UNDESIRABLE USES

Municipalities have increasingly resorted to zoning, the primary mechanism for local regulation of land use and development,[1] to exclude uses that the community feels are "undesirable."[2] Using the common law police power to zone for the general welfare,[3] local governments have classified adult entertainment establishments, abortion clinics, and community group homes[4] as undesirable land uses.[5] Zoning ordinances exclude adult entertainment establishments and abortion clinics from business districts, and exclude group homes from residential areas. Although reasons differ for excluding each use, one common concern is the detrimental impact of the offending use on property values.[6] A court's response to this concern depends on the amount of proof that property values will indeed suffer. The

1. Yohalem, *Exclusionary Zoning, reprinted in* PRACTICING LAW INSTITUTE, LEGAL RIGHTS OF MENTALLY DISABLED PERSONS 1673, 1675 (1979) (each state has either enabling legislation or state constitutional provisions granting to municipalities the power to zone).

2. *See generally* Marcus, *Zoning Obscenity: Or, The Moral Politics of Porn*, 27 BUFFALO L. REV. 1 (1978) (a growing recognition of inability of judges to distinguish obscenity as well as public outcry has led to restrictive zoning to regulate pornography).

3. *See* 1 R. ANDERSON, AMERICAN LAW OF ZONING § 1.14 (2d ed. 1976); Chandler & Ross, *Zoning Restrictions and the Right to Live in the Community, reprinted in* THE MENTALLY RETARDED CITIZEN AND THE LAW 311 (M. Kindred, ed. 1976) (state enabling legislation generally does not have clear substantive standards and requires only that zoning ordinances prohibit things which are harmful to health, morals, safety, or welfare).

4. Community group homes are generally non-secure residential programs that emphasize family-style living in a home-like atmosphere. They are usually operated by non-profit corporations, government agencies, or private persons. *See Legal Issues in State Mental Health Care: Proposals for Change, Zoning for Community Residences*, 2 MENTAL DISABILITY L. REP. 316 (1977).

5. Another land use that has been litigated over as undesirable is land used for halfway houses for drug addicts or prisoners. These cases have generally been treated similar to group home cases. *See* City of Dallas v. Turtle Creek Manor, Inc., 546 S.W.2d 384 (Tex. Civ. App. 1977).

6. *See* Note, *Zoning for the Mentally Ill: A Legislative Mandate*, 16 HARV. J. LEGIS. 853, 860 (1979) [hereinafter cited as *Zoning for the Mentally Ill*]. *See also* D. LAUBER & F. BANGS, ZONING FOR FAMILY AND GROUP CARE FACILITIES 8-10 (Am. Soc'y of Planning Officials Planning Advisory Serv. Rep. No. 300, 1974), *cited in* Lip-

main issue in adult entertainment establishment cases is the impact of zoning ordinances on constitutionally protected speech. Controversies over abortion clinic zoning also involve a constitutional right—the right of privacy in obtaining an abortion. Litigation over community group homes, however, generally focuses on state law issues, as the homes try to qualify within the existing zoning structure.

I. ADULT ENTERTAINMENT ESTABLISHMENTS

As the number of adult bookstores, theaters, and live nude dancing establishments has grown, so has the amount of litigation over these businesses. The public, indignant at the proliferation of adult entertainment land uses and upset over their destructive impact on property values,[7] has tried to regulate their location through exclusionary zoning.[8] Cities attempting to revitalize downtown areas often try to disperse adult entertainment establishments in order to prevent an overconcentration in the redevelopment areas.[9] Courts faced with challenges to these ordinances must deal with the first amendment's protection of pornographic, but not obscene, communication.[10]

In *Young v. American Mini Theaters, Inc.*[11] the Supreme Court upheld Detroit's anti-skid row ordinance. It denied conditional use permits to any adult use that was located within 500 feet of a residential district or within 100 feet of any other adult use. The lower court declared the 500 foot limitation invalid as a prior restraint on speech.[12] A plurality of the Supreme Court found that Detroit's interest in protecting the quality of urban life outweighed the plaintiff's first amendment rights.[13] Although the first amendment protects por-

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pincott, *"A Sanctuary for People": Strategies for Overcoming Zoning Restrictions on Community Homes for Retarded Persons*, 31 STAN. L. REV. 767, 769 (1979).

7. Marcus, *supra* note 2, at 1.

8. *Id.* Exclusionary zoning is a method whereby a municipality either fails to provide a zone for a particular use or specifically prohibits the use. 2 R. ANDERSON, AMERICAN LAW OF ZONING, §§ 8.01-8.31 (2d ed. 1977).

9. *See* Marcus, *supra* note 2, at 4.

10. *See* Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976).

11. *Id.*

12. Nortown Theatre, Inc. v. Gribbs, 373 F. Supp. 363 (E.D. Mich. 1974), *rev'd sub nom.* American Mini Theatres, Inc. v. Gribbs, 518 F.2d 1014 (6th Cir. 1975), *rev'd sub nom.* Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976). The 500 foot requirement was not challenged on appeal.

13. Young v. American Mini Theatres, Inc., 427 U.S. at 62-63. *See also* Comment, 38 WASH. & LEE L. REV. 495, 498 (1981).

nographic communication from total suppression, the plurality allowed the state to regulate it to a greater extent than other types of speech.[14]

Justice Powell, concurring, disagreed with the plurality's implication that non-obscene, erotic materials may be treated differently under the first amendment than other types of non-commercial speech.[15] Justice Powell found instead that the ordinance did not impose any content limitation on the creators of adult movies, did not make them less available, and did not restrict access to the movies in any significant way.[16] The Detroit zoning ordinance was merely a restriction on the location of adult establishments, not on the content of their communication.[17]

Cases interpreting *Young* have generally followed the Powell concurrence.[18] The Seventh Circuit used Justice Powell's analysis[19] to invalidate a zoning ordinance requiring a special use permit for

14. 427 U.S. at 70-71. *See* Note, *Zoning Control of Abortion Clinics*, 28 CLEV. ST. L. REV. 507, 523 (1979) [hereinafter cited as *Zoning Control*].

15. 427 U.S. at 73 n.1 (Powell, J. concurring). Motion pictures are fully within the protection of the first amendment. Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501-03 (1952).

16. 427 U.S. at 78 (Powell, J. concurring).

17. *Id.* at 78-79.

18. *See* Purple Onion, Inc. v. Jackson, 511 F. Supp. 1207, 1223 (N.D. Ga. 1981) (followed Justice Powell's emphasis concerning the fact that the Detroit ordinance did not restrict public access to communication; Atlanta's ordinance differed); Borrago v. City of Louisville, 456 F. Supp. 30 (W.D. Ky. 1978) (ordinance regulating adult materials justified under the Powell analysis in *Young* since it furthered important and substantial interests); Bayside Enterprises, Inc. v. Carson, 450 F. Supp. 696, 702 (M.D. Fla. 1978) (under the plurality and concurring opinions in *Young*, the denial of access to the adult entertainment market would eliminate a crucial underpinning of the validity of the Detroit zoning scheme); Kacar, Inc. v. Zoning Hearing Bd. of Allentown,—Pa. Commw.—, 432 A.2d 310, 313 (1981) (under the Powell analysis, the legitimate state interest furthered by the government action outweighed the individual rights; ordinance regulated a economic exploitation and location of certain films and books).

