GROUP HOMES FOR THE MENTALLY RETARDED: DO THESE HOMES QUALIFY AS PERMITTED USES IN RESIDENTIAL AREAS ZONED FOR THE SINGLE FAMILY?

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Institutionalization has been the traditional method of accommodating and caring for mentally retarded persons. Recently, however, there has been a dramatic change of focus in the treatment of the mentally retarded.[1] Rather than segregating mentally retarded persons into large institutions, considerable emphasis is being placed upon locating small groups of these individuals in residential facilities known as "group homes" or "community residences".

The establishment of group homes for the mentally retarded in the community has generated considerable controversy in municipalities throughout Canada and the United States. While individuals may profess acceptance (or at least tolerance) of the theory and the need for group homes, neighbourhood communities tend to resist the establishment of these homes.[2] Since a community is no more than a coming together of individuals, it is anomalous that this community resistance should emerge from professed individual tolerance.

Since the Canadian provinces delegate their power to zone to local municipalities who are more likely to respond to neighbourhood pressures, community resistance may result in either the total exclusion of the retarded from all residential districts, or in their partial exclusion (by relegating group homes to areas not zoned for single family residences).[3] Total exclusion forces some retarded persons to remain in institutions, while partial exclusion compels operators of group homes for the mentally handicapped to locate in high density, transient and low income neighbourhoods.

Concentrations of many types of group homes (eg. for mentally retarded, mentally ill, alcoholics, juveniles) in high density, low income neighbourhoods undercut the very purpose behind integration of the retarded by establishing an "institution within the community". Further, such concentrations of group homes (as has occurred in some larger cities), provokes justified, negative reaction on the part of the neighbourhoods where these group homes are impacted, and strengthens the resolve of other communities to avoid admitting group homes for fear that such concentrations will occur in their communities.[4]

Part I of this article outlines the nature of neighbourhood opposition to the establishment of group homes for the mentally retarded in single family residential districts. Part II reviews judicial decisions which have a bearing upon whether group homes for the mentally retarded may locate as of right in

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1. Mental Retardation is primarily an educational problem and not a disease which can be cured through drugs or treatment. Generally, retardation is classified according to intelligence quotient (I.Q.) levels spanning four degrees - mild, moderate, severe and profound.

2. P. Boyd, "Strategies in Zoning and Community Living Arrangements for Retarded Citizens: *Parens Patrie* Meets Police Power" (1979-80), 25 *Vill. L. Rev.* 273 at 277.

3. *Id.*, at 278.

4. "The Developmental Disabilities Model Legislation Series: Zoning for Community Homes Serving Developmentally Disabled Persons" (1977-78), 2 *Mental Disab. L. Rep.* 794 at 796.

residential districts zoned for the single family.[5] The proposition will be advanced that depending on the specificity of the definition of "family" in the particular zoning by-law, some group homes for the mentally retarded may qualify for admittance into districts zoned for the single family.[6]

As Canadian judicial decisions on this subject are relatively few, some reference will be made to applicable American case law.

PART I

The Objective: A Normal Life in the Community for the Retarded

All mentally retarded persons do not function at the same level. Retardation levels fluctuate from those who are mildly retarded (educable), to moderately retarded (trainable), to severely retarded (totally dependent). "Both the moderately and mildly mentally retarded can live successfully in the community if adequate training is provided. These two classes comprise approximately 95% of the entire retarded population."[7]

Recently, it has been recognized that retarded persons have the potential to learn and develop intellectually, like the rest of the human population, and are not victims of a static condition.[8]

Some mental retardation professionals have begun to question the social utility of the large institutions in promoting the development of mentally retarded persons.[9] It is now widely believed that many retarded persons fail to reach their intellectual potential precisely because they are isolated from society and are not expected to develop.[10]

According to P. Boyd, the theory is that a person is best taught how to live in the community by living there, rather than attempting to learn "to live in the community by living in an institution."[11]

By establishing group homes within the community, it is hoped to stimulate neighbourhood interaction and give the handicapped residents access to community resources such as department stores, work opportunities, and entertainment. Allowing mentally retarded persons to live in residential areas, particularly single family residential districts, is thought to be most conducive to normalization.[12] From the standpoint of mental retardation experts, entry into single family residential zones is not simply preferable, but is necessary for minimally adequate normalization to take place.[13]

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5. This article focuses on exclusionary zoning of group homes for the mentally retarded. Group homes are, of course, used in the rehabilitation of other groups such as ex-offenders, ex drug addicts, juveniles, and the mentally ill. Differences in the characteristics of these other types of group homes may well lead to differences in legal treatment. In any event, I do not attempt to analyze here the factual or legal issues raised by any other group homes, except to the extent that all group homes face the same basic obstacles in the community, and in some zoning by-laws.

