

1998

## Residential Group Homes for Nebraska's Troubled Youth: An Attractive Alternative to Institutionalization

Jill E. Thomsen

*University of Nebraska College of Law*

Follow this and additional works at: <https://digitalcommons.unl.edu/nlr>

---

### Recommended Citation

Jill E. Thomsen, *Residential Group Homes for Nebraska's Troubled Youth: An Attractive Alternative to Institutionalization*, 77 Neb. L. Rev. (1998)

Available at: <https://digitalcommons.unl.edu/nlr/vol77/iss4/10>

This Article is brought to you for free and open access by the Law, College of at DigitalCommons@University of Nebraska - Lincoln. It has been accepted for inclusion in Nebraska Law Review by an authorized administrator of DigitalCommons@University of Nebraska - Lincoln.

# Residential Group Homes for Nebraska's Troubled Youth: An Attractive Alternative to Institutionalization

## TABLE OF CONTENTS

I. Introduction .....	835
II. Residential Group Homes Promote Feelings of Confidence and Belonging .....	837
III. Obstacles Facing the Creation of Juvenile Group Homes Posed by "Single-Family Dwelling" Restrictions .....	838
A. Restrictive Covenants .....	840
B. Municipal Zoning Laws .....	842
IV. Federal Statutory Laws and State Public Policies Provide Additional Support for Juvenile Group Homes .....	844
A. Federal Protection from Family Status Discrimination .....	844
B. State Policy Promotes Placing Youth in Family Settings .....	848
V. Conclusion .....	849

## I. INTRODUCTION

Recently a battle has been waged within Nebraska neighborhoods.<sup>1</sup> The conflict derives from the state's increasing exigence to provide housing for its troubled youth: teens who have been either

---

© Copyright held by the NEBRASKA LAW REVIEW.

\* B.A. 1993, Boston College; M.S.W. 1994, Boston College; J.D. 1999, University of Nebraska. The author is a "second generation" student of Professor Berger's first-year Property course, following her father, Thomas B. Thomsen, J.D. 1968, University of Nebraska. She would like to thank Professor Berger and her parents for their generous assistance with this Note.

1. The idea for this Note came from the recent Nebraska case, *Shadle-Cusic v. First Home Care Corporation*, No. S-970-795 (Neb. April 1, 1998) (order granting temporary injunction). This case was ultimately dismissed when First Home Care withdrew its plans to erect a group home within plaintiffs' neighborhood. How-

orphaned, abused or neglected.<sup>2</sup> On one side of the debate are state officials and child welfare advocates who recognize the unprecedented need for out-of-home residential care. The other side is represented by residential homeowners who fear that neighborhood tranquility will be jeopardized by the surge of troubled teens.

Clearly, the urgency to resolve this problem is real and undisputed. It is the proposed solution, however, that causes the most consternation: community-based group homes.

Residential treatment of troubled youth has gained vast acceptance over the past three decades.<sup>3</sup> Its growing popularity is largely due to the movement towards de-institutionalizing non-criminal juveniles, thereby separating them from their more troublesome and delinquent peers who *do* require some form of institutionalized detention.<sup>4</sup> Further, the lack of available foster homes, adoptive families and long-term care has created additional motives for the state to support residential care facilities.

The single largest obstacle facing the creation of such homes, however, is neighborhood opposition. Based largely on societal stereotypes and misconceptions, surrounding property owners contend that juvenile group homes pose special threats to neighborhoods, voicing concern over the dangerous nature of the juveniles and the lack of proper supervision within the group homes.<sup>5</sup> To combat this perceived problem, homeowners raise arguments under restrictive covenants or municipal zoning laws which restrict residential land use to "single-family dwellings."<sup>6</sup>

The concerns of neighboring homeowners are important considerations and must be respected by the state seeking to create residential group homes for troubled teens. However, such concerns should not prevent the state from advancing community-based group homes, but instead provide the needed impetus for the state to ensure proper supervision within the residential facilities and to educate neighborhood

---

ever, it is anticipated that First Home Care will meet similar opposition to any subsequent proposals for residential group homes.

2. The proposed residential facility at contention in *Shadle-Cusic* would have provided temporary housing for youths suffering from physical abuse, sexual abuse, neglect, dependency, conduct disorder, hyperactivity and attention deficit disorder. Some of the teens had committed a status offense, such as running away from home or truancy, however, none had been charged with delinquency. See Letter from Joel Rogers, Supervisor of the Adoptive Services Unit, to Karen Anderson, Attorney for the Nebraska Department of Health and Human Services (March 30, 1998)(on file with author).
3. See ALBERT L. SHOSTACK, *GROUP HOMES FOR TEENAGERS* 11 (1987).
4. See *id.*
5. See *generally* *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 448-50 (1985)(invalidating a municipal ordinance which required a special use permit for a proposed group home for the mentally retarded).
6. See *generally id.*

groups on the nonviolent nature of the juvenile residents. Ultimately, these efforts will help to eradicate "irrational prejudice"<sup>7</sup> and create a comfortable, neighborly environment for *all* residents.

