Introduced November 26, 1985 by
Councilman Barthelemy, seconded by
Councilman Salvaggio

Item No. 85-11-922

ORDINANCE NO. 1896

An ordinance establishing a moratorium on establishing and/or locating group and/or community homes not specifically protected by Louisiana R.S. 28:380-478, in districts zoned A-2, A-6 and A-7.

BE IT ORDAINED by the Slidell City Council, that the establishment of group and/or community homes not specifically protected by Louisiana R.S. 28:380-478 is hereby prohibited in districts zoned A-2, A-6 and A-7. Said prohibition shall take effect immediately in compliance with Section 2-11C of the City Charter and shall remain in effect until a new comprehensive zoning ordinance is approved by the Slidell City Council.

ADOPTED this 17th day of December, 1985.

Richard B. Van Sandt
Richard B. Van Sandt
Councilman, District C
President of the Council

Salvatore A. Caruso
Salvatore A. Caruso
Mayor

Barbara Manteris Penton
Barbara Manteris Penton
Clerk of the Council

DELIVERED
12-19-85 3:30 p.m.
to the Mayor

RECEIVED
12-20-85 11:15 p.m.
from the Mayor

November 27, 1985

PUBLIC NOTICE

Item No. 85-11-922, an ordinance establishing a moratorium on establishing and/or locating group and/or community homes not specifically protected by Louisiana R.S. 28:380-478, in districts zoned A-2, A-6 and A-7.

A Public Hearing will be held on said proposed ordinance at 6:30 P.M. on Tuesday, December 17, 1985 in the Council Chambers, 2055 Second St.

This proposed ordinance is being printed by title only as required by Ordinance No. 1528.

CITY OF SLIDELL

Barbara Manteris Penton
Clerk of the Council

Publish: 12/3/85

# THE CITY OF SLIDELL

*Planning Department*

SALVATORE A. "SAM" CARUSO, MSW
*Mayor*

MEMO TO: JOHN BREWER - COUNCIL ADMINISTRATOR
FROM: PETER J. CIONI - PLANNING DIRECTOR PJC
DATE: NOVEMBER 21, 1985
RE: GROUP HOMES

Per the request of Councilman Barthelemy, I have reviewed State legislation concerning group homes for the mentally and physically handicapped and a recent U.S. Supreme Court ruling. (see the attached) It is my interpretation of State legislation that municipalities must allow group homes in any residential district that also permits multi-family housing. Therefore, Slidell could only prohibit group homes in the A-1, A-2, and A-6 residential zoning districts.

According to an interpretation of the U.S. Supreme Court ruling in the Cleburne case, a community must permit group homes in any zoning district where similar uses are permitted. The court listed boarding houses, apartments, hospitals, and nursing homes as similar uses. To adhere to this ruling, the City of Slidell would have to permit group homes in all but the A-1 and A-2 zoning districts.

PJC/ar

Attachment

2056 SECOND STREET • P.O. BOX 828 • SLIDELL, LOUISIANA 70459 • PHONE 646-4320 / N.O. LINE 561-5647

# THE CITY OF SLIDELL

*Planning Department*

SALVATORE A. "SAM" CARUSO, MSW
*Mayor*

MEMO TO: REINHARD DEARING
ELAINE GUILLOT

DATE: OCOTOBER 1, 1985

MEMO FROM: PETER J. CIONI

RE: SUPREME COURT CASE ON GROUP HOMES

Attached for your information is an explanation of the recent Supreme Court ruling effecting the right of local government jurisdiction to exclude group homes for the mentally handicapped from certain zoning districts. According to this ruling, group homes for the mentally handicapped can not be excluded from a zoning district if that same zone permits multi-family uses and institutional uses such as homes for the aged and nursing homes.

PJC/ar

Attachment

2056 SECOND STREET • P.O. BOX 828 • SLIDELL, LOUISIANA 70459 • PHONE 646-4320 / N.O. LINE 561-5647

## Court Avoids ing Ruling (Again)

Last June the Supreme Court threw out a $350,000 damage award that a federal appeals court ordered the Williamson County, Tennessee, planning board to pay to Hamilton Bank for blocking the bank's plans for a new residential subdivision. Hamilton Bank had convinced a district court jury that it was entitled to an award of damages for the period that the county's zoning restrictions had frustrated its development plans, and the federal appeals court upheld that judgment. The Supreme Court sidestepped the issue of whether local land use regulations may constitute a taking of property without compensation, leaving takings law in the state of confusion that has persisted since the Court's 1981 decision in *San Diego Gas and Electric*.

In *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City* (53 U.S.L.W. 4969), the high court ruled, 7 to 1, that Hamilton Bank's claim for damages was premature because the bank had failed to apply to the county zoning board of appeals for variances or to seek a damage award in state court under the state inverse condemnation law. The Court concluded that these two steps were necessary before it could evaluate whether a "temporary taking" had occurred.

The high court concluded that the county planning commission's denial of the approval of the proposed development did not constitute "a final decision regarding the application of the zoning ordinance and subdivision regulations." Without a "final, definitive position," the court was unwilling to consider whether the zoning regulations went so far as to have the same effect as a physical taking of land that required compensation. In so ruling, the Court indicated that a landowner must virtually "exhaust" the state and local appeals before it would be willing to debate whether zoning regulations can have the effect of taking of private property.

Justice Brennan, in a concurring opinion joined by Justice White, agreed with the majority's ruling that the case was not yet reviewable, but noted that this did not indicate that he was departing from the views he set forth in *San Diego Gas and Electric*: that government must compensate landowners for regulatory takings. Justice Stevens, also concurring, took a different view, noting that "even though these controversies are costly and temporarily harmful to the private citizen, as long as fair procedures are followed, I do not believe there is any basis in the Constitution for characterizing the inevitable by-product of every such dispute as a 'taking' of private property."

More information on the case will be included in a forthcoming issue of *Land Use Law & Zoning Digest*. Also see "Planning Practice" in the August issue of *Planning*.

## Zoning Banning Retarded Invalidated

Last month the Supreme Court invalidated the Cleburne, Texas, zoning decision that blocked a group home for the mentally retarded from a neighborhood where similar uses such as boardinghouses, apartments, hospitals, and nursing homes were allowed by right.

The high court concluded that the city violated the equal protection clause of the U.S. Constitution when it denied a special permit for a group home for the mentally handicapped without demonstrating adequate reason for the denial. The Court invalidated only the permit decision, not the zoning ordinance. It concluded that "the record does not reveal any rational basis for believing the Featherstone (group) home would pose any special threat to the city's legitimate interests." The record showed that city officials denied the permit on the basis of the neighbors' "negative attitudes or fears," which "are not permissible bases for treating a home for the mentally retarded differently from apartments, multiple dwellings, and the like." The other factors listed as the basis for the permit denial—density, flood hazards, and traffic congestion—were not unique to the proposed group home and did not distinguish the home from the other permitted uses.

In striking down the city's permit denial, however, the court rejected the federal appeals court's conclusion that the mentally handicapped should be given special status under the Constitution's equal protection clause. Typically, in equal protection challenges, courts test only to see if a zoning restriction is "reasonably related" to some public interest or objective. The Fifth Circuit, however, had ruled that laws affecting the retarded should be subject to a more exacting standard of judicial review. Under a tougher test, called intermediate scrutiny, the city's zoning decision affecting the mentally retarded had to serve "important" and "compelling" governmental objectives in order to be valid. Intermediate scrutiny is applied to laws affecting groups that historically have been subject to mistreatment on the basis of deep-seated prejudices (such as women). After concluding that the mentally retarded were such a group, the appeals court applied this stricter test to the Cleburne zoning code.

The Supreme Court rejected the appeals court's application of the intermediate scrutiny test for the ordinance, saying many of the past prejudices have been erased by federal and state laws protecting the rights of the retarded. The majority opinion held that decisions about how to treat the retarded are "very much a task for legislators guided by qualified professionals and not by the perhaps ill-informed opinions of the judiciary."

The Court also concluded that their refusal to grant the retarded the special protection of heightened scrutiny doesn't leave them unprotected. According to the Court, legislation that discriminates against the retarded is still subject to the traditional equal protection test: that there be a rational relationship between the law and legitimate government interests.

## ZONING Reports

**Site Planning and Design for the Elderly**

*Diane R. Carstens. Van Nostrand Reinhold Company, Inc., 135 W. 50th St., New York, NY 10020, May 1985, 170 pp. $39.95.*

This book examines design issues and guidelines for site planning for housing for the elderly. The design guidelines apply to many development types including low-rise, high-rise, and mixed-use developments. The book presents case studies of unique design solutions for entryways, parking, patios, roof-top gardens, and recreational areas in housing developments for the elderly.

*Zoning News* is a monthly supplement to *Land Use Law & Zoning Digest* and the *PAS Memo*, published by the American Planning Association. Separate subscriptions are available for $25 (U.S.) and $31 (foreign). Israel Stollman, Executive Director; Frank S. So, Deputy Executive Director; Judith Getzels, Director of Research; Sylvia Lewis, Publications Director.