6. Particular emphasis will be placed upon single family zoning by-laws enacted by certain Manitoba municipalities.

7. D. Zeitlin, "Zoning The Mentally Retarded Into Single-Family Residential Areas: A Grape of Wrath or the Fermentation of Wisdom" in (1979), *Ariz. State L.J.* 385 at 388.

8. *Supra* n. 2, at 273.

9. W. Wolfensburger, "The Origin and Nature of Our Institutional Models" in *Changing Patterns in Residential Services to Mentally Retarded Citizens* (R. Kugel and W. Wolfensburger eds. 1969) 59.

10. Nirje, "The Normalization Principle" in *Changing Patterns in Residential Services for the Mentally Retarded* (rev. ed. R. Kugel and A. Shearer 1976) 231-32.

11. *Supra* n. 2, at 274.

12. E. Hong, "Exclusion of the Mentally Handicapped: Housing the Non-Traditional Family" (1974) 7 *U.C.D. L.R.* 150.

13. M. Lippincott, "A Sanctuary for People" (1979) 31 *Stan. L. Rev.* 767 at 769. It is beyond the scope of this article to fully determine the relative advantage and disadvantage to the community of a residential normalization program compared to alternative programs for the mentally retarded. It is also beyond the scope of this article to review the possibility of reforming and improving existing institutions (which house many retarded persons).

The establishment of group homes in single family residential districts has also received judicial support. One court recently stated that:

> If petitioner's 'group home' is to be a success, it would most appropriately be placed in such a quiet residential neighbourhood, for that is the very type of atmosphere which it seeks to emulate.[14]

What Is A Group Home?

Typically, group homes for the mentally retarded consist of approximately four to eight retarded adults (men and women) living together in a house under the supervision of one or more surrogate parents ("house parents"). The house parents either live in the residence or have their own accommodation elsewhere. The residents live, eat and engage in recreational activities together. They are often employed during the day at either sheltered workshops or at a job in the community. The house parent in his or her role as head of the family is responsible for offering advice and guidance to the residents, seeing that meals are well balanced, and that the house is kept in good order.

The parties who operate such group homes for the mentally retarded are often non-profit corporations which own or lease the houses, and are paid by the provincial government for the room and board provided to each resident.

Zoning, and Neighbourhood Opposition to Group Homes in Single Family Residential Districts.

Zoning is a form of regulation of property by municipal governments. Municipalities derive their authority to adopt zoning by-laws from provincial enabling acts. The municipalities are limited by this enabling legislation to the powers specifically delegated.

The primary purpose of zoning is to separate incompatible uses that would otherwise have a harmful effect on each other. To this effect, municipalities are commonly divided into zones to accomodate certain uses of land: agricultural, residential (single-family, two-family and multi-family), commercial and industrial.

The zoning by-law usually creates five or six different residential zones ranging from an "R" zone, in which the major permitted uses are single family detached dwellings, to another level of "R" zone, in which the major permitted uses are multi-storey high density apartments.

The "permitted use" is the type of use to which all lands in a particular zone may be put as of right. Other uses are conditional upon special approval from the zoning authority. Few zoning by-laws expressly allow group homes for the mentally retarded as "permitted uses" in areas zoned for the single family detached dwelling. Therefore, applications are often brought before the zoning authority for permission to locate group homes as "conditional uses" in single family residential districts. These applications (which usually involve public hearings) are invariably met with stiff neighbourhood opposition.

14. *Group House of Port Washington v. Board of Zoning* (1978), 380 N.E. 2d. 207 at 210 (N.Y. Court of Appeals).

In a national survey of nearly two hundred city planning department directors,[15] it was learned that the most common reason for denying zoning applications for group homes for the mentally handicapped and other special groups was opposition from nearby property owners, and community prejudice.

When an operator of a group home for the mentally retarded applies to the zoning authority for permission to establish the home as a "conditional use", the issue is not usually approached from a standpoint of what the municipality needs, but of what the neighbours of the proposed group home desire, and will permit. The conflict between the proposed operator of a group home, and the neighbours, gives rise to so called "government by screaming" and "trial by neighbourism". It has been said that in such disputes, "the municipality speaks but the voice is that of the neighbour."[16]

While the concerns of a given neighbourhood are no doubt based on a number of factors, the resistance usually results from many of the feared "attributes" of retarded individuals - for instance, that their presence in the community will lead to an increase in the crime rate, a destruction of the residential character of the neighbourhood, and a decline in property values.[17]

With respect to the fear of an increase in crime, one American author has noted[18] that crime rates have not, in fact, risen in neighbourhoods with group homes. Furthermore, studies have shown that mentally handicapped persons are, as a group, no more likely to engage in violent or criminal behavior than the rest of the population.[19] Moreover, the supervision of the residents by house parents should give some added assurance that discipline will be maintained.