This Note examines the viability of residential group homes for Nebraska's troubled teenagers. Part II describes the positive impact that community-based group homes have upon abused and neglected youth. Part III addresses the obstacles facing the creation of such facilities, focusing on difficulties posed by restrictive covenants and municipal zoning efforts which restrict residential land use to "single-family dwellings." Finally, Part IV proposes that protections offered by the Federal Housing Amendments Act [hereinafter "FHAA"] under its "family status" provision, as well as the expressed public policies of this state, provide supplemental support in the movement towards sheltering Nebraska's troubled youth.<sup>8</sup>

## II. RESIDENTIAL GROUP HOMES PROMOTE FEELINGS OF CONFIDENCE AND BELONGING

Group homes are community-based treatment facilities in which a small number of residents live under the supervision and direction of a trained staff.<sup>9</sup> Regarded as a middle range placement option, as opposed to a foster family home or a more restrictive institutionalized setting, group homes represent an effective, inexpensive and, most importantly, "humane" approach to the care and treatment of troubled youth.<sup>10</sup>

---

7. *Cf. id.* at 450 (stating that the requirement of a permit rests on the "irrational prejudice" against the mentally retarded).

8. Jessie Rasmussen, Director of the Nebraska Health and Human Servs. System, expressed the Services' desire for such homes: "It is about providing a safe and secure home for young people who need more supervision than they can receive in foster care or other group homes, or who have been in institutions or out-of-state programs because Nebraska had nowhere else for them to go." Judith Nygren, *Neighbors Ask Judge to Halt Group Home*, OMAHA WORLD HERALD, April 8, 1998, at 17SF.

9. See SHOSTACK, *supra* note 3, at 11. The group home at issue in *Shadle-Cusic* proposed to operate an eight-bed facility for persons under nineteen years of age. See Defendant's Brief in Opposition to Motion for Temporary Restraining Order at 2, *Shadle-Cusic v. First Home Care Corp.*, No. S-970-795 (Neb. April 1, 1998)(order granting temporary injunction). The group home was designed to serve as a residence for juveniles, in that the youth would reside in the home, attend neighborhood schools, and participate in community activities and extra-curricular school activities. Further, the residents would have participated in grocery shopping, cleaning and other family-based responsibilities. See *id.*

10. See JAKE TERPSTRA, U.S. DEP'T OF HEALTH, EDUC., AND WELFARE, *GROUP HOMES FOR CHILDREN: TYPES & CHARACTERISTICS* 6 (1979). The author feels it noteworthy that Nebraska is home to Father Flanagan's Boys Town USA, the famous national non-profit organization founded in Omaha, Nebraska in 1917. Its mission is also to provide for the care and treatment of "at-risk" boys and girls by

By employing a structured therapeutic program, group homes create a social milieu whereby community involvement, group work, nondirective counseling and peer relationships are encouraged.<sup>11</sup> Such a nonauthoritarian approach, as compared with the more punitive and controlled environments of detention facilities, fosters interpersonal relations and character growth while exercising an overall positive influence on the attitudes and values of each resident.<sup>12</sup> Thus, by virtue of the group setting, interpersonal dynamics, trust and social skills may well be developed.<sup>13</sup>

An additional advantage of residential facilities is the benefits derived from the surrounding neighborhood.<sup>14</sup> As group homes essentially blend with other residences in the community, this indirectly provides a wealth of opportunities and positive influences for the juvenile residents.<sup>15</sup> Neighborhood services, such as educational, religious, athletic and social clubs, enable teenagers to become active members of the community. This ultimately gives them the ability to acquire personal living skills, self-reliance and a sense of belonging.<sup>16</sup>

### III. OBSTACLES FACING THE CREATION OF JUVENILE GROUP HOMES POSED BY "SINGLE-FAMILY DWELLING" RESTRICTIONS

Notwithstanding the beneficial influences of group homes upon juvenile residents, community opposition to these facilities remains vigorous.<sup>17</sup> Attempting to prevent the creation of group homes, homeowners raise arguments under restrictive covenants or municipal zoning laws which restrict residential land use to "single-family dwellings." Neighborhood groups advocate a narrow interpretation of

implementing long-term, residential-care homes in the least-restrictive environment.

Flanagan knew that boys, facing neglect, indifference and ignorance, had bleak futures. . . . He wanted to get the boys off the streets, away from crime, and to give them a chance to be successful. To do this, he offered them a home and gave them generous amounts of love, care, patience and understanding.

BOYS TOWN USA, QUESTIONS & ANSWERS 3 (1997). In 1979, this same treatment was extended to girls. *See id.* at 4.

