

Legal Aspects of Transitional Housing for Recovering Schizophrenics

John Kuhn Bleimaier, B.A., M.I.A., J.D.¹

The provision of a healthful physical environment is a critical component in the treatment of the mental and physical problems associated with the condition we call Schizophrenia. The most well conceived and regulated nutritional and psychiatric regimen is seriously compromised if the patient's general life style is not geared toward recovery, "wellness", and long term independence. Even the most conservative practitioners have come to realize that the treatment of mental illness in traditional institutions seldom provides satisfactory, lasting solutions to patients' problems and is not generally a realistic preparation for the return of a mental patient to productive society. Furthermore, the lack of space and/or financial resources for expansion of facilities, has left our mental institutions incapable of housing all but the most serious cases of mental illness. Thus, for theoretical and pragmatic reasons, the concept of deinstitutionalization has developed and come to be accepted. For the good of the patient and because of scarce societal resources, those suffering from mental illness have come more and more to be housed outside of clinics and hospitals and in the community at large.

Positive deinstitutionalization has taken the form of the establishment of small, closely knit family-like living arrangements where recovering schizophrenics can pool their strengths and, together, combat their problems under

trained supervision and with careful guidance. Such transitional residences can provide the backbone of successful treatment of the schizophrenias through nutritional and psychiatric therapy. Outside cold, institutional constraints, the patient learns to live in society through an effective apprenticeship — "on the job training" in the community.

There have, however, also been instances of negative deinstitutionalization where unwell persons are dumped indiscriminately in single room occupancy hotels or boarding houses operated by unscrupulous landlords without any concern for recovery, with only an eye for signed over supplemental security income checks. This dark side of deinstitutionalization has, to some extent, given the concept a bad name in some quarters.

Recognizing that positive deinstitutionalization by way of housing recovering schizophrenics in the community, in family-like setting is highly desirable, it is important to consider where such housing can be provided. Long standing, deep seated fear and prejudice against those suffering from mental illness makes the question of where to locate transitional housing for recovering schizophrenics one which is charged with emotion and highly controversial. Ideally, housing for recovering schizophrenics in the community should be just that, in the community, in the midst of the everyday society to which the patient is to return. However, ignorance of the nature of schizophrenia and fear of the unknown can translate into community obstacles to the placement of transitional residences. Opponents of transitional residences may attempt to use zoning regulations

1. Attorney and Counsellor at Law Member of the New York, New Jersey and United States Supreme Court Bars
15 Witherspoon Street Princeton, New Jersey 08542

as a weapon to thwart the location of housing for mental patients in the community.

The concept of zoning developed early in the 20th century as municipalities sought to plan and control their development so as to balance and separate residential, commercial and industrial construction.¹ In the 19th century, the only way to control the use of land was for a seller to place in his deed restrictive covenants which would prohibit certain uses of the property henceforth. However, in the context of *laisse faire* capitalism and burgeoning industrial revolution, anomalies developed with smoke stack industries belching soot located near to residential areas with consequent impact on the quality of life and real estate values. Zoning developed thus to allow local governments to control the uses of land as opposed to leaving patterns of development to the vagaries and chance of the market place.

Soon, zoning went beyond the separation of industrial, commercial and residential land uses and came to make distinctions within these categories. Thence developed the concept of the single family residential zone with restrictions on lot size, construction type and occupancy. At the pinnacle of the zoning hierarchy, the single family residential zone was designed to keep out the squalid poor and enshrine the values of quietness and repose characterized by green lawns, two car garages and meandering streets without sidewalks. This life style reached its high watermark in the 1950s when America seemed for the one and only time in its history a truly homogeneous society with all but universally shared values and perceptions.

The single family residential zone is of importance in considering transitional residence for recovering schizophrenics. First of all, single family residential zones comprise a substantial component of the nation's housing stock. Furthermore, the single family residential zone provides the privacy and quietude conducive to the success of the transitional residence within the community. However, we must consider whether the zoning restrictions which make the single family residential zone desirable will be manipulated so as to exclude the transitional

residence.

