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“NOT IN MY NEIGHBORHOOD:” LEGAL CHALLENGES TO THE ESTABLISHMENT OF COMMUNITY RESIDENCES FOR THE MENTALLY DISABLED IN NEW YORK STATE

Robert L. Schonfeld*

I. Introduction

Sharply critical investigations into the inhumane conditions at the Willowbrook State School for the Mentally Retarded in Staten Island, New York were undertaken in the early 1970's,¹ and subsequently,

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1. See, e.g., Kihss, *U.S. Willowbrook Study Calls for Smaller Mental Hospitals*, N.Y. Times, Nov. 1, 1972, at 49, col. 4 [hereinafter cited as *Willowbrook Study*]; Sibley, *Willowbrook Physician Doubts Report About Severe Injury as Result of Fall*, N.Y. Times, Sept. 30, 1972, at 35, col. 4; Narvaez, *Albany Session Labeled 'Do Nothing'*, N.Y. Times, Feb. 18, 1972, at 24, col. 4; N.Y. Times, Feb. 5, 1972, at 33, col. 1; *id.*, Feb. 2, 1972, at 78, col. 4; *id.*, Jan. 13, 1972, at 45, col. 1; Sibley, *Legislators Tour School for the Retarded*, N.Y. Times, Dec. 21, 1971, at 35, col. 3. These articles describe various investigations undertaken by state and local officials, the National Institute of Mental Health, the United States Department of Health Education and Welfare, and WABC-TV newsman Geraldo Rivera. The litigation concerning Willowbrook State School for the Mentally Retarded (Willowbrook) was brought by the New York State Association for Retarded Children, Inc. (NYSARC). In one phase of the litigation, *NYSARC v. Rockefeller*, 357 F. Supp. 752 (E.D.N.Y. 1973), the testimony illustrated the types of conditions existing at Willowbrook. In its decision granting NYSARC a preliminary injunction, the court noted:

Testimony of ten parents, plus affidavits of others, showed failure to protect the physical safety of their children, and deterioration rather than improvement after they were placed in Willowbrook School. The loss of an eye, the breaking of teeth, the loss of part of an ear bitten off by another resident, and frequent bruises and scalp wounds were typical of the testimony. During eight months of 1972 there were over 1,300 reported incidents of injury, patient assaults, or patient fights.

The number of ward attendants is below the level which even the Director of Willowbrook thinks proper, and unauthorized absences worsen the shortage. There are only half the number of doctors that are needed, and nurses, physical therapists, recreation therapists, and other professional staff are in short supply. . . .

Physical maintenance is poor, with a backlog of 750 work orders and at least one toilet inoperative in every battery of toilets.

a lawsuit was filed in federal district court challenging the constitutionality of those conditions.² Spurred by those investigations, New York State entered into the "Willowbrook Consent Decree"³ which required a reduction in the population at Willowbrook⁴ and the placement of Willowbrook residents into smaller community residences.⁵ However, when the state attempted to place residents from Willowbrook and other institutions into the community,⁶ it faced

These conditions are hazardous to the health, safety, and sanity of the residents. They do not conform with the standards published by the American Association on Mental Deficiency in 1964, or with the proposed standards published on March 5, 1973 by the United States Department of Health, Education and Welfare. A most striking deficiency is the inadequate coverage of dayrooms, where the ratio is frequently 15 or more residents per attendant on duty even for profoundly or severely retarded residents.

Over three-fourths of the residents of Willowbrook are profoundly or severely retarded, and would require resident care personnel in the ratio of 1:5 for the first shift, 1:7 for the second shift, and 1:15 for the third shift, to comply with the 1964 A.A.M.D. Standards.

Id. at 756. See generally D.J. ROTHMAN, S.M. ROTHMAN, *THE WILLOWBROOK WARS* (1984) (further describing conditions at Willowbrook) [hereinafter cited as ROTHMAN].

2. *NYSARC v. Rockefeller*, 357 F. Supp. at 752; see Oelsner, *2 Suits Call for Eventual Phase-Out of Willowbrook*, N.Y. Times, Mar. 18, 1972, at *62, col. 5 [hereinafter cited as *2 Suits*].

3. AMERICAN BAR ASS'N, COMM'N ON THE MENTALLY DISABLED, *1 MENTAL DISABILITY L. REP.* 58-68 (July—August 1976); see *NYSARC v. Carey*, 393 F. Supp. 715, 717 (E.D.N.Y. 1975); see also N.Y. Times, Apr. 22, 1975, at 1, col. 2 (describing provisions of consent decree).

4. At the commencement of the lawsuit, there were approximately 5700 residents at Willowbrook. *NYSARC v. Rockefeller*, 357 F. Supp. at 755. At the time of the trial, there were 3500 persons residing at Willowbrook. Prial, *Problems Cited at Willowbrook*, N.Y. Times, Oct. 2, 1974, at 51, col. 7 [hereinafter cited as *Willowbrook Problems*]. The consent decree required that Willowbrook house no more than 250 persons. *NYSARC v. Carey*, 393 F. Supp. at 717. In 1985, there were still 700 patients at Willowbrook and the federal government was planning to deny Medicaid funds to Willowbrook due to federal health and safety standard violations. Sullivan, *U.S., Citing Violations, Plans to Deny \$22 Million for Old Willowbrook Site*, N.Y. Times, Apr. 19, 1985, at B1, col. 1.

5. *NYSARC v. Carey*, 393 F. Supp. at 717. As defined by the New York State Mental Hygiene Law, a "community residential facility for the disabled" is a supportive living facility with four to fourteen residents or a supervised living facility subject to licensure by the office of mental health or the office of mental retardation and developmental disabilities which provides a residence for up to fourteen mentally disabled persons, including residential treatment facilities for children and youth.

N.Y. MENTAL HYG. LAW § 41.34(a)(1) (McKinney Supp. 1984-1985). Community residential facilities are operated pursuant to the state regulations stated at N.Y. ADMIN. CODE tit. 14, §§ 86.1-86.12, 586.1-586.13, 686.1-686.4 (1983-1984). See § 86.6 which describes programs at community residences.

6. See, e.g., Smothers, *Scarsdale's Retarded Get a New Home, A Mixed Welcome*, N.Y. Times, July 22, 1978, at 21, col. 3; Johnston, *New Willowbrook Holds an Open House*, N.Y. Times, Oct. 31, 1977, at 54, col. 4; Kihss, *For*

opposition from communities which voiced fears ranging from decreased property values to increased traffic and crime.⁷ Consequently, in 1978, the New York State Legislature enacted the Padavan Law⁸ which attempted to facilitate the development of community residences while giving municipalities some input into the selection of residence locations.⁹ While its drafters hoped that the statute would

Retarded, Finds Suspicion and Hostility, N.Y. Times, June 18, 1977, at 21, col. 1; N.Y. Times, Nov. 9, 1976, at 27, col. 3.

7. See *supra* note 6; NEW YORK STATE SENATE MENTAL HYGIENE AND ADDICTION CONTROL COMMITTEE, SITE SELECTION OF COMMUNITY RESIDENCES FOR THE MENTALLY DISABLED: HISTORICAL PERSPECTIVE AND LEGISLATION 16-24 (1979) [hereinafter cited as SITE SELECTION STUDY].

The fears of neighbors in New York State have proven to be unfounded. Studies have shown that mentally retarded persons residing in community residences pose fewer threats to their neighbors than other persons (R.A. LUBIN, M.P. JANICKI, W. ZIGMAN & R. ROSS, THE LIKELIHOOD OF POLICE CONTACTS WITH DEVELOPMENTALLY DISABLED PERSONS IN COMMUNITY RESIDENCES 5-6 (1982)) and that community residences do not decrease property values or cause neighborhood decline. See L.W. DOLAN & J. WOLPERT, LONG TERM NEIGHBORHOOD PROPERTY IMPACTS OF GROUP HOMES FOR MENTALLY RETARDED PEOPLE (1982); M.S. LINDAUER, P. TUNG, & F. O'DONNELL, THE EFFECT OF COMMUNITY RESIDENCES FOR THE MENTALLY RETARDED ON REAL-ESTATE VALUES IN THE NEIGHBORHOODS IN WHICH THEY ARE LOCATED (1980); J. WOLPERT, GROUP HOMES FOR THE MENTALLY RETARDED, AN INVESTIGATION OF NEIGHBORHOOD PROPERTY IMPACTS (1978). A decision by neighboring Greenwich, Connecticut to reduce property taxes for those living near a community residence on the grounds that the residence caused a decline in property values was totally unsupported by concrete evidence. See Johnson, *Taxes Cut for Neighbors of Home for Mentally Ill*, N.Y. Times, Apr. 11, 1985, at B2, col. 1.

8. 1978 N.Y. Laws ch. 468, § 2. The statute is named for State Senator Frank Padavan, Chairman of the New York State Senate Mental Hygiene and Addiction Control Committee.

9. The statute, as amended in 1981, provides in pertinent part:

(b) If a sponsoring agency intends to establish a residential facility for the disabled within a municipality but does not have a specific site selected, it may notify the chief executive officer of the municipality in writing of its intentions and include in such notice a description of the nature, size and community support requirements of the program. Provided, however, nothing in this subdivision shall preclude the proposed establishment of a site pursuant to subdivision (c) of this section.

(c)(1) When a site has been selected by the sponsoring agency, it shall notify the chief executive officer of the municipality in writing and include in such notice the specific address of the site, the type of community residence, the number of residents and the community support requirements of the program. Such notice shall also contain the most recently published data compiled pursuant to section four hundred sixty-three of the social services law which can reasonably be expected to permit the municipality to evaluate all such facilities affecting the nature and character of the area wherein such proposed facility is to be located. The municipality shall have forty days after the receipt of such notice to:

(A) Approve the site recommended by the sponsoring agency;

(B) suggest one or more suitable sites within its jurisdiction which could

accommodate such a facility; or

(C) object to the establishment of a facility of the kind described by the sponsoring agency because to do so would result in such a concentration of community residential facilities for the mentally disabled in the municipality or in the area in proximity to the site selected or a combination of such facilities with other community residences or similar facilities licensed by other agencies of state government that the nature and character of the areas within the municipality would be substantially altered.