11. *See* SHOSTACK, *supra* note 3, at 12-13.

12. *See id.*

13. *See* Michael J. Davis & Karen L. Gaus, *Protecting Group Homes for the Non-Handicapped: Zoning in the Post-Edmonds Era*, 46 U. KAN. L. REV. 777, 801 (1998).

14. *See id.* at 800-01.

15. *See id.* at 799.

16. *See id.* at 799-800.

17. *See, e.g.*, *Shadle-Cusic v. First Home Care Corp.*, No. S-970-795 (Neb. April 1, 1998)(order granting temporary injunction); *see also State ex rel. Ellis v. Liddle*, 520 S.W.2d 644 (Mo. Ct. App. 1975); *Sunderland Family Treatment Servs. v. City of Pasco*, 903 P.2d 986 (Wash. 1995).

"family,"<sup>18</sup> voicing concern that: (1) the dangerous nature of the juvenile residents will endanger the safety and welfare, peace, and tranquility of neighborhoods;<sup>19</sup> (2) there will be a decrease in neighboring property values;<sup>20</sup> (3) municipalities will be held liable for the actions of the juvenile residents;<sup>21</sup> and (4) juvenile residents will be exposed to teasing and harassment from neighborhood children.<sup>22</sup>

In response to these concerns, research by zoning experts indicates that group homes do not have a negative impact upon surrounding communities.<sup>23</sup> As cited in the case law, studies have been conducted on various group homes, including those occupied by more than eight residents, developmentally disabled adults, recovering substance abuse addicts, prison pre-parolees, the seriously mentally ill and dangerous juveniles.<sup>24</sup> These studies reveal that group homes do not have an adverse impact on residential character, property values, crime, safety, traffic, utilities, noise and parking, ultimately concluding that "group homes are residential uses compatible with residential neighborhoods."<sup>25</sup>

To date, most of the group home litigation concerns efforts to house handicapped individuals within residential neighborhoods.<sup>26</sup> Increasingly, however, litigation has focused on the viability of group homes for non-handicapped disadvantaged persons, such as the mentally ill,<sup>27</sup> recovering substance abuse addicts<sup>28</sup> and the elderly.<sup>29</sup> In addition, although relatively few in number, there are notable cases re-

- 
18. *See generally* City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 448-50 (1985)(invalidating a municipal ordinance which required a special use permit for a proposed group home for the mentally retarded).
  19. *See* Shadle-Cusic v. First Home Care Corp., No. S-970-795 (Neb. April 1, 1998)(petition in equity); *see also* City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. at 448-50.
  20. *See* Shadle-Cusic v. First Home Care Corp., No. S-970-795 (Neb. April 1, 1998)(petition in equity).
  21. *See generally* City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. at 448-50.
  22. *See generally id.*
  23. *See* Oxford House-C v. City of St. Louis, 843 F. Supp. 1556, 1570 (E.D. Mo. 1994), *rev'd on other grounds*, 77 F.3d 249 (8th Cir. 1996).
  24. *See id.*
  25. *Id.*
  26. *See, e.g.,* City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985)(striking down a municipal zoning ordinance which required a special use permit for a proposed group home for the mentally retarded); Hill v. Community of Damien of Molokai, 911 P.2d 861 (N.M. 1996)(holding that the Federal Fair Housing Act Amendments required city to allow group home for persons with AIDS despite restrictive covenant requiring single family residences).
  27. *See, e.g.,* Township of West Orange v. Whitman, 8 F. Supp. 2d 408 (D.N.J. 1998); Texas Comm'n on Human Rights v. Kinneer, No. 09-97-238CV, 1999 WL 160606 (Tex. App. Mar. 25, 1999).
  28. *See, e.g.,* City of Edmonds v. Oxford House, Inc., 514 U.S. 725 (1995).
  29. *See, e.g.,* Jayno Heights Landowners Ass'n v. Preston, 271 N.W.2d 268 (Mich. Ct. App. 1978).

garding the viability of juvenile group homes.<sup>30</sup> These occur within the context of restrictive covenants as well as municipal zoning ordinances.

Thus, the viability of group homes depends primarily upon judicial interpretation of either a restrictive covenant or a municipal zoning ordinance which limits residential land use to a "single-family dwelling."<sup>31</sup> Accordingly, courts are required to confront the difficult task of understanding and defining "family."<sup>32</sup>

### A. Restrictive Covenants

Covenants running with the land commonly restrict land use to a "single-family dwelling." Not only do such restrictions control the use of land, "single-family dwelling" covenants also impact the types of people who occupy the land as well as the nature of improvements made upon the land.<sup>33</sup> Accordingly, developers are allowed to create and maintain attractive residential subdivisions by implementing such restrictions.<sup>34</sup>

Frequently, the phrase "single-family dwelling" is not defined in private covenants. Thus, courts have ample discretion to consult collateral authority, such as state statutory laws or municipal zoning ordinances, to properly interpret the language in the covenant.<sup>35</sup>