Persons who challenge group homes for the mentally retarded frequently claim that the social structure of the group home is incompatible with the character of the neighbourhood. These apprehensions misconstrue the manner in which group homes for the mentally retarded operate. The very purpose of a group home is to provide its occupants with an inconspicuous, normal, family-like environment.[20] One court said of a group home for the mentally retarded that such homes are "consonant with, not destructive of, the residential nature of the community".[21]

The proposed establishment of a group home for the mentally retarded in a single family residential district almost invariably raises complaints from

14. *Group House of Port Washington v. Board of Zoning* (1978), 380 N.E. 2d. 207 at 210 (N.Y. Court of Appeals).

15. American Society of Planning Officials, Planning Advisory Services Report, (March, 1974) No. 300, at 9 (D. Lauber and F. Bangs).

16. R. Babcock, *The Zoning Game*, (1966) 140.

17. *Supra* n. 2, at 288.

18. L. Kressel, "The Community Residence Movement: Land Use Conflicts and Planning Imperatives" (1975), 5 *N.Y.U. Rev. L. & Soc. Change* 137 at 145.

19. Gulevich and Bourne, "Mental Illness and Violence" in *Violence and the Struggle for Existence* (Daniels, Gilula and Ochberg eds. 1970) 309.

20. D. Schmedermann, "Zoning for the Mentally Ill: A Legislative Mandate." (1979), 16 *Harv. J. On Legislation* 853 at 858-59.

21. *Adams County Association for Retarded Citizens v. City of Westminster* (1978), 580 P. 2d. 1246 at 1250 (Colorado S.C.) *See also Little Neck Community Organization v. Working Organization for Retarded Children* (1976), 383 N.Y.S. 2d. 364, where the N.Y.S.C. Appellate Division approved a group home for retarded children in a single family zone holding that the home preserved both the "quality of life" and the "character of the neighbourhood" that the single family zoning ordinance is designed to protect.

adjoining property owners that property value in the area will decline. This concern, although arguable, has been repeatedly disproved.[22]

There is little doubt that neighbours will often experience a general uneasiness at the prospect of having a group home for the mentally retarded established on their particular block. These neighbours have a legitimiate right to seek a normal single family residential environment in which to raise their children. Furthermore, persons who have already purchased homes in areas zoned for the single family naturally want the same type of homes in their district. These persons probably feel that the residential normalization program for the mentally retarded is distributing the "costs" of caring for the mentally retarded (eg. the maintenance of large institutions) from the general public, to the neighbour's back yard.

Unfortunately, the legitimate interests of the neighbours often conflict with the legitimate interests of mentally retarded persons who wish to live in residential areas. As group homes are the vehicle by which mentally retarded persons are integrated into society, neighbours who are successful in excluding these homes are in fact denying many mentally retarded persons the opportunity to be successfully integrated into the community.

The proponents of group homes for the mentally retarded should not overlook the fact, however, that the neighbour has an interest that is entitled to protection. Objection should be taken, however, to the dominant position presently afforded the neighbour in zoning disputes which concern the location of group homes for the mentally retarded.

PART II

The Barrier: Do By-laws Which Define "Family" Restrict Group Homes From Single Family Districts?

Most Canadian municipalities are astute enough to refrain from enacting zoning by-laws which expressly designate group homes for the mentally retarded as forbidden uses in residential districts. One of the most favoured (and most subtle) ways in which Canadian and American municipalities have accomplished the same objective (the exclusion of group homes) has been to enact by-laws which restrict the occupancy of houses in single family residential districts to a "family".

Most people think of a "family" as a group whose members are related either by marriage, blood or adoption. Since the individuals living in a group home for the mentally retarded are generally unrelated to each other, the municipality and its property owners have had reason to be confident that these individuals do not constitute a "family" within the meaning of the particular zoning by-law (and that therefore the group home does not qualify as a permitted use).

22. *Supra* n. 15, at 10. Studies regarding community residences for other groups indicate no adverse affect on property values: *see* Green Bay, Wisconsin Planning Commission (1973) "The Social Impact of Group Homes". *A Study of Residential Programs in First Residential Areas* (R. Baba and E. Knowles).

See also a 1981 study prepared by A.E. Lepage Melton Real Estate in support of an application by Shalom Residences Inc. to the Winnipeg City Council, for a conditional use permit to operate a group home for the mentally retarded.

Much to the surprise of some municipal zoning officials and their legal counsel, certain Canadian and American courts have recently pronounced decisions[23] which would allow homes for the retarded (and other handicapped groups) to locate as permitted uses in single family residential districts, notwithstanding the restriction on occupancy to a "family". As the wording of the particular by-law which defines (or fails to define) the term "family" is often determinative of whether a court will permit a group home for the retarded to locate as a permitted use (thereby avoiding the public hearings required in most conditional use applications), cases concerning single family zoning by-laws will be examined according to the type of by-law in question.