*Zoning News* is produced at APA. Thomas P. Smith, Editor; Jim Hecimovich and Adele Rothblatt, Assistant Editors.

# THE CITY OF SLIDELL

*Office of City Attorney*

SALVATORE A. "SAM" CARUSO, MSW
*Mayor*

November 20, 1985

TO: Peter Cioni, Director of Planning

FROM: Elaine W. Guillot, City Attorney

RE: Group Homes
Planning Department
My File No. 2302.44

Dear Peter:

Enclosed are copies of everything I have in my files on group homes. Please call me if you need anything additional.

Sincerely yours,

Elaine

Elaine W. Guillot

EWG/jkf
Enc.

2055 SECOND STREET • P.O. BOX 828 • SLIDELL, LOUISIANA 70459 • PHONE 504/643-3434

The apparent selective enforcement of a zoning and building code was held not to deny equal protection.

3. Due Process

a. J.W. v. City of Tacoma, 720 F.2d 1126 (9th Cir. 1983).

While former mental patients do not constitute a suspect class, the city of Tacoma, Washington, was found to have violated due process when its zoning authorities responded to neighborhood opposition and arbitrarily denied a permit to establish a group home for former mental patients in a residential area. The court found the decision to deny the permit did not relate to any of the substantial zoning interests that justified the use permit's discriminatory classification.

b. Butcher v. Detroit, 131 Mich. App. 698, 347 N.W.2d 702 (1984).

A Detroit ordinance requiring a valid certificate of approval or inspection before family residential structures may be sold or transferred does not amount to an unconstitutional taking of property without due process. The state's Home Rule Act gives the city sufficient police power to require that homes be inspected to deter fraud and assist in enforcement of the building code.

c. O'Neill v. Town of Nantucket, 711 F.2d 469 (1st Cir. 1983).

Federal Court of Appeals held that where a video game license was revoked on policy grounds, procedural due process was not violated by denying the licensee the opportunity to cross-examine adverse witnesses at the revocation hearing, therefore the right to examine and cross-examine witnesses at a public hearing depends mainly on whether administrative authority is acting in a political/legislative capacity or in a judicial capacity.

C. Antitrust

1. Legislation to end the penalty of treble damages against local governments sued for antitrust violations is on its way to a joint conference committee. After the Supreme Court decided in Community Communications v. City of Boulder 455 U.S. 40 (1982) that local governments are not protected from suits brought under antitrust laws, cities and county officials turned to Congress for relief. The bill makes it clear that treble damages cannot be assessed against local governments when they create monopoly situations under authority granted by the state to carry out governmental functions. S. 1578, 98th Cong., 2d Sess. (1984) (Now attached to H.R. 5712).

Has now been adopted 1984 - gov. no longer liable in damages but can get ordered overturned

be fined not more than one thousand dollars, or imprisoned for not more than six months, or both.

Acts 1983, No. 659, § 1, eff. Aug. 1, 1983.

**Source:**
Acts 1978, No. 680, § 2.
R.S. 28:448.
Acts 1982, No. 538, § 2, eff. Aug. 1, 1983.
R.S. 28:449.

### § 443. Rules and regulations

The office is authorized to establish regulations approved by the department, promulgated in accordance with the requirements of this Chapter and the Administrative Procedure Act, and these regulations shall have the force and effect of law.

Acts 1983, No. 659, § 1, eff. Aug. 1, 1983.

**Source:**
Acts 1978, No. 680, § 2.
R.S. 28:452.
Acts 1982, No. 538, § 2, eff. Aug. 1, 1983.
R.S. 28:450.

### § 444. Advertisement and award of lease bid

The office and administrative units thereof are exempt from the requirement of R.S. 39:195.1 or R.S. 39:1643 regarding advertisement and award of lease bids, except that such exemption shall only be to lease privately owned buildings or space for the purpose of establishing residential living options.

Acts 1983, No. 659, § 1, eff. Aug. 1, 1983.

**Source:**
Acts 1982, No. 538, § 2, eff. Aug. 1, 1983.
R.S. 28:451.

### §§ 445 to 452. [Blank]

Acts 1982, No. 538 amended and reenacted this Chapter, vacating R.S. 28:445 to 28:447 and 28:452. In addition R.S. 28:448 to 28:451, as contained in the 1982 reenactment, were redesignated as R.S. 28:441 to 28:444, respectively, on authority of R.S. 24:253.

The further amendment and reenactment of this Chapter by Acts 1983, No. 659 continued to leave all these section numbers vacant.

See Table and notes preceding R.S. 28:380.

## CHAPTER 5. GROUP HOME FOR HANDICAPPED PERSONS ACT



A prior Chapter 5, containing R.S. 28:441 to 445 and relating to the Southeast Louisiana Hospital, was repealed in 1958. See note in main volume.

### § 475. Short title

This Chapter shall be known and may be cited as the Group Home for Handicapped Persons Act.

Added by Acts 1981, No. 892, § 1, eff. Aug. 2, 1981.

**Title of Act:**

An Act to amend Title 28 of the Louisiana Revised Statutes of 1950 by adding thereto a new Chapter, to be designated as Chapter 5 thereof, comprised of R.S. 28:475 through R.S. 28:478, to provide relative to the promotion of community facilities for the care of mentally and physically handicapped persons, to allow small

community homes to be permitted in all residential districts zoned for multiple-family dwellings, and otherwise to provide with respect thereto. Acts 1981, No. 892, eff. Aug. 2, 1981.

## § 476. Declaration of policy

The legislature hereby declares that it is the policy of this state as declared and established in this Title and in the mental retardation law and in the mental health law that mentally and physically handicapped persons are entitled to live in the least restrictive environment in their own community and in normal residential surroundings and should not be excluded therefrom because of their disabilities. The legislature further declares that the provisions of this Chapter are intended to secure to all of the citizens of this state the right to individual dignity as provided in Article I, Section 3 of the Constitution of Louisiana and to protect the rights and promote the happiness and general welfare of the people of this state. To that end, the legislature hereby declares that the provisions of this Chapter are an exercise of the police power reserved to the state by Article I, Section 4 and Article VI, Section 9(B) of the Constitution of Louisiana.

Added by Acts 1981, No. 892, § 1, eff. Aug. 2, 1981.

**Library References**

Mental Health ⇐31.
C.J.S. Insane Persons §§ 58, 61.

**Notes of Decisions**



### 1. In general

City-parish ordinance, requiring an applicant for a "special home" permit to obtain the signatures of 51% of the owners and occupants of all properties located within a 1,000-foot radius of the proposed facility, was not in violation of the Group Home for Handicapped Persons Act (R.S. 28:475 et seq.) in relation to the particular community home in question; the applicant planned to house seven mentally retarded adults, but the aforesaid state statute only requires that group homes be permitted by right where the facility is to house "six or fewer handicapped persons." Hays v. City of Baton Rouge, App.1982, 421 So.2d 347, writ denied 423 So.2d 1166.

### 2. Injunction

Where plaintiff alleged that city and parish acted illegally in refusing to grant her an occupancy permit for a home for retarded adults in that the refusal was based upon an invalid ordinance, and where plaintiff contended that the ordinance was in direct conflict with this section, there was no need to prove irreparable harm in injunction proceeding; the applicability of state law was the major issue at the injunction hearing and was an appropriate issue on plaintiff's devolutive appeal from the denial of injunctive relief. Hays v. City of Baton Rouge, App.1982, 421 So.2d 347, writ denied 423 So.2d 1166.

## § 477. Definitions

As used in this Chapter, unless otherwise clearly indicated, these words and phrases have the following meanings:

(1) "Community Home" means a facility certified, licensed, or monitored by the Department of Health and Human Resources to provide resident services and supervision to six or fewer handicapped persons. Such facility shall provide supervisory personnel in order to function as a single family unit but not to exceed two live-in persons.

(2) "Department" means the Department of Health and Human Resources.

(3) "Handicapped Person" means any person who has a physical or mental impairment which substantially limits one or more of the following major life activities: 1) self care; 2) receptive or expressive language; 3) learning; 4) mobility; 5) self direction; 6) capacity for independent living; 7) economic self sufficiency. This definition shall not include persons handicapped by reason of drug abuse or alcohol abuse, nor shall it apply to handicapped persons currently under sentence or on parole from any criminal violation or who have been found not guilty of a criminal charge by reason of insanity.

Added by Acts 1981, No. 892, § 1, eff. Aug. 2, 1981.

COMMUNITY HOMES FOR HANDICAPPED PERSONS AND CERTAIN OTHER HEALTH CARE OR TREATMENT FACILITIES—PUBLIC HEARINGS REGARDING APPLICATIONS—NOTICE TO LEGISLATORS

ACT NO. 521

SENATE BILL NO. 182

AN ACT

To enact R.S. 28:478 (D) and to amend and reenact R.S. 40:2017.6, relative to community homes for handicapped persons and certain other health care or treatment facilities; to require the Department of Health and Human Resources to notify legislators of public hearings regarding applications for community homes and certain other health care or treatment facilities in their district; and to provide for related matters.