Such response shall be forwarded to the sponsoring agency and the commissioner. If the municipality does not respond within forty days, the sponsoring agency may establish a community residence at a site recommended in its notice.

(2) Prior to forwarding a response to the sponsoring agency and the commissioner, the municipality may hold a public hearing pursuant to local law.

(3) If the municipality approves the site recommended by the sponsoring agency, the sponsoring agency shall seek to establish the facility at the approved site.

(4) If the site or sites suggested by the municipality are satisfactory with regard to the nature, size and community support requirements of the program of the proposed facility and the area in which such site or sites are located does not already include an excessive number of community residential facilities for the mentally disabled or similar facilities licensed by other state agencies, the sponsoring agency shall seek to establish its facility at one of the sites designated by the municipality.

If the municipality suggests a site or sites which are not satisfactory to the sponsoring agency, the agency shall so notify the municipality which shall have fifteen days to suggest an alternative site or sites for the proposed community residential facility.

(5) In the event the municipality objects to establishment of a facility in the municipality because to do so would result in such a concentration of community residential facilities for the mentally disabled or combination of such facilities and other facilities licensed by other state agencies that the nature and character of areas within the municipality would be substantially altered; or the sponsoring agency objects to the establishment of a facility in the area or areas suggested by the municipality; or in the event that the municipality and sponsoring agency cannot agree upon a site, either the sponsoring agency or the municipality may request an immediate hearing before the commissioner to resolve the issue. The commissioner shall personally or by a hearing officer conduct such a hearing within fifteen days of such a request.

In reviewing any such objections, the need for such facilities in the municipality shall be considered as shall the existing concentration of such facilities and other similar facilities licensed by other state agencies in the municipality or in the area in proximity to the site selected and any other facilities in the municipality or in the area in proximity to the site selected providing residential services to a significant number of persons who have formerly received in-patient mental health services in facilities of the office of mental health or the office of mental retardation and developmental disabilities. The commissioner shall sustain the objection if he determines that the nature and character of the area in which the facility is to be based would be substantially altered as a result of establishment of the facility. The commissioner shall make a deter-

eliminate litigation over community residence sites,¹⁰ instead the statute has resulted in numerous lawsuits throughout New York State challenging community residence sites.

This Article examines the laws and lawsuits which have affected the establishment of community residences for the mentally disabled in New York State. First, the Article traces the history of community residences prior to the enactment of the Padavan Law in 1978.¹¹ Thereafter, this Article analyzes the statute to determine whether its procedures and interpretations by courts have been consistent with the drafters' stated intentions.¹² In addition to examining the statutory procedures,¹³ this Article considers issues of zoning,¹⁴ the statute's constitutionality,¹⁵ the standing of neighbors and neighborhood groups to challenge community residence sites,¹⁶ and the effect of restrictive covenants on community residences.¹⁷ Finally, the Article looks at the attempted use of preliminary injunctions and temporary restraining orders to delay the establishment of residences.¹⁸ The Article recommends that the New York State Legislature amend the Padavan Law so that the statute will truly reflect the stated intentions of its drafters.¹⁹

mination within thirty days of the hearing.

(d) Review of a decision rendered by a commissioner pursuant to this section may be had in a proceeding pursuant to article seventy-eight of the civil practice law and rules commenced within thirty days of the determination of the commissioner.

(e) A licensing authority shall not issue an operating certificate to a sponsoring agency for operation of a facility if the sponsoring agency does not notify the municipality of its intention to establish a program as required by subdivision (c) of this section. Any operating certificate issued without compliance with the provisions of this section shall be considered null and void and continued operation of the facility may be enjoined.

(f) A community residence established pursuant to this section and family care homes shall be deemed a family unit, for the purposes of local laws and ordinances.

N.Y. MENTAL HYG. LAW § 41.34(b)-(f) (McKinney Supp. 1984-1985).

10. See 1978 McKinney's Sess. Laws at 1821-22 (memorandum of Governor Carey); see also 1978 N.Y. Laws ch. 468, § 1 (declarations of legislative findings and intent).

11. See *infra* notes 20-39 and accompanying text.

12. See *infra* notes 50-60 and accompanying text.

13. See *infra* notes 61-144 and accompanying text.

14. See *infra* notes 145-50 and accompanying text.

15. See *infra* notes 151-94 and accompanying text.

16. See *infra* notes 195-216 and accompanying text.

17. See *infra* notes 217-56 and accompanying text.

18. See *infra* notes 257-64 and accompanying text.

19. See *infra* notes 265-74 and accompanying text.

II. History of Community Residences Prior to the Padavan Law

While the 1970's witnessed New York State's greatest movement towards deinstitutionalization and placement of mentally disabled persons in community residences, the policy of deinstitutionalization actually began in the 1950's.²⁰ In 1954, the New York State Legislature established community health boards²¹ for the purpose of developing community treatment services,²² a program described by Governor Thomas E. Dewey as one that "offer[ed] a unique opportunity to reclaim the productive value of men and women who might otherwise spend their days within the walls of a mental institution."²³ In 1967, the state legislature amended the Mental Hygiene Law and Private Housing Finance Law²⁴ to direct the Commissioner of Mental Hygiene to acquire or construct "community residential facilities to be operated as hostels for the mentally retarded"²⁵ and to grant financial assistance to public or private nonprofit organizations for acquisition or construction of such facilities.²⁶ Governor Nelson A. Rockefeller,

20. SITE SELECTION STUDY, *supra* note 7, at 2. In the early 1900's, the Rome State Custodial Asylum established a number of "colonies," which were actually groups of residents placed with families. These colonies, however, died out during the Depression years. See M.P. JANICKI, P.J. CASTELLANI & R.A. LUBIN, A PERSPECTIVE ON THE SCOPE AND STRUCTURE OF NEW YORK'S COMMUNITY RESIDENCE SYSTEM 2 (1982) [hereinafter cited as JANICKI].

21. Community health boards were empowered to establish psychiatric clinics, develop mental health services for schools and courts, provide in-patient services in general hospitals for short-term treatment or observation, establish rehabilitation services for the mentally ill, and devise other mental health services for the community. See 1954 N.Y. Laws ch. 10, § 190-c; 1954 McKinney's Sess. Laws at 1372.

22. 1954 N.Y. Laws ch. 10, § 1 states, in pertinent part:

§ 190-c Community mental health boards: powers and duties

Subject to the provisions of this chapter, and the regulations of the commissioner, every board shall have the power to:

- (a) review and evaluate community mental health services and facilities;
- (b) submit to the appointing officer and governing body a program of community mental health services and facilities;
- (c) within amounts appropriated therefor, execute such program and maintain such services and facilities as may be authorized under such appropriations;
- (d) enter into contracts for rendition or operation of services and facilities on a per capita basis or otherwise;
- (e) make rules and regulations concerning the rendition or operation of services and facilities under its direction;
- (f) appoint a psychiatrist, whose qualifications meet standards fixed by the commissioner, to serve as director of the community mental health service. Such director need not be a resident of the city or county and he may be employed on a full or part-time basis.

23. 1954 McKinney's Sess. Laws at 1372 (memorandum of Governor Dewey).

24. 1967 N.Y. Laws ch. 576.

25. *Id.*

26. *Id.*

upon signing the statute into law, noted that community residences allowed the mildly retarded person to lead a reasonably full life in dignity, self support and self respect and not to be committed to almost complete dependency in a State institution.²⁷

Early in the 1970's, when the deplorable conditions at Willowbrook were being exposed,²⁸ various mental health experts and state legislators recommended that the residents of large state institutions be moved to smaller community residences.²⁹ They blamed the conditions at Willowbrook and similar institutions on their large sizes.³⁰ In its federal lawsuit³¹ against New York State to improve conditions at Willowbrook, the New York State Association for Retarded Children sought, as part of its relief, the establishment of smaller community facilities.³² The district court issued a preliminary injunction requiring the state to upgrade staffing and other conditions at Willowbrook.³³ After a subsequent trial revealed shocking facts regarding the treatment of residents at Willowbrook,³⁴ New York State signed a consent

27. 1967 McKinney's Sess. Laws at 1531.

28. See *supra* note 1.

29. N.Y. Times, July 17, 1973, at 43, col. 2; *id.*, Mar. 1, 1973, at 55, col. 2; Clines, *Democrats, on a Tour, Criticize The State's Retardation Services*, N.Y. Times, Mar. 8, 1972, at 36, col. 1; Sibley, *U.S. Unit Concludes Study Here of Mentally Retarded Centers*, N.Y. Times, Mar. 1, 1972, at 48, col. 1; N.Y. Times, Feb. 29, 1972, at 39, col. 4; *Willowbrook Study*, *supra* note 1, at 49, col. 4. The experts included the Director of the National Institute of Mental Health, Bertram Brown, and the U.S. Department of Health, Education and Welfare. The legislators included Assemblypersons Brown, Krupsak and Steingut and Senator Conklin. *Id.*

30. See *Willowbrook Study*, *supra* note 1, at 49, col. 4; N.Y. Times, Feb. 29, 1972, at 39, col. 4.

31. See *supra* note 2.

32. 2 *Suits*, *supra* note 2, at 62, col. 5.

33. NYSARC v. Rockefeller, 357 F. Supp. at 768-70. The court ordered a prohibition against seclusion of residents, immediate and continuing repair of all inoperable toilets, and immediate hiring of additional ward attendants, at least 85 more nurses, 30 more physical therapy personnel, 15 additional physicians, and sufficient recreation staff. 357 F. Supp. at 768-69.

34. *Willowbrook Problems*, *supra* note 4, at 51, col. 7; Gerston, *Parent Testifies on Willowbrook*, N.Y. Times, Nov. 1, 1974, at 43, col. 6; Gerston, *Teacher Testifies On Willowbrook*, N.Y. Times, Oct. 31, 1974, at 25, col. 1; N.Y. Times, Oct. 30, 1974, at 49, col. 5; Prial, *Willowbrook Negligence Cited By a Nurse in Court Testimony*, N.Y. Times, Oct. 8, 1974, at 45, col. 6; Moraghan, *A Program for the Retarded, Where the School Age Begins at 5 Weeks Old*, N.Y. Times, Oct. 7, 1974, at 43, col. 1; Prial, *Willowbrook Employe Forced Inmates to Try Sex, Judge Told*, N.Y. Times, Oct. 4, 1974, at 35, col. 5; Prial, *Parents Say That Willowbrook Is Harmful to Children There*, N.Y. Times, Oct. 3, 1974, at 28, col. 4.