19. Justice Powell had used the test in United States v. O'Brien, 391 U.S. 367 (1968). Under that test, a government regulation is sufficiently justified despite its incidental impact on first amendment interests if the regulation is within the constitutional power of the government, if it furthers an important or substantive government interest, if the government interest is unrelated to the suppression of free expression, and if the incidental restriction on first amendment freedoms is not greater than is essential to the furtherance of that interest. *See* County of Cook v. World Wide News Agency, 98 Ill. App. 3d 1094, 424 N.E.2d 1173, 1176 (1981) (statement of the test).

"adult" movie theaters.[20] The court found that the ordinance was a prior restraint on protected communication since it impermissibly classified speech based on content.[21] Similarly, the Fifth Circuit, in *Bayou Landing v. Watts*,[22] found that when a municipality bases the denial of an occupancy permit on the content of objectionable materials, it has the burden of demonstrating that the restraint scrupulously comports with the most rigorous procedural safeguards.[23]

The *Young* Court placed considerable emphasis on Detroit's justification for the zoning ordinance.[24] It is important, therefore, that the municipality clearly set out the reasons for its action. In *E & B Enterprises v. City of University Park*,[25] the city offered no studies of the effect of adult uses on town neighborhoods. Evidence showed that community objection to the content of the adult films prompted the exclusionary zoning.[26] The court distinguished *Young* on these factors and invalidated the ordinance. Courts generally hold vague or overbroad ordinances to be a prior restraint on speech,[27] and use a

20. Entertainment Concepts, Inc. v. Maciejewski, 631 F.2d 497 (7th Cir. 1980), *cert. denied*, 450 U.S. 919 (1981).

21. *Id.* at 503.

22. 563 F.2d 1172 (5th Cir. 1977), *cert. denied*, 439 U.S. 818 (1978).

23. *Id.* at 1176. Conditional use permit requirements pose a threat to the validity of zoning ordinances if the standards for granting a permit are not sufficiently clear. *See* County of Cook v. World Wide News Agency, 98 Ill. App. 3d 1094, 424 N.E.2d 1173, 1177 (1981) (Ordinance requiring that every operator of an adult bookstore obtain a special use permit from the County Board regardless of the store's proximity to another regulated use was a prior restraint on speech. The County Board had unbridled discretion to grant or deny the permit); City of Imperial Beach v. Palm Avenue Books, Inc., 115 Cal. App. 3d 134, 171 Cal. Rptr. 197 (1981); Note, *Abortion Clinic Zoning: The Right to Procreative Freedom and the Zoning Power*, 5 WOMEN'S RIGHTS L. REP. 283, 295 (1980) (zoning must be based on a legislative determination rather than the popularity of certain activities) [hereinafter cited as *Abortion Clinic Zoning*].

24. The Detroit Common Council made a specific finding that these uses of property were especially injurious to neighborhoods when concentrated in limited areas. 427 U.S. at 54. Urban planners and real estate experts stated that the location of several such businesses in the same neighborhood tended to adversely affect property values, cause an increase in crime, and encourage residents and businesses to move elsewhere. *Id.* at 55.

25. 449 F. Supp. 695 (N.D. Tex. 1977).

26. *Id.* at 696. The neighborhood preservation rationale was merely a mask to cover an attempt to run the theater out of town. Town disapproval of the content of the theater's films and the effect on speech were highly significant. *Id.* at 697.

27. *E.g.*, Entertainment Concepts, Inc. v. Maciejewski, 631 F.2d 497 (7th Cir.

strict scrutiny analysis to strike them down.[28] A Michigan court, in *Ferndale v. Ealand*,[29] applied strict scrutiny in finding that a city had not demonstrated a compelling governmental interest in the regulation of adult entertainment facilities.[30] In *Purple Onion v. Jackson*[31] the City of Atlanta attempted to justify its Adult Entertainment Zoning Ordinance as a measure to prevent blight and to protect property values.[32] The court used Powell's analysis to find the ordinance's definitions of "adult book store," "adult theater," and "adult entertainment establishment" unconstitutionally vague[33] and overbroad.[34] The distance limitations imposed were far greater than necessary to serve the city's interest in reducing the effects of adult business.[35]

1980) *cert. denied*, 450 U.S. 919 (1981); E & B Enterprises v. City of University Park, 449 F. Supp. 695 (N.D. Tex. 1977).

28. Entertainment Concepts, Inc. v. Maciejewski, 631 F.2d at 501-02; E & B Enterprises v. City of University Park, 449 F. Supp. at 697.

29. 92 Mich. App. 88, 286 N.W.2d 688 (1979).

30. *Id.* at 691. The effect of the particular restriction was almost a total ban on the facilities. *See also* Genusa v. City of Peoria, 619 F.2d 1203 (7th Cir. 1980) (parts of ordinance invalid as a prior restraint on speech).

31. 511 F. Supp. 1207 (N.D. Ga. 1981).

32. *Id.* at 1210. The Atlanta Adult Entertainment Zoning Ordinance was enacted by the city council to establish locational requirements for adult businesses. The council found that adult businesses blight and downgrade property values when located in business districts; cause traffic congestion in already concentrated areas of the city; require extra police and fire protection from the city; and create excessive noise, causing surrounding property and those nearby to suffer. *Id.*

33. *Id.* at 1218. For other cases holding ordinances void for vagueness, see Entertainment Concepts, Inc. v. Maciejewski, 631 F.2d 497 (7th Cir. 1980), *cert. denied*, 450 U.S. 919 (1981) (adult movie ordinance was vague since there was no definition of "adult") and Pringle v. City of Covina, 115 Cal. App. 3d 151, 171 Cal. Rptr. 251 (1981) (definition of adult movie theatre contained vague statutory language; statute was construed narrowly so that it did not apply to plaintiff). *But see* Basiardanes v. City of Galveston, 514 F. Supp. 975 (S.D. Tex. 1981) (definition of adult motion picture theater not unconstitutionally vague); Northend Cinema, Inc. v. City of Seattle, 90 Wash. 2d 709, 585 P.2d 1153 (1978) (ordinance requiring all adult movie theaters to be located in certain downtown areas not void for vagueness).