Be it enacted by the Legislature of Louisiana:

Section 1. R.S. 28:478 (D) is hereby enacted to read as follows:

§478. Promotion of community based homes

* * *

D. Whenever the department schedules a public hearing to review any application to open a community home, the department shall notify each legislator whose district encompasses the proposed location of the home. The notice shall be provided at least five calendar days prior to the public hearing.

Section 2. R.S. 40:2017.6 is hereby amended and reenacted to read as follows:

§2017.6. Acceptance of federal funds

A. The department may accept on behalf of the state any federal funds made to assist in meeting the cost of carrying out the purposes of any part of this Chapter. Moneys received from the federal government for a construction project approved by the surgeon general of the United States

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182

enact R.S. 40:2017.6, relative to
and certain other health care or
partment of Health and Human
earings regarding applications for
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d to read as follows:

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the department shall notify each
proposed location of the home. The
calendar days prior to the public

amended and reenacted to read as

behalf of the state any federal funds
rying out the purposes of any part of
the federal government for a
rgeon general of the United States



shall be used solely for the payments to applicants for work performed and purchases made in carrying out approved projects.

B. Whenever the department schedules a public hearing to review any application for a finding of conformity pursuant to the provisions of Section 1122 of the Social Security Act, as amended, the department shall notify each legislator whose district emcompasses the proposed location of the facility. The notice shall be provided at least five calendar days prior to the public hearing.

Section 3. This Act shall become effective upon signature by the governor or, if not signed by the governor, upon expiration of the time for bills to become law without signature by the governor, as provided by Article III, Section 18 of the Constitution of Louisiana.

Approved July 12, 1985.

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## NULLITY OF DONATION INTER VIVOS OF ENTIRE PATRIMONY

ACT NO. 522

SENATE BILL NO. 199

AN ACT

To amend and reenact Civil Code Art. 1497, relative to donations inter vivos of a donor's entire patrimony; to authorize a donor to claim immovable property in the hands of the donee subject to any real right held by a third party which was created by operation of law or by onerous title; to provide accountability by the donee or his successors by gratuitous title for any diminution in value of the property; to provide for applicability of the retroactive provisions; and to provide for related matters.

ALFORD, LIVAUDAIS & GUILLOT a partnership of professional law corporations

Attorneys and Counsellors at Law

November 7, 1984

Mr. Barry Brupbacker
City Planning Department
City of Slidell
Post Office Box 828
Slidell, LA 70459

Re: Proposed Zoning Regulations

Dear Barry:

The following is a summary of what our code defines as descendants and collaterals.

Propinquity of consanguinity is established by the number of generations and each generation is called a degree.

The series of degrees forms the line. The Direct line is the series of degrees between persons who descend from one another. The Collateral line is the series of degrees between persons who do not descend from one another but from a common ancestor.

It might be interesting to note LSA C.C. Art. 229-"Children are bound to maintain their father, mother and other ascendants, who are in need, and the relatives in the direct ascending line are likewise bound to maintain their needy descendants, this obligation being reciprocal. This reciprocal obligation is limited to life's basic necessities of food, clothing, shelter and health care, and arises only upon proof of inability to obtain these necessities by other means or from other sources."

In light of this, I do not think you can limit this to the mother and father.

Ascendants are defined as moving upward or to go back in time in order to genealogical succession.

Also interestingly in my research, I found "Family" to be defined in C.C. Art. 3556(12):

> "Family-Family in a limited sense, signifies father, mother and children. In a more extensive sense, it comprehends all the individuals who live under authority of another and includes the servants of a family."

martha c frazier+ patricia c. penton*

william c. neil alford, II* - f. pierre livaudais+ - elaine w. guillot* - marian m. livaudais+

+Covington - u. s. highway 190 at eighth ave. p. o. drawer 367 covington, louisiana 70434 892-7870 n.o. 821-9088

*Slidell - 5 bosworth avenue p. o. box 870 slidell, louisiana 70459 643-6440 892-3234

The following is a suggestion for the definition section:

"Except when the context clearly indicates otherwise, as used for the purposes of this Code:

"Relative" means a spouse, ascendant, descendant, brother or sister, aunt or uncle.

I hope this helps.

Sincerely yours,

Patricia C. Penton

PCP/dk

file:

ALFORD, LIVAUDAIS & GUILLOT a partnership of professional law corporations
Covington - u. s. highway 190 at eighth ave. p. o. drawer 367 covington, louisiana 70434 892-7870 n.o. 821-9088
Slidell - 5 bosworth avenue p. o. box 870 slidell, louisiana 70459 643-6440 892-3234

School District's 1980 student population was 59.2% black, 37 out of its 55 school counselors were white. Stuart Marsh, a white counselor, was demoted in 1980 to classroom teacher as a result of an affirmative aciton plan (AAP) designed to maintain a specified quota of black counselors in the Flint secondary school system. The AAP was part of a 1979-82 collective bargaining agreement between the school board and the United Teachers of Flint. Marsh brought suit under 42 USC § 198, contending that the demotion constituted reverse discrimination violative of equal protection. The United States District Court for the Eastern District of **Michigan** reluctantly decided the demotion was constitutional despite ruling that the AAP was not a temporary measure and that other means less intrusive than quotas, such as an emphasis on recruiting black counselors, could have been used to rectify past discrimination. The court felt bound by the Sixth Circuit's decision in Bratton v. City of Detroit, 704 F2d 879 (1983), cert den 104 S Ct 703 (1984), upholding the Detroit Police Department's AAP establishing separate lists for black and white officers respecting promotions from sergeant to lieutenant. Marsh v. Board of Education of City of Flint, 581 F Supp 614 (1984). [See McQuillin, Mun Corp §§ 12.132, 12.140, 24.431 (3rd Ed).]

*City Liable for Dumping Raw Sewage into River:* In October 1975, the City of Spokane, Washington deliberately discharged 100 million gallons of untreated sewage into the Spokane River to allow the construction of a new sewage treatment plant for the city. This discharge of raw sewage severely polluted a nearby artificial lake whose waterfront had been developed with lakefront homes. The homeowners brought suit to recover damages for loss of the use and enjoyment of their lakefront properties and lifestyle as well as the mental distress they suffered as a result of the pollution. Affirming the trial court's award of $245,000 against the city, the **Washington** Supreme Court concluded that the discharge of raw sewage constituted a blatant violation of the city's waste discharge permit issued pursuant to federal and state clean water legislation. See 33 USC §§ 1251-1376; Rev Code Washington § 90.48.010 et seq. This wrongful discharge amounted to a statutory nuisance for which the city was responsible, entitling the injured homeowners to a recovery of damages. See RCW § 7.48.010 et seq. Moreover, although the decision to dump raw sewage to facilitate construction of the new treatment plant involved the exercise of expert judgment, it was not a basic policy decision falling within the doctrine of governmental immunity from tort liability for discretionary acts. Moitke v. City of Spokane, 678 P2d 803 (1984). [See McQuillin, Mun Corp §§ 53.04a, 53.138 (3rd Ed).]

*Publicly Funded Home for Mentally Retarded not Exempt from Local Zoning:* The Macon Association for Retarded Citizens, a governmentally financed nonprofit corporation, wanted to build group homes for the mentally retarded in single family residential areas of Macon and Bibb County. However, the county zoning ordinance narrowly defined the term "family" as including no more than four unrelated persons. Macon unsuccessfully petitioned the county planning and zoning commission to exempt publicly funded group homes under the Georgia Community Services Act for the Mentally Retarded, Off Code of Ga Ann § 37-5-1 et seq., from compliance with county zoning restrictions. Affirming the commission's action by a 5-2 vote, the **Georgia** Supreme Court acknowledged that state government and its agencies are immune from local zoning regulations. However, property owned by a nonprofit corporation is not immune even if the corporation is performing services of governmental nature, at least absent a clear expression of legislative intent to the contrary. No such expression of legislative intent can be found in the Community Services Act for the Mentally Retarded. Macon Ass'n for Retarded Citizens v. Macon-Bibb County Planning & Zoning Commission, 314 SE2d218 (1984). [See McQuillin, Mun Corp §§ 25.15, 25.128b (3rd Ed).]

May 22, 1984

Mr. Barry Brupbacher
P. O. Box 828
Slidell, Louisiana 70459

Re: Planning Department
Our File No. 2302.44

Dear Barry:

This is to reply to your request that I review Ordinance #1681 in light of the recent Cleburne case.

The moratorium on community homes in A-2 and A-6 districts seems to be valid provided that the ordinance serves important governmental interests and that the ordinance is substantially related to the achievement of those interest.

In any event, some factors will not withstand judicial scrutiny; such factors include: the attitude of a majority of property owners near the site of the home or the concern for the fears of any residents in the neighborhood.

If the objective of the ordinance is to avoid undue concentration of population, the moratorium in A-2 and A-6 districts is valid. However, if the objective is to lessen traffic in the streets, or to ensure safety from fire, or to protect the serenity of the neighborhood or protect residents from harm, the moratorium would not be valid without a showing that community homes and their residents pose an actual threat to those objectives. Most likely those objectives would not withstand scrutiny.