Courts typically construe single-family covenants by invoking either contract interpretation techniques or public policies favoring free and unrestricted land use. Thus, while some courts mandate enforcement of the covenant's original intent and plain meaning,<sup>36</sup> other courts follow the legal maxim which construes land restrictions

---

30. *See, e.g.*, *City of Vinita Park v. Girls Sheltercare, Inc.*, 664 S.W.2d 256 (Mo. Ct. App. 1984); *Young Women's Christian Ass'n v. Board of Adjustment*, 341 A.2d 356 (N.J. Super. Ct. Law Div. 1975); *Group House of Port Washington, Inc. v. Board of Zoning and Appeals*, 380 N.E.2d 207 (N.Y. 1978); *Saunders v. Clark County Zoning Dep't*, 421 N.E.2d 152 (Ohio 1981); *Pennsylvania George Junior Republic v. Zoning Hearing Bd. of Coolspring Township*, 389 A.2d 261 (Pa. Commw. Ct. 1978); *Sunderland Family Treatment Servs. v. City of Pasco*, 903 P.2d 986 (Wash. 1995).

31. *See supra* note 18 and accompanying text; *see also* JESSE DUKEMINIER & JAMES E. KRIER, *PROPERTY* 910 n.3 (3d ed. 1993).

32. *See* Gerald Korngold, *Single Family Use Covenants: For Achieving a Balance Between Traditional Family Life and Individual Autonomy*, 22 U.C. DAVIS L. REV. 951 (1989).

33. *See id.* at 951-55.

34. *See id.* at 951.

35. *See generally id.* at 970-72.

36. *See id.* at 958 (citing, e.g., *Shaver v. Hunter*, 626 S.W.2d 574, 576 (Tex. Ct. App. 1981); *Craig v. Bossenbery*, 351 N.W.2d 596, 599 (Mich. 1984)).

strictly so as to allow for the maximum, unfettered use of property.<sup>37</sup> However, striking an appropriate balance between these factors has become increasingly desirable. This is particularly true in light of the growing need for community-based treatment facilities as well as the desire to attain neighborhood support for the development of such facilities.<sup>38</sup>

The Nebraska Supreme Court struck this balance in *Knudtson v. Trainor*.<sup>39</sup> The court strictly construed a restrictive covenant in *Knudtson* when it denied an injunction sought by homeowners to enjoin a county office of mental retardation from operating a group home for five mentally retarded women.<sup>40</sup>

The court first considered whether the operation of a group home falls under the phrase "residential use" as defined in the covenant at issue. Interpreting the word "residential," the court adopted the plain and ordinary meaning of the word, stating "that such a building is . . . one in which people reside or dwell, or in which they make their homes, as distinguished from one which is used for commercial or business purposes."<sup>41</sup> The court concluded that operation of the group home was permissible under the "residential purposes" portion of the covenant.<sup>42</sup>

Next, the court considered a matter of first impression in Nebraska: whether the phrase "single-family dwelling" describes an architectural style or, instead, the relationship of persons residing within the dwelling.<sup>43</sup> Adopting the position of numerous jurisdictions, the court concluded that the proposed group home fit within the definition of a "single-family dwelling" because the architectural style of the group home would look like any of the other neighborhood's houses and the women would live together as a family unit.<sup>44</sup>

Five mentally retarded women living with a foster parent in an environment therapeutically designed to emulate a more conventional family environment should also be considered a family and such use of the property an appropriate family residential use. The residents are more than a group of unrelated individuals sharing a common roof. They do not have natural families on which to rely, and due to their unique circumstances, it is unlikely that these women will ever rejoin their parents or marry and form independent families. The substitute family provided by the group home allows the residents to lead

---

37. *See id.* (citing, e.g., *Blevins v. Barry-Lawrence County Ass'n for Retarded Citizens*, 707 S.W.2d 407, 408 (Mo. 1986); *Jackson v. Williams*, 714 P.2d 1017, 1021 (Okla. 1985)).

38. *See generally id.*

39. 216 Neb. 653, 345 N.W.2d 4 (1984).

40. *See id.* at 659, 345 N.W.2d at 8.

41. *Id.* at 656, 345 N.W.2d at 6.

42. *See id.* at 657, 345 N.W.2d at 6.

43. *See id.*, 345 N.W.2d at 7.