34. 511 F. Supp. at 1221. *See also* Keego Harbor Co. v. City of Keego Harbor, 657 F.2d 94 (6th Cir. 1981) (ordinance that effectively zoned adult theaters from the town was void as overbroad); E & B Enterprises v. City of University Park, 449 F. Supp. 695 (N.D. Tex. 1977) (city ordinance that in effect required adult theater to change type of film it showed or move out of city violated equal protection and was overbroad). *But see* Northend Cinema, Inc. v. City of Seattle, 90 Wash. 2d 709, 585 P.2d 1153 (1978) (ordinance not overbroad).

35. 511 F. Supp. at 1227. The adult uses were restricted to three zoning districts

In *Young*, the plurality noted that although Detroit could constitutionally regulate the geographical placement of adult entertainment establishments within its jurisdiction,[36] "the situation would be quite different if the ordinance had the effect of suppressing, or greatly restricting access to lawful speech."[37] Accordingly, many courts have upheld zoning ordinances that merely impose restrictions on the location of adult establishments.[38] The closer an ordinance approaches a total ban on the adult use, however, the more likely a court will strike it down.[39] In *Bayside Enterprises v. Carson*,[40] the city of Jacksonville, Florida imposed such restrictive distance limitations that no proposed adult use could comply with them.[41] The court focused on the effect of the limitations on the exercise of first amendment rights.[42] Here, unlike *Young*, the ordinance precluded access to the adult entertainment market,[43] thereby unlawfully suppressing speech.[44]

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and limited to 1000 feet from any other adult use, and 500 feet from any residential district. The court found that of 81 sites for adult uses suggested by the city, all but 10 or so were wholly unacceptable as sites for adult businesses. *Id.* at 1216.

36. Young v. American Mini Theatres, Inc., 427 U.S. at 71-73.

37. *Id.* at 71 n.35.

38. *See* Avalon Cinema Corp. v. Thompson, 658 F.2d 555 (8th Cir. 1981) (city ordinance prohibiting adult movies within 100 yards of a church, public or private school or residential area a valid exercise of city's police power); Walnut Properties, Inc. v. Long Beach City Council, 100 Cal. App. 3d 1018, 161 Cal. Rptr. 411 (1980), *cert. denied*, 449 U.S. 836 (1980) (ordinance passed to insure that adult entertainment businesses will not contribute to blighting or downgrading of the surrounding neighborhoods did not restrict access to the adult movie market); Dandy Co., Inc. v. South Bend, 75 Ind. Dec. 98, 401 N.E.2d 1380 (1980) (zoning ordinance did not prohibit plaintiff from operating an adult bookstore); Northend Cinema, Inc. v. City of Seattle, 90 Wash. 2d 709, 585 P.2d 1153 (1978), *cert. denied sub nom.* Apple Theatre, Inc. v. Seattle, 441 U.S. 946 (1979) (ordinance requiring all adult movie theaters to be located in certain downtown areas justified by a study of need for zoning of adult theaters which cited specific concerns).

39. *See* Purple Onion, Inc. v. Jackson, 511 F. Supp. 1207 (N.D. Ga. 1981); Bayside Enterprises, Inc. v. Carson, 450 F. Supp. 696 (M.D. Fla. 1978); City of Ferndale v. Ealand, 92 Mich. App. 88, 286 N.W.2d 688 (1979).

40. 450 F. Supp. 696 (M.D. Fla. 1978).

41. The distance limitations were 2500 feet from a church or school, 2500 feet from another adult use, and 500 feet from a residential district. *Id.* at 701-02.

42. *Id.* at 702.

43. *Id.* The ordinance contained a grandfather clause allowing currently operating establishments to continue in their present locations. *Id.* at 702 n.9.

44. *Id.* at 703. *See also* Marco Lounge, Inc. v. City of Federal Heights,—Colo.—, 625 P.2d 982 (1981) (*en banc*) (zoning ordinance that effectively banned all live nude entertainment was invalidated).

The United States Supreme Court recently considered a total ban on live entertainment in *Schad v. Borough of Mount Ephraim*.[45] The ordinance in question purported to list all permitted uses in the borough's commercial district, adding that all uses not expressly permitted were prohibited.[46] The operators of an adult bookstore were found guilty in criminal court of violating the ordinance. They had allowed a customer to watch live nude dancing from behind a glass panel. The state court expressly found that the ordinance validly forbade live entertainment in any establishment.[47] The Supreme Court reversed the convictions and struck down the ordinance.

The Court stated that by excluding all live entertainment, Mount Ephraim prohibited protected expression without justifying such a broad exclusion.[48] The Court recognized municipal power to control land use, but held that zoning laws that infringe on protected liberties must be narrowly drawn and must further a sufficiently substantial governmental interest.[49] The Supreme Court thus implicitly endorsed the Powell analysis in *Young*,[50] and followed the line of lower court cases using a strict scrutiny test.[51] *Schad*, then, was a logical extension of *Young*, since *Young* warned that if the ordinance had the effect of totally suppressing or greatly restricting access to speech, the Court would hold differently.[52] Since Mount Ephraim could

45. 452 U.S. 61 (1981).

46. *Id.* at 63-64. Some permitted uses were offices, banks, taverns, restaurants, retail stores, repair shops, cleaners and motels.

47. *Id.* at 64-65. The Supreme Court stated that it was bound by state court interpretation of the local ordinance. *Id.* at 65.

48. *Id.* at 67. There was no justification on the face of the ordinance. *Id.*

49. *Id.* at 68-70.

50. In a footnote, the Court cited the test Justice Powell used in *Young*. *Id.* at 68 n.7.

51. For lower federal court decisions applying strict scrutiny analysis see Keego Harbor Co. v. City of Keego Harbor, 657 F.2d 94 (6th Cir. 1981); Bayside Enterprises v. Carson, 450 F. Supp. 696 (M.D. Fla. 1978); E & B Enterprises v. City of University Park, 449 F. Supp. 695 (N.D. Tex. 1977); City of Imperial Beach v. Palm Avenue Books, 115 Cal. App. 3d 134, 171 Cal. Rptr. 197 (1981); City of Ferndale v. Ealand, 92 Mich. App. 88, 286 N.W.2d 688 (1979).

The ordinance in *Schad* was also invalid as a time, place, and manner restriction. The borough could not identify why it was reasonable to exclude all commercial live entertainment while allowing a variety of other commercial uses. The borough was unable to show that live entertainment was incompatible with uses presently permitted. Additionally, there were no open adequate alternative channels of communication. 452 U.S. at 74-76.