The moratorium in A-7 districts appears to be illegal. LSA-R.S. 28:478 provides that community homes are permitted by right in all residential district zones for multiple family dwellings. That provision is a matter of statewide policy and the fact that the ordinance allows community homes which are specifically protected by LSA-R.S. 28:380-478 should make no difference as to the illegality of the A-7 district prohibition.

xx

Please call me if you have any questions.

Sincerely yours,

Elaine W. Guillot
CITY ATTORNEY

EWG/rb

cc: Mr. Reinhard Dearing

Thomas R. Caruso
ATTORNEY & COUNSELOR AT LAW
2254 FIRST STREET
P. O. BOX 160
SLIDELL, LOUISIANA 70459-1689
(504) 641-1558

CATHERINE L. BARTER
(LA. & MISS.)

CAROL H. CARUSO
NOTARY PUBLIC

NEW ORLEANS:
(504) 525-8739

April 23, 1984

Mr. Barry Brubacher
P.O. Box 828
Slidell, Louisiana 70459

Re: Zoning Ordinances
Mentally Handicapped Persons

Dear Barry,

I thought you might be interested in knowing of a case recently decided in the Fifth Circuit, Cleburne Living Center, Inc. v. City of Cleburne, No. 82-1565, which dealt with the zoning ordinance permitting apartment houses and hospitals... or homes for convalescents or aged, other than for the insane or feeble minded. The ordinance was held on its face and as applied to deny equal protection to the "quasi -- suspect" class of mentally handicapped persons. As you can imagine, this is an important decision considering it was decided by a U.S. Appellate Court rather than a State Court and because it extends protection of a "quasi -- suspect" class to mentally handicapped persons.

I trust you will find this case of interest.

Sincerely,

THOMAS R. CARUSO

TRC/blc

CLEBURNE LIVING CENTER, INC., et al., Plaintiffs-Appellants,

v.

CITY OF CLEBURNE, TEXAS, et al., Defendants-Appellees.

No. 82-1565.

United States Court of Appeals, Fifth Circuit.

March 5, 1984.

Suit was brought challenging validity of zoning ordinance excluding mental retardates' group homes from permitted uses in "apartment house district." The United States District Court for the Northern District of Texas, Robert W. Porter, J., entered judgment denying plaintiffs relief, and they appealed. The Court of Appeals, Goldberg, Circuit Judge, held that: (1) zoning function of city council was not within a "program or activity" subject to provisions of Revenue Sharing Act; thus, zoning ordinance could not be challenged under the Act, and (2) zoning ordinance was unconstitutional on its face and as applied under intermediate scrutiny equal protection analysis.

Affirmed in part and reversed and remanded in part.

1. United States ⇐82(2)

Zoning function of city council was not within a "program or activity" subject to provisions of Revenue Sharing Act; thus, zoning ordinance excluding mental retardates' group homes from permitted uses in "apartment house district" could not be challenged under the Act. 31 U.S.C.A. § 6716.

2. Constitutional Law ⇐213.1(2)

Three degrees of scrutiny are applied by courts in analyzing statutes challenged under equal protection clause: if a legislative classification disadvantages a "suspect class" or impinges upon exercise of a "fundamental right," then courts will employ strict scrutiny and statute must fall unless government can demonstrate that the classification has been precisely tailored to serve a compelling governmental interest; if the classification, while not facially invidious, nonetheless gives rise to recurring constitutional difficulties, it will be treated under intermediate scrutiny and statutory classification must serve important governmental objectives and must be substantially related to achievement of those objectives in order to withstand such scrutiny; if neither strict nor intermediate scrutiny is appropriate, then statute will be tested for mere rationality. U.S.C.A. Const.Amend. 14.

3. Constitutional Law ⇐213.1(2)

Mentally retarded persons are a "quasi-suspect" class and laws discriminating against the mentally retarded should be given intermediate scrutiny. U.S.C.A. Const.Amend. 14.

4. Constitutional Law ⇐228.2

Zoning ordinance excluding mental retardates' group homes from permitted uses in "apartment house district" was unconstitutional on its face and as applied under intermediate scrutiny equal protection analysis. U.S.C.A. Const.Amend. 14.

5. Constitutional Law ⇐42.2(2)

Organization which aimed to improve welfare and treatment of the mentally retarded, which never identified any individu-

als who actually desired to live in mental retardates' group home and which failed to prove a sufficient injury to its own interests, lacked standing to challenge constitutionality of zoning ordinance excluding mental retardates' group homes from permitted uses in "apartment house district" in its own right or as a representative of its members.

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Appeal from the United States District Court for the Northern District of Texas.

Before CHARLES CLARK, Chief Judge, GOLDBERG and POLITZ, Circuit Judges.

GOLDBERG, Circuit Judge:

The segregation of one group from the rest of society has been the historical benchmark of unfair discrimination in this country. Such segregation perpetuates false stereotypes about the exiled group and leads to a virtual caste system built on misconceptions. Thus, blacks were unable to disprove racist stereotypes so long as they were excluded from white neighborhoods and their children were isolated in segregated schools.

Moreover, the effects of such segregation are especially pernicious when the outcast group lacks the political power to resist unfair categorization. Courts have carefully scrutinized legislation that discriminates against politically impotent groups, for under those circumstances the danger is great that the statute will reflect and enshrine untrue stereotypes.

In the present case, we are faced with the isolation of just such a group—the mentally retarded, i.e. persons who possess certain learning disorders [1] but who are to be distinguished from the "mentally ill." [2]

1. As an expert, Dr. Phillip Roos, stated at trial:

A: Essentially mental retardation is a problem of learning. It is manifested particularly in difficulty with abstract thinking, judgment and problem solving and includes social adjustment and economic productivity.

Q: How do you decide if a person is mentally retarded?

A: We use basically three criteria: Measured intelligence, adaptive behavior and medical classification.

Q: Are there different degrees or levels of mental retardation?

A: Very definitely. There is a wide variability among retarded individuals. The mildest level of mental retardation, referred to as mild mental retardation, these are individuals whose intelligence is roughly between an IQ of 50 and an IQ of 70. This includes approximately eighty-nine percent of all mentally retarded people. Roughly nine out of ten mentally retarded people are mildly retarded.

Moderate mental retardation, IQ's of roughly 35 to 50, include six percent of the population. Severe mental retardation, IQ's 20 to 35, profound mental retardation, IQ below 20. these two categories combined include only about five percent of the population.

Trial Transcript at 137–38, 140.

2. Dr. Roos also explained that mental retardation is not a mental illness.

Q: Is mental retardation a type of mental illness?

A: No, sir. It's an entirely different condition requiring entirely different approaches.

Q: Well, how do they differ?

A: Mental retardation is a problem of a deficit in intellectual development and social adaption. Its onset is sometimes from birth or during childhood. It is primarily an educational type of problem. And, traditionally it is irreversible. By which I mean there may be some amelioration, but to date it is not a curable condition.

Mental illness, on the other hand, is a disorder of thinking, of emotions and of behavior. It can occur anytime in life, often after a period of normal development. It is primarily a psychiatric, rather than an educational problem, and often it is reversible. That is, it is potentially curable in many cases.

A zoning ordinance of Cleburne, Texas, excludes mental retardates' group homes from the permitted uses in the "apartment house district." The owners of a proposed group home challenged the ordinance under the Federal Revenue Sharing Act and the Equal Protection Clause of the Fourteenth Amendment. We reject the Revenue Sharing Act claim, because zoning was not a "program or activity" receiving federal funds. In evaluating the Equal Protection claim, we hold that mental retardates constitute a "quasi-suspect" class; and, therefore, we test the ordinance according to the "intermediate" level of scrutiny established by the Supreme Court. Because the city has failed to prove that the ordinance substantially furthers a significant governmental interest, we hold that the ordinance violates the Equal Protection Clause.

## I. FACTS

In July, 1980, Jan Hannah purchased a house at 201 Featherston Street in Cleburne, Texas. Hannah is the Vice President and part-owner of Cleburne Living Centers, Inc. ("CLC"), a Texas corporation organized for the purpose of establishing and operating supervised group homes for the mentally retarded. Hannah bought the Featherston house for the purpose of leasing it to CLC for the operation of a group home, classified as a Level I Intermediate Care Facility.

The home would house thirteen men and women who are mildly or moderately retarded. They would receive twenty-four hour supervision from CLC staff members, working eight-hour shifts. In addition to handling some cooking and cleaning, the staff would work with the mentally retarded residents to train them in such skills as "kitchen management, maintenance, personal budgeting, meat preparation, academics related to independent living (such as how to read classified advertisements for jobs and housing), and the use and enjoyment of leisure time activities." [3] An interdisciplinary team of staff workers would prepare an individualized program for each resident, based on his or her particular needs. The residents would have jobs in the community and in a work activity center. They would probably not have private cars. Their stay at the home would be voluntary, and the length of the stay indeterminate.