44. *See id.* at 659-60, 345 N.W. 2d at 8.

more normal and meaningful lives within the community than would be feasible were they institutionalized.<sup>45</sup>

Similarly, community-based residences for abused and neglected youth are designed to provide surrogate homes for teens who do not have homes of their own. Accordingly, such a facility is properly interpreted as a "single-family dwelling" within the meaning of applicable restrictive covenants.<sup>46</sup>

## B. Municipal Zoning Laws

Land use is also regulated through local zoning ordinances. The municipality's ability to regulate land has long been recognized as a valid exercise of local government police power.<sup>47</sup> The promotion of public health, safety, morals and welfare have served as a justification for municipal control over private property.<sup>48</sup>

By imposing systematic restrictions or requirements upon the types of land use permissible within a given area, many residential districts are arranged to exclusively allow for "single-family dwellings."<sup>49</sup> Accordingly, municipalities must define "family."<sup>50</sup> Zoning or-

45. *Id.* at 659, 345 N.W.2d at 7-8 (quoting *Malcolm v. Shamie*, 290 N.W.2d 101, 103 (Mich. Ct. App. 1980)); *see also* Defendant's Brief in Opposition to Motion for Temporary Restraining Order at 4-5, *Shadle-Cusic v. First Home Care Corp.*, No. S-970-795 (Neb. April 1, 1998).

46. *See* Defendant's Brief in Opposition to Motion for Temporary Restraining Order at 5, *Shadle-Cusic v. First Home Care Corp.*, No. S-970-795 (Neb. April 1, 1998).

47. *See* *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

48. *See id.* at 387.

49. *See* Paul Holmes Masters, Note and Comment, *City of Edmonds v. Oxford House: Group Homes in the Family's Backyard*, 11 *BYU J. PUB. L.* 141 (1997).

50. The city of Omaha defines "family" as follows:

One (1) or more persons living together and sharing common living, sleeping, cooking and eating facilities within an individual housing unit, no more than three (3) of whom may be unrelated. The following persons shall be considered related for the purpose of this definition: (a) Persons related by blood, marriage or adoption; (b) Persons residing with a family for the purpose of adoption; (c) Not more than eight (8) persons under nineteen (19) years of age, residing in a foster house licensed or approved by the state; (d) Not more than eight persons (19) years of age or older residing with a family for the purpose of receiving foster care licensed or approved by the state; (e) Person(s) living with a family at the direction of a court.

OMAHA, NEB., MUNICIPAL CODE § 55-19 (1996).

The city of Lincoln defines "family" as follows:

One of more persons immediately related by blood, marriage, or adoption and living as a single housekeeping unit in a dwelling shall constitute a family. A family may include, in addition, not more than two (2) persons who are unrelated for the purpose of this title. The following persons shall be considered related for the purpose of this title: (1) A person residing with a family for the purpose of adoption; (2) Not more than six persons under nineteen (19) years of age, residing in a foster home licensed or approved by the state of Nebraska; (3) Not more than four (4) persons nineteen (19) years of age or older residing with a family for the

dinances typically define "family" as either persons related by blood, marriage or adoption, or a group of unrelated persons that meet maximum occupancy requirements.<sup>51</sup> By advocating a traditional construction of "family," communities are thus able to exclude residential uses that do not meet these restrictive definitions.

The United States Supreme Court upheld such a restrictive interpretation of "family" in *Village of Belle Terre v. Boraas*.<sup>52</sup> This case is often cited by neighborhood groups seeking to exclude group homes from their single-family zoning districts.<sup>53</sup> In *Belle Terre*, the Court found constitutional an ordinance whose definition of "family" precluded the home of unrelated college students who lived and functioned as a single housekeeping unit.<sup>54</sup> The Court noted that group facilities would pose a threat to establishing "[a] quiet place where yards are wide, people few, and motor vehicles restricted. [These goals are] legitimate guidelines in a land-use project addressed to family needs."<sup>55</sup> In subsequent years, however, lower courts appeared to recognize community-based group homes as an attractive alternative for sheltering disadvantaged or handicapped persons. In fact, a majority of lower courts have consistently held that group homes for individuals with disabilities are functionally equivalent to single-family residences and actually serve to further the objectives of single-family zoning districts.<sup>56</sup> Based on this reasoning, lower courts have been careful to distinguish *Belle Terre*.

*City of White Plains v. Ferraioli*<sup>57</sup> is illustrative. There, the New York Court of Appeals rejected a lower court's narrow interpretation of "family" in a local zoning ordinance that restricted occupancy in "single-family dwellings" to related individuals, which would preclude a group establishment for ten neglected and abandoned children.<sup>58</sup> The appellate court instead found that the group home constituted a "family."

---

purpose of receiving foster care licensed or approved by the state or its delegate; (4) Any person who is living with a family at the direction of a court.

LINCOLN, NEB., MUNICIPAL CODE § 27.03.220 (1991).

51. See Brian E. Davis, Comment, *The State Giveth and the Court Taketh Away: Preserving the Municipality's Ability to Zone for Group Homes Under the Fair Housing Amendments Act of 1988*, 59 U. PITT. L. REV. 193 (1997).

52. 416 U.S. 1 (1974).

53. See Daniel Lauber, *A Real LuLu: Zoning for Group Homes and Halfway Houses Under the Fair Housing Amendments Act of 1988*, 29 J. MARSHALL L. REV. 369, 395 (1996).

