establish the necessity of such legislation. This is critical when two worthy, conflicting policy goals, such as normalization and local control, compete. Proponents must show that a limitation of one is necessary because it impedes the implementation of the other. The demonstration of necessity can be made in an abstract way. Moreover, if an opponent helps to make the argument in a concrete way, this testimony can be used effectively.

E. Demonstrate that State Legislation is the Only Alternative

Elements of an effective legislative strategy include identification of policy issues, prior legislative articulation of the normalization, effective treatment of constitutional home rule, and showing that local zoning frustrates normalization. These may not, however, be sufficient. An additional critical element is the ability to demonstrate that no feasible alternative to state zoning legislation exists. In Ohio, this was accomplished by explaining the failure of concerted efforts to achieve favorable zoning treatment for community homes at the local level.¹⁰⁴ The unsuccessful attempt at local legislative reform pro-

103. ABA PROJECT, *supra* note 3, at 3 n.20.

104. See text accompanying notes 48-54 *supra*.

vided advocates of S.B. 71 with critically important information that demonstrated state zoning legislation was the only solution to local barriers. Had this attempt not preceded the state legislative efforts, legislators would in all likelihood have asked proponents to make a good faith effort at local legislation. Having already made that effort, proponents of S.B. 71 could justify to state legislators the need for state zoning legislation for community homes.

State zoning legislation will succeed, if at all, only after state legislators are satisfied that it is the *single*, reasonable solution. An essential element of the strategy to enact community home legislation then is to make this argument effectively. Otherwise, reluctant legislators and opponents of state zoning limitations can argue persuasively for delay of state action until the alternatives are exhausted.

F. *Development of Proponents' Negotiating Position*

Well-drafted legislation plus a sound, well-executed strategy usually guarantee that a bill will progress through legislative channels. This progress, however, will result in a new set of questions for the legislative advocate. Supporters, other interested parties, and opponents will, at various points, propose amendments to the legislation. Therefore, another cornerstone of a legislative strategy is the development of a negotiating position on possible amendments.

In Ohio, the preparation of this element started quite early, during the drafting stages of S.B. 71. First, proponents, recognizing that the legislative process was one of compromise and accommodation of conflicting interests, determined which provisions had to be included in S.B. 71 if meaningful normalization was to be achieved. These components were:

- 1) establishment of smaller community homes ("Family Homes") as permitted uses;¹⁰⁵
- 2) inclusion of "Family Homes" (as permitted uses) in *all* residential zones—single family as well as multiple family—throughout the state;¹⁰⁶ and
- 3) a direct tie between community homes and a state licensing system for community home operators.¹⁰⁷

Proponents agreed that compromise on these three points would render ineffective the limitation on local control and therefore defeat

105. See S.B. 71 § 5123.18(D), Appendix B *infra*.

106. *Id.*

107. *Id.* § 5123.18(C).

the normalization goal. This conclusion dictated the first part of the proponents' negotiating position on S.B. 71—no compromise on the three core provisions.

The next step was to decide which provisions were nonessential. Examples of provisions deemed dispensable were:

- 1) establishment of the size of "Family Homes" at eight residents,¹⁰⁸
- 2) inclusion of the larger community homes ("Group Homes") in S.B. 71;¹⁰⁹ and
- 3) treatment of "Group Homes" as a permitted use if they were included in S.B. 71.¹¹⁰

These points were examples of potential bargaining chips. If compromise was necessary they could be conceded without impairing the fundamental thrust of S.B. 71.

Early and thoughtful delineation of the essential and nonessential components of S.B. 71 prepared proponents well for the give and take of the legislative process. Most of the amendments suggested by interests such as the League were anticipated and effective negotiating positions were defined. As a result, none of the essential provisions and only one of the nonessential provisions were affected by amendments.¹¹¹ The League did propose, however, two "surprise" additions, one procedural,¹¹² the other substantive.¹¹³ Because

108. *Id.* § 5123.18(A)(3).

109. *Id.* § 5123.18(A)(4). Proponents would have been willing to delete the "group home" provision from S.B. 71 because of a conviction that the smaller "family home" provides the community-based residences most nearly like normal family arrangements. Therefore, while the "family home," being the optimal living arrangement, was an indispensable provision, the "group home" provision was expendable. See ABA PROJECT, *supra* note 3, at 14.