As a Level I Intermediate Care Facility, the Featherston home would be subject to extensive regulations and guidelines established and administered by the United States Department of Health and Human Resources, the Texas Department of Human Resources, the Texas Department of Mental Health and Mental Retardation, and the Texas Department of Health. CLC plans to comply with all applicable and valid statutes, regulations, codes, and ordinances. *Cleburne, supra* note 3, at 6, Finding 20.

For mentally retarded persons living in the 1980's, the existence of group homes is critical to assimilation into the normal culture. As the trial court found,

> Group homes currently are the principal community living alternatives for persons who are mentally retarded. The availability of such a home in communities is an essential ingredient of normal

Trial Transcript at 138–139.

3. *Cleburne Living Center v. City of Cleburne*, No. CA 3–80–1576–F, slip op. at 7, Finding 23 (N.D. Tex. April 16, 1982).

living patterns for persons who are mentally retarded, and each factor that makes such group homes harder to establish operates to exclude persons who are mentally retarded from the community.

*Cleburne Living Center v. City of Cleburne*, *supra* note 3, at 9, Finding 30. At present, there are no group homes or hospitals for the mentally retarded in Cleburne. One is located in Keene, Texas, approximately 15 minutes by automobile from Cleburne.

## II. THE ORDINANCE

Section 8 of Cleburne's zoning ordinance lists the permitted uses in a district zoned R–3:

1. Any use permitted in District R–2.
2. Apartment houses, or multiple dwellings.
3. Boarding and lodging houses.
4. Fraternity or sorority houses and dormitories.
5. Apartment hotels.
6. *Hospitals,* sanitariums, nursing homes *or homes for* convalescents or aged, *other than for the* insane or *feeble-minded* or alcoholics or drug addicts.
7. Private clubs or fraternal orders, except those whose chief activity is carried on as a business.
8. Philanthropic or eleemosynary institutions, other than penal institutions.
9. Accessory uses customarily incident to any of the above uses....

*Id.* at 4, Finding 12 (emphasis added).

Section 16, subdivision 9, of the same ordinance requires that special use permits be obtained for "*hospitals for the* insane or *feeble-minded,* or alcoholic or drug addicts, or penal or correctional institutions" that are to be operated anywhere in the city. *Id.* at 5, Finding 13 (emphasis added). Because the Featherston house is located in an R–3 zone and, more generally, because it is located anywhere within Cleburne, its use as a group home is not automatically permitted but requires a special use permit from the Cleburne City Council. Under the zoning ordinance, each special use permit is valid for only one year; so the owners of the Featherston house would have to reapply year after year.

## III. PROCEEDINGS BELOW

On July 28, 1980, Hannah applied for a special use permit. The Cleburne Planning and Zoning Commission held a hearing and denied the permit. On October 14, 1980, the City Council of Cleburne held a public hearing on the permit application and again voted (3–1) to deny the permit. The Council members considered the following factors:

1. the attitude of a majority of owners of property located within two hundred (200) feet of 201 Featherston;
2. the location of a junior high school across the street from 201 Featherston;
3. concern for the fears of elderly residents of the neighborhood;
4. the size of the home and the number of people to be housed;
5. concern over the legal responsibility of CLC for any actions which the mentally retarded residents might take;
6. the home's location on a five hundred (500) year flood plain; and
7. in general, the presentation made before the City Council.

After exhausting administrative remedies, Hannah and the CLC sued for injunctive relief and damages, in the United States District Court for the Northern District of Texas. They were joined by the plaintiffs Johnson County Association for Retarded Citizens (JCARC) and Advocacy, Inc. in asserting the constitutional rights of mentally retarded persons who were potential residents of the facility. JCARC is an organization that aims to improve the welfare and treatment of the mentally retarded. Advocacy, Inc. is a non-profit corporation that provides legal services to developmentally disabled persons.

The defendants in the suit include the City of Cleburne and individual city employees and council members. After a bench trial, the district judge entered judgment denying the plaintiffs relief on each of the grounds they had claimed. This appeal follows.

## IV. ISSUES ON APPEAL

The plaintiffs raise various challenges to the zoning ordinance on its face and as applied. They argue, first, that the ordinance and the special use permit denial violate the Revenue Sharing Act which prohibits discrimination against "otherwise qualified" handicapped people. 31 U.S.C. § 1242(a)(1) (1982), *recodified at* 31 U.S.C.A. § 6716(b)(2) (1983).

The plaintiffs also claim that the ordinance and its application violate the Equal Protection and Due Process clauses of the Constitution.[4] We find the Revenue Sharing Act claim unconvincing in the circumstances of this case. However, we hold that the Cleburne ordinance, both on its face and as applied, denies equal protection. Therefore, we need not address the other constitutional claims. The one tangential issue that is worthy of note is the defendants' argument that JCARC lacks standing to prosecute this suit. Given the specific facts of this case, we agree. That determination does not affect our decision on the merits, however, for the other plaintiffs remain in the suit.

## V. REVENUE SHARING ACT

[1] The plaintiffs argue, first, that the zoning function of the Cleburne City Council is within a "program or activity" subject to the provisions of the Revenue Sharing Act. 31 U.S.C.A. § 6716 (1983). We disagree. As the trial court held, clear and convincing evidence proved that federal funds were not used to finance the zoning activities of the City Council. *See* 31 U.S.C.A. § 6716(c)(1); *see also North Haven Board of Education v. Bell*, 456 U.S. 512, 102 S.Ct. 1912, 1926, 72 L.Ed.2d 299 (1982) ("program or activity" language in Education Amendments of 1972 makes their coverage program-specific); *Brown v. Sibley*, 650 F.2d 760, 767 (5th Cir.1981) (receipt of federal financial assistance by multiprogram entity, for application to certain programs or activities, does not bring entire entity within the reach of Section 504 of the Rehabilitation Act); *Board of Public Instruction of Taylor County v. Finch*,

4. The plaintiffs assert that the ordinance violates Due Process in two ways. The distinctions drawn in the statute are allegedly arbitrary and capricious, thus failing to meet the minimal rationality requirements set out in *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926); *see also Moore v. City of East Cleveland*, 431 U.S. 494, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977); *Nectow v. City of Cambridge*, 277 U.S. 183, 48 S.Ct. 447, 72 L.Ed. 842 (1928). Moreover, the plaintiffs allege that the statute is unconstitutionally vague. *See Papachristou v. City of Jacksonville*, 405 U.S. 156, 92 S.Ct. 839, 31 L.Ed.2d 110 (1972).

414 F.2d 1068 (5th Cir.1969) (multiple programs in Title VI context).

The plaintiffs claim, however, that the City Council itself is an activity receiving federal funds, because it decides which specific city programs will ultimately receive the monies. Therefore, every action of the City Council (including zoning) is subject to the requirements of the Revenue Sharing Act. *Cf. Grove City College v. Bell*, 687 F.2d 684 (3d Cir.1982), *cert. granted* —— U.S. ——, 103 S.Ct. 1181, 75 L.Ed.2d 429 (1983) (entire college a "program or activity" in Title IX case). We are not willing to make that leap in the circumstances of the case. Even if we assume that the City Council's function in disbursing funds subjected those decisions to the Revenue Sharing Act, there was no apparent link between that function and the Council's function in making zoning decisions. These were two entirely separate powers and should be considered separate programs.

We do not hold that a City Council could *never* be a single program or activity. We merely hold that those conditions do not exist in this case.[5]

## VI. EQUAL PROTECTION

[2] The real problem with the Cleburne ordinance is that it denies equal protection both facially and as applied. In recent years, the formulaic analysis of Equal Protection claims has produced three degrees of scrutiny for courts to apply in analyzing challenged statutes. The levels are generally called "strict scrutiny," "intermediate" or "heightened" scrutiny, and "rational review," *see Plyler v. Doe*, 457 U.S. 202, 102 S.Ct. 2382, 2394–96, 72 L.Ed.2d 786 (1982); the choice among the three levels depends upon the nature of the statute in question. If the legislative classification disadvantages a "suspect class" [6] or impinges upon the exercise of a "fundamental right," then the courts will employ strict scrutiny. *Plyler v. Doe, supra*, 102 S.Ct. at 2394–95 and nn. 14, 15. The statute must fall unless the government can demonstrate that the "classification has been precisely tailored to serve a compelling governmental interest." *Id.* at 2395.