As an example of some of the more shocking testimony, a registered nurse testified about a Willowbrook patient whose leg was in a cast:

Q. What did the cast itself look like?

decree in April, 1975 requiring it to "take all steps necessary to develop and operate a broad range of non-institutional community facilities and programs to meet the needs of Willowbrook's residents and of the class."³⁵

Following its signing of the consent decree, New York State escalated its attempts to deinstitutionalize mentally disabled persons.³⁶

A. It was rotted and broken in several places. . . . There was an extremely foul odor from his cast, the odor of urine and feces.

Q. Did you notice anything unusual . . . before the cast was removed?

A. Yes, there were maggots crawling out from underneath it. . . . We picked them off the cast with forceps and put them in a covered jar.

Q. How many maggots did you find?

A. Before the cast was removed we picked off 35 or 40.

Q. When the cast was taken off?

A. There were numerous maggots in the wound itself. And there was a large black bug embedded in the wound.

Q. I refer to one photograph . . . Can you identify it?

A. It is a photograph of the container with the maggots in it.

ROTHMAN, *supra* note 1, at 108. Much of the testimony, however, centered on the advantages of deinstitutionalization and community placement of the retarded. *Id.* at 108-11; *see also* Renelli v. State Comm'r of Mental Hygiene, 73 Misc. 2d 261, 266, 340 N.Y.S.2d 498, 503 (Sup. Ct. Richmond County 1973) (court found that state was derelict in providing adequate care and treatment for Willowbrook resident and ordered state to formulate specific program for resident to provide her with treatment and care to afford her the opportunity to be taught elementary functions).

35. NYSARC v. Carey, 393 F. Supp. at 717. The decree mandated that within six years of the date of the judgment, or May 5, 1981, the state reduce the population of Willowbrook to 250 or fewer. *Id.* at 717. The state applied for and received an extension of time to comply with this portion of this decree to April 1, 1985, on the ground that the procedures mandated by the Padavan Law and the tight housing market in New York City made it difficult to achieve the goal within the timetable agreed to. NYSARC v. Carey, 551 F. Supp. 1165, 1187-88 (E.D.N.Y. 1982), *modified on appeal*, 706 F.2d 956, 966 (2d Cir.), *cert. denied*, 104 S. Ct. 277 (1983).

The vitality of the decree is in doubt anyway, considering that the federal court refused to hold the state in contempt when other portions of the decree were not followed. NYSARC v. Carey, 631 F.2d 162, 163-64 (2d Cir. 1980). Moreover, it is questionable whether the state would sign a similar consent decree today, as the Second Circuit Court of Appeals has since held that mentally disabled persons do not have a constitutional right to placement in a community residence. Society for Good Will to Retarded Children v. Cuomo, 737 F.2d 1239 (2d Cir. 1984).

36. *See* Johnston, *New Willowbrook Holds An Open House*, N.Y. Times, Oct. 31, 1977, at 54, col. 4; Kihss, *Court-Ordered Winds of Change Touch Willowbrook*, N.Y. Times, Feb. 26, 1977, at 21, col. 2; Clines, *When Will the Willowbrooks Vanish?*, N.Y. Times, Nov. 30, 1976, at 36, col. 1; Peterson, *Carey Calls for Local Care of the Retarded and Unruly*, N.Y. Times, Jan. 21, 1976, at 43, col. 2. The threatened loss of federal funding unless the state depopulated its large institutions also prompted the state to expedite its community residence program. *See* JANICKI, *supra* note 20, at 5-6.

To illustrate the growth of community residences in New York State, there were fewer than 10 residences in the State in 1970, about 130 in 1976 and over 1000

However, the state and private sponsoring agencies with whom it contracted to run community residences encountered opposition from neighbors and municipalities to consideration of local sites.³⁷ Although several courts rejected municipality and homeowner association claims that community residences were not single-family dwellings for purposes of local zoning laws and ordinances permitting only single-family dwellings in residential areas,³⁸ other neighborhoods

by 1982. JANICKI, *supra* note 20, at 13. As of 1982, New York State had more community residence beds than any other state, with the total for the state amounting to more than ten percent of the total beds for the entire country. *Id.* The number of persons residing in community residences rose from 904 in 1974 to more than 15,000 in 1984. Collins, *State Officials Vow Help for Disabled*, N.Y. Times, May 9, 1985, at C3, col. 1.

37. See *supra* note 7.

38. Little Neck Community Ass'n v. Working Org. for Retarded Children, 52 A.D.2d 90, 383 N.Y.S.2d 364 (2d Dep't 1976), *leave to appeal denied*, 40 N.Y.2d 803, 356 N.E.2d 482, 387 N.Y.S.2d 1030 (1977); Incorporated Village of Freeport v. Ass'n for the Help of Retarded Children, 94 Misc. 2d 1048, 406 N.Y.S.2d 221 (Sup. Ct. Nassau County 1977), *aff'd*, 60 A.D.2d 644, 400 N.Y.S.2d 724 (2d Dep't 1977). The community residences in these cases were found to be family-like in structure. *Id.*; see also *Connors v. NYSARC*, 82 Misc. 2d 861, 370 N.Y.S.2d 474 (Sup. Ct. Rensselaer County 1975) (community residence premises purchased by state immune from local zoning laws under theory of sovereign immunity although residence would be used by private sponsoring agency). The *Connors* decision, issued three years prior to the enactment of the Padavan Law, seems to imply that a group of neighbors have the right, absent the existence of an independent statute, to challenge the selection of a community residence site by the state as being "beyond the parameters of reason and without a rational basis" pursuant to Article 78 of the New York Civil Practice Law and Rules. 82 Misc. 2d at 864-65, 370 N.Y.S.2d at 477-78. This view would be untenable today in light of the New York Court of Appeals decisions in *Abrams v. New York City Transit Auth.*, 39 N.Y.2d 990, 992, 355 N.E.2d 289, 290, 387 N.Y.S.2d 235, 236 (1976) and *Jones v. Beame*, 45 N.Y.2d 402, 380 N.E.2d 277, 408 N.Y.S.2d 449 (1978). Those cases held that discretionary, managerial decisions of the government were not subject to judicial review absent a showing of a statutory violation. Independent of the grounds for review provided in the Padavan Law, the decision on where to locate a community residence would be a purely managerial, discretionary action on the part of the state not subject to review. See *Shannon v. Introne*, 80 A.D.2d 834, 436 N.Y.S.2d 339 (2d Dep't 1981), *aff'd*, 53 N.Y.2d 929, 423 N.E.2d 818, 441 N.Y.S.2d 60 (1981); *Karas v. New York State Office of Mental Retardation & Developmental Disabilities*, No. 15601/82 (Sup. Ct. N.Y. County 1983), *aff'd*, 95 A.D.2d 984, 464 N.Y.S.2d 613 (1st Dep't 1983), *lv. to appeal denied*, 60 N.Y.2d 560 (1983); *Romita v. New York State Office of Mental Retardation & Developmental Disabilities*, No. 4537/82 (Sup. Ct. N.Y. County 1982); *Nippes v. Kolb*, No. 19642/79 (Sup. Ct. N.Y. County 1979).

In holding that the community residences for mentally retarded persons at issue were single family dwellings for the purpose of local zoning laws and ordinances, the decisions in *Little Neck Community Ass'n* and *Incorporated Village of Freeport* were consistent with decisions finding that other types of group homes were single family dwellings for local laws and ordinances. See *Group House of Port Washington v. Bd. of Zoning and Appeals of North Hempstead*, 45 N.Y.2d 266, 380 N.E.2d

attempted to use extra-legal means to block the establishment of residences in their areas.³⁹

207, 408 N.Y.S.2d 377 (1978) (foster care home of two permanent surrogate parents and seven children was single family for purpose of zoning ordinance); *City of White Plains v. Ferraioli*, 34 N.Y.2d 300, 313 N.E.2d 756, 357 N.Y.S.2d 449 (1974) (group home of married couple, two children and ten foster children deemed single family for purpose of zoning ordinance); *Abbott House v. Village of Tarrytown*, 34 A.D.2d 821, 312 N.Y.S.2d 841 (2d Dep't 1970) (zoning ordinance could not be enforced against house for neglected children as such enforcement would be contrary to and would thwart state policy). In *People v. St. Agatha Home*, 47 N.Y.2d 46, 389 N.E.2d 1098, 416 N.Y.S.2d 577 (1979), *cert. denied*, 444 U.S. 869 (1979), the New York Court of Appeals rejected an attempt of a county to gain a criminal conviction of an operator of a home for persons in need of supervision on the ground that the operator was violating a local zoning ordinance restricting use to one-family occupancy. The court found that the requested conviction would be contrary to county policy in favor of the establishment of such homes.

39. See *supra* note 7. See also ROTHMAN, *supra* note 1, which illustrates the types of community harassment which occurred.

Communities . . . could, and often did, convince the owner of the property to be sold or leased to the state to cancel the agreement. In a handful of very wealthy communities, like suburban Scarsdale, neighbors would join together to buy the house themselves, . . . [b]ut not every community could come up with one hundred or two hundred thousand dollars, and so most of them had to resort to still other strategies. In some cases, angry residents persuaded an owner to find another tenant or buyer, particularly when he had a continuing stake in the area, by virtue of either his business, his professional practice, or his other property holdings. Thus one physician had initially been willing to lease a second house that he owned in the Cobble Hill section of Brooklyn . . . so that St. Vincent's, a Catholic charity, could open a group home. But when neighbors protested, he backed off and refused to sign the lease.