54. See 416 U.S. 1, 7-9 (1974).

55. *Id.* at 9; see also Lauber, *supra* note 53, at 395.

56. See Lauber, *supra* note 53, at 396.

57. 313 N.E.2d 756 (N.Y. 1974).

58. See *id.* at 758-59; see also Robert D. Brussack, *Group Homes, Families, and Meaning in the Law of Subdivision Covenants*, 16 GA. L. REV. 33, 49 (1981); Lauber, *supra* note 53, at 396-97.

It is significant that the group home is structured as a single housekeeping unit and is, to all outward appearances, a relatively normal, stable, and permanent family unit. . . . [T]he group home is no less qualified to occupy the Ferraioli house than are any of the neighboring families in their respective homes.

. . . .  
Whether a family be organized along ties of blood or formal adoptions, or be a similarly structured group sponsored by the State, as is the group home [at issue], should not be consequential in meeting the test of the zoning ordinance.

. . . [A]n ordinance may restrict a residential zone to occupancy by stable families occupying single-family homes, but neither by express provision nor construction may it limit the definition of family to exclude a household which in every but a biological sense is a single family.<sup>59</sup>

*Ferraioli* and its progeny<sup>60</sup> have particular importance for determining the viability of juvenile group homes in Nebraska. Although this matter has not been litigated in the state, proposals for the development of juvenile-based group homes are increasing rapidly. The *Ferraioli* court's recognition that juvenile group homes are akin to a "family," demonstrates that to exclude such facilities under local zoning laws would advance no legitimate purpose. In fact, such exclusionary techniques would only serve to obstruct the state's attempt to shelter its neglected youth and increase the isolation already experienced by these youth.

#### IV. FEDERAL STATUTORY LAWS AND STATE PUBLIC POLICIES PROVIDE ADDITIONAL SUPPORT FOR JUVENILE GROUP HOMES

##### A. Federal Protection from Family Status Discrimination

Federal law, as evidenced by the Fair Housing Act of 1968 ("FHA")<sup>61</sup> and the Fair Housing Amendments Act of 1988 ("FHAA"),<sup>62</sup>

---

59. *City of White Plains v. Ferraioli*, 313 N.E.2d 756, 758-59 (N.Y. 1974); see also Brussack, *supra* note 58, at 49-50; Lauber, *supra* note 53, at 396;

60. See, e.g., *City of Vinita Park v. Girls Sheltercare, Inc.*, 664 S.W.2d 256 (Mo. Ct. App. 1984)(holding that group home for girls was a single-family dwelling within the meaning of the city zoning ordinances); *Young Women's Christian Ass'n v. Board of Adjustment*, 341 A.2d 356 (N.J. Super. Ct. Law Div. 1975)(striking down local ordinance which precluded group home for adolescent girls); *Group House of Port Washington, Inc. v. Board of Zoning and Appeals*, 380 N.E.2d 207 (N.Y. 1978)(holding that group home for seven children with two surrogate parents was the functional equivalent of a natural family and thus permissible in area zoned for single-family residences); *Saunders v. Clark County Zoning Dep't*, 421 N.E.2d 152 (Ohio 1981)(finding group home for delinquent boys was occupied by a "family," and therefore permissible under a local zoning ordinance which defined "family" as two or more persons living together as a single housekeeping unit).

61. Fair Housing Act of 1968, Pub. L. No. 90-284, Title VIII, 82 Stat. 81 (codified as amended at 45 U.S.C. §§ 3601-3631 (1994)).

62. 42 U.S.C. §§ 3601-3631 (1994).

may also preclude enforcement of restrictive covenants and municipal zoning ordinances against group homes for neglected youth. The FHA prohibits discrimination based on gender, race, color, religion or national origin.<sup>63</sup> The FHAA goes further by making it unlawful to discriminate on the basis of handicap or family status.<sup>64</sup> As discussed in this section, it is the latter provision which provides additional support for erecting group homes for juveniles within residential neighborhoods, notwithstanding the existence of restrictive covenants or municipal zoning laws which limit land use to "single-family dwellings."

Both the FHA and the FHAA were enacted to generally protect individuals from discrimination in housing. The particular objectives behind the FHAA's prohibition against handicap and family status discrimination are two-fold: (1) to protect these populations against erroneous misconceptions and societal stereotypes and (2) to effectively integrate these populations into mainstream society.<sup>65</sup> Accordingly, the FHAA expansively mandates that full housing opportunities are made available to individuals falling under a protected handicap or, as relevant to the viability of juvenile group homes, a protected familial status.<sup>66</sup>

The FHAA defines "familial status" as follows:

[O]ne or more individuals (who have not attained the age of 18 years) being domiciled with—(1) a parent or another person having legal custody of such individual or individuals; or (2) the designee of such parent or other person having such custody, with the written permission of such parent or other person. The protections afforded against discrimination on the basis of familial status shall apply to any person who is pregnant or is in the process of securing legal custody of any individual who has not attained the age of 18 years.<sup>67</sup>

Under the FHAA, two analytical tools may be employed to illustrate that either a restrictive covenant or a municipal zoning ordi-

---

63. *See id.* § 3604.