110. S.B. 71 § 5123.18(A)(4), Appendix B *infra*. Proponents concluded that if the "group home" was to be included, an acceptable trade off was to allow municipalities to treat it as a conditionally permitted use.

111. "Group homes" were included in S.B. 71, but cities that had enacted a zoning ordinance could exclude them from "planned unit developments" and from single-family zones, and could treat them as a conditionally permitted use.

112. S.B. 71 § 5123.18(C), Appendix B *infra*. The Ohio Municipal League indicated during consideration of S.B. 71 in the Ohio House that it would stop its "public" opposition to the bill if two amendments were added. The first was the three-part procedure in the state licensing subsection of S.B. 71 calling for 1) notice to political subdivisions from the state prior to licensure of a community home within the political subdivision, 2) an opportunity for officials and residents of the political subdivision to comment, and 3) the appropriate state official to make written findings to accompany his licensure decision. See S.B. 71 § 5123.18(D), Appendix B *infra*.

113. The substantive amendment that the League asked for as a price for ending

proponents already had analyzed most of the possible compromises and their consequences, they were able to decide relatively quickly and easily whether to accept the League amendments.¹¹⁴

A legislative advocate should frame his negotiating position as a politician does. The effective politician is aware of his party's goals and knows how to mesh the needs of his constituents into the overall party platform. Advocates who have not clearly defined their negotiating plan as an element of their overall strategy may react to proposed amendments in ways that violate their basic policy goal.

G. *Identification of Developmental Disability*

The elements discussed thus far are necessary to a legislative strategy sufficient to enact a state zoning statute for developmentally disabled persons. Each is critical because it answers a hard question

its "public" opposition to the bill was a "grandfather clause" designed to permit the 11 Ohio municipalities that previously had specifically allowed community homes (through conditionally permitted uses) to continue their treatment of these homes notwithstanding S.B. 71. Litigation concerning this clause has occurred in Ohio with the City of Columbus contending that it meets the "specifically permitting" language of § 5123.18(G) because it had permitted one or two community homes under its general "variance" device. See *Columbus v. Rhodes*, No. 79-AP-214 (October 9, 1979). This contention by the City of Columbus is contrary to the intent behind § 5123.18(G) which was designed to allow only cities that had provisions expressly providing for community homes to continue their prior zoning treatment of community homes.

114. The two amendments proposed by the League provided two different negotiating questions. The procedural amendment caused no disagreement among proponents because it merely added some steps to the state licensing process. It would mean only some additional work for the Department of Mental Health and Mental Retardation.

The second League amendment posed a more difficult choice for proponents. Proponents had been unable to predict how the floor vote on S.B. 71 would go in the Ohio House of Representatives so the possibility of removing the League's public opposition was viewed as most attractive, perhaps critical to ultimate passage. On the other hand, proponents anticipated that § 5123.18(G) might encourage a city that had never provided *specific*, favorable treatment to do just what Columbus did in claiming that, because it had allowed a community home under a *general* variance or special exception device, it had met the requirements of § 5123.18(G). Proponents resolved to accept the "grandfather clause" amendment because the "specifically permitting" language clearly indicated that the intent of the provision was to include only the 11 cities that had explicitly allowed licensed residential facilities in their zoning ordinances. The addition of "specifically permitting" language (plus the fact that § 5123.18(G) was severable from the rest of S.B. 71) justified to a majority of proponents the acceptance of the "grandfather" provision in exchange for League non-opposition to S.B. 71.

asked by opponents or a critical concern expressed by legislators. Failure to include any one in a legislative strategy could be decisive. The importance of the last element—identification of developmental disability and mental retardation¹¹⁵—is more subjective, and thus more difficult to discuss with precision.

This element answers questions seldom asked explicitly, but frequently implied, by both opponents and legislators. For instance, inquiries about dangers of increased crime in residential neighborhoods having community homes often disguise questions such as: "What is developmental disability?" or "What is mental retardation?" Most legislators probably wonder what developmental disability or mental retardation is, what implications it has for those who suffer from it, and those who live around it. Legislators, however, may be afraid to ask and, thereby, find out all they ever wanted to know about developmental disability.