At other times, community protest so prolonged the process of approval that the owner tired of waiting and found another purchaser. Take the case of 3350 Cross Bronx Expressway, a proposed group home in the Bronx . . . [T]he site was located in June 1978 and inspections were completed by September 1978. [I]n mid-October, Community Planning Board 10 objected ostensibly because the house lacked a backyard and was too near a highway. . . . Alternative sites were investigated and found inadequate, whereupon the Board requested a formal hearing under the Padavan Law. The hearing was held on February 9, 1979, and in March the commissioner decided in favor of the site, at just which point the owner sold the property to a different buyer.

In still other instances, . . . the situation could get nasty. Some opponents were prepared to use scare tactics, ranging from abusive telephone calls at all times of the day and night to outright threats of violence to the owner and his family. [Although such incidents were not very common, approximately] thirteen [such] incidents occurred. . . . Nevertheless, its importance was greater than its frequency implied, first because these incidents generally occurred . . . as . . . a last resort when the retarded were about to arrive, which meant that the staff had invested great energy in the project. Second, the recurring fear was that hooliganism would be contagious, success in scaring off an owner in one neighborhood serving as a lesson for another. Finally, these incidents were so morally

III. The Padavan Law

In recognition of both the need to encourage the establishment of community residences and deinstitutionalization and the concerns of municipalities regarding the siting of residences,⁴⁰ the New York

outrageous as to raise the question whether integration of the retarded was possible when prejudices ran so deep.

Still other communities resisted the opening of group homes by mustering political influence. When local politicians with some clout in the city or the state actively opposed a site and had the solid support of a core of constituents, . . . [they were often successful in preventing the opening of group homes].

ROTHMAN, *supra* note 1, at 187-88; see also *Society for Good Will to Retarded Children v. Cuomo*, 572 F. Supp. 1300, 1340 (E.D.N.Y. 1983), *rev'd on other grounds*, 737 F.2d 1239 (2d Cir. 1984) (three instances of arson to community residences on Long Island noted in testimony at trial).

40. See Governor's Program Bill No. 303 (1978), which states that the purpose of the statute was:

[t]o involve municipalities in the process of selecting sites for community residential programs for the mentally disabled; to foster the smooth integration of the disabled into the communities in which they will live; to promote the establishment of community-based residential facilities for the disabled; to require careful and cooperative planning for such facilities by state agencies and municipalities.

Id.

The Legislative Findings and Intent states:

[t]he legislature hereby finds and determines that mentally disabled individuals have the right to attain the benefits of normal residential surroundings. It is further found that the opportunities for mentally disabled individuals will be enhanced, and the delivery of services improved, by providing these individuals with the least restrictive environment that is consistent with their needs, and that such environment will foster the development of maximum capabilities. It is the intention of this legislation to meet the needs of the mentally disabled in New York state by providing, wherever possible, that such persons remain in normal community settings, receiving such treatment, care, rehabilitation and education, as may be appropriate to each individual. It is further intended that communication and cooperation between the various state agencies, local agencies and local communities be fostered by this legislation, and that this will be best achieved by establishment of clearly defined procedures for the selection of locations for community residences . . . by local communities. In the establishment of such community residences, the legislature recognizes the need to avoid, wherever practicable, a disproportionate distribution of community residences and other similar facilities.

Act of July 6, 1978, 1978 N.Y. Laws ch. 468, § 1.

Governor Carey's memorandum accompanying the enactment of the statute states:

[t]he national movement towards providing care and treatment for the mentally disabled in the least restrictive environment consistent with their needs has generated a great demand for community residential facilities for persons formerly served in State institutions. The rapid development of such facilities in the late sixties and early seventies, particularly when

State Legislature enacted the Padavan Law.⁴¹ The statute sets forth mandatory procedures for the establishment of community residences for the mentally disabled,⁴² permits municipalities only limited in-

added to the uncoordinated establishment of similar types of residential accommodations for other client groups, has in some instances drastically altered the nature and character of certain communities in this state. As a result, many such communities have strongly resisted the establishment of residential facilities for the mentally disabled.

Without community participation in the site selection process, there is a real possibility that residents of the facility will be unwelcome neighbors, ostracized from the life of the community which is expected to provide them with sustenance. Far from achieving the benevolent objective of improving their lot and providing them with more humane and dignified care at a time of severe need, they may become objects of fear, ridicule, hostility and deprivation.

These bills, developed jointly by the Offices of Mental Health and Mental Retardation and Developmental Disabilities, the Senate and Assembly Mental Hygiene Committees and my staff, implement a far-reaching program to place the dynamic relationship between State and local governments and voluntary providers of care to the mentally ill, mentally retarded and developmentally disabled upon a new footing.

Senate Bill 8213—B implements my program objective, announced in my State of the State Message, of assuring the involvement of local governments in the process of determining where new community residential facilities will be located. This bill prohibits the issuance of an operating certificate for any new facility unless the operator of the facility complies with the newly established procedures requiring notice to the municipality and an opportunity to suggest suitable sites. It further requires the Commissioners of the Office of Mental Health or the Office of Mental Retardation and Developmental Disabilities to sustain an objection to the establishment of a new community residence if he finds that the nature and character of the area in which the facility is to be based would be substantially altered as a result of the establishment of the facility.

At the same time, the bill aims to facilitate the establishment of community residences by discouraging frivolous legal challenges that have needlessly delayed proper establishment of such facilities in the past, at great cost to the litigants. This legislation attempts to encourage a process of joint discussion and accommodation between the providers of care and services to the mentally disabled and representatives of the community, rather than legal antagonism. . . .

These bills clearly comprise the most important mental hygiene legislation of this session. It is my earnest hope that they will assist the State government, acting through its various agencies, to forge a new partnership with local governments, consumers and providers in developing the type of network of community services that was envisioned when this nation moved away from the back wards and towards the least restrictive environment.

1978 McKinney's Sess. Laws at 1821-22.

41. 1978 N.Y. Laws ch. 468, § 2.

42. See *supra* note 9.

volvement in the process of selecting community residence sites⁴³ and declares that community residences established pursuant to the statute are single-family dwellings for the purposes of local laws and ordinances.⁴⁴ The statute received mixed reviews from agencies seeking to establish community residences as well as from municipalities.⁴⁵

This section of the Article first will examine legislative and executive memoranda which state the goals of the Padavan Law's drafters.⁴⁶ It then will analyze the Padavan Law procedures and court interpretations thereof to determine whether those procedures and interpretations fulfill the goals of the drafters of the statute.⁴⁷ In this regard, the applicability of the statute, procedures for notifying a municipality about the proposed establishment of a community residence, objections a municipality can raise to the establishment of a residence, fact-finding hearings on proposed community residence sites, commissioners' determinations rendered after fact-finding hearings and court review of commissioners' determi-

43. The only objection that a municipality may raise to a community residence is that it would

result in such a concentration of community residential facilities for the mentally disabled in the municipality or in the area in proximity to the site selected or a combination of such facilities with other community residences or similar facilities licensed by other agencies of state government that the nature and character of the areas within the municipality would be substantially altered.

N.Y. MENTAL HYG. LAW § 41.34(c)(1)(C) (McKinney Supp. 1984-1985).

Also, the municipality must present evidence of a "concrete and . . . convincing nature" to prevail on its objection. *Grasmere Homeowners Ass'n v. Introne*, 84 A.D.2d 778, 779, 443 N.Y.S.2d 956, 957 (2d Dep't 1981); see *infra* notes 95-144 and accompanying text.

44. Mental Hygiene Law § 41.34(f) specifically states that "[a] community residence established pursuant to this section . . . shall be deemed a family unit, for the purposes of local laws and ordinances." N.Y. MENTAL HYG. LAW § 41.34(f) (McKinney Supp. 1984-1985).

45. The bill jacket for the statute indicates that approval of the bill came from the New York Association for the Learning Disabled, the New York State Health Planning Commission, the New York Mental Health Association, the New York State Office of Mental Health and the New York State Office of Mental Retardation and Developmental Disabilities, United Cerebral Palsy, the Association of the Bar of the City of New York, the Fulton County Chapter of the New York State Association for Retarded Children, Inc., and the New York State Association of Counties. Groups that opposed the statute were the Board of Visitors for Rockland Psychiatric Center, the New York State Bar Association Committee on Mental Hygiene, the Schenectady Association to Retain Residential Zoning, and the City of Schenectady. The New York State Department of Social Services and the New York Conference of Mayors expressed mixed views about the statute. Assembly Bill No. 8768, bill jacket (available in Fordham Law School Library).

46. See *infra* notes 50-60 and accompanying text.

47. See *infra* 61-144 and accompanying text.

nations will be discussed.⁴⁸ Finally, this section will examine the statute's impact on zoning and other local ordinances, the constitutionality of the statute, and the standing of neighbors' and homeowner associations to challenge community residences under the statute.⁴⁹

A. Legislative and Executive Memoranda on the Goals of the Padavan Law

Both the state legislature in enacting the Padavan Law⁵⁰ and Governor Hugh L. Carey in signing it into law⁵¹ issued memoranda expressing their views as to what the Padavan Law was intended to accomplish. These memorializations make it possible to determine whether the statute and its interpretation by the courts truly serve the purposes expounded by the statute's drafters.⁵²

The Padavan Law was accompanied by a statement entitled "Declaration of legislative findings and intent" (Declaration).⁵³ The Declaration, which strongly expresses the policy favoring deinstitutionalization and community residences, states:

The legislature hereby finds and determines that mentally disabled individuals have the right to attain the benefits of normal residential surroundings. It is further found that the opportunities for mentally disabled individuals will be enhanced, and the delivery of services improved, by providing these individuals with the least restrictive environment that is consistent with their needs, and that such environment will foster the development of maximum capabilities. It is the intention of this legislation to meet the needs of the mentally disabled in New York [S]tate by providing, wherever possible, that such persons remain in normal community settings, receiving such treatment, care, rehabilitation and education, as may be appropriate to each individual⁵⁴

Further, the Declaration emphasized that "[i]n the establishment of such community residences, the legislature recognizes the need to avoid, wherever practicable, a disproportionate distribution of community residences and other similar facilities."⁵⁵ On balance, however,

48. *Id.*

49. *See infra* notes 145-216 and accompanying text.

50. 1978 N.Y. Laws ch. 468, § 1.

51. 1978 McKinney's Sess. Law at 1821-22.