64. *See id.*

65. *See* H.R. REP. NO. 100-711, at 18 (1988).

66. Interestingly, there may be a growing line of cases that address whether emotionally disturbed children, abused and neglected children, or juvenile delinquents are "handicapped" for purposes of receiving protection under the FHAA. *See, e.g.,* *Sunderland Family Treatment Servs. v. City of Pasco*, 903 P.2d 986 (Wash. 1995) (finding that abused and neglected children are not "handicapped" under the FHAA). If it is determined that one of these children's major life activities is substantially impaired, then these children may be deemed "handicapped," thereby allowing for the protection of juvenile group homes under the FHAA's handicapped provision. Currently, case law is limited on this subject, however, one authority argues that such juveniles should be covered under the "learning" prong of "major life activities" which would thus afford FHAA protection. *See* Davis & Gaus, *supra* note 13, at 807-08.

67. 42 U.S.C. § 3602(k)(1994); *see also* NEB. REV. STAT. § 20-311 (1993) for Nebraska Fair Housing Act's definition of "familial status," which essentially mirrors the federal statute.

nance violates the statute's family status provision: disparate treatment and disparate impact.<sup>68</sup>

In order to demonstrate intentional discrimination under a disparate treatment analysis, the complaining party must show that the defendant treats members of a protected group differently than others who are similarly situated because of the protected group's family status.<sup>69</sup> A clear example of disparate treatment occurs when a restrictive covenant or a municipal ordinance is facially discriminatory towards the protected group. "Differential treatment on the face of an ordinance demonstrates an intent to discriminate; additional evidence of discriminatory animus is not required. Thus a court undertaking a disparate treatment analysis must focus on the specific language used in an ordinance."<sup>70</sup>

Disparate impact cases, on the other hand, require the complaining party to demonstrate that although a particular covenant or ordinance is neutral on its face, its application has a discriminatory effect.<sup>71</sup> If a complaining party establishes a prima facie case of discriminatory impact, then the burden shifts to the defendant to show that the covenant or ordinance is rationally related to a legitimate purpose and that no alternative action would be less discriminatory.<sup>72</sup>

Upon enacting the FHAA, Congress extended coverage to persons suffering from family status discrimination to prohibit discrimination against parents or other custodial persons domiciled with children under the age of 18.<sup>73</sup>

In *Children's Alliance v. City of Bellevue*,<sup>74</sup> the court considered the validity of a Bellevue ordinance which imposed burdens on group homes for youths who were abandoned, abused or neglected.<sup>75</sup> The ordinance in its original form prohibited all group housing for children in residential areas; however, this was later held to be invalid because it treated facilities for handicapped children differently than other facilities.<sup>76</sup> A subsequent ordinance was enacted which removed the provision banning all youth homes from residential areas; however, the new ordinance continued to treat group-care facilities differently than other facilities.<sup>77</sup>

---

68. See, e.g., *Children's Alliance v. City of Bellevue*, 950 F. Supp. 1491, 1495 (W.D. Wash. 1997).

69. See *id.*

70. *Id.*

71. See *id.*

72. See *Davis*, *supra* note 51.

73. See, e.g., *City of Edmonds, v. Oxford House, Inc.*, 514 U.S. 725, 728 n. 1 (1995); *Gorski v. Troy*, 929 F.2d 1183, 1187 (7th Cir. 1991).

74. 950 F. Supp. 1491 (W.D. Wash. 1997).

75. See *id.* at 1493-94.

76. See *id.* at 1493.

77. See *id.*

First, the ordinance distinguished between "group facility" and "family." "Group facility" was defined as: "[a] staffed living facility for a group of persons, which may include both children and adults. . . ."78 "Family," on the other hand, was defined as "[o]ne or more persons (but not more than six unrelated persons) living together as a single housekeeping unit."<sup>79</sup>

In addition, the ordinance drew distinctions in its treatment of group facilities based upon their placement in either of one of two classes.<sup>80</sup> Class I covered adult family homes, group facilities for the handicapped, domestic violence shelters and foster family homes; all other group homes were relegated to Class II.<sup>81</sup> Both classes were permitted to locate in residential zones, however, Class II facilities could not do so if the facilities (1) were not operated by a residential staff, (2) accepted occupants for fewer than thirty days, and (3) housed non-handicapped individuals who were considered "dangerous."<sup>82</sup>