Zoning By-laws Which Do Not Define "Family"

The City of Charlottetown, Prince Edward Island, restricts occupancy in a single family residential district to a "one family dwelling" which is defined as:

> "a detached building having independent exterior walls and designed or *used exclusively for residence purposes by not more than one family*".[24] (emphasis added)

The term "family" is not defined in the by-law.

In 1979, the City of Charlottetown sought a court injunction restraining a non-profit corporation from operating a group home for six mildly to moderately retarded adults (under the supervision of a "house parent") in a residential district of the City. Counsel for the City raised the usual argument that this group home did not constitute a "family", because its members were not related to each other.

Mr. Justice McQuaid of the Prince Edward Island Supreme Court held that the home was "used exclusively for residence purposes", within the terms of the by-law.[25] The court noted, however, that the word "family" was not defined in the City by-law, (as it is in many of the zoning by-laws in other cities). In the absence of any such definition, the court recited with approval the definition of "family" set forth in an American case, where it was stated:

> The word "family" has several meanings. It's primary meaning is the collective body of persons who live in one house under one head or management. Its secondary meaning is those who are of the same lineage or descend from one common progenitor. *Unless the context manifests a different intention, the word "family" is usually construed in its primary sense.*[26] (emphasis added)

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23. *City of Charlottetown v. Charlottetown Association for Residential Services* (1979), 100 D.L.R. (3d) 614 (P.E.I.S.C.); *City of Barrie v. Brown Camps* (No. 3) (1973), 2 O.R. (2d) 37 (C.A.); *Oliver v. Zoning Commission* (1974), 326 A. 2d. 841 (Conn.); *City of White Plains v. Ferraioli* (1974), 313 N.E. 2d. 756 (N.Y. C.A.); *Little Neck Community Organization v. Working Organization for Retarded Children* (1976), 383 N.Y.S. 2d. 364 (N.Y.); *Hessling v. City of Broomfield* (1977), 563 P. 2d. 12 (Colo. S.C.)

24. Cited in *City of Charlottetown v. Charlottetown Association for Residential Services* (1979), 100 D.L.R. (3d) 614 at 621 (P.E.I.S.C.).

25. *Ibid.* In reaching this conclusion that the home was "used for residence purposes", the Court noted that no professional training was provided to the occupants while they are in the residence and no rehabilitation program was conducted there. The Court also stressed that the mentally retarded residents participated with the house parent in the daily operation of the house by cleaning their own rooms, cleaning the residence, and assisting with the preparation of meals. Furthermore, the residents left the home in the morning at normal hours to attend at either a training facility or employment in the community.

26. *Supra* n. 24, at 621, per McQuaid, J. quoting from *Dodge v. Boston and Providence Railroad Corp.* (1891), 154 Mass. 299 at 301. The *Dodge* definition of "family" has also been followed in a taxation case: *Ramsay v. Provincial Treasurer of Alberta*, [1939] 2 D.L.R. 707 (Alta. C.A.).

Mr. Justice McQuaid concluded that:

> ... [I]n the absence of anything specifically to the contrary in the by-law presently under consideration, I am of the opinion that the primary meaning of the word should be adopted. If the City had intended the secondary meaning, it could have defined "family" as a "group of two or more persons living together and inter-related by bonds of consanquinity, marriage or legal adoption.[27]

His Lordship stated further:

> I am unable to conclude from the evidence before me that the character of this R2 zone is being changed or that the real objective of the by-law is being frustrated by reason of the operation of this home and for this reason I do not find it in me to invoke the extraordinary remedy of an injunction to restrain an operation which has so much to recommend it.[28]

The *Charlottetown* case is consistent with traditional principles of statutory interpretation. Pursuant to these principles of statutory interpretation the courts have and should continue to refuse to create narrow, exclusionary provisions by interpretation (eg. "blood, marriage or adoption" relationships) when the by-law itself does not further define the term "family". The courts will not read into this type of by-law any requirement of consanguinity or affinity among members of the household.[29] If a couple acts as surrogate parents and takes responsibility and control for the residents (who function as a family unit) it would be difficult to distinguish between that group as a family and the traditional type of blood related family.[30] Therefore, it would appear that group homes for the mentally retarded (operated to emulate a traditional family) may very well qualify as permitted uses in the single family residential district which does not specifically define the term "family" in its particular zoning by-law.

Zoning By-laws Which Specifically Restrict "Family" to "Blood, Marriage or Adoption" Relationships

One of the more common types of zoning by-laws is the by-law which restricts its definition of "family" to those persons related by blood, marriage or adoption. The City of Brandon, Manitoba, for example, has enacted such a zoning by-law.[31]

Many zoning by-laws which define "family" in terms of only blood, marriage or adoption, were enacted a number of years ago in order to prevent the spread of communes into single family residential districts. The unfortunate side effects of such a restrictive definition has often been to effectively deter group homes for the mentally retarded from locating in such districts. Today, municipalities attempt to justify the continued existence of such restrictive definitions of "family" in their by-laws, as necessary controls on

27. *Supra* n. 24, at 622. Defining "family" in terms of *only* the relationship of "Consanquinity, marriage or legal adoption" may no longer be permissible in light of the subsequent decision of the S.C.C. in *Regina v. Bell* (1979), 26 N.R. 457.