As with element (D) above, it is possible to demonstrate what developmental disability is in an abstract way. For example, definitions, statistics on its incidence, and professional opinions on its meaning and treatment can be recited in testimony before legislative committees. Nevertheless, the definitions, statistics, and professional pronouncements do not necessarily provide legislators with a gut-level understanding. To give legislators a first-hand, concrete experience with developmental disability, Ohio proponents of S.B. 71 invited a developmentally disabled (mentally retarded) woman to testify at the first legislative committee hearing on the bill. She gave the following testimony:

I lived in a state institution from an early age until I was 39. It was smelly, dirty, noisy, and there were too many people there. I didn't like living there.

Now, I live in a community home on a nice street. I like living there. I have made friends with the other people who live and work there. I now have a job.

Most of my friends still live in the state institution. One of them was recently assaulted and robbed there. I hope you can do something so my friends can live in a community home some day. Thank you.

After a long pause the committee chairperson asked other members of the committee if there were any questions. There were none. He

115. See note 19 *supra*; MODEL STATUTE § 2, Appendix A *infra*.

thanked the witness in a fatherly way and told her she could step down. As the woman walked back to her seat, every eye was on her.

No one could accurately estimate the impact that woman's testimony had on legislators. It may have had little; or, it may have removed much of the mystery, fear, and embarrassment of developmental disability harbored by at least some members of the committee. After her testimony, developmental disability was probably no longer a strange abstraction; it may well have been personalized and made concrete for everyone in that hearing room.

Other proponents testified that evening but their testimony seemed anti-climactic. The following week at the opponents' hearing a city official from a suburb of a large Ohio city testified that community homes for the developmentally disabled would result in an increase of violent crime in good residential neighborhoods around the state. Questions of that witness from committee members indicated that his testimony about the "evils" of developmental disability had been given little credence.

As indicated, one's views of the overall effect of testimony by a developmentally disabled witness are unverifiable. In Ohio, the legislative strategy included this type of testimony, not only because it helped to identify developmental disability for legislators, but also because a developmentally disabled person, directly affected by the legislation at issue, testified competently and effectively about a bill directly related to the normalization goal. That is what normalization is about—preparing developmentally disabled persons to participate in the normal activities of the community.

VI. CONCLUSION

Proponents of normalization for developmentally disabled persons are often passionate advocates of zoning reform for the community homes. Unfortunately, this type of advocacy frequently leads to a "we're the good guys, they're the bad guys" approach to legislative strategy that is usually counter-productive in legislative corridors.

At issue in state zoning legislation for community homes is a decision as to which deserves higher state priority—normalization, more specifically community-based residential services for developmentally disabled persons, or local control over zoning. Obviously, both normalization and local control are commendable policy goals that serve useful purposes, and the arena to best solve this conflict is the state legislature. Elected representatives, however, not only serve all

social, economic, ethnic, religious, and geographical groups within a state, but also may have started their public careers as local officials.

As a result, legislative strategies based on a "good guys/bad guys" approach, deriving more from emotion than well-thought-out plans and sound preparation, are likely to fail. Effective lobbying on behalf of state zoning legislation for community homes requires a sound strategy based on a detached, dispassionate, and balanced assessment of the probable constitutional, legal, and political barriers. Proponents must recognize that state zoning legislation is a controversial, complex, and difficult issue that will produce intensive and effective opposition from experienced interest groups. That recognition should lead to a long-term and comprehensive strategy that isolates policy issues, deals with constitutional questions, persuades legislators of the necessity and reasonableness of state zoning legislation, insures effective negotiation, and provides knowledge of the population benefited. Such a strategy can anticipate and answer the difficult questions and problems posed by opponents and legislators.

Obviously, legislative strategies will vary from state to state, but this discussion of the experience of one state should provide a valuable case study. As Judge Schneider pointed out,¹¹⁶ however, the most important element in legislative success, is local effort and commitment; and this, of course, depends on a great deal more than the availability of model statutes and suggested strategies.