52. The statute was developed cooperatively by the Offices of Mental Health and Mental Retardation and Developmental Disabilities, the Senate and Assembly Mental Hygiene Committees, and the Governor's Staff. *Id.* at 1821.

53. 1978 N.Y. Laws ch. 468, § 1.

54. *Id.*

55. *Id.*

the Declaration was a strong statement favoring the establishment of community residences and an indication that the legislature intended the statute to facilitate their development. According to the Declaration, the only limitation to be placed on the development of residences was that there not be a "disproportionate distribution"⁵⁶ of such residences. Thus, based upon the legislature's Declaration, the Padavan Law should be construed liberally in favor of the development of community residences.⁵⁷

The Governor's memorandum⁵⁸ echoed the pro-community residence sentiments of the legislature. While the Governor's message noted that the statute assured "the involvement of local governments in the process of determining where new community residential facilities w[ould] be located,"⁵⁹ it also stated that

the bill aims to facilitate the establishment of community residences by discouraging frivolous legal challenges that have needlessly delayed proper establishment of such facilities in the past, at great cost to the litigants It is my earnest hope that they (the bills) will assist the State government . . . [in] forg[ing] a new partnership with local governments, consumers and providers in developing the type of network of community services that was envisioned when this nation moved away from the back wards and towards the least restrictive environment.⁶⁰

56. *Id.*

57. Indeed, the courts have taken the position that substantial rather than strict compliance with the procedures of the statute is necessary. *See* *Town of Pleasant Valley v. Wassaic Developmental Disabilities Servs. Office*, 92 A.D.2d 543, 459 N.Y.S.2d 109 (2d Dep't 1983); *Community Bd. No. 3 v. New York Office of Mental Retardation and Developmental Disabilities*, 76 A.D.2d 851, 428 N.Y.S.2d 520 (2d Dep't 1980), *appeal dismissed*, 53 N.Y.2d 839 (1981); *Town of Webster v. Slezak*, No. 1993-82 (Sup. Ct. Monroe County 1982).

Perhaps the strongest statement that the statute should be read in favor of establishing residences and against the promotion of legal challenges to such residences is the New York Court of Appeals' decision in *Crane Neck Ass'n v. New York City/Long Island County Servs. Group*, 61 N.Y.2d 154, 460 N.E.2d 1336, 472 N.Y.S.2d 901 (1984), *cert. denied*, 105 S. Ct. 60 (1984). In *Crane Neck*, the Court noted that "[a] major purpose of section 41.34 . . . was to eliminate the legal challenges that were impeding implementation of the State policy" (of establishing community residences). 61 N.Y.2d at 164, 460 N.E.2d at 1341, 472 N.Y.S.2d at 906-07.

58. 1978 McKinney's Sess. Laws at 1821-22.

59. *Id.* at 1821. Although much of the language of the Governor's memoranda and some of the language of the Declaration of Legislative Findings and Intent talk about the need for cooperation between municipalities and sponsoring agencies, the two documents together demonstrate a strong preference for the development of community residences and a strict limit on the types of objections that can be raised against them.

60. *Id.* at 1821-22. Of importance in the Governor's memoranda is a description

B. Padavan Law Procedures

1. Applicability

Before discussing the actual procedures of the Padavan Law, it is necessary to outline the types of facilities to which the statute and its procedures are applicable. The Padavan Law is applicable only to sponsoring agencies⁶¹ intending to establish community residences for the mentally disabled⁶² licensed by either the New York State Office of Mental Health or the New York State Office of Mental Retardation and Developmental Disabilities.⁶³ The procedural requirements⁶⁴ imposed on sponsoring agencies seeking to establish

of a relationship between local governments and sponsoring agencies in the site selection process. As will be discussed in more detail later, this is evidence that the drafters of the statute, the Governor's staff members being among them, did not intend that sponsoring agencies be the target of litigation from neighbors and homeowner groups. See *infra* notes 195-216 and accompanying text.

Other states have adopted similar statutes and policy statements aimed at facilitating the establishment of community residences for the mentally disabled and granting community residences priority over local zoning ordinances. See, e.g., CAL. WELF. & INST. CODE § 5115 (West 1984); COLO. REV. STAT. § 31-23-303(2)(a) (1977 & Supp. 1984); HAWAII REV. STAT. § 333 E-3.5 (Supp. 1983); IND. CODE ANN. § 16-13-21-14 (Burns Supp. 1984); ME. REV. STAT. ANN. tit. 30, § 4962-A (Supp. 1983-1984); MICH. COMP. LAWS ANN. § 125.216a (West Supp. 1984-1985); MINN. STAT. ANN. §§ 245.812, 462.357(7)(3) (West Supp. 1985); MONT. CODE ANN. §§ 53-20-101, 53-20-301 (1983); NEB. REV. STAT. § 18-1745-47 (1983); NEV. REV. STAT. § 278.021 (1983); N.J. REV. STAT. ANN. § 40:55D-66.1 (West Supp. 1984-1985); N.C. GEN. STAT. §§ 168-20 to -23 (1982); OHIO REV. CODE ANN. § 6 5123.19(D) (Page 1981 & Supp. 1983); R.I. GEN. LAWS §§ 45-24-22, 45-24-23 (1980 & Supp. 1984); S.C. CODE ANN. § 44-21-20 (Law. Co-op. 1976); TENN. CODE ANN. § 13-24-102 (1980); VT. STAT. ANN. tit. 24, § 4409 (1979 & Supp. 1984); VA. CODE § 15.1-486.2 (1981).

61. A sponsoring agency can be any agency or unit of government, a voluntary agency, or any other person or organization which intends to establish or operate a community residence. N.Y. MENTAL HYG. LAW § 41.34(a)(2) (McKinney Supp. 1984-1985). A municipality, having limited grounds upon which it can challenge a community residence, cannot challenge a community residence on the ground that the sponsoring agency is unqualified to care for mentally disabled persons. See *id.* § 41.34(c)(1)(C), (c)(5) (McKinney Supp. 1984-1985). The Commissioner retains the power to deny an operating certificate to an unqualified sponsoring agency. *Id.* §§ 31.02, 31.05 (McKinney 1978 and Supp. 1984-1985). The Padavan procedures are mandatory. *Id.* § 41.34(e) (McKinney Supp. 1984-1985).

62. N.Y. MENTAL HYG. LAW § 41.34(a)(1) (McKinney Supp. 1984-1985).

63. *Id.* The statute is only applicable to residence sites which, in the opinion of the Commissioner, were selected after September 1, 1978. 1978 N.Y. Laws ch. 468, § 4. See Community Bd. No. 3 v. New York Office of Mental Retardation and Developmental Disabilities, 76 A.D.2d 851, 428 N.Y.S.2d 520 (2d Dep't 1980), *appeal dismissed*, 53 N.Y.2d 839 (1981); Gedney Ass'n v. New York State Dep't of Mental Hygiene, 112 Misc. 2d 209, 446 N.Y.S.2d 876 (Sup. Ct. Westchester County 1982).

64. See *infra* notes 79-144 and accompanying text for discussion of procedures.

community residences for the mentally disabled⁶⁵ are not placed on agencies seeking to establish community residences which are licensed by the department of social services,⁶⁶ the division of substance abuse services,⁶⁷ the department of corrections,⁶⁸ the division for youth⁶⁹ or any other state agency for other disabled or needy persons.⁷⁰ Thus, the Padavan Law actually makes it more difficult procedurally for a sponsoring agency to establish a community residence for mentally disabled persons than for other types of disabled persons in most instances.⁷¹ This result is contrary to the stated aims of the drafters of the statute.⁷²

65. N.Y. MENTAL HYG. LAW § 41.34(c)(1) (McKinney Supp. 1984-1985).

66. *Id.* § 41.34(a)(1).

67. *Id.*; see also *Nippes v. Kolb*, No. 19642/79 (Sup. Ct. N.Y. County 1979) (methadone center not required to give notice of its opening to local community planning board).

68. N.Y. MENTAL HYG. LAW § 41.34(a)(1) (McKinney Supp. 1984-1985).

69. *Id.*

70. *Id.*

71. The New York State Office of Mental Retardation and Developmental Disabilities has testified that procedures of the statute have delayed the establishment of residences and that residences were even lost because of the statutory timetable that must be followed. *NYSARC v. Carey*, 551 F. Supp. 1165, 1187-88 (E.D.N.Y. 1982). The Second Circuit acknowledged that the delays created by the statutory procedures were justification for granting the State a four-year extension of time to move persons from Willowbrook to smaller community residences under the Willowbrook Consent Decree. *NYSARC v. Carey*, 706 F.2d 956, 966 (2d Cir. 1983), *cert. denied*, 104 S. Ct. 277 (1984).

There is actually a class of community residences that has benefited from the Padavan Law. As discussed in the text accompanying notes 145-50, the Padavan Law declares that all community residences established through its procedures are single family dwellings for the purposes of local laws and ordinances. As discussed *supra* at note 38, community residences run by private agencies that had a family-like structure were construed by the courts as single family dwellings prior to the enactment of the Padavan Law. Also, state-operated facilities are immune from local laws and ordinances under the doctrine of sovereign immunity, as is discussed *supra* at note 38 and *infra* at note 150. However, it is quite likely that community residences run by private sponsoring agencies that were not family-like in structure would not have been deemed single family dwellings for the purpose of local laws and ordinances and may have been banned from certain residential areas prior to the Padavan Law. See *Crane Neck Ass'n v. New York City/Long Island County Servs. Group*, 61 N.Y.2d 154, 160, 460 N.E.2d 1336, 1339, 472 N.Y.S.2d 901, 904 (1984), *cert. denied*, 105 S. Ct. 60 (1984), where the New York Court of Appeals held that a community residence that was not family-like in structure would likely not have been deemed a single family dwelling for the purpose of local laws and ordinances. Thus, the Padavan Law has facilitated the development of non-family-like community residences by private sponsoring agencies in that they can now be established in residential areas permitting only single family dwellings. Some commentators believe that the statute has encouraged the development of residences. See *infra* notes 267-68 and accompanying text.