28. *Supra* n. 24, at 624.

29. *Brady v. Superior Court* (1962), 200 Cal. App. 2d. 69; 19 Cal. Rptr. 242 (District Court of Appeal) in which case the court reviewed a very similar zoning ordinance to that in question in the *Charlottetown* case, and refused to read into the ordinance a requirement of consanquinity and affinity.

30. J. Wildgen "Group Homes in Areas Zoned for Single-Family Dwellings" (1975-76), 24 *U. of Kansas L.R.* 677 at 688.

31. City of Brandon, Manitoba Zoning By-Law #3383. See also the following Manitoba municipal by-laws which define "family" in much the same way: St. James - Assiniboia By-law #1558; Tuxedo, Fort Garry, Charleswood Zoning By-law #1800.

problems of population density, traffic, and the like. To attack these problems by the use of such a restrictive definition of "family" is, however, as one court noted, like "burning the house to roast the pig".[32]

In *City of Barrie v. Brown Camps (No. 3)*[33] the Ontario Court of Appeal had occasion to consider a zoning by-law definition of "family" which is very similar to that in force in Brandon. The zoning by-law in question defined "family" to mean:

> One or more persons who are inter-related by bonds of consanguinity, marriage or legal adoption, or not more than five unrelated persons, with or without one or more full time domestic servants, occupying a dwelling unit.[34]

In *Brown Camps (No. 3)* the Defendant, a profit-making corporation, operated a number of group homes for unrelated emotionally disturbed children. In each home there resided a maximum of five children, who were supervised by trained child care workers. The purpose of the program was a process of rehabilitation in a family setting whereby emotionally disturbed children were prepared for an eventual return to their regular families. The City of Barrie sought an injunction to restrain the Defendant from operating these homes in single family residential districts. Although the persons on the premises were unrelated, the Ontario Court of Appeal refused to grant an injunction, holding that these persons constituted a "family" within the definition in the by-law. The Court found that although the residents were unrelated, this particular group home was not unlike a traditional family raising its own emotionally disturbed children.[35]

In a 1979 decision of the New York Supreme Court,[36] a municipality sought to restrain the defendant from operating a group home for eight (unrelated) mentally retarded young adult women in a residential district confined to single family dwellings. The municipality defined "family" as "one or more persons related by blood, marriage or adoption, living and cooking ... as a single housekeeping unit".[37] The Court held that as the residence was created to emulate a single family unit, its operation would not violate the policy implicit in the municipality's zoning ordinance of creating a family-oriented community. The Court overcame the blood related restriction contained in the ordinance, thereby allowing the group home to operate. The Court justified its decision to override the ordinance by holding that whereas zoning is intended to control the types of housing and uses in residential districts, this particular ordinance was an improper attempt to regulate the intimate or internal relations of the human beings who used that housing.

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32. *Larson v. Mayor and Council of Spring Lake Heights* (1968), 240 A. 2d. 31 at 36 (N.J. Superior Ct.): For these problems can be attacked by by-laws which prohibit use of residences for commercial purposes, by-laws which deal with density of population per square footage, parking by-laws, etc.

33. (1973), 2 O.R. (2d) 337 (C.A.). A motion for leave to appeal to the S.C.C. was dismissed with costs on March 18, 1974, without written or recorded reason.

34. *Id.*, at 341.

35. *Id.*, at 344. In this particular group home, a member of a resource group composed of psychiatrists, psychologists and social workers, attended at the premises on a weekly basis to meet with the children and the staff; no formal psychiatric or psychological treatment was given on the premises.

36. *Village of Freeport v. Association for Help of Retarded Children* (1978), 406 N.Y.S. 2d. 221 (S.C.)

37. *Id.*, at 222.

A zoning ordinance which defined "family" to mean "one or more persons related by blood, adoption, marriage, or not more than two unrelated persons...", was considered by the United States Supreme Court in *Village of Belle Terre v. Boraas*.[38] The majority decision of the Supreme Court legitimized this restrictive definition of "family", at least as it pertained to communal living of college students.[39] Mr. Justice Marshall, in a strong dissenting opinion, would have refused to uphold such a definition of "family", by reason that it did not represent an attempt by the municipality to regulate the *use of housing*, but rather *who uses it*.[40]

The concept that municipalities may regulate the use of housing, but not who uses it, was very recently applied by the Supreme Court of Canada in *Regina v. Bell*.[41] In *Bell*, the appellant and two other unrelated adult males occupied, as tenants, a dwelling unit zoned for "one family". The appellant was prosecuted under the North York, Ontario by-law pursuant to a charge alleging that these three people did not come within the permitted uses of a "dwelling unit" in the by-law. The relevant sections of the by-law in issue were as follows:

> Section 17.1 USES PERMITTED
>
> 'Dwelling unit' shall mean a separate set of living quarters designed or intended for use or used by an individual *or one family alone*, and which shall include at least one room and a separate kitchen and sanitary conveniences...
>
> *'Family' means a group of two or more persons living together and inter-related by bonds of consanguinity, marriage or legal adoption* occupying a dwelling unit ... (emphasis added).[42]

The power to enact the by-law in question came from Section 35(1) of *The Planning Act* of Ontario[43] which in paragraph (1) authorized by-laws to prohibit the use of land, in paragraph (2) to prohibit the erection or use of buildings, and in paragraph (4) to regulate, *inter alia*, the character and use of buildings.

Mr. Justice Spence delivering the majority (3-2) decision of the Supreme Court of Canada (Laskin, C.J.C., and Dickson, J. concurring) held that by restricting the occupation to "family", and by defining "family" by reference to *only* consanguinity, marriage and adoption, the by-law was not regulating the use of the building, but rather *who used it*.[44]

In the majority judgment, Mr. Justice Spence held that in view of the many possible inequitable applications of this definition of "family" (as the only allowed use) the Provincial legislature could not have intended to give authority to the municipality to enact such a by-law. Accordingly, Mr. Justice Spence found the device of zoning by reference to the relationship of occupants rather

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38. (1974), 416 U.S. 1.

39. The *Village of Berre Terre* decision of the U.S. Supreme Court has been distinguished by later decisions as a case primarily concerned with transients in a small suburban community: see *City of White Plains v. Ferraioli* (1974), 313 N.E. 2d. 756, (N.Y.C.A.); and the decision of Mr. Justice Stevens in *Moore v. East Cleveland* (1977), 431 U.S. 494 at 519.

40. *Supra* n. 38, at 14-15, Justice Marshall, dissenting.

41. (1979), 26 N.R. 457; 98 D.L.R. (3d) 255; 9 M.P.L.R. 103.

42. (1979), 26 N.R. 457, at 459.

43. R.S.O. 1970, c. 349.

44. *Supra* n. 42, at 467.

than by the use of the building, to be *ultra vires* the municipality's powers under the provisions of the provincial enabling legislation[45] *(The Planning Act* of Ontario).

Although it is too early to accurately gauge the full impact of the *Bell* decision, the decision should at least facilitate the establishment of group homes for the mentally retarded in single family residential districts which define "family" in terms of relationship by *only* blood, marriage or adoption.

Zoning by-laws which define "family" in much broader terms, incorporating most types of arrangements usual for people living together as single housekeeping units, will likely continue to be upheld by the courts even after the *Bell* decision.[46]

Since the proper function of zoning is to separate incompatible uses (eg. homes from factories), zoning officials should properly concern themselves with the uses of land (eg. the number and kind of dwellings to be constructed in a certain neighbourhood). It is inconceivable that our society would condone the exercise of zoning power to restrict occupancy to individuals adhering to a particular religious, political or scientific group. Therefore, it is submitted that our municipalities should not be using zoning by-laws (designed for separation of incompatible uses) to segregate people because they may function at a lower intelligence level.

By-laws Defining Family as "Single Housekeeping Unit"

Many municipalities throughout Canada and the United States define "family" as primarily a "single housekeeping unit". For example, the City of Winnipeg zoning by-law defines "family" as:

> One (1) or more persons occupying a premises and living as a single housekeeping unit, as distinguished from a group occupying a boarding house, roominghouse, lodging house, club, fraternity or sorority house, or institutional building.[47]

This definition is virtually identical to the definition in the City of Thompson, Manitoba, zoning by-law.[48] The term "single housekeeping unit" is not defined in either by-law.

The zoning definition of "family" in the by-laws of the cities of Winnipeg and Thompson are more likely to be construed as legitimate attempts at regulating the "use" of property rather than an improper attempt to zone on the

45. S. Himel, "A Comment on *Bell*; (1980), 1 Sup. Crt. L.R. 367 at 372. The majority of the S.C.C. in *Bell* was of the view that the enabling legislation (The Planning Act) did not give the municipality the power to restrict who uses the premises. The inference which might be drawn from *Bell*, is that if the enabling legislation had been amended to specifically give the municipality the power to restrict who uses the premises, then the by-lay considered in *Bell* would have been upheld. Note that the enabling legislation for the City of Winnipeg, namely, *The City of Winnipeg Act*, S.M. 1971, c. 105 (in s. 598) fails to specifically delegate to the City of Winnipeg the power to restrict who may use particular premises.