Does a transitional residence for recovering schizophrenics fit the definition of a single family residence? The answer must be conditional. If the transitional residence is of limited size approximating that of a family, if it is structured as an independent unit paralleling the nuclear family, and if the outward appearances of the home are consistent with neighborhood standards, then our answer should be yes. On the other hand, a large institutional home or an impersonal boarding house might well not be appropriate in a single family residential zone. The character of each transitional residence must be pivotal.

It is a matter of firmly established law that zoning ordinances may not be used to exclude unwanted minorities.² Just as local ordinances may not bar ethnic minorities, so also are they prohibited from discriminating against the mentally or physically handicapped.³

With the spread of the "counter culture" in the late 60s and the entrenchment of "alternative life styles" in the 70s, municipal zoners were compelled to accept that homes in single family residential zones could not be limited to persons related by blood or marriage alone. Thus, judicial decisions have held that persons may occupy homes in single family residential zones as long as they live as a single housekeeping unit and regardless of whether or not they are actually a family.⁴ In order to qualify as a single housekeeping unit, a group of persons must constitute a stable entity and share the facilities of the home. A transitional residence can meet these requirements. In order to assess the zoning climate for transitional residences in single family residential zones, it may be helpful to look in some detail at the law of a particular jurisdiction. Developments in the state of New Jersey may be of some interest. As a fairly sophisticated northeastern state with a liberal, activist judiciary, New Jersey may be viewed as a trend setter. As a state possessed of perhaps the largest proportion of suburban homes in relation to total housing stock, developments relating to the single family residential

zone can be expected to be matters of serious attention.

New Jersey courts were early to note that unrelated persons could reside in single family residential zones as long as the character of their occupancy was similar to that of a family.⁵ Thus, two or more families might share a home as long as they lived together as a single housekeeping unit. For example, a group of Roman Catholic nuns renting a home together were found to qualify as a single housekeeping unit appropriate in a single family residential zone.⁶

Of even greater significance for our purposes, the New Jersey supreme court permitted the establishment of a group home for handicapped children in a single family residential zone.⁷ The court found that surrogate parents along with up to twelve disabled children could occupy a single family home as a single housekeeping unit. This decision is of critical importance in opening up single family residential zones to transitional residences of all kinds of family like groups including those for recovering schizophrenics.

The New Jersey supreme court has gone so far as to establish that there exists a constitutional right for all citizens to have access to adequate housing.⁸ The court has held that zoning laws may not be written or applied in such a fashion as to zone out any particular group.⁹ Thus, by implication, municipalities who must accept college students sharing a home as a single housekeeping unit must also accept the household group of recovering schizophrenics living as a transitional residence.

In order to remove the inherent subjectivity from the enforcement of zoning ordinances, the New Jersey supreme court has specifically suggested that municipalities regulate the physical use of land rather than the relationship between persons living together.¹⁰ Thus, the court has recommended that the desirable characteristics of the single family residential zone be maintained by prescribing the maximum number of people per square footage of living area, the maximum number of cars allotted at each home and by strictly enforcing police regulation of rowdy behavior. Thus, the court has opened, may the quiet and restful life style of the suburbs be preserved without intrusion into the privacy of

interpersonal relations. Certainly the adoption of such "bulk" oriented zoning would facilitate the establishment of transitional residences in single family residential zones.

In 1985, the United States supreme court came down with an important decision relating to the zoning treatment of residences for the mentally handicapped.¹¹ In *City of Cleburne vs. Cleburne Living Center*, the supreme court decided that disparate zoning regulation for the mentally handicapped was unconstitutional being violative of the equal protection clause of the United States constitution. The zoning ordinance of Cleburne, Texas had prescribed that residences for the mentally handicapped required special municipal permits, whereas similar residences for non mentally handicapped persons required no municipal zoning approval. The supreme court ruled that treating mentally handicapped persons differently from other individuals violated basic constitutional rights in the absence of some specifically articulated rational basis. No basis for zoning discrimination against the mentally handicapped was presented and the zoning ordinance in question was struck down.