52. Young v. American Mini Theatres, 427 U.S. at 71 n.35.

have employed a less restrictive alternative to further its interest, the ordinance failed.[53]

Schad probably will not put an end to litigation over zoning and adult uses because zoning ordinances vary so widely. *Schad* will, however, put municipalities on notice that they must draw ordinances narrowly, and support them with sufficient justification to pass constitutional muster. The effect of *Schad* on future adult use cases may be limited by the extent of Mount Ephraim's prohibition of live entertainment, and the inadequacy of the borough's justifications for the ban.[54] The zoning authority never arrived at a defensible conclusion that live entertainment presented unusual problems for the community.[55]

Schad emphasizes the need for sufficient objective data to justify adult use restrictions. Following *Schad*, the Sixth Circuit in *Keego Harbor Co. v. City of Keego Harbor*[56] invalidated an ordinance that effectively banned adult uses. In addition to distance requirements, the ordinance required permission of the city council and planning commission for a permit.[57] The court interpreted *Schad* as demanding that a city provide "sufficient justification" for imposing a burden on the first amendment.[58] The city in *Keego Harbor* attempted to justify the restrictions as necessary to prevent blight and to control

53. 452 U.S. at 74.

54. Mount Ephraim did not articulate the justifications for the ban. The borough asserted the following justifications for the ordinance: (1) that live entertainment would conflict with the borough's plan to create a commercial area that catered only to the immediate needs of its residents and (2) to avoid problems that may be associated with live entertainment, such as parking, trash, police protection and medical facilities. *Id.* at 72-73.

55. *Id.* at 73. Justice Powell concurred on the ground that Mount Ephraim "failed altogether to justify its broad restriction of protected expression." *Id.* at 79. Justice Stevens also agreed that the borough had the burden of showing that the introduction of live entertainment had an adverse impact on the neighborhood or borough as a whole. Interestingly, Justice Stevens, author of the *Young* plurality, added that when first amendment interests are implicated, the borough must demonstrate that a "uniform policy in fact exists and is applied in a content neutral fashion." *Id.* at 84. This seems to contradict his implied holding in *Young*, that classifications of speech based on content would be permissible.

56. 657 F.2d 94 (6th Cir. 1981).

57. *Id.* at 96 n.1. *See also* County of Cook v. World Wide News Agency, 98 Ill. App. 3d 1094, 424 N.E.2d 1173 (1981) (special use permit requirement in zoning ordinance was a prior restraint).

58. 657 F.2d at 97. The city had to establish that the restrictions were necessary to meet delineated city goals. *Id.*

traffic.[59] The city, however, had no objective information on the claimed harm at the time of the ordinance's enactment.[60] The court found insufficient grounds to support an ordinance which in effect banned all adult theaters.[61] *Keego Harbor* clearly imposes burdens of practical proof on municipalities that infringe on protected areas of communication.

II. ABORTION CLINICS

Community sentiments against abortion often lead to zoning ordinances that discriminate against abortion clinics. Unlike adult use restrictions, however, municipalities in abortion clinic cases cannot claim that their ordinances fulfill the valid zoning objective of neighborhood preservation.[62] An abortion clinic is practically indistinguishable from other medical outpatient clinics.[63] Furthermore the constitutional obstacle in these cases arises not from freedom of speech but from a woman's fundamental right of privacy.[64]

In *Framingham Clinic v. Board of Selectmen*[65] the Supreme Judicial Court of Massachusetts invalidated a zoning bylaw which prohibited abortion clinics while allowing other types of medical clinics. The court found that the ordinance unconstitutionally interfered with the right of a woman to terminate her pregnancy during the first trimester.[66] Although a woman seeking an abortion could go to a hospital, the court found that this would "burden arbitrarily the constitutional right"[67] because the purpose of the clinic was to provide low cost, outpatient service. The board's mere authority to zone, without some compelling governmental interest, could not justify sin-

59. *Id.* at 98.

60. *Id.*

61. *Id.* at 97-98. The court added that it was "not immediately apparent as a matter of experience" that adult movie theaters would have a deleterious effect on a town that already had many bars and few of the attributes of a quiet residential community. *Id.* at 98.

62. *See Zoning Control, supra* note 14, at 527.

63. *Abortion Clinic Zoning, supra* note 23, at 286.

64. Roe v. Wade, 410 U.S. 113 (1973) (right of privacy encompasses a woman's decision whether or not to terminate pregnancy). *See Abortion Clinic Zoning, supra* note 23, at 291-92.

65. 373 Mass. 279, 367 N.E.2d 606 (1977).

66. *Id.* at 283, 367 N.E.2d at 609.

67. *Id.* In addition one community could not ban clinics simply because they were available in the next town. *Id.*

gling out one type of clinic.[68]

Discrimination against a particular clinic also may supply grounds to strike down an ordinance. In *Planned Parenthood of Minnesota v. Citizens for Community Action*[69] the zoning ordinance directly prevented the opening of a specific clinic.[70] When the prospective clinic operator—a family planning organization—sought a preliminary injunction against enforcement of the ordinance, a neighborhood association moved to intervene.[71] The neighborhood association claimed an interest in preserving property values as grounds for intervention, and presented a real estate expert who testified that an abortion clinic would lower residential and community property values in the immediate area.[72] Nevertheless, the Planned Parenthood established the requirements for a permanent injunction by showing that the ordinance, aimed primarily at the organization's proposed clinic, interfered with women's right to secure a first trimester abortion.[73] The court emphasized that "[t]here is no judicial authority allowing a municipality, by imposing special restrictive zoning requirements on first trimester abortion clinics, to do indirectly that which it cannot do directly by medical regulation."[74]

One district court looked at the zoning of abortion clinics in a dif-

68. *Id.* at 287, 367 N.E.2d at 611. *See* Fox Valley Reproductive Health Care Center, Inc. v. Arft, 446 F. Supp. 1072 (E.D. Wis. 1978). The ordinance in *Fox Valley* effectuated a total ban on abortion clinics. The court found that the cost of bringing the clinic in compliance with the various regulations would force the clinic to raise the abortion fee so high that it would be beyond the economic means of poor women. 446 F. Supp. at 1074. *See also* Planned Parenthood Ass'n of Northwest Indiana v. Town of Merrillville, No. 78-70 (N.D. Ind. April 20, 1978) (ordinance preventing the construction and operation of an abortion clinic in a zone permitting business and commercial uses enjoined); Fox Hill Surgery Clinic, Inc. v. City of Overland Park, No. 77-4120 (E.D. Kan. July 11, 1977) (city ordered to issue building permits to abortion clinic). Cases summarized in 4 ABORTION L. REP., Zoning § 10.1, *cited in Abortion Clinic Zoning, supra* note 23, at 292 n.81.

69. 558 F.2d 861 (8th Cir. 1977).

70. *Id.* at 867. The city council had not previously attempted to restrict abortion operations until Planned Parenthood bought the land and planned to transfer its operations. *Id.* at 863-74.

71. *Id.* at 869.

72. *Id.* Thus, the court allowed the association to intervene. The association had significant protectable interest in the subject matter of the litigation. *Id.*

73. *Id.* at 866. *See Abortion Clinic Zoning, supra* note 23, at 291-292 (use compelling state interest test when a zoning classification contravenes a fundamental right).