46. *See: Smith v. Township of Tiny* (1980), 107 D.L.R. (3d) 483 (Ont. H.C.) where a zoning definition of "family" referred to the consanquinity and affinity relationship, but went further to include other types of relationships as well. It was held that the definition was not rendered invalid by *Bell*, because this definition would "incorporate most types of arrangements usual for people living together as a simple housekeeping unit..." (see Robins, J. at p. 488).

47. City of Winnipeg Zoning By-law #16502, (Ch. 2).

48. City of Thompson Planning Scheme #1967B.

basis of the relationship of the occupants.[49] Therefore, it is suggested that this particular type of definition of "family" would not violate the principle of law established by the Supreme Court of Canada in *Bell*.

The Ontario Court of Appeal, in a case[50] in which "family" was defined as basically a "single housekeeping unit", has given further judicial recognition to the fact that "family" should not necessarily be confined to those persons related by consanguinity or affinity. Mr. Justice Kelly, speaking for the Ontario Court of Appeal, stated:

> I am not unaware that the definition of "family" as contained in the by-law is sufficiently wide to include persons who do not necessarily have any special relationship one to another save that they reside 'as a housekeeping unit'. Even twenty-five or fifty persons living co-operatively in a house they had by mutual agreement decided to occupy as their common residence and unrelated otherwise than by their agreement to live together and jointly to provide for their living accommodation by sharing a residence which they themselves provided, might well come within the definition of 'family'.[51]

American courts have been quite liberal in their interpretation of zoning ordinances which define "family" as a "single housekeeping unit", allowing such groups as three priests living together with two other persons,[52] and twenty nurses,[53] to constitute a single housekeeping unit.

In the case of *Regina v. Brown Camps Ltd. (No. 1)*,[54] the Ontario Court of Appeal was called upon to interpret a definition of "family" in the Scarborough, Ontario by-law. There, the definition of family was couched in much the same terms as the definition of "family" in the City of Winnipeg by-law. In that case, the Defendant was prosecuted for operating a home for the treatment of emotionally disturbed children or adolescents in a single family dwelling district of Scarborough, Ontario. The Court held that the particular use of the home was not a permitted use in this district because the occupancy was not that of a single family but rather a commercial use of premises by a profit-making corporation.[55]

There are, however, three ways to distinguish this type of home (and this case) from other group homes for the mentally retarded. First, the Court placed a heavy emphasis on the fact that the Defendant was a profit-making corporation which was paid a per diem rate by the Children's Aid Society of Metro Toronto to place residents in its various houses throughout the municipality.[56] Secondly, the Defendant placed emotionally disturbed children or adolescents, most of whom were wards of the Childrens Aid Society, into these homes. The element of personal election to enter the family unit was lacking. In fact, throughout the judgment, the Court referred to the residents as

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49. This is because the definition of "family" is conceivably wide enough to allow any types of persons, whether related or not, to reside in the premises, as long as they are occupying as a single housekeeping unit. *See Smith v. Township of Tiny*, *Supra* n. 46.

50. *Regina v. Brown Camps Ltd. (No. 1)*, [1969] 2 O.R. 461 (C.A.).

51. *Id.*, at 466-67.

52. *Missionaries of our Lady of La Salette v. Village of Whitefish Bay* (1954), 66 N.W. 2d. 627 (Wisconsin S.C.).

53. *Robertson v. Western Baptist Hospital* (1954), 267 S.W. 2d 395 (Kentucky C.A.). The favourable treatment in the courts may in these instances have depended on the group's perceived social utility.

54. *Supra* n. 50.

55. *Supra* n. 50 at 465-66. See also *Regina v. Brown Camps Ltd.* (No. 2), [1970] 1 O.R. 388 (C.A.) to the same effect.

56. *The City of Charlottetown* case, *Supra* n. 24, distinguished *Brown Camps No. 1* on the basis that the group home in Brown Camps was operated as a business which produced a profit for the operator. See also *Browndale International Ltd. v. Board of Adjustment* (1973), 208 N.W. 2d 121, where the Wisconsin S.C. ruled against the right of a group home to locate in a residential district by reason, that, inter alia, the operator of the home was carrying on a commercial business of running such homes for profit.

"inmates".[57] Thirdly, the Brown Camps' home was not set up on a strict family style basis: the staff members were not living in the premises at all, and the "inmates" were not responsible for their accommodation and meals.[58] Therefore, one could reasonably conclude, as the Court did, that this home operated more as a boarding house, or a nursing home, than as a group home.

The American case of *Oliver v. Zoning Commission of the Town of Chester*[59] may be persuasive, for it involves virtually the identical definition of "family" as examined in *Brown Camps (No. 1)*, (and as contained in the City of Winnipeg and Thompson by-laws). In the *Oliver* case, the municipality attempted to block the establishment of a proposed group home for eight or nine employable mentally retarded persons who were to be under the care of a specially trained couple. In this case, the home was not being operated by a profit-making corporation. It was held that since the term "family" was not limited in either number or relationship by the definition contained in the ordinance, this particular group home qualified as a "single housekeeping unit", in the residential district in question.