If the "classification, while not facially invidious, nonetheless give[s] rise to recurring constitutional difficulties," *id.*, it will be tested under intermediate scrutiny. Such difficulties arise, for example, when a statute discriminates against a class which shares some of the characteristics of the suspect classes. *See id.* at 2395–97; *Trimble v. Gordon*, 430 U.S. 762, 767, 97 S.Ct. 1459, 1463, 52 L.Ed.2d 31 (1977); Tribe, *American Constitutional Law*, 1090 (1978). To withstand intermediate scrutiny, the statutory classification must serve important governmental objectives and must be substantially related to the achievement of those objectives." *Craig v.*

5. This case is distinguishable from *Grove City College, supra*, where the college was considered a single "program or activity" under the Educational Amendments of 1972 because students received federal tuition aid. The aid, which was not earmarked for any specific program, 687 F.2d at 696–97, would conceivably have ultimately funded every program in the college; but the case reveals no attempt by the school to prove that certain programs were not funded. Instead, the college argued that the funding was indirect, going to students rather than any program of the college itself. *Id.*

6. The courts have identified a number of classifications as inherently suspect. *See, e.g., McLaughlin v. Florida*, 379 U.S. 184, 85 S.Ct. 283, 13 L.Ed.2d 222 (1964) (classification by race); *Oyama v. California*, 332 U.S. 633, 68 S.Ct. 269, 92 L.Ed. 249 (1948) (national origin); *Graham v. Richardson*, 403 U.S. 365, 91 S.Ct. 1848, 29 L.Ed.2d 534 (1971) (alienage).

*Boren*, 429 U.S. 190, 197, 97 S.Ct. 451, 457, 50 L.Ed.2d 397 (1976); *see also Plyler v. Doe*, *supra*, 102 S.Ct. at 2395, *Lalli v. Lalli*, 439 U.S. 259, 265, 99 S.Ct. 518, 523, 58 L.Ed.2d 503 (1978).

If neither strict nor intermediate scrutiny is appropriate, then the statute will be tested for mere rationality. We "seek only the assurance that the classification at issue bears some fair relationship to a legitimate public purpose." *Plyler v. Doe*, *supra*, 102 S.Ct. at 2394.

[3] In deciding the appropriate level of scrutiny in this case, we note that the plaintiffs have identified no fundamental rights that are impaired by the Cleburne ordinance. Our analysis, then, is limited to whether the class of mentally retarded persons is suspect or at least possesses sufficient characteristics of a suspect class to warrant intermediate review.

Although some district courts have discussed this issue,[7] we can find no appellate opinions directly deciding the proper characterization of mentally retarded persons for Equal Protection analysis.[8] Therefore, we face the issue as one of first impression.

The courts have identified several indicia of the suspect classes. In *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 28, 93 S.Ct. 1278, 1294, 36 L.Ed.2d 16 (1973), the Supreme Court considered whether

> the class is ... saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.

*Accord, Plyler v. Doe*, *supra*, 102 S.Ct. at 2394–95 n. 14; *Graham v. Richardson*, 403 U.S. 365, 372, 91 S.Ct. 1848, 29 L.Ed.2d 534 (1964); *see also United States v. Carolene Products Co.*, 304 U.S. 144, 152–53 n. 4, 58 S.Ct. 778, 783–84 n. 4, 82 L.Ed. 1234 (1938). In *Plyler v. Doe*, *supra*, the Court also noted that

> [s]ome classifications are more likely than others to reflect deep-seated prejudice rather than legislative rationality in

7. *See Association for Retarded Citizens of North Dakota v. Olson*, 561 F.Supp. 473, 490 (D.N.D. 1982) (intermediate scrutiny appropriate for classifications discriminating against mentally retarded persons); *Fialkowski v. Shapp*, 405 F.Supp. 946, 957–59 (E.D.Pa.1975) (same) (*dictum*); *cf. Frederick L. v. Thomas*, 408 F.Supp. 832, 836 (E.D.Pa.1976) (classification discriminating against learning disabled should be tested under intermediate scrutiny) (*dictum*). *But see New York State Assoc. for Retarded Children v. Rockefeller*, 357 F.Supp. 752, 762 (E.D.N.Y. 1973) (inmates of state institution for mentally retarded not a suspect class); *Developmental Disabilities Advocacy Center v. Melton*, 521 F.Supp. 365, 371 (D.N.H.1981) (same); *Anderson v. Banks*, 520 F.Supp. 472, 512 (S.D.Ga.1981) (mentally retarded persons not a "quasi-suspect" class). Some cases have discussed whether mentally *ill* persons are a suspect or "quasi-suspect" class. *See, e.g., Doe v. Colautti*, 592 F.2d 704, 710 (3d Cir.1979) (mentally ill not a suspect class); *Sterling v. Harris*, 478 F.Supp. 1046, 1056 (N.D.Ill.1979), *rev'd other grounds sub nom; Schweiker v. Wilson*, 450 U.S. 221, 101 S.Ct. 1074, 67 L.Ed.2d 186 (1981) (mentally ill a "quasi-suspect" class). However, mental illness is distinguishable in significant ways from mental retardation, as we discuss *infra* at note 10. Thus, the mental illness cases offer at best only weak analogies to the case at bar.

8. *Romeo v. Youngberg*, 644 F.2d 147, 163 n. 35 (3d Cir.1981) (*en banc*) does suggest, however, that mentally retarded persons might be a "discrete and insular" minority deserving heightened scrutiny. *See infra* at 14. *Cf. Abrams v. 11 Cornwall Co.*, 695 F.2d 34, 39 (2d Cir.1982) (discrimination against mentally retarded persons is invidious).

pursuit of some legitimate objective. Legislation predicated on such prejudice is easily recognized as incompatible with the constitutional understanding that each person is to be judged individually and is entitled to equal justice under the law. Classifications treated as suspect tend to be irrelevant to any proper legislative goal.

102 S.Ct. at 2394–95 n. 14.

Finally, if membership in the minority class is immutable, the Supreme Court is more likely to give the class special protection. *See Parham v. Hughes*, 441 U.S. 347, 351, 99 S.Ct. 1742, 1745–46, 60 L.Ed.2d 269 (1979); *cf. Plyler v. Doe, supra*, 102 S.Ct. at 2396 (minor children of illegal aliens are not in this country voluntarily and, therefore, are not comparably situated to their parents).

Applying these tests to the case at bar, we conclude that although mental retardates are not a suspect class, they do share enough of the characteristics of a suspect class to warrant heightened scrutiny. Discrimination against the mentally retarded is likely to reflect deep-seated prejudice. They have been subjected to a history of unfair and often grotesque mistreatment. Until the 1970s, they were universally denied admittance into public schools in the United States. In addition, the Eugenic Society of America fought during the first half of this century to have retarded persons eradicated entirely through euthanasia and compulsory sterilization. *See Pennsylvania Assoc. of Retarded Children v. Pennsylvania*, 343 F.Supp. 279, 294 (E.D.Pa.1972). Euthanasia was rejected; but thirty-two states have had statutes providing for the sterilization of retarded individuals. *Id.* at 294 n. 42; *Falkowski v. Shapp, supra* note 7, at 959 n. 9; O'Hara & Sanks, Eugenic Sterilization, *45 Geo.L.J. 30* (1956); *see also Buck v. Bell*, 274 U.S. 200, 47 S.Ct. 584, 71 L.Ed. 1000 (1927) (upholding Virginia compulsory sterilization law).[9]

Mental retardates have been segregated in remote, stigmatizing institutions. *Cleburne Living Center v. City of Cleburne, supra* note 3, at 9. Finding 32, Trial Transcript at 142; and when permitted in society, they have often been subjected to ridicule, *id.* at 141. Once-technical terms for various degrees of retardation—e.g. "idiots," "imbeciles," "morons"—have become popular terms of derision.

These forms of mistreatment have perpetuated the historical misunderstanding of mental retardation and led to popular fears and uncertainty. The Cleburne ordinance discriminates between the mentally retarded and other groups—e.g. the elderly—that also require supervision but may establish group homes in the R–3 district without a special use permit. This distinction is likely to reflect the deep-seated historical prejudice against the mentally retarded.

In addition, mentally retarded persons have lacked political power. The trial court found that they "historically have been subjected to exclusion from the political process...." *Cleburne, supra* note 3, at 9, Finding 32. Indeed, as of 1979, most

9. The attitude of the past can be read in the words of Justice Holmes:

> We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange indeed if it could not call upon those who sap the strength of the State for these lesser sacrifices ... in order to prevent our being swamped with incompetence.... Three generations of imbeciles are enough.

*Id.* 274 U.S. at 207, 47 S.Ct. at 585.

states disqualified mentally retarded individuals from voting. Note, *Mental Disability and the Right to Vote*, 88 *Yale L.J.* 1644 (1979).[10] Furthermore, political organizations for the mentally retarded have emerged only recently and still possess relatively little power. As the Third Circuit declared in *Romeo v. Youngberg*, 644 F.2d 147 (3d Cir.1981) (*en banc*):

> The mentally retarded may well be a paradigmatic example of a discrete and insular minority for whom the judiciary should exercise special solicitude. *Cf. United States v. Carolene Products*, 304 U.S. 144, 152–53 n. 4, 58 S.Ct. 778, 783–84 n. 4, 82 L.Ed.2d 1234 (1938). The retarded cannot vote in most states and, with few community ties, sponsors or friends, have minimal impact on the political process. *See* J. Ely, *Democracy and District*, 135–79 (1980).

*Id.* at 163 n. 35.

Finally, the mentally retarded deserve special consideration because their condition is immutable. Dr. Phillip Roos explained at trial that mental retardation is "irreversible." "[T]here may be some amelioration, but to date it is not a curable condition." Trial Transcript at 139.