72. See *supra* notes 50-60 and accompanying text.

Originally, the Padavan law applied only to sponsoring agencies seeking to establish supervised community residences for four to fourteen mentally disabled persons.⁷³ While the "four to fourteen" requirement appeared to be arbitrary, courts correctly held that the statute did not apply to community residences containing three⁷⁴ or twenty⁷⁵ persons on the ground that the courts could not alter the statute's specific "four to fourteen" language no matter how arbitrary it seemed.⁷⁶ The 1981 amendments⁷⁷ extended the coverage of the statute to supervised residences for one to fourteen persons and supportive residences for four to fourteen persons.⁷⁸ The amendment requiring sponsoring agencies of supervised residences for one or two persons to follow the procedures of the statute is contrary to the original goals of the statute—facilitation of the development

73. N.Y. MENTAL HYG. LAW § 41.34(a)(1) (McKinney Supp. 1978-1979), amended, 1981 N.Y. Laws ch. 1024, § 3; *id.* ch. 1025, § 1.

74. *Shannon v. Introne*, 80 A.D.2d 834, 835, 436 N.Y.S.2d 337, 339 (2d Dep't), *aff'd*, 53 N.Y.2d 929, 423 N.E.2d 818, 441 N.Y.S.2d 60 (1981).

75. *Romita v. New York State Office of Mental Retardation and Developmental Disabilities*, No. 4537/82, slip. op. at 9 (Sup. Ct. N.Y. County 1982).

76. The courts in *Shannon* and *Romita* correctly applied the principle that where the words of a statute are free from ambiguity and doubt, there is no need to resort to other means of interpretation. *See, e.g., Meltzer v. Koenigsberg*, 302 N.Y. 523, 525, 99 N.E.2d 679, 680 (1951).

77. 1981 N.Y. Laws ch. 1024, § 3; *id.* ch. 1025, § 1.

78. N.Y. MENTAL HYG. LAW § 41.34(a)(1) (McKinney Supp. 1984-1985). A supervised community residence is one providing supervisory staff on-site 24 hours per day for the purpose of enabling residents to live as independently as possible. *Id.* § 1.03(28-a). A supportive living residence is one providing practice in independent living under supervision but not providing staff on-site on a 24 hour per day basis. *Id.* § 1.03(28-b).

The bill jacket for the 1981 amendments indicates opposition to the amendments from the Division of the Budget, the State Advocate for the Disabled, the Richmond Fellowship of New York, Inc., the Association of Community Living Administrators in Mental Health, the New York State Mental Health Association, Inc., Mental Health Services Corporation 2, Binghamton Catholic Charities, Federation of Parents Organizations for the New York State Mental Institutions, Inc., Catholic Charities Diocese of Brooklyn, Family Service Association of Nassau County, Woodward Mental Health Center, Mental Health Association of Nassau County, Suffolk Community Council, Inc., Unity House, North County Transitional Living Services, Inc. and the Family Residences & Essential Enterprises, Inc. Surprisingly, the New York State Office of Mental Health, the New York State Commission on Quality of Care for the Mentally Disabled, the New York State Office for the Aging, the New York State Health Planning Commission, and the New York State Conference of Local Mental Hygiene Directors had no objection to the statute amendments, while, unsurprisingly, the New York Conference of Mayors and Municipal Officers and the New York Association of Counties supported the amendments. Assembly Bill No. 8768, bill jacket (available in Fordham Law School Library). The amendments apply to community residence sites which, in the judgment of the commissioner, were selected after January 10, 1982. 1981 N.Y. Laws ch. 1024, § 4; *id.* ch. 1025, § 2.

of community residences—since it would be unduly burdensome for a sponsoring agency to follow the intricate statutory procedures for one or two persons. Moreover, it is difficult to envision how a community residence for one or two persons or a concentration of such residences would have any adverse impact on a neighborhood.

2. Notification

To establish a community residence, a sponsoring agency first must send written notification to the chief executive officer of the targeted municipality⁷⁹ announcing its intention to establish a residence there.⁸⁰ Prior to the 1981 amendments, the sponsoring agency was required to include in its notice to the chief executive officer only a description of the nature, size and community support requirements of the program.⁸¹ The agency was not required to name a specific site or have a specific site in mind when sending the letter, and courts have unanimously upheld the validity of such notification letters.⁸² However, the statute was amended in 1981 to

79. For the purpose of the Padavan Law, as applied outside of New York City, the term "municipality" means an incorporated village or city if the facility is to be located therein or the town if the facility is not located within an incorporated village or city. N.Y. MENTAL HYG. LAW § 41.34(a)(3) (McKinney Supp. 1984-1985). In New York City, the relevant municipality is the community planning board. *Id.* A county is only required to be notified where a voluntary agency is seeking state aid to establish a residence. *Id.* § 41.33 (McKinney Supp. 1984-1985).

80. *Id.* § 41.34(c)(1) (McKinney Supp. 1984-1985).

81. *Id.* § 41.34(b)(1) (McKinney Supp. 1978-1979), amended by 1981 N.Y. Laws, ch. 1024 § 3.

82. *Community Planning Board No. 18 v. Introne*, 84 A.D.2d 564, 443 N.Y.S.2d 262 (2d Dep't 1981); *Town of Stony Point v. New York State Office of Mental Retardation & Development Disabilities*, 78 A.D.2d 858, 432 N.Y.S.2d 633 (2d Dep't 1980); *Cosgrove v. Introne*, No. 1025/80 (Sup. Ct. Orange County 1982); *Town of Pleasant Valley v. Wassaic Developmental Disabilities Servs. Offices*, No. 4967/80 (Sup. Ct. Dutchess County 1981); *Town of Cortlandt v. Office of Mental Retardation and Developmental Disabilities*, N.Y.L.J., Jan. 29, 1981, at 13, col. 6 (Sup. Ct. Westchester County 1981); *cf.* *Town of Pleasant Valley v. Wassaic Developmental Disabilities Servs. Office*, 92 A.D.2d 543, 459 N.Y.S.2d 109 (2d Dep't 1983) (court held that sponsoring agency violated letter and spirit of statute by intentionally omitting any reference to proposed specific sites in its notification letter, but upheld sponsoring agency's actions on ground that agency informed municipality about specific sites and municipality was not precluded from introducing evidence or in any way prejudiced by sponsoring agency's actions).

The Westchester County Supreme Court decision in *Town of Cortlandt v. Office of Mental Retardation and Developmental Disabilities* is typical of the type of attitudes sponsors of community residences must sometimes face from local courts. While the court found that the initial statute and prior case law clearly stated that a sponsoring agency did not have to provide a municipality with a specific site, the court added:

require notification letters to mention specific sites.⁸³

By requiring a sponsoring agency to find a suitable site prior to commencing Padavan procedures, this amendment impedes the development of community residence sites. Further, the specific site requirement forces sponsoring agencies either to purchase the site before commencing Padavan Law procedures,⁸⁴ thereby risking the possibility of owning an unusable house if the municipality prevails in its objections to the site,⁸⁵ or to spend extra money to purchase options to buy the house during the Padavan procedures. Similarly, the provision discourages sellers from offering their houses to sponsoring agencies since the sellers may have to await the outcome of the Padavan procedures before knowing whether the agency will actually purchase their home.⁸⁶ Moreover, the required notice of a specific site, if leaked to the neighborhood of the proposed site, could lead to neighborhood groups either pressuring the municipality to oppose the site or attempting to stop the establishment of the residence themselves through extra-legal⁸⁷ or

It appears to this court that Section 41.34 of the Mental Hygiene Law is a very unfair law and is in violation of the spirit of the Municipal Home Rule Law of the State of New York. In the court's opinion, it grants excessive discretionary powers to a bureaucratic department whose personnel is motivated primarily, if not solely, in carrying out the function of the Mental Retardation and Developmental Disabilities Office rather than looking at the questions from a broader point of view. In this court's judgment, the statute should be amended to give the municipality involved more input into the selection of a group home site. The court might point out that the respondent refused to reveal to the petitioner the location in the Town of Cortlandt where the respondent planned to place the group home until directed to do so by the court on the day that this proceeding was argued. In the opinion of this court, such conduct verges upon bureaucratic arrogance.

N.Y.L.J., Jan. 29, 1981, at 14, col. 1.

83. N.Y. MENTAL HYG. LAW § 41.34(c)(1) (McKinney Supp. 1984-1985); 1981 N.Y. Laws ch. 1024, § 3.

84. N.Y. MENTAL HYG. LAW § 41.34(c)(1) (McKinney Supp. 1984-1985). A private sponsoring agency may purchase a residence prior to the commencement of Padavan Law procedures. *Town of Oyster Bay v. Mental Health Ass'n of Nassau County No. 23069/83* (Sup. Ct. Nassau County 1983). However, unlike other states, New York does not guarantee mortgages for voluntary agencies so that they can secure mortgages more easily. *Society for Good Will and Retarded Children v. Cuomo*, 572 F. Supp. 1300, 1340 (E.D.N.Y. 1983), *rev'd on other grounds*, 737 F.2d 1239 (2d Cir. 1984).

85. See, e.g., N.Y. MENTAL HYG. LAW § 41.34(c)(5) (McKinney Supp. 1984-1985) which states that sponsoring agencies cannot use a proposed residence for a community residence if the municipality's position is upheld.

86. See *id.*

87. See *People v. 11 Cornwell Co.*, 695 F.2d 34 (2d Cir. 1982), *vacated in part on other grounds*, 718 F.2d 22 (2d Cir. 1983), where a group of neighbors

legal means.⁸⁸ An argument can be made that the inclusion of a specific site affords the municipality a better opportunity to make a response to the sponsoring agency's notification letter.⁸⁹ However, the Padavan Law has always given municipalities the right to object to the establishment of residences within their jurisdictions even where no specific sites were listed⁹⁰ or to suggest areas within their jurisdiction where the residence would be suitable.⁹¹

The 1981 amendments also require sponsoring agencies to provide municipalities with "the most recently published data compiled pursuant to section four hundred sixty-three of the social services law which can reasonably be expected to permit the municipality to evaluate all such facilities affecting the nature and character of the areas wherein such proposed facility is to be located."⁹² This data constitutes a listing of all community residences and institutions in the proximity of the proposed community residence.⁹³ The clause, "which can reasonably be expected to permit the municipality to evaluate all such facilities affecting the nature and character of the areas wherein such proposed facility is to be located,"⁹⁴ is vague and may result in some litigation. However, the requirement is not difficult for sponsoring agencies to meet, and it does provide a municipality with useful information with which to make an intel-

of a proposed community residence site pooled their money together and purchased a site proposed by a sponsoring agency for the purpose of blocking the sponsoring agency from establishing a residence there. The Second Circuit Court of Appeals held that the neighbors' action violated Executive Law § 296(5), the section of the New York State Human Rights Law prohibiting discrimination in real property transactions against handicapped persons. N.Y. EXEC. LAW § 296(5) (McKinney 1982 & Supp. 1984).