74. 558 F.2d at 868. The zoning ordinance was only a disguised attempt to regulate medical practices.

ferent light. In *West Side Women's Services v. City of Cleveland*,[75] the court allowed a city to ban abortion clinics from certain areas of the city. The court found that the ordinance did not unduly burden the abortion decision or the physician-patient relationship.[76] The city did not impose a total ban of abortion clinics from an entire political subdivision thus giving women access to abortion clinics in other areas of the city.[77] The court disregarded the discriminatory motivation of the ordinance.[78] The city justified the ordinance as a proper exercise of the police power.[79] The court thus allowed a zoning classification based on anti-abortion sentiments.

If there is no overt discriminatory action against an abortion clinic, courts may be more willing to uphold a zoning ordinance. They will probably uphold an ordinance regulating all clinics, which is not a response to an abortion clinic's attempt to locate in the community.[80] The abortion clinic would simply have to qualify under the existing rules.

Still another method municipalities use to exclude abortion clinics is the requirement of a special use permit. If the town already allows professional offices or other medical clinics, it must show some real distinction between abortion clinics and other clinics to justify excluding only abortion clinics. The Supreme Judicial Court of Massachusetts disapproved of the excessive amount of discretion involved in the special permit process in the recent case *Framingham Clinic v. Zoning Board of Appeals*.[81] The court found that an abortion clinic was a permitted use as a "professional office." The personal opinion

75. 450 F. Supp 796 (N.D. Ohio 1978), *aff'd mem.*, 582 F.2d 1281 (6th Cir. 1978), *cert. denied* 439 U.S. 983 (1978).

76. *Id.* at 798.

77. *Id.* The court essentially followed the same rationale as the *Young* plurality.

78. For a criticism of *West Side Women's Services*, see *Zoning Control, supra* note 14, at 522.

79. 450 F. Supp. at 797. The city argued that the ordinance did not interfere with a fundamental constitutional right so must be judged by a rational basis test. *Id.*

80. *See* Bossier City Medical Suite, Inc. v. City of Bossier City, 483 F. Supp. 633 (W.D. La. 1980). No clinics that allowed "major surgery" were allowed in the district. The court refused to apply strict scrutiny to the ordinance, although plaintiff argued that traditional deference to zoning should not apply when the ordinance infringed on a fundamental right. The court added that, "A commercial enterprise cannot disregard the land use regulations of a valid zoning ordinance merely because its customers are exercising a fundamental right." *Id.* at 647-48.

81. 1981 Mass. Adv. Sh. 109, 415 N.E.2d 840 (1981) (excessive amount of discretion invited an abuse of discretion).

of a zoning administrator whether the use promoted "life" as stated in the bylaw's purposes was irrelevant.[82]

In abortion clinic zoning cases thus far, none have proved a causal relationship between the operation of an abortion clinic and an undesirable community effect.[83] The prohibition then would lack a rational basis and may be a violation of substantive due process[84] or equal protection.[85] Local governments have tried to use zoning, nevertheless, as a tool to effectuate sentiment against abortion. Courts faced with these cases are reluctant to allow community values against a fundamental right to influence land use. Since the abortion decision is protected by the right of privacy, the right should be beyond the reach of the police power[86] without a compelling governmental interest.

Courts may uphold more carefully drafted ordinances. Such an ordinance would distinguish between abortion clinics and other types of clinics on an empirical basis. Proof of harm to property values or traffic control problems combined with a well drafted ordinance will advance the validity of the ordinance. If the zoning plan establishes less than a total ban on abortion clinics in the city, it will also stand on more solid ground. Recently enacted ordinances have been primarily emotional reactions to planned abortion clinics and have not achieved the sophistication of adult entertainment regulations.[87] With growing opposition to abortion and increasing influence of anti-abortion groups, cities will draft careful, narrow zoning ordinances—ordinances that courts will be more likely to uphold.

III. Community Group Homes

Community group homes[88] include homes for foster children, the mentally retarded, and juvenile delinquents. Group homes are an integral part of the de-institutionalization process,[89] which involves

82. 415 N.E.2d at 848.

83. *See Zoning Control, supra* note 14, at 526.

84. *See Abortion Clinic Zoning, supra* note 23, at 291.

85. *Id.* at 291-292.

86. *See Zoning Control, supra* note 14, at 527.

87. *But cf.* E & B Enterprises v. City of University Park, 449 F. Supp. 695 (N.D. Tex. 1977) (exclusion of adult theater based on community reaction overturned). *See* note 26 and accompanying text *supra*.

88. *See* note 4 *supra*.

89. *See* Note, Group House of Port Washington v. Board of Zoning and Appeals:

not only placing the developmentally disabled[90] in more normal environments, but treating them as much like the rest of society as possible. Group homes, which emphasize family-style living,[91] are best located in residential areas.[92] Neighbors present substantial opposition to efforts to establish group homes in residential areas.[93] Local residents view group homes as mini-institutions causing concern over safety, traffic, noise levels, and property values.[94] Recent studies indicate, however, that group homes have no significant negative impact.[95] Unlike adult entertainment establishments and abortion clinics, states have promoted group homes by enacting legislation limiting the effect of local zoning restrictions.[96]

Encroachment of Community Residences into Single Family Districts, 43 ALB. L. REV. 539, 542 (1979) [hereinafter cited as *Encroachment*].

A federal report has defined the term in the mental health field as "[t]he process of (1) preventing both unnecessary admission to and retention in institutions, and (2) finding and developing appropriate alternatives in the community for housing, treatment, training, education, and rehabilitation of the mentally disabled." *Comptroller General Report to Congress, Returning the Mentally Disabled to the Community: Government Needs to Do More* (Jan. 1, 1977), *quoted in* 16 HARV. J. LEGIS., *supra* note 4, at 855.

90. The above definition of deinstitutionalization applies equally as well to juveniles. Unless otherwise specified, all references to "developmentally disabled" refer collectively to the mentally ill, mentally retarded, delinquent, dependent and neglected children. For a discussion of deinstitutionalization see *Encroachment, supra* note 89; Comment, *Exclusionary Zoning and its Effects on Group Homes in Areas Zoned for Single Family Dwellings*, 24 KAN. L. REV. 677, 679-81 (1976).

91. *See Legal Issues in State Mental Health Care: Proposals for Change, Zoning for Community Residences*, 2 MENTAL DISABILITY L. REP. 316 (1977) [hereinafter cited as *Legal Issues*].

92. COMMISSION ON ACCREDITATION FOR CORRECTIONS OF THE AMERICAN CORRECTIONAL ASSOCIATION, MANUAL OF STANDARDS FOR JUVENILE RESIDENTIAL SERVICES foreward at xxi (1974).

93. These districts offer the highest form of protection to a homeowner when limited to single family detached residences. Single family districts are generally upheld on the ground that they promote legitimate zoning purposes: advancement of family and youth values, alleviation of congestion, and population density control. *See* Carroll v. Washington Township Zoning Comm'n, 63 Ohio St. 2d 249, 252, 408 N.E.2d 191, 193 (1980); *Encroachment, supra* note 89, at 539.