The combination of these factors—historical prejudice, political powerlessness, and immutability—calls for heightened scrutiny of classifications discriminating against the mentally retarded. We are not prepared to say that they are a full-fledged suspect class, however. Strict scrutiny has been reserved for classifications, such as race, that "tend to be irrelevant to any proper legislative goal." *Plyler v. Doe*, *supra* 102 S.Ct. at 2394–95 n. 14. Though mental retardation is irrelevant to many policies, it *is* a relevant distinction in some cases. For example, learning difficulties may have a bearing on the types of school programs to which a child is assigned or the types of employment for which an adult is qualified. Therefore, we hold that mentally retarded persons are only a "quasi-suspect" class and that laws discriminating against the mentally retarded should be given intermediate scrutiny.[11]

10. In Texas, both the state constitution and election code provide:

> The following classes of persons shall not be allowed to vote in this state, to wit:
>
> . . . . .
>
> Second: Idiots and lunatics.

Tex. Const. art. VI, § 1; Tex.Elec.Code Ann. art. 5.01 (Vernon Supp 1982). A 1982 opinion of the Texas Secretary of State limited that language to mentally retarded persons who have been adjudicated incompetent. Election Law Opinion DAD–27 (1982). The opinion relied in large part on the Mentally Retarded Persons Act of 1977, Tex.Rev.Civ.Stat.Ann. art. 5547–300, § 2(c) (Vernon Supp.1982).

We do not believe, however, that the mentally retarded have suddenly become politically powerful in Texas. They are still a relatively small bloc, notwithstanding the existence of organizations like the Johnson County Association of Retarded Citizens. Moreover, their right to vote was unclear as late as 1982. The Secretary of State opinion was necessitated by a local judge's decision to bar from the polls a mentally retarded person who had not been adjudicated incompetent. *Id.* The powerlessness of the minority is especially clear in our case, for the Cleburne Ordinance was passed in 1965, long before the Secretary of State Opinion or the Mentally Retarded Persons Act.

11. In deciding that classifications against the mentally retarded deserve heightened scrutiny, we express no view about classifications involving the mentally ill. Some courts and commentators have suggested that mentally ill persons are a suspect or quasi-suspect class. *See, e.g., Sterling v. Harris, supra,* 478 F.Supp. at 1053; Note, *Mental Illness: A Suspect Classification*, 83 Y.L.J. 1237 (1974); *but see Doe v. Colautti supra.* The Fifth Circuit has not addressed this issue, except to say in *dictum* that the mentally ill are not a *suspect* class. *See Benham v. Edwards*, 678 F.2d 511, 515 n. 9 (5th Cir. Unit B 1982).

We note that heightened scrutiny is particularly appropriate in the case at bar, because the Cleburne ordinance as applied withholds a benefit which, though not fundamental, is very important to the mentally retarded. See *Plyler v. Doe, supra*, 102 S.Ct. at 2398; *Tribe, supra* at 1089–90. In *Plyler*, the Supreme Court addressed a Texas statute which withheld from local school districts any funds for the education of children who were not legally admitted into the United States. The statute also authorized local districts to exclude such children from the public schools. 102 S.Ct. at 2389. The Court held that heightened scrutiny was appropriate not only because the children shared some of the characteristics of a suspect class, but also because they were denied an important benefit. Education is not a fundamental right, *id.* at 2397, *San Antonio Independent School District v. Rodriguez, supra*, 93 S.Ct. at 1297; but it is important in helping such children overcome the bias against them and participate in American society:

> The stigma of illiteracy will mark them for the rest of their lives. By denying these children a basic education, we deny them the ability to live within the structure of our civic institutions, and foreclose any realistic possibility that they will contribute in even the smallest way to the progress of our Nation. In determining the rationality of [the Texas statute], we may appropriately take into account its costs to the Nation and to the innocent children who are its victims.

102 S.Ct. at 2398.

In the same way, the exclusion of group homes from Cleburne operates to prevent mentally retarded persons from assimilating into and contributing to their society. The trial court found that

> [g]roup homes currently are the principal community living alternatives for persons who are mentally retarded. The availability of such a home in a community is an essential ingredient of normal living patterns for persons who are mentally retarded, and each factor that makes such group homes harder to establish operates to exclude persons who are mentally retarded from the community.

*Cleburne, supra* at 9, Finding 30. Isolated from normal community patterns, they can never hope to adapt. The resulting awkwardness of retarded persons as well as the fact of state-sanctioned isolation further stigmatize the group and provide additional barriers to their hope for self-improvement.

The Ninth Circuit has held in an analogous case that heightened scrutiny is appropriate. *See J.W. v. City of Tacoma*, 720 F.2d 1126 (9th Cir.1983). The Court re-

The Court explicitly declined to decide whether intermediate scrutiny would be appropriate. *Id.*

In any event, mental retardation is functionally different from mental illness; see *supra* note 2; and the differences cut in favor of heightened scrutiny for the retarded. Mental retardation is not an emotional disorder but a learning problem; it arguably invokes fewer safety concerns than does mental retardation. More important, mental retardation, unlike many mental illnesses, is an immutable disorder. The mentally retarded cannot be cured. *Id.*

Finally, mental illness covers a broader spectrum of disorders and is more difficult to define than mental retardation. The court in *Doe v. Colautti, supra*, 592 F.2d at 711, refused to grant extraordinary protection to the mentally ill:

> a class that is "large, diverse, [and] amorphous...." The concept of mental illness is susceptible to much dispute, and the category encompasses a whole range of disorders, varying in character, and effects.

Mental retardation is much more narrowly defined. *See supra* note 1.

viewed a local zoning ordinance that required a special use permit before the establishment of a group home for former mental patients [12] in the R–2 zone.[13] Intermediate scrutiny was held to be applicable because the class shared some of the characteristics of suspect classes and because the ordinance denied important benefits:

> We note ... that the benefits the ordinance restricts are the former mental patients' access to housing and rehabilitative services. While they are not fundamental rights, they like education at issue in *Plyler*, are essential to individuals' full participation in society. Indeed, for former mental patients, a reintegration into society accomplished through living, in a moderately structured setting in a residential neighborhood is an essential part of therapy.

*Id.* at 1129.[14]

For the same reasons, we think that intermediate scrutiny is particularly appropriate in reviewing an ordinance [15] that restricts the availability of group homes for the mentally retarded.

[4] In applying that test, we hold that the ordinance is unconstitutional both on its face and as applied. First, the provision itself does not substantially further any important governmental interests. The problem lies not with the interests themselves but with the relevance of the ordinance to those interests. We will assume that all of the legislative goals asserted by the City of Cleburne are substantial. In each instance, however, there is not a sufficiently close correspondence between the goal and the ordinance's means of achieving it. *See Craig v. Boren*, *supra*, 429 U.S. at 197, 200–204, 97 S.Ct. at 460 (requiring closer fit between legislative objective and statutory means than is required under rational review); Tribe, *supra* at

12. We are not suggesting that former mental patients are identical to the mentally retarded. *See supra* notes 2, 10. However, many of the problems (e.g. the community's fear and distrust) that face mental patients in returning to society are similar to problems faced by the mentally retarded.

13. The Tacoma ordinance was arguably less problematic than the Cleburne ordinance, because the Tacoma law provided specific conditions for the issuance of a permit. *See id.* at 1130 n. 5. The Cleburne ordinance has no guidelines at all.

14. Incidentally, although the court relied on these arguments to apply heightened scrutiny, it explicitly left open

> the possibility that, in a case with a record more fully developed as to the characteristics and status of former mental patients, a conclusion that they indeed constitute a suspect class might be warranted.

*Id.* at 1129.

15. The City has argued that the statute does not actually exclude all such group homes but merely requires one additional procedural hurdle. In effect, there is only a possibility of exclusion. Arguably, then we should not adopt heightened review in testing the *facial* validity of the statute as opposed to its application.

Yet the same possibility obtained in both *Plyler* and *City of Tacoma*. The Texas Ordinance in *Plyler* authorized but did not require local school districts to exclude undocumented children. Indeed, the Tyler Independent School District had enrolled such children free of charge until 1977 when it required a tuition fee. 102 S.Ct. at 2389 n. 2. The Court tested the provision, however, with more than minimal scrutiny because of the potential exclusion.

More to the point, the zoning ordinance in *City of Tacoma*, like the Cleburne Ordinance, did not exclude all group homes but merely required a special use permit. The Ninth Circuit tested the statute under intermediate scrutiny again because of the possible denial of an important benefit.

Thus, the *possible* exclusion here is sufficient to justify our considering the importance of the restricted benefit when we analyze the statute on its face.

1083 & n. 10 (same); *see also Trimble v. Gordon, supra,* 430 U.S. at 770–71, 97 S.Ct. at 1465–66; *Hampton v. Mow Sun Wong,* 426 U.S. 88, 96 S.Ct. 1895, 1904 n. 20, 1911 n. 48, 48 L.Ed.2d 495 (1976); *Cleveland Board of Education v. LaFleur,* 414 U.S. 632, 94 S.Ct. 791, 799–80 n. 13, 39 L.Ed.2d 52 (1974). The standardless requirement of a special use permit for all group homes for the mentally retarded is both vastly overbroad and vastly underinclusive.