88. Neighbors and homeowners associations have been given standing to challenge the establishment of community residence sites. See *infra* notes 195-216 and accompanying text.

89. N.Y. MENTAL HYG. LAW § 41.34(c)(1)(A), (B), (C) (McKinney Supp. 1984-1985).

90. See *id.* § 41.34(b)(1)(C) (McKinney Supp. 1978-1979). See *City of Schenectady v. Coughlin*, 74 A.D.2d 985, 426 N.Y.S.2d 328 (3d Dep't 1980), where the commissioner found that a sponsoring agency could not locate in certain areas of the city because of overconcentration but could locate in an unsaturated area.

91. N.Y. MENTAL HYG. LAW § 41.34(c)(1)(B) (McKinney Supp. 1984-1985).

92. *Id.* § 41.34(c)(1) (McKinney Supp. 1984-1985).

93. N.Y. SOC. SERVS. LAW § 463-a (McKinney 1983); N.Y. MENTAL HYGIENE LAW § 41.34(c)(1) (McKinney Supp. 1984-1985). The data compiled pursuant to Social Services Law § 463-a, known as "Social Services Law Registry," includes listings of both community residences and institutions. However, not all of the listings on the registry are relevant to the matters that the Commissioner must consider in ruling on a municipality's objections to a community residence proposal. See *infra* notes 128-34 and accompanying text.

94. N.Y. MENTAL HYG. LAW § 41.34(c)(1) (McKinney Supp. 1984). See *supra* note 92 and accompanying text for language of this clause.

ligent response to the sponsoring agency's notification letter. A sponsoring agency giving the most recent data for as large an area as possible should not receive any serious challenge on this point in litigation.

3. *The Municipality's Response*

Within forty days of receipt of the sponsoring agency's notification letter,⁹⁵ the municipality, if it chooses to respond, must make one of three statutorily mandated responses.⁹⁶ It must either:

- (A) Approve the site recommended by the sponsoring agency;
- (B) [S]uggest one or more suitable sites within its jurisdiction which could accommodate such a facility; or
- (C) [O]bject to the establishment of a facility of the kind described by the sponsoring agency because to do so would result in such a concentration of community residential facilities for the mentally disabled in the municipality or in the area in proximity to the site selected^[97] or a combination of such facilities with other community residences or similar facilities licensed by other agencies of state government that the nature and character of the areas within the municipality would be substantially altered.⁹⁸

Thus, the grounds for a municipality's objection to a proposed site are limited to whether the residence would create a concentration of community and other similar residences which would substantially alter the area in which the proposed residence is to be located.⁹⁹ A

95. N.Y. MENTAL HYG. LAW §41.34(c)(1) (McKinney Supp. 1984-1985).

96. *Id.* § 41.34(c)(1)(A), (B), (C) (McKinney Supp. 1984-1985). A municipality may hold a public hearing pursuant to local law prior to making a response, *id.* § 41.34(c)(2) (McKinney Supp. 1984-1985), but cannot force the sponsoring agency to comply with procedures additional to those required in the Padavan Law. *Cosgrove v. Introne*, No. 1025/80 (Sup. Ct. Orange County 1982).

97. Prior to the 1981 amendment, the municipality could only object to an overconcentration of facilities located in the municipality. 1981 N.Y. Laws ch. 1024, § 3. This led to the illogical result that a municipality could not point to facilities that might just be over the municipality's borders to show overconcentration. *See Spielman v. Introne*, 88 A.D.2d 958, 451 N.Y.S.2d 194 (2d Dep't 1982). The 1981 amendment corrected the oversight of the original statute.

98. N.Y. MENTAL HYG. LAW § 41.34(c)(1)(A), (B), (C) (McKinney Supp. 1984-1985).

99. *See, e.g., Town of Greenburgh v. Coughlin*, 73 A.D.2d 672, 423 N.Y.S.2d 209 (2d Dep't 1979), *lv. to appeal denied*, 49 N.Y.2d 704, 404 N.E.2d 1341, 427 N.Y.S.2d 1025 (1980) and *Town of Hempstead v. Comm'r*, 78 A.D.2d 677, 432

municipality cannot object to a community residence site on the ground that the residence itself would create more traffic, crime or garbage, lower property values¹⁰⁰ or would be unsafe for the persons who would reside there.¹⁰¹ Moreover, a mere assertion by a municipality of a concentration of residences in the area is legally insufficient to form a statutory objection—a municipality must allege and prove both that the proposed residence would create an overconcentration of residences *and* that said overconcentration would result in the substantial alteration of the area.¹⁰²

If the municipality approves the proposed community residence site or fails to respond within forty days of its receipt of the notification letter, the sponsoring agency can seek to establish the proposed residence.¹⁰³ Courts have unanimously held municipalities to the forty day statute of limitations.¹⁰⁴ The Appellate Division of the New York State Supreme Court, Fourth Department, correctly

N.Y.S.2d 399 (2d Dep't 1980), where courts dismissed objections made by municipalities to community residence sites where the municipalities failed to demonstrate at a fact-finding hearing that the proposed community residence would substantially alter the area.

100. See *Town of Mount Pleasant v. State of New York Office of Mental Retardation and Developmental Disabilities*, No. 21747/82 (Sup. Ct. Westchester County 1983); *Village of Painted Post v. Slezak*, No. 47424 (Sup. Ct. Steuben County 1982); *Lincoln Assocs. v. Introne*, No. 24653/80 (Sup. Ct. Nassau County 1981); *Town of Hempstead v. Comm'r*, No. 6891/80 (Sup. Ct. Nassau County 1980) (where municipalities or neighborhood groups involved failed to even allege that proposed residence would create overconcentration of residences that would substantially alter area).

101. Since the opponents to a community residence are neither persons to reside in the residence nor their representatives, it is hard to imagine how neighbors, homeowners or municipalities would have standing to complain that a community residence site would be unsafe for the proposed residents. The Commissioner, of course, would have the power to deny an operating certificate if he believes a residence would not be safe. N.Y. MENTAL HYG. LAW §§ 31.02, 31.05 (McKinney 1978 & Supp. 1984-1985). A residence must comply with the safety features outlined in 14 N.Y.C.R.R. § 586 (Office of Mental Health) or 14 N.Y.C.R.R. § 686 (Office of Mental Retardation and Developmental Disabilities) before a license can be issued. N.Y. ADMIN. CODE tit. 14, §§ 586, 686 (1983-1984).

102. N.Y. MENTAL HYG. LAW § 41.34(c)(1)(C), (c)(5) (McKinney Supp. 1984-1985). *Town of Hempstead v. Comm'r*, 89 A.D.2d 850, 453 N.Y.S.2d 32 (2d Dep't 1982); *Grasmere Homeowners' Ass'n v. Introne*, 84 A.D.2d 778, 443 N.Y.S.2d 956 (2d Dep't 1981).

103. N.Y. MENTAL HYG. LAW § 41.34(c)(1)(C), (c)(3) (McKinney Supp. 1984-1985).

104. *City of Oswego v. Prevost*, 91 A.D.2d 848, 458 N.Y.S.2d 414 (4th Dep't 1982), *appeal dismissed*, 58 N.Y.2d 1033, 448 N.E.2d 1354, 462 N.Y.S.2d 443 (1983); *Town of Stony Point v. New York Office of Mental Retardation and Developmental Disabilities*, 78 A.D.2d 858, 432 N.Y.S.2d 633 (2d Dep't 1980); *Town of Oyster Bay v. New York Office of Mental Retardation and Developmental Disabilities*, No. 13767/84 (Sup. Ct. Nassau County 1984); *City of Fulton v. Prevost*, No. 79-1451 (Sup. Ct. Oswego County 1979). A sponsoring agency can give a

noted that "prejudice and cost to the agency inevitably increase with delay."¹⁰⁵

However, if the municipality suggests an alternate site that is satisfactory as to the nature, size and community support requirements of the proposed residence and the area in which the site is located does not already contain an overconcentration of similar facilities,¹⁰⁶ the sponsoring agency must establish its residence at the site suggested by the municipality.¹⁰⁷ Considering that the agency must have a specific site in mind to commence the Padavan procedures and may have to purchase the specific site or an option to keep the site available prior to the conclusion of the Padavan procedures,¹⁰⁸ the statutory provision requiring a sponsoring agency to take the municipality's site if satisfactory may force sponsoring agencies to finance two houses for the purpose of establishing one residence. On the other hand, a sponsoring agency may be reluctant to purchase and develop a site for fear that it may be forced to purchase the municipality's suggested site. Thus, the statutory mandate that a sponsoring agency take the municipality's suggested site if suitable does not facilitate the development of community residences.

Where the suggested site is not satisfactory to the sponsoring agency, it must notify the municipality, which will have fifteen days to suggest another suitable site.¹⁰⁹ One court has held correctly that the municipality can only suggest one alternative site after its initial suggested site is rejected because a municipality should not be permitted to name site after site to delay the establishment of a res-

municipality an extension of the forty-day period. See *Birch Lane Ad Hoc Committee v. Slezak*, No. 3159/82 (Sup. Ct. Monroe County 1982), *aff'd*, 97 A.D.2d 985, 469 N.Y.S.2d 829 (4th Dep't 1983).

105. *City of Oswego v. Prevost*, 91 A.D.2d 848, 849, 458 N.Y.S.2d 414, 415 (4th Dep't 1982), *appeal dismissed*, 58 N.Y.2d 1033, 448 N.E.2d 1354, 462 N.Y.S.2d 443 (1983).