94. *See* note 6 and accompanying text *supra*.

95. *See Legal Issues, supra* note 91, at 320; Developmental Disabilities State Legislative Project of the ABA Commission on the Mentally Disabled, *Zoning for Community Homes*, 2 MENTAL DISABILITY L. REP. 794, 795 (1978); Yohalem, *supra* note 1, at 1685 (citing studies which find that property values do not decrease when a group home moves into a neighborhood).

96. *See* note 127 and accompanying text *infra*.

Zoning ordinances that exclude group homes from residential areas vary in type. Some ordinances explicitly exclude the homes, classifying them as businesses, schools, or boarding houses. Others exclude them implicitly by limiting residential areas to single family dwellings. Still other ordinances allow group homes only if they meet conditions imposed on special or conditional use permits.[97]

In *Village of Belle Terre v. Boraas*,[98] the Supreme Court sustained an ordinance which prohibited more than two unrelated persons from living together in a single family residence. The Court found the ordinance reasonable and rationally related to the permissible state objective of forestalling density problems.[99] *Belle Terre* involved groups of college students rather than group homes. The New Jersey Supreme Court, however, in *State v. Baker*,[100] held unconstitutional an ordinance that prohibited more than four unrelated individuals from sharing a single housing unit. The Supreme Court of California also invalidated a similar ordinance in *Santa Barbara v. Adamson*.[101] The state courts found the ordinances not pertinent to noise, traffic, parking congestion or kinds of activity that might alter land use characteristics or the environment of the district.[102] Pennsylvania courts have also effectively distinguished the factual situation in *Belle Terre*[103] in finding limitations on the number of unrelated individuals unconstitutional.[104]

Within single family district zoning ordinances there is wide varia-

97. Yohalem, *supra* note 1, at 1676. Conditions imposed generally include compliance with elaborate building codes and restrictions on the number of residents allowed in the home. *Id.*

98. 416 U.S. 1 (1974).

99. *Id.* at 8-9.

100. 81 N.J. 99, 405 A.2d 368 (1979). *See also* Berger v. State, 71 N.J. 206, 364 A.2d 993 (1976) (restrict single family dwellings only to a reasonable number of persons who constitute a bona fide single housekeeping unit).

101. 27 Cal. 3d 123, 132, 164 Cal. Rptr. 539, 544, 610 P.2d 436, 441 (1980).

102. *See also* City of Chula Vista v. Pagard, 115 Cal. App. 3d 785, 171 Cal. Rptr. 738 (1981).

103. *Belle Terre* involved college students who had housing alternatives.

104. Christ United Methodist Church v. Bethel Park, 55 Pa. Commw. 365, 423 A.2d 1082 (1980); Children's Home of Easton v. City of Easton, 53 Pa. Commw. 216, 417 A.2d 830 (1980) (although population density control was a legitimate zoning interest, there was no logical distinction between three unrelated children in a foster home and three related by blood or adoption). The court in *Children's Home* distinguished *Belle Terre* finding the factual difference between foster families and the six unrelated college students too vast. 53 Pa. Commw. at 220, 417 A.2d at 832.

tion. Some require only that the occupants form a "single housekeeping unit,"[105] while others attempt to define "family."[106] Interpretations of the latter type of ordinance often rely on an expanded use of the term "family" to allow group homes entry into the district.[107] In *City of White Plains v. Ferraioli*,[108] the New York Court of Appeals held that a group home consisting of a married couple, their two children, and their foster children qualified as a single family unit. As long as the home bore the generic character of a family unit maintained as a relatively permanent household it conformed to the ordinance.[109]

A notable exception to the trend of expanding the definition of family to include group homes illustrates the weakness of this ap-

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105. Single family districts offer the highest form of protection to a homeowner when limited to single family detached residences. Single family districts are generally upheld on the ground that they promote legitimate zoning purposes: advancement of family and youth values, alleviation of congestion, and population density control. *See* Carroll v. Washington Township Zoning Comm'n, 63 Ohio St. 2d 249, 252, 408 N.E.2d 191, 193 (1980); *Encroachment, supra* note 89, at 539.

In City of White Plains v. Ferraioli, 34 N.Y.2d 300, 304, 313 N.E.2d 756, 757, 357 N.Y.S.2d 449, 451 (1974), the principle permitted uses in the ordinance were for a "single family dwelling for one housekeeping unit."

106. *See* Group House of Port Washington, Inc. v. Board of Zoning and Appeals of North Hempstead, 45 N.Y.2d 266, 380 N.E.2d 207, 408 N.Y.S.2d 377 (1978), where the zoning ordinance defined family as "one or more persons related by blood, marriage or legal adoption residing or cooking or warming food as a single housekeeping unit." *Id.* at 270, 380 N.E.2d at 208, 408 N.Y.S. at 378.

107. *See* Robertson v. Western Baptist Hospital, 267 S.W.2d 395, 396 (Ky. 1954) (word "family" is an elastic term, often given broad meaning; it may mean a collection of persons living together in a home, although none are married). *Accord*, Brady v. Superior Court, 200 Cal. App. 2d 69, 77, 19 Cal. Rptr. 242, 247 (1962) ("family" means living as a family); Carroll v. City of Miami Beach, 198 So. 2d 643, 645 (Fla. Dist. Ct. App. 1967); Bellarmine Hills Ass'n v. Residential Systems Co., 84 Mich. App. 554, 560, 269 N.W.2d 673, 675 (1978) (family is a concept; interpretation depends on the group and public policies involved); Missionaries of Our Lady of LaSalette v. Village of Whitefish Bay, 267 Wis. 609, 615, 66 N.W.2d 627, 630 (1954).

108. 34 N.Y.2d 300, 313 N.E.2d 756, 357 N.Y.S.2d 449 (1974).

109. *Id.* at 305-06, 313 N.E.2d at 758, 357 N.Y.S.2d at 453. *Accord*, Hessling v. City of Broomfield, 193 Colo. 124, 563 P.2d 12 (1977); Oliver v. Zoning Comm'n of Chester, 31 Conn. Sup. 197, 326 A.2d 841 (1974); Little Neck Community Ass'n v. Working Organization for Retarded Children, 52 A.D.2d 90, 94, 383 N.Y.S.2d 364, 366 (1976); Incorporated Village of Freeport v. Ass'n for Help of Retarded Children, 94 Misc. 2d 1048, 406 N.Y.S.2d 221 (1977) *aff'd* 60 A.D. 2d 644, 400 N.Y.S.2d 724 (1977). *But see* Palm Beach Hosp., Inc. v. West Palm Beach, 2 MENTAL DISABILITY L. REP. 18 (S.D. Fla. 1977) (group home of 10 retarded males not a family under ordinance that prohibited more than five unrelated persons from occupying single family unit, following *Belle Terre* rational relationship test).

proach. In *Garcia v. Siffrin Residential Association*[110] the Ohio Supreme Court refused to find that the purpose of a proposed group home was for eight retarded people to share a "dwelling."[111] The court instead ruled that the real purpose of the home was for "professional" training and education.[112] The court relied on the fact that the homes would be licensed, and that a "professional plan of habilitation" would be implemented through a director and trained personnel.[113] The next year, however, in *Saunders v. Clark County Zoning Department*,[114] the same court found that a group home for delinquent boys constituted a "family." The ordinance defined family as two or more persons living together as a single housekeeping unit.[115] These results indicate the inconsistency of litigation in this field.