For example, the City claims that the objectives of the statute were:

1. to avoid undue concentrations of population;

2. to lessen congestion in the streets;

3. to ensure safety from fire and other dangers; and

4. to protect the health, safety and welfare of the City's population—in particular

   a. to protect the serenity of the existing neighborhoods,

   b. to protect neighbors from harm; and

   c. to protect the mental retardates themselves by providing an appropriate living environment.

*See* Brief of Appellees at 21–24.

The ordinance is irrelevant to the achievement of the first two asserted objectives. The same house with the same number of occupants would be a permitted use so long as the occupants were not mentally retarded. *Cleburne, supra* note 3 at 7, Finding 24. Therefore the ordinance does not control population at all. It merely controls the learning skills of the population.

The ordinance likewise does not control traffic flow. The government has not shown that mentally retarded persons drive more cars or receive more visitors than other people. There is no basis for concluding that traffic will be any more congested because the residents of the Featherston house are mentally retarded. One might argue (though the City has not taken this position) that traffic would be more congested because mentally retarded persons would wander into the streets. Other people do the same, however, and there is no evidence in the record that mentally retarded persons are unusually prone to cause such a hazard. We reject traffic congestion as a goal that is furthered by the ordinance.

The record also fails to support the claim that the ordinance protects the serenity of neighborhoods and shields neighbors from harm. The City produced only one story of a mentally retarded person who had caused a disruption: he had removed some mail from a neighbor's mailbox but later returned it. Moreover, this event did not even take place in Cleburne. *See* Trial Transcript at 111. Nothing in the record indicates that mentally retarded persons—and particularly those admitted into group homes—are more disruptive or dangerous than other people. On the contrary, Dr. Roos testified that the mailbox incident was not common behavior in moderately retarded persons and was just as possible in most children. *Id.* at 164. Yet public schools and homes for delinquent children are permitted in the zone. The discrimination between the mentally retarded and other persons is not explained by recourse to neighborhood serenity.

Finally, as to "safety from fire and other dangers," the City does not clarify whether mentally retarded persons will cause t

dangers or require special city services when accidents occur. In either event, the City has not proved a substantial relationship between the goal and the ordinance. There is no evidence in the record that mentally retarded persons are more likely than other people to light fires (or cause other hazards). It is conceivable that they might require special care in an emergency. However, the City has never shown that they require more supervision than groups like the elderly whose nursing homes are permitted in the R–3 zone without permits. Nor has the City shown that the existing supervisors in the Featherston house would provide inadequate care. To treat all homes for the mentally retarded as non-permitted uses is an excessively blunt instrument for achieving fire safety. The City could more appropriately solve this problem by requiring a certain number of caretakers per resident or by setting limits on occupancy. Such requirements already exist in federal and state regulations. *See Cleburne, supra* note 3, at 6, Finding 20. There is no reason why the City cannot be more specific in delineating its concerns.

The same objection can be raised to the City's general claim that the ordinance serves to protect the health, safety, and welfare of mentally retarded persons—by insuring, for example, that group homes are well constructed, safely located, and not over-crowded. The City could serve these interests in a much more direct manner by setting specific requirements to guide the judgment of the City Council. The alternative (embodied in the Cleburne ordinance) of giving the city council complete discretion to bar all group homes is too dangerous. There is too great a potential for blanket discrimination, fueled by the very fears and prejudices that drove neighbors in this case to petition the City Council against the Featherston Home. We cannot sanction such unbridled discretion in dealing with a class that has suffered a history of mistreatment and political impotence. The Cleburne provision requiring a special use permit for mental retardates' group homes is facially invalid under the Equal Protection Clause.

That holding alone would be sufficient to decide this case. The ordinance provision was unconstitutional; therefore it could not be invoked to exclude the Featherston Home. However, even if the statute were facially constitutional, the City Council's decision in this case would have violated equal protection. Again, the decision must be tested under intermediate scrutiny; and we hold that the denial of a permit for the Featherston Home did not substantially further any important government interest justifying the discriminatory classification.

The factors going into the Council's decision were:

> (a) the attitude of a majority of owners of property located within two hundred (200) feet of 210 [sic] Featherston;
>
> (b) the location of a junior high across the street from 201 Featherston;
>
> (c) concern for the fears of elderly residents of the neighborhood;
>
> (d) the size of the home and the number of people to be housed;
>
> (e) concern over the legal responsibility of CLC for any actions which the mentally retarded residents might take;
>
> (f) the home's location on a five hundred (500) year flood plain; and
>
> (g) in general, the presentation made before the City Council.

*Cleburne, supra* note 3, at 9–10, Finding 34.

The final factor (g) is too ambiguous to justify discrimination; and two more (a and c) do not serve substantial interests. The prejudices and fears of neighbors are not in themselves legitimate bases for discrimination.

The location of a junior high across the street from the Featherston Home (factor b) raises an arguable concern that the students would tease or abuse residents of the home. However, that danger seems minimal, since about thirty students are themselves mentally retarded. *Cleburne, supra,* note 3, at 6, Finding 21. More important, the very purpose of living in a community group home is to confront and learn to handle society's obstacles. If we accept that the hostility of junior high students is a substantial concern, then any hostility may become the justification for denying a use permit. In effect, prejudice becomes its own excuse. We cannot accept that as a substantial interest, particularly given the speculative, unsupported nature of the City's allegations.

The size of the home and the number of people to be housed are important interests; but they are not substantially served by denying the permit in this case. The Featherston Home has four bedrooms and two baths and will house thirteen people. The structure contains 2700 square feet and is located on a lot that is 156 feet long by 103 feet wide. Citing a recent Texas regulation that limits group homes to six residents, the City argues that residents of the Featherston Home will be too crowded. The regulation only applies to applications made after May 1, 1982 and, therefore, does not govern the Featherston Home; but the City feels that the regulation indicates the needs of mentally retarded persons. However, the existence of the regulation does not explain Cleburne's discrimination between the mentally retarded and others. The City never justifies its apparent view that other people can live under such "crowded" conditions when mentally retarded persons cannot. Moreover, assuming that the City would be comfortable with six residents, it has never justified the difference between six and thirteen persons. The only discussion of this question came from Dr. Roos who knew of "no research evidence indicating that a group home with six does a better job than a group home with fifteen." Trial Record at 161. In sum, the City has never proven that the mentally retarded have unusual space needs or that denying the Featherston permit serves that interest.

The stated goal of insuring CLC's legal responsibility for the actions of its residents is not sufficiently important. Nowhere in the briefs or the record do we find an explanation why mental retardates alone must prove their financial solvency to live in Cleburne. Nor do we find any explanation of how CLC fell short.

Finally, the argument that the Home would be in a 500 year flood plain seems somewhat strained. Though the safety of the residents is important, the danger of a flood every five hundred years is not particularly great.

In sum, none of the proffered reasons for denying the Featherston permit substantially served an important government interest. The application of the ordinance denied equal protection.

## VII. STANDING OF JCARC

[5] The Johnson County Association of Retarded Citizens has asserted standing to litigate this suit in its own right and as a representative of its members. The trial

court held that the association had failed to prove any injury to itself or to its members. Therefore, it failed to satisfy the requirements for standing.

We affirm, for the reason given by the trial court. The JCARC has not shown any injury to its members. Although it claims that some of its members are potential residents of the Featherston Home, it has never identified any individuals who actually desire to live there. Thus, it is impossible to tell if any of the members were actually harmed by the City Council's action. *See Warth v. Seldin;* 422 U.S. 490, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975); *Sierra Club v. Morton,* 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972).

Nor has the JCARC proven a sufficient injury to its own interests. The association's activities include "promoting the general welfare of mentally retarded people, fostering the development of programs on their behalf, and advising and aiding parents of mentally retarded persons in the solution of their problems in this area." Brief of Appellant at 3. In particular, the JCARC favors the development of group homes; and the City Council's decision allegedly impairs this interest. However, the association's interest seems no different from that of the low-income housing association denied standing in *Warth v. Seldin, supra.* The injury to the JCARC's "abstract social interests" is too intangible to justify standing. *Havens Realty Corp. v. Coleman,* 455 U.S. 363, 102 S.Ct. 1114, 1124, 71 L.Ed.2d 214 (1982).

The association would have standing if it proved that (1) it provides counseling and referral services for mentally retarded persons seeking group homes, and (2) it has had to devote significant resources to combatting the City Council's discrimination. *Id.* However, it has not yet proven any drain on its resources, so it does not come within the *Havens* formula.

In future cases, the JCARC can put forth evidence proving such an injury, or it can show that one of its members actually desires to live in the contested group home.[16]

AFFIRMED IN PART, REVERSED AND REMANDED IN PART.

16. Admittedly, we have provided the JCARC with a formula for establishing standing in its future litigation. There is high precedent for giving such advice. *See Sierra Club v. Morton, supra,* 92 S.Ct. at 1366.

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