It has previously been noted in this article[60] that the courts are reluctant to extend the definition of "family" to include limitations not strictly prescribed. Therefore, if the City of Winnipeg or Town of Thompson had intended to exclude unrelated persons (i.e. persons in a group home) from the definition of "family", it would be incumbent upon the respective municipalities to have stated so explicitly in their particular by-laws. The failure to do so should lead the courts to refrain from reading in restrictions that are not apparent in the actual wording of the by-law.

Thus, it would appear that group homes for the mentally retarded (set up on a family model and not operated as a business) should qualify as a "family" when the definition of "family" is couched in terms of simply a "single housekeeping unit."

In 1981, the City of Winnipeg amended its zoning by-law to include a definition of a "semi-institutional home".[61] The "semi-institutional home" is defined in such a way as to leave little doubt that the definition was designed to specifically regulate group homes for the mentally retarded and other handicapped groups. The amendment provides that such "semi-institutional homes" are not permitted to locate in any of the three most favoured residential district classifications[62] unless approved as a conditional use. Other Canadian cities[63] have begun to adopt similar definitions which may result in the exclusion of group homes from single family residential districts.[64]

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57. *Supra* n. 50, at 464, 466.

58. *Supra* n. 50, at 466.

59. (1974), 326 A. 2d. 841 (Conn. Ct. of Common pleas).

60. *Supra* n. 24.

61. City of Winnipeg By-law #2897/81 enacted Feb. 18, 1981.

62. Zones defined in City of Winnipeg Zoning By-law #16502 as "R1", "R2" and "R3".

63. See for example the definition of a "Special Needs Facility" in Vancouver's Zoning and Development By-law #3575; or the definition of a "Residential Care Facility" in the City of Hamilton Zoning By-law.

64. A tenuous argument could be advanced to the effect that the City of Winnipeg definition of "semi-institutional home" is itself in violation of the *Bell* principle: to suggest that "families" composed of residents of group homes are to be distinguished from natural families in determining which single family districts will be considered open to them, is to confuse the power to control physical use of premises with the power to distinguish among occupants making the same physical use of them. An amendment to the enabling legislation would serve to clarify the City's authority to enact such a restriction.

Conclusion

The right of a group home to qualify as a permitted use in a single family residential district will depend on, inter alia, the specificity with which the by-law defines the term "family".

Furthermore, the success of the group home in qualifying as a "family" may depend on the extent to which legal counsel is able to direct the court's attention away from the issue of what is a "family" and focus it upon the more general and proper issue of what is a *family use*.[65] In the United States, some courts[66] are beginning to adopt a functional view of whether the group home qualifies as a "family" - a view which stresses the way in which the occupants of the group home are *using* the home as opposed to the relationships among the occupants.

Regardless of the particular type of definition of "family" in question, much of the current Canadian and American case law is emphasizing whether the group home is set up on a "family-style" model (to emulate the traditional family) as opposed to a mini-institutional model. If treatment is implemented by having a large staff administering medical, psychiatric and psychological help to the residents, the courts may well compare the use to that of an institution. On the other hand, "if treatment is implemented by having one couple teach the residents skills that they need to know to be successfully reintegrated into society, and if this is done in a traditional family structure by having the residents take family responsibilities, then the court might easily find that the proposed use would be encompassed by a single-family use definition."[67]

Due to the fact that the typical court challenge to the establishment of a group home will involve only one particular type of group home, and one particular by-law, it is, of course, difficult to assess how far-reaching each court decision on this subject will be.

Even if group homes for the mentally retarded are able to secure physical inclusion into a residential community due to the manner in which the term "family" is defined in the municipal by-law, simple physical inclusion may not be enough. A home for the mentally retarded does not automatically become successful once the zoning barrier is overcome.

Zoning barriers do, in some instances, reflect legitimate fears and concerns of single family residential neighbourhoods. The group home for the mentally retarded will only truly be successful once it has achieved social inclusion into that neighbourhood. The willingness of members of the neighbourhood to accept such a home (social inclusion) may come about when the community fully appreciates that the purpose of a group home is not to destroy the character of the neighbourhood, but rather, as one court has noted,

65. *Supra* n. 2, at 292.

66. See for example: *County of Lake v. Gateway Houses* (1974), 311 N.E. 2d. 371 (Illinois C.A.); and *State of Missouri ex rel. Ellis v. Liddle* (1975), 520 S.W. 2d. 644 (Missouri C.A.).

67. *Supra* n. 30, at 694.

> ... [To] provide retarded [persons] with a stable environment in a setting in which they will have a real opportunity to develop to their full potential.[68]

68. *Little Neck Community Association v. Working Organization for Retarded Children* (1976), 383 N.Y.S. 2d. 364 at 367 (S.C. App. Div.).