The Children's Alliance ("Alliance") brought action against Bellevue, challenging the ordinance's validity due to the additional burdens placed upon group homes for juveniles. As part of its claim, the Alliance invoked the amended FHA's family status provision.<sup>83</sup>

The court concluded that the classifications drawn by the Bellevue ordinance and the burdens it placed on certain residents rendered the statute facially discriminatory.<sup>84</sup> First, the court found the distinction between "group facilities" and "family" to be discriminatory.<sup>85</sup> Under the language of the ordinance, if a particular group home fit within the definition of "group facility" as well as the definition of "family," then the ordinance mandated that the former definition controlled. This resulted in different treatment for similarly situated groups solely on account of a particular group's familial status.<sup>86</sup> The court found this distinction to rise to the level of a statutory violation because of the burdens placed upon "group facilities,"<sup>87</sup> including geographical limitations and occupancy restrictions which were not similarly imposed upon individuals falling under the ordinance's definition of "family."<sup>88</sup> The court also found the ordinance to be facially invalid based on the placement of group homes in either Class I or

---

78. *Id.* at 1494.

79. *Id.*

80. *See id.*

81. *See id.*

82. *See id.*

83. *See id.* at 1495.

84. *See id.* at 1496.

85. *See id.*

86. *See id.*

87. *See id.*

88. *See id.* at 1497.

Class II.<sup>89</sup> Because Class II homes suffered additional burdens, such as the inability to locate in a residential area if short-term residents were accepted, and because juvenile group homes clearly fell under Class II, this distinction was deemed discriminatory against juveniles solely due to their familial status.<sup>90</sup>

Bellevue attempted to rebut the prima facie finding of discrimination by urging the court that society's interests in public safety, stability and tranquility justified differential treatment.<sup>91</sup> However, the court found these justifications to fail because the city was operating under stereotyped notions about group home residents.<sup>92</sup>

It seems clear that *Children's Alliance v. City of Bellevue* stands for the proposition that juvenile group homes are protected under the FHAA's family status provision. Although case law on the matter is limited to date, this case represents a sound and recent articulation of the protection provided to juvenile group homes resulting from the custodial status of their residents.

## B. State Policy Promotes Placing Youth in Family Settings

Finally, Nebraska public policy firmly establishes the state's desire to place juveniles within state custody in the most neutral family setting as possible. Nebraska Revised Statute 43-532 requires the Department of Health and Human Services, the state agency charged with caring for children within state custody, to serve state wards "in the least intrusive and least restrictive method consistent with the needs of the child and to deliver such assistance as close to the home community of the child or family requiring assistance as possible."<sup>93</sup> This duty is consistent with the needs of juveniles and the safety of the community. Further, Nebraska Revised Statute § 43-533(2) mandates the state to "encourage community involvement in the provision of services to families and children . . . in order to encourage and provide innovative strategies in the development of services for families and children."<sup>94</sup> Thus, as the state has a legal duty to serve youth within its care and custody as well as the obligation to do so in the least restrictive environment, it seems most appropriate for the state to support the development of juvenile group homes within residential communities. Equally important is for courts to enforce the state's actions.

Any determination regarding the viability of juvenile group homes will have a broad impact upon juvenile welfare in the state of Ne-

---

89. *See id.*

90. *See id.*

91. *See id.*

92. *See id.* at 1498.

93. NEB. REV. STAT. § 43-532 (1993).

94. *Id.* § 43-533(2).

braska. Indeed, the state's ability to serve the youth within its custody is at stake. If neighborhood groups were to prevail in an action to keep group homes out of their neighborhoods because, for example, a covenant in the title restricts land use to a "single-family dwelling," then large sections of Nebraska communities will be unavailable for the development of group homes.<sup>95</sup> This would ultimately render the state's obligation to raise its children within family settings extremely difficult, if not impossible.<sup>96</sup>

## V. CONCLUSION

The development of residential group homes represents a proper solution for housing Nebraska's troubled youth. At a minimum these facilities provide shelter and supervision for teens who are neglected, abused or otherwise unable to return to their homes. Further, the unique placement of group homes within residential neighborhoods exerts positive influences on juveniles' social and behavioral development which ultimately allows the juvenile residents to become active and contributing members of society.

It is imperative that states seeking to develop juvenile group homes honor the concerns of neighboring homeowners. This may be achieved by ensuring proper supervision and structure within the facilities. Additionally, states must restrict placement in residential group homes solely to juveniles who suffer problems at home, excluding those juveniles who exhibit signs of deviant or delinquent behavior. Such protections will comfort neighboring homeowners, enhance the overall effectiveness of residential care facilities and genuinely attend to the needs and interests of today's troubled teenagers.

*Jill E. Thomsen '99*

---

95. See Letter from Deb Thomas, Policy Secretary of the Nebraska Dep't of Health and Human Servs., to Don Stenberg, Attorney General for the State of Nebraska (Apr. 17, 1998)(on file with author).

96. See *id.*