Ordinances defining "family" along blood lines[116] and those that attempt to regulate activities inside a house create other problems for group home siting.[117] The New Jersey Supreme Court in *Berger v. State*[118] invalidated an ordinance that limited "family" to those related by blood, marriage, or adoption.[119] Zoning ordinances center-

110. 63 Ohio St. 2d 259, 407 N.E.2d 1369 (1980), *cert. denied* 450 U.S. 911 (1981).

111. 63 Ohio St. 2d at 268, 407 N.E.2d at 1376. *See* Lakeside Youth Service v. Zoning Hearing Bd., 51 Pa. Commw. 485, 414 A.2d 1115 (1980) (home for six young women adjudicated by juvenile court too far removed from ordinance's concept of a single family dwelling to be considered of that use).

In spite of a state statute specifically authorizing use of such a group facility in residential districts, the *Garcia* court not only found that the home would not be a single housekeeping unit, but invalidated portions of the state statute. 63 Ohio St. 2d at 273, 407 N.E.2d at 1379.

112. *Id.* at 268, 407 N.E.2d at 1376.

113. *Id.*

114. 66 Ohio St. 2d 259, 421 N.E.2d 152 (1981).

115. The court found that the family unit performed the social function of child rearing, regardless of whether it included foster children as well as natural children. Additionally, child rearing was held constitutionally protected against governmental intrusion not supported by a compelling state interest. 66 Ohio St. 2d at —, 421 N.E.2d at 155-56.

116. *See, e.g.*, Berger v. State, 71 N.J. 206, 212, 364 A.2d 993, 999 (1976) (ordinance limited family to one person living alone or two or more related by blood, marriage or adoption and living together as a single unit under one head).

117. *See* note 120 and accompanying text *infra*.

118. 71 N.J. 206, 364 A.2d 993 (1976).

119. *Id.* at 223-24, 364 A.2d at 1002. The ordinance excluded individuals who posed no threat to the community. *Accord*, Brady v. Superior Court, 200 Cal. App. 2d 69, 19 Cal. Rptr. 242 (1962); Hessling v. City of Bloomfield, 193 Colo. 124, 563 P.2d 12 (1977); City of White Plains v. Ferraioli, 34 N.Y.2d 300, 313 N.E.2d 756, 357 N.Y.S.2d 449 (1974); Incorporated Village of Freeport v. Ass'n for Help of Retarded

ing on the use of a residence rather than on inquiry into the identity of the users, are less suspect.[120] Zoning, after all, is intended to control types of housing and not the "genetic or intimate internal family relations of human beings."[121]

Operators of group homes use several other methods to attack exclusionary zoning. If the home cannot qualify as a family or single housekeeping unit, it may still qualify for a conditional or special use permit.[122] Conditional use permits can be difficult to obtain, however, since members of the community that oppose the group home often influence the decision.[123] Nevertheless proponents have had some success in obtaining conditional use permits.[124]

Children, 94 Misc. 2d 1048, 406 N.Y.S.2d 221 (1977), *aff'd*, 60 App. Div. 644, 400 N.Y.S.2d 724 (1977).

120. City of Santa Barbara v. Adamson, 27 Cal. 3d 123, 133, 164 Cal. Rptr. 539, 544-45, 610 P.2d 436, 441 (1980). *See also* Hessling v. City of Broomfield, 193 Colo. at 128, 563 P.2d at 13; YWCA of Summit v. Board of Adjustment, 134 N.J. Super. 384, 391, 341 A.2d 356, 359 (1975), *aff'd*, 141 N.J. Super. 315, 358 A.2d 211 (1976) (distinguishing between families composed of group home residents and natural families in determining permissibility of use is to confuse power to control physical use of premises with power to distinguish among occupants making some physical use of them); Kirsch Holding Co. v. Borough of Manasquan, 59 N.J. 241, 253-54, 281 A.2d 513, 520 (1971) ("zoning ordinances are not intended and cannot be expected to cure or prevent most anti-social conduct in dwelling situations"); *but see* Garcia v. Siffrin Residential Ass'n, 63 Ohio St. 2d at 270, 407 N.E.2d at 1377 (zoning prescribes and regulates the conduct of individuals in their use of land, and aims to secure and promote the public welfare by restraint and compulsion); *Encroachment, supra* note 89 at 561.

121. City of White Plains v. Ferraioli, 34 N.Y.2d at 305, 357 N.Y.S.2d at 452.

122. Special approval is usually needed from the local zoning authority for such a use. *See* Lippincott, *supra* note 6, at 770, *citing* 1 R. ANDERSON, AMERICAN LAW OF ZONING, §§ 9.14-.18 (1976). This approval is a grant of administrative permission for uses compatible with the prescribed zone, but which may be subject to regulation for the general welfare. See Chandler & Ross, *supra* note 3, at 314.

123. Chandler & Ross, *supra* note 3, at 314-315. The criteria for granting a special use permit is usually based on a general welfare standard or nuisance definition. Such vagueness gives great discretion to administrative bodies. For a description of the procedures in obtaining a conditional use permit see Yohalem, *supra* note 1, at 1676 and Lippincott, *supra* note 6, at 775.

124. *See* Adams County Ass'n for Retarded Citizens, Inc. v. City of Westminster, 196 Colo. 79, 580 P.2d 1246 (1978) (city council denied special use permit for group home for retarded based on impermissible factors); Hessling v. City of Broomfield, 193 Colo. 124, 563 P.2d 12 (1977) (special use permit not needed as group home for retarded children since it was a permitted one family dwelling); Children's Aid Society v. Zoning Bd. of Adjustment, 44 Pa. Commw. 123, 402 A.2d 1162 (1979) (proposed use for children's home entitled to a special use permit, as it would have no greater effect on conditions than would a family with six children); State *ex rel.* Cath-

As an alternative to seeking a conditional permit, operators may allege that the zoning ordinances exceed municipal authority where the state has an express policy assisting the developmentally disabled.[125] When a state legislature enacts a statutory scheme for placing the disabled in residential areas, this state policy preempts local zoning ordinances excluding group homes.[126] Many states have enacted such legislation.[127] These statutes often identify the type of community home covered by the act, the type of population served, the number of residents allowed in the home, and the type of zoning in which the home will be allowed. Many are based on the American Bar Association Model Act.[128] A California court held its state stat-

olic Family and Children's Services v. City of Bellingham, 25 Wash. App. 33, 605 P.2d 788 (1979) (conditional use permit not required for juvenile home).