The Cleburne decision definitely establishes that local zoning authorities may not treat transitional residences for recovering schizophrenics differently from other housekeeping units. If a municipality permits college students to live together in a single family home, then any attempt to treat recovering schizophrenics living in a similar fashion differently would represent a denial of equal protection.

In general, we may conclude that a transitional residence for recovering schizophrenics which consists of a relatively small number of individuals living together in a family-like relationship may reside in any single family residential zone. However, it must be noted that in those municipalities which persist in defining single family residential zones with reference to the interpersonal relationships constituting a single housekeeping unit as opposed to "bulk zoning", there is always an element of subjectivity. How many

individuals may live together in a housekeeping unit? How long lasting need relationships between the residents be in order to be the functional equivalent of a family? When does a transitional residence become a boarding house?

Because there is room for subjective argument, those who would plan the location of transitional residences in single family residential zones must be prepared to defend their placement before municipal zoning authorities and/or the courts. In those instances where operators of transitional residences are full of the courage of their conviction that they constitute a single housekeeping unit, they may begin operation and wait and see if municipal authorities will challenge them. Obviously, relations with neighbors are critical and friendly people in the neighborhood can make the difference between pressure upon zoners to act and happy tolerance.

If a municipality wishes to take action against a transitional residence, it has at least two avenues open to it. First, it may decide to initiate a municipal court prosecution alleging a violation of the zoning ordinance and seeking the imposition of a fine.¹² Alternatively, the municipality may attempt to bring an action before a court of equity seeking an injunction prohibiting a continued occupancy of the premises in question as a transitional residence.¹³

Ordinarily, one is not entitled to a jury trial in either a municipal court or equity proceeding so that legal arguments as opposed to emotionally charged factual testimony can be expected to carry the day. An adverse decision at the trial court is subject to appeal and a stay of enforcement may ordinarily be sought from either the trial court or the appellate tribunal.¹⁴

Either in advance of beginning operation of a transitional residence or in response to pressure from zoning authorities with regard to an existing residence, one may make application to the local zoning board for specific permission to operate in a single family residential zone. Ordinarily, applications to a zoning board take the form of requests for an exception or variance from the strict application of the rules applicable to the zone in question.¹⁵ Thus, one may seek a variance to build a two

family home in a single family zone or to locate a manufacturing facility in a retail commercial zone. Therefore, if a transitional residence for recovering schizophrenics makes an application to a zoning board for a variance in order to occupy premises in a single family residential zone, the transitional residence is in effect conceding that it is not a single housekeeping unit which would be entitled to be located in a single family residential zone.

If a transitional residence is confident that it constitutes a bona fide single housekeeping unit but wishes to secure advance zoning approval or is pressured to make application to the zoning board by the municipal zoning enforcement officers, a bifurcated application may be presented. The applicant may seek the alternative remedies of either a certificate of compliance or a variance. By so doing, the transitional residence takes the position that it is a single housekeeping unit entitled to locate in a single family residential zone and seeks a certificate of conformity representing zoning recognition of its legal status. By simultaneously applying for a variance, it permits the zoning board to approve the proposed occupancy even if the board is of the impression that the residence is not a single housekeeping unit.