116. See text accompanying note 67 *supra*.

APPENDIX A

American Bar Association ABA Commission on the Mentally Disabled

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."

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 developmentally disabled persons and to integrate developmentally 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.

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.

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

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

(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.

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

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

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.

Section 5. Licensing Regulations and Density Control for Family Homes

(1) For the purposes of safeguarding the health and safety of developmentally disabled persons and avoiding over-concentration of family 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:

(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;

(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;

(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;

(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 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.

(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.

(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.

(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.

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.

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.

APPENDIX B

Sub. S.B. No. 71

A Bill

To amend sections 3313.74, 5123.19, and 5123.99, to enact new section 5123.18, and to repeal section 5123.18 of the Revised Code to expand the licensing program for residential facilities to include developmentally disabled persons and persons requiring similar services, and to limit restrictions on the location of such facilities.

Be it enacted by the General Assembly of the State of Ohio:

SECTION 1. That sections 3313.74, 5123.19, and 5123.99 be amended and section 5123.18 of the Revised Code be enacted to read as follows:

Sec. 3313.74. No person, ~~firm, partnership, or corporation~~ shall establish any institution to house or care for ~~the following~~ persons SUFFERING FROM A COMMUNICABLE DISEASE, AS DEFINED BY THE DIRECTOR OF HEALTH, within two thousand feet of any public, private, or parochial school operating under the standards set by the school laws or school land used for recreational purposes in connection with school activities.

~~(A) Persons suffering from a communicable disease as defined by the director of health;~~

~~(B) Persons adjudged to be mentally ill, feeble minded, epileptic, or insane.~~

This section does not apply to members of an established household suffering from such ailments.

Sec. 5123.18. (A) AS USED IN THIS SECTION AND SECTION 5123.19 OF THE REVISED CODE:

(1) "RESIDENTIAL FACILITY" MEANS A HOME OR FACILITY IN WHICH A PERSON WITH A DEVELOPMENTAL DISABILITY RESIDES, EXCEPT A HOME SUBJECT TO CHAPTER 3721. OF THE REVISED CODE OR THE HOME OF A RELATIVE OR LEGAL GUARDIAN IN WHICH A PERSON WITH A DEVELOPMENTAL DISABILITY RESIDES.

(2) "DEVELOPMENTAL DISABILITY" MEANS A DISABILITY THAT ORIGINATED BEFORE THE ATTAINMENT OF EIGHTEEN YEARS OF AGE AND CAN BE EXPECTED TO CONTINUE INDEFINITELY, CONSTITUTES A SUBSTANTIAL HANDICAP TO THE PERSON'S ABILITY TO FUNCTION NORMALLY IN SOCIETY, AND IS ATTRIBUTABLE TO MENTAL RETARDATION, CEREBRAL PALSY, EPILEPSY, AUTISM, OR 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 OR REQUIRES SIMILAR TREATMENT AND SERVICES.

(3) "FAMILY HOME" MEANS A RESIDENTIAL FACILITY THAT PROVIDES ROOM AND BOARD, PERSONAL CARE, HABILITATION SERVICES, AND SUPERVISION IN A FAM-

ILY SETTING FOR NOT MORE THAN EIGHT PERSONS WITH DEVELOPMENTAL DISABILITIES.

(4) "GROUP HOME" MEANS A RESIDENTIAL FACILITY THAT PROVIDES ROOM AND BOARD, PERSONAL CARE, HABILITATION SERVICES, AND SUPERVISION IN A FAMILY SETTING FOR AT LEAST NINE BUT NOT MORE THAN SIXTEEN PERSONS WITH DEVELOPMENTAL DISABILITIES.

(5) "POLITICAL SUBDIVISION" MEANS A MUNICIPAL CORPORATION, COUNTY, OR TOWNSHIP.

(B) EVERY PERSON DESIRING TO OPERATE A RESIDENTIAL FACILITY SHALL APPLY FOR LICENSURE OF THE FACILITY TO THE CHIEF OF THE DIVISION OF MENTAL RETARDATION AND DEVELOPMENTAL DISABILITIES.