125. *See Zoning for the Mentally Ill, supra* note 6, at 875-76. *See also* City of Des Plaines v. Trottner, 34 Ill. 2d 432, 216 N.E.2d 116 (1966) (state general assembly never specifically authorized adoption of zoning ordinances that penetrated deeply into the internal composition of a single housekeeping unit); Mental Health Ass'n of Union County, Inc. v. City of Elizabeth, 180 N.J. Super. 304, 434 A.2d 688 (1981) (city's interpretation of ordinance as prohibiting proposed use of community home was in direct contravention of state policy and such interpretation had to fall); Abbott House v. Village of Tarrytown, 34 App. Div. 2d 821, 312 N.Y.S.2d 841 (1970) (ordinance void in exceeding authority vested in village); Baptist Children's House v. Comm'r of Industrial Bd., 51 Pa. Commw. 227, 414 A.2d 159 (1980) (board exceeded authority in attempting to regulate group home in reliance on overbroad and doubtful application of definition of lodging and rooming houses found in ordinance).

126. Incorporated Village of Old Field v. Introne, 104 Misc. 2d 122, 430 N.Y.S.2d 192 (1980). (local zoning powers found in state constitutions may not be susceptible to a preemption).

See Region 10 Client Management, Inc. v. Town of Hampstead, 120 N.H. 885; 424 A.2d 207 (1980). *See also* City of Los Angeles v. Cal. Dep't of Health, 63 Cal. App. 3d 473, 133 Cal. Rptr. 771 (1976) (state policy applied to both "home rule" chartered cities; group homes for retarded a matter of statewide concern); State *ex rel.* Thelen v. City of Missoula, 168 Mont. 375, 543 P.2d 173 (1975) (since legislature can give cities power to regulate through zoning it can also take that power away); Township of South Fayette v. Commonwealth of Pennsylvania, 477 Pa. 574, 580, 385 A.2d 344, 347 (1978) (application of zoning regulations to the state depends on an examination in each case of the nature of competing legislative grants of authority, the purposes for which these grants were created, and the facts of the individual case). *But see* Garcia v. Siffrin Residential Ass'n, 63 Ohio St. 2d 259, 407 N.E.2d 1369 (1980), *cert. denied*, 454 U.S. 911 (1981) (certain sections of state law unreasonably and unlawfully limited enforcement by municipalities of certain police powers authorized by Ohio Constitution to such municipalities).

127. For a list of state statutes see Hopperton, *A State Legislative Strategy for Ending Exclusionary Zoning of Community Homes*, 19 URBAN L. ANN. 47, 48 (1980).

128. *See* Developmental Disabilities State Legislative Project of the ABA Commission on the Mentally Disabled, *Zoning for Community Homes*, 2 MENTAL DISA-

ute to apply to "home rule" cities.[129] The Ohio Supreme Court has evinced an opposite attitude. In *Garcia v. Siffrin Residential Association*,[130] it declared unconstitutional major portions of an Ohio statute designed to promote group homes. The court found that the statute unreasonably and unlawfully limited a municipality's enforcement of those police powers authorized by the state constitution.[131]

Although state legislation is probably the most effective means of providing needed community homes,[132] these statutes are hardly perfect in implementation. In addition to challenges based on home rule, some statutes still may require a special use permit, thus mandating local discretion.[133] There has been criticism that these statutes focus to narrowly on zoning.[134] In viewing the problem merely as a

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BILITY L. REP. 794, 806 (ABA Model Statute, "An Act to Establish the Right to Locate Community Homes for Developmentally Disabled Persons in the Residential Neighborhoods of this State").

129. City of Los Angeles v. California Dep't of Health, 63 Cal. App. 3d 473, 133 Cal. Rptr. 771 (1976). *Accord*, State *ex rel.* Thelen v. City of Missoula, 168 Mont. 375, 543 P.2d 173 (1975) (upholding constitutionality of special state legislation); Zubli v. Community Mainstreaming Ass'n, 102 Misc. 2d 320, 423 N.Y.S.2d 982 (1979), *aff'd*, 74 App. Div. 2d 624, 425 N.Y.S.2d (1980), *modified* 50 N.Y.2d 1024, 410 N.E.2d 746, 431 N.Y.S.2d 813 (1980) (upholding constitutionality of part of New York Mental Hygiene Law).

Municipal home rule is a system of powers given to local governments by state constitutional provisions which often include powers over zoning. Yohalem, *supra* note 1, at 1678. Each home rule provision differs, as do judicial interpretations of them. It is difficult to draw general conclusions, then, about when a state statute will prevail over a municipal ordinance.

130. 63 Ohio St. 2d 259, 407 N.E.2d 1369 (1980).

131. *Id.* at 271, 407 N.E.2d at 1378. The court stated that although the state's desire to make group homes available in residential zones was laudable, the state law had to apply uniformly to all municipalities. This particular statute had drawn an arbitrary retroactive date, and was therefore invalid.

In Adams County Ass'n for Retarded Citizens, Inc. v. City of Westminster, 196 Colo. at 83-84, 580 P.2d at 1249, the Supreme Court of Colorado declined to decide the constitutionality of the state statute. The city charged that the statute attempted to regulate a matter of purely local concern in violation of a constitutional home rule grant. The court found, however, that the city voluntarily chose to follow the statutory mandate.

132. *See* Comment, *Zoning and Community Group Homes for the Mentally Retarded—Boon or Bust*, 7 OHIO N.U.L. REV. 64, 75-76. State legislation promotes uniformity, which eliminates over-concentration of homes in limited areas, and also avoids vetoes by local subdivisions.

133. See *Zoning for the Mentally Ill, supra* note 6, at 888-94 for a criticism of state legislation.

134. *Id.* at 889.

zoning issue, many statutes incorporate the obstacles of zoning into their solutions—problematic definitions and regulations that may be distorted and reworked to accomplish exclusion of group homes despite the legislative purpose.[135] The statutes do emphasize, however, that state policies to provide group homes for the developmentally disabled supercede local concerns over property values.

IV. CONCLUSION

As the Supreme Court has signaled in *Young* and *Schad*, communities can effectively regulate undesirable uses if they can provide proof of detrimental effects. One effective mode of proof is to show an inevitable decline in property values. As long as the community does not totally ban the use from all zones in the municipality, empirical proof will justify the ordinance. Courts seem willing to find ordinances reasonable if given some empirical evidence, especially in adult use cases. Group homes generally have been allowed in single family districts, but residents have never proved a deleterious effect on property values. The zoning power is a potent instrument for effectuating community values, but not a foolproof one.

Hope S. Redmond

135. *Id.*