The unique utility of the bifurcated application is to be found in the fact that it places the municipal zoning board in a position where it cannot lightly deny the transitional residence's application. The board is placed upon notice that the applicant believes itself to be entitled to occupancy as of right. Thus, if the board denies both the certificate of compliance and a variance, the board can expect the transitional residence to contest its decision in the courts. While it may be necessary for an applicant attempting to overturn a zoning board decision in the courts on a variance to establish that the board had abused its discretion, on review of denial of a certificate of compliance, the applicant need only establish that it is a single housekeeping unit and that the board erred as a matter of law. Faced with a bifurcated application, a zoning board is most likely to grant a variance, as opposed

to a certificate of compliance. By granting a variance, the zoning board may exercise an element of control over the nature of the occupancy by the transitional residence. For example, the variance may be specifically conditioned upon the applicant's not housing more than a specific number of people and/or the nature and extent of supervision to be exercised by the operators of the transitional residence. By granting a variance as opposed to a certificate of compliance, the zoning board may effectively regulate the transitional residence. Furthermore, if the zoning board granted a certificate of compliance, it would constitute permission for operation of any similar transitional residence in any other single family residential zone without the necessity of application to the zoning board.

In general, the type of regulation relating to space or number of occupants which a zoning board may attempt to impose when it grants a variance may not be at all burdensome. Thus, operators of a transitional residence may be completely satisfied with the outcome of their bifurcated application if their certificate of compliance is denied but their variance is granted with specific reasonable restraints on the operation of the residence.

In general, zoning boards are composed of lay persons active in local affairs and interested in the land use planning of their municipalities. Municipal zoning boards ordinarily employ the services of a staff attorney who advises them on the legal consequences of their actions and the legal merits of the applications which come before them. However, the zoning boards have a tendency to be political in the sense that they reflect community attitudes, prejudices and trends. If neighbors are well disposed toward a transitional residence and/ or if a transitional residence enjoys the favor or patronage of leading members of the community, this may have a distinct, positive impact on proceedings before the zoning board. On the other hand, when zoning questions are decided in the courts, they tend to receive a more dispassionate and objective legal analysis.

In the final analysis, it must be conceded that, as important and beneficial a function as the transitional residence for recovering schizophrenics performs, the path toward "getting

legal" is complex, long and tortuous. There are many choices to be made between alternatives. Should one first begin operation and be prepared to defend oneself as a single housekeeping unit if problems arise? Should one go directly to the municipal zoning board or attempt to have legal issues resolved in the courts? The answers to these questions will vary from one situation and community to another.

It is critical to realize that the prospective operator of a transitional residence for recovering schizophrenics must consider the options and develop a game plan well in advance of any crisis. Legal strategy should be carefully considered and contingency plans mapped out before beginning operation and long before inquiring municipal officials are breathing down one's neck.

On the whole, recent judicial decisions have recognized the rights of the mentally handicapped and formerly mentally handicapped. While each individual transitional residence must choose its own course on its voyage to community acceptance, let us take heart that we are not journeying in uncharted waters.

Footnotes

- 1 See: R. M. Anderson *American Law of Zoning* 2nd § 1.02
- 2 State vs. Baker 81 N J 99, 106 (1979)
- 3 N J S A 10:5-4.1
- 4 Township of Washington vs. Central Bergen Community Health 156 N J Super 388 (App Div 1978)
- 5 Berger vs. State 71 N J 206 (1976)
- 6 Holy Name Hospital vs. Montroy 153 N J Super 181 (Law Div, 1977)
- 7 See Berger vs. State No. 5 supra
- 8 Taxpayers Association of Weymouth Township vs. Weymouth Township 71 N J 249 (1976); South Burlington Country NAACP vs. Mount Laurel Township 67 N J 151 (1975)
- 9 See State vs. Baker No. 2 supra
- 10 Kirsch Holding Company vs. Borough of Manasquan 59 N J 241 (1971)
- 11 City of Cleburne vs. Cleburne Living Center _____ US _____, 87 LE2d 313 (1985)
- 12 See generally: 101 A C.J.S. "Zoning & Land Planning" § 355 et seq
- 13 See generally: 101 A C.J.S. "Zoning & Land Planning" § 337 et seq
- 14 Rules Governing the Courts of the State of New Jersey 2:9-5
- 15 N. J. S. A. 40: 55D-70