(C) THE CHIEF OF THE DIVISION OF MENTAL RETARDATION AND DEVELOPMENTAL DISABILITIES SHALL LICENSE AND INSPECT THE OPERATION OF RESIDENTIAL FACILITIES AND MAY RENEW AND REVOKE SUCH LICENSES. A LICENSE IS VALID FOR ONE YEAR FROM THE DATE IT IS ISSUED OR RENEWED. BEFORE ISSUING OR RENEWING A LICENSE, THE CHIEF OF THE DIVISION OR HIS DESIGNEE SHALL INSPECT EACH RESIDENTIAL FACILITY FOR WHICH APPLICATION IS MADE. THE CHIEF OR HIS DESIGNEE MAY MAKE ADDITIONAL INSPECTIONS OF A LICENSED RESIDENTIAL FACILITY. THE CHIEF SHALL NOT ISSUE OR RENEW AND MAY REVOKE THE LICENSE OF A RESIDENTIAL FACILITY NOT OPERATED IN COMPLIANCE WITH THIS SECTION AND RULES ADOPTED THEREUNDER. THE CHIEF SHALL ISSUE OR RENEW THE LICENSE OF A FACILITY FOR WHICH PROPER APPLICATION IS MADE IF THE FACILITY IS OPERATED IN COMPLIANCE WITH THIS SECTION AND RULES ADOPTED THEREUNDER. NO LICENSE FOR A RESIDENTIAL FACILITY SHALL BE ISSUED OR RENEWED NOR THE LOCATION OF A LICENSE BE TRANSFERRED BY THE CHIEF UNTIL HE NOTIFIES, BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED, OR BY PERSONAL SERVICE, THE CLERK OF THE LEGISLATIVE AUTHORITY OF THE MUNICIPAL CORPORATION IF THE LOCATION OF THE

RESIDENTIAL FACILITY IS WITHIN A MUNICIPAL CORPORATION, OR THE CLERK OF THE BOARD OF COUNTY COMMISSIONERS AND CLERK OF THE BOARD OF TOWNSHIP TRUSTEES IF THE LOCATION OF THE RESIDENTIAL FACILITY IS LOCATED IN UNINCORPORATED TERRITORY; AND AN OPPORTUNITY IS PROVIDED TO THE GENERAL PUBLIC AND OFFICIALS OR EMPLOYEES OF THE MUNICIPAL CORPORATION OR COUNTY AND TOWNSHIP, WHICH OFFICIALS AND EMPLOYEES SHALL BE DESIGNATED BY THE CHIEF EXECUTIVE OFFICER OR LEGISLATIVE AUTHORITY OF THE MUNICIPAL CORPORATION OR THE BOARD OF COUNTY COMMISSIONERS OR TOWNSHIP TRUSTEES, TO OBJECT OR TO COMMENT UPON THE ADVISABILITY OF THE ISSUANCE, RENEWAL OR TRANSFER OF LOCATION OF THE LICENSE IN WRITING. THE WRITTEN OBJECTIONS OR COMMENTS SHALL BE MADE TO THE CHIEF NOT LATER THAN FORTY-FIVE DAYS AFTER THE CHIEF NOTIFIES THE APPROPRIATE LOCAL GOVERNMENTAL OFFICIALS OR BODIES. AT THE TIME OF THE ISSUANCE OR RENEWAL OF THE LICENSE THE CHIEF SHALL MAKE WRITTEN FINDINGS CONCERNING THE OBJECTIONS OR COMMENTS AND HIS DECISION OF THE ISSUANCE OR RENEWAL OF THE LICENSE.

THE CHIEF SHALL ADOPT AND MAY AMEND AND RESCIND RULES ESTABLISHING PROCEDURES AND FEES FOR ISSUING AND RENEWING LICENSES AND REGULATING THE OPERATION OF RESIDENTIAL FACILITIES. ADOPTION, AMENDMENT, AND RESCISSION OF RULES AND APPEALS FROM ORDERS AFFECTING ISSUANCE, RENEWAL, AND REVOCATION OF LICENSES UNDER THIS SECTION, ARE GOVERNED BY CHAPTER 119 OF THE REVISED CODE.

(D) ANY PERSON MAY OPERATE A LICENSED FAMILY HOME AS A PERMITTED USE IN ANY RESIDENTIAL DISTRICT OR ZONE, INCLUDING ANY SINGLE-FAMILY RESIDENTIAL DISTRICT OR ZONE, OF ANY POLITICAL SUBDIVISION. FAMILY HOMES MAY BE REQUIRED TO COMPLY WITH AREA, HEIGHT, YARD, AND ARCHITECTURAL COMPATIBILITY REQUIREMENTS THAT ARE UNI-

FORMLY IMPOSED UPON ALL SINGLE-FAMILY RESIDENCES WITHIN THE DISTRICT OR ZONE.

(E) ANY PERSON MAY OPERATE A LICENSED GROUP HOME AS A PERMITTED USE IN ANY MULTIPLE-FAMILY RESIDENTIAL DISTRICT OR ZONE OF ANY POLITICAL SUBDIVISION, EXCEPT THAT A POLITICAL SUBDIVISION THAT HAS ENACTED A ZONING ORDINANCE OR RESOLUTION ESTABLISHING PLANNED UNIT DEVELOPMENT DISTRICTS MAY EXCLUDE GROUP HOMES FROM SUCH DISTRICTS, AND A POLITICAL SUBDIVISION THAT HAS ENACTED A ZONING ORDINANCE OR RESOLUTION MAY REGULATE GROUP HOMES IN MULTIPLE-FAMILY RESIDENTIAL DISTRICTS OR ZONES AS A CONDITIONALLY PERMITTED USE OR SPECIAL EXCEPTION, IN EITHER CASE, UNDER REASONABLE AND SPECIFIC STANDARDS AND CONDITIONS SET OUT IN THE ZONING ORDINANCE OR RESOLUTION TO:

(1) REQUIRE THE ARCHITECTURAL DESIGN AND SITE LAYOUT OF THE HOME AND THE LOCATION, NATURE, AND HEIGHT OF ANY WALLS, SCREENS, AND FENCES TO BE COMPATIBLE WITH ADJOINING LAND USES AND THE RESIDENTIAL CHARACTER OF THE NEIGHBORHOOD;

(2) REQUIRE COMPLIANCE WITH YARD, PARKING, AND SIGN REGULATION;

(3) LIMIT EXCESSIVE CONCENTRATION OF HOMES.

(F) THIS SECTION DOES NOT PROHIBIT A POLITICAL SUBDIVISION FROM APPLYING TO RESIDENTIAL FACILITIES NONDISCRIMINATORY REGULATIONS REQUIRING COMPLIANCE WITH HEALTH, FIRE, AND SAFETY REGULATIONS AND BUILDING STANDARDS AND REGULATIONS.

(G) DIVISIONS (D) AND (E) OF THIS SECTION SHALL NOT BE APPLICABLE TO MUNICIPAL CORPORATIONS THAT HAD IN EFFECT ON JUNE 15, 1977 AN ORDINANCE SPECIFICALLY PERMITTING IN RESIDENTIAL ZONES LICENSED RESIDENTIAL FACILITIES BY MEANS OF PERMITTED USES, CONDITIONAL USES, OR SPECIAL EXCEPTIONS, SO LONG AS SUCH ORDINANCE REMAINS IN EFFECT WITHOUT ANY SUBSTANTIVE MODIFICATION.

Sec. 5123.19. No person shall OPERATE A RESIDENTIAL FACILITY OR receive a ~~mentally-retarded~~ person for care in WITH A DEVELOPMENTAL DISABILITY AS A RESIDENT OF a residential ~~care~~ facility unless such facility is licensed under section 5123.18 of the Revised Code.

Sec. 5123.99. Whoever violates section 5123.17 or 5123.19 of the Revised Code ~~shall be fined not more than one thousand dollars or imprisoned not more than six months, or both~~ IS GUILTY OF A MISDEMEANOR OF THE FIRST DEGREE.

SECTION 2. That existing sections 3313.74, 5123.19, and 5123.99 and section 5123.18 of the Revised Code are hereby repealed.

SECTION 3. Rules adopted under former section 5123.18 of the Revised Code in effect on the effective date of this act shall remain in effect until amended or rescinded under new section 5123.18 of the Revised Code as enacted by this act.