106. N.Y. MENTAL HYG. LAW § 41.34(c)(4) (McKinney Supp. 1984-1985).

107. *Id.* See *Talercio v. Letchworth Village Developmental Disabilities Servs. Office*, No. 738/83 (Sup. Ct. Orange County 1984), in which the court held that a sponsoring agency was required by the statute to establish a community residence at a satisfactory site proposed by a municipality.

108. See *supra* note 84.

109. N.Y. MENTAL HYG. LAW § 41.34(c)(4) (McKinney Supp. 1984-1985). A hearing pursuant to Mental Hygiene Law § 41.34(c)(5) may be scheduled during this period to take place after the fifteen-day period has expired. *Community Bd. No. 3 v. New York Office of Mental Retardation and Developmental Disabilities*, 76 A.D.2d 851, 428 N.Y.S.2d 520 (2d Dep't 1980), *appeal dismissed*, 53 N.Y.2d 839 (1981).

idence.¹¹⁰ This approach is consistent with the stated aims of the statute.¹¹¹

4. Hearing

If the municipality objects that the establishment of a residence would result in a concentration of community residences and similar facilities creating a substantial alteration of the area,¹¹² or if the sponsoring agency and the municipality cannot agree on a site,¹¹³ either party may request an immediate hearing before the commissioner¹¹⁴ to resolve the issue.¹¹⁵ While the statute dictates that the commissioner "shall personally or by a hearing officer conduct such a hearing within fifteen days of such a request,"¹¹⁶ one court

110. *Birch Lane Ad Hoc Committee v. Slezak* No. 3159/82, (Sup. Ct. Monroe County 1982), *aff'd*, 97 A.D.2d 985, 469 N.Y.S.2d 829 (4th Dep't 1983). The lower court in this case correctly recognized the tactics of the municipality stating that the municipality's interpretation of the statute "would enable any municipality to hamstring, at will, the efforts of the sponsoring agency, a result plainly contrary to the purpose of Mental Hygiene Law § 41.34." *Id.* slip op. at 6.

111. *See supra* notes 50-60 and accompanying text.

112. N.Y. MENTAL HYG. LAW § 41.34(c)(5) (McKinney Supp. 1984-1985).

113. *Id.*

114. *Id.* The hearing would be held either before the Commissioner of the Office of Mental Retardation and Developmental Disabilities for a residence for mentally retarded, developmentally disabled, or autistic persons or before the Commissioner of the Office of Mental Health for a residence for mentally ill persons. *Id.*

115. N.Y. MENTAL HYG. LAW § 41.34(c)(5) (McKinney Supp. 1984-1985). It is hard to imagine why a municipality opposing a community residence site would want to request a hearing, as a community residence cannot be established where there is an objection unless a hearing is held and the Commissioner rules in favor of the sponsoring agency. If a municipality does not object to a community residence site, no hearing need be held and the Commissioner does not have to make findings on the issue of substantial alteration. *Dunleavy v. Introne*, N.Y.L.J., Aug. 5, 1981, at 13, col. 1 (Sup. Ct. Bronx County 1981).

116. N.Y. MENTAL HYG. LAW. § 41.34(c)(5) (McKinney Supp. 1984-1985). Even if the State is the sponsoring agency as it is statutorily permitted to be, *id.* § 41.34(a)(2) (McKinney Supp. 1984-1985), there should be no reason why the Commissioner should disqualify himself as hearing officer as in administrative hearings, an agency will serve as both the applicant and the hearing officer, or the prosecutor and the hearing officer, without legal infirmity. *See Withrow v. Larkin*, 421 U.S. 35, 55 (1975); *Sharkey v. Thurston*, 268 N.Y. 123, 128, 196 N.E. 766, 768 (1935); *Amos v. Bd. of Educ.*, 54 A.D.2d 297, 304, 388 N.Y.S.2d 435, 440 (4th Dep't 1976), *aff'd*, 43 N.Y.2d 706, 372 N.E.2d 41, 401 N.Y.S.2d 207 (1977); *Felin Assocs. Inc. v. Altman*, 41 A.D.2d 825, 342 N.Y.S.2d 752 (1st Dep't 1973), *aff'd*, 34 N.Y.2d 895, 316 N.E.2d 718, 359 N.Y.S.2d 283 (1974). As the court of appeals said in *Sharkey*, "when the statute clearly requires the hearing to be held before a designated administrative officer and no other officer can hold the hearing, then the language of the statute may not be disregarded, nor the legislative intent defeated by holding that the officer is disqualified." 268 N.Y. at 128, 196 N.E. at 768.

has held that a hearing held more than fifteen days after a request is not invalid.¹¹⁷

At the hearing, the burden of proof is on the municipality to show that the establishment of the proposed facility would create an overconcentration of residences resulting in the substantial alteration of the area.¹¹⁸ The Padavan Law neither defines "substantial alteration"¹¹⁹ nor mandates a distance limit between residences or quotas for the number of mentally disabled persons that can live in a municipality. While the lack of a definition for the term "substantial alteration" may lead to more litigation, the Padavan Law's approach is preferable to those employed elsewhere.¹²⁰ A distance limit between residences without regard to the topography or nature of an area is arbitrary, and the notion that a quota can be placed on the numbers of a certain type of person to live in an area is abhorrent and probably unconstitutional.¹²¹ The "substantial alteration" standard is of benefit to both communities and to mentally disabled persons, who may not benefit from living in a substantially altered area,¹²² and it is reasonable to let the courts decide,

117. See, e.g., *Town of Pleasant Valley v. Wassaic Developmental Disabilities Servs. Office*, 92 A.D.2d 543, 459 N.Y.S.2d 109 (2d Dep't 1983).

118. *Town of Hempstead v. Commissioner*, 89 A.D.2d 850, 851, 453 N.Y.S.2d 32, 33 (2d Dep't 1982); *Grasmere Homeowners' Ass'n v. Introne*, 84 A.D.2d 778, 779, 443 N.Y.S.2d 956, 957 (2d Dep't 1981). The municipality must prove its case with evidence of a "concrete and of a convincing nature." *Id.* at 779, 443 N.Y.S.2d at 957. Conclusory allegations cannot sustain a municipality's objections. See *id.*; *Town of Hempstead v. Comm'r*, 78 A.D.2d 677, 432 N.Y.S.2d 399 (2d Dep't 1980); *Town of Greenburgh v. Coughlin*, 73 A.D.2d 672, 423 N.Y.S.2d 209 (2d Dep't 1979), *lv. to appeal denied*, 49 N.Y.2d 704, 404 N.E.2d 1341, 427 N.Y.S.2d 1025 (1980). Placing the burden of proof on the objecting municipality is consistent with New York State's Administrative Procedure Act § 306 which places the burden on the party initiating the hearing. 1975 N.Y. Laws ch. 167, § 1. Were it not for the objection of the municipality, the sponsoring agency would be free to establish the community residence without a hearing. See N.Y. MENTAL HYG. LAW § 41.34(c)(1)(C), (c)(3) (McKinney Supp. 1984-1985).

119. See N.Y. MENTAL HYG. LAW § 41.34(c)(5) (McKinney Supp. 1984-1985).

120. See MINN. STAT. ANN. § 245.812(a) (West 1982), which states:

Under no circumstances may the commissioner newly license any group residential facility pursuant to sections 245.781 to 245.812 and 252.28, subdivision 2 if such residential facility will be within 1,320 feet of any existing group residential facility unless the appropriate town, municipality or county zoning authority grants the facility a conditional use or special use permit.

Id.

121. See, e.g., *Shapiro v. Thompson*, 394 U.S. 618 (1969), which found unconstitutional state statutes whose aim were to deter indigents from settling within the states' boundaries.

122. See SITE SELECTION STUDY *supra* note 7, at 26-27.

based on the record of a fact-finding hearing, whether an area would be substantially altered by a residence.¹²³

5. Determination

In reviewing a municipality's objections to a community residence, the commissioner must consider "the need for such facilities in the municipality."¹²⁴ However, a municipality's objections cannot be sustained solely on the ground that no need was shown at the hearing.¹²⁵ Although some municipalities have argued that the need must exist in the specific municipality, the Appellate Division of the New York State Supreme Court, Second Department, has correctly held that a showing of need in the general community as opposed to the smaller municipality is sufficient.¹²⁶ This interpretation is logical—any other reading of the statute would discourage the establishment of residences in smaller municipalities and, with regard to small incorporated villages and New York City where the relevant municipality is the local community board,¹²⁷ would require sponsoring agencies to engage in detailed, unnecessary record-keeping to determine the precise "municipality" in which each prospective resident lives. Additionally, this requirement would make it more difficult for sponsoring agencies seeking to establish community residences for persons afflicted with rarer forms of mental disabilities and would not promote the avoidance of a disproportionate distribution of community residences.

In determining whether an area would be substantially altered, the commissioner must consider the existing¹²⁸ concentration of community residences, similar residences licensed by other state

123. The constitutionality of this portion of the Padavan Law was upheld against a municipality's challenge that the standard was too vague. *Incorporated Village of Old Field v. Introne*, 104 Misc. 2d 122, 124, 430 N.Y.S.2d 192, 194 (Sup. Ct. Suffolk County 1980).

124. N.Y. MENTAL HYG. LAW § 41.34(c)(5) (McKinney Supp. 1984-1985); see *Town of Hempstead v. Comm'r*, 97 A.D.2d 826, 468 N.Y.S.2d 710 (2d Dep't 1983).

125. *Town of Pound Ridge v. Introne*, 81 A.D.2d 890, 890, 439 N.Y.S.2d 54, 55 (2d Dep't 1981).

126. *Id.* at 890, 439 N.Y.S.2d at 55. In *Town of Pound Ridge*, the court held that a showing of need for the entire Westchester County was sufficient for showing that there was a need for this residence in Pound Ridge, a town in Westchester County. *Id.*

127. See N.Y. MENTAL HYG. LAW § 41.34(a)(3) (McKinney Supp. 1984-1985).

128. *Roberts v. Selzak*, 89 A.D.2d 559, 452 N.Y.S.2d 113 (2d Dep't 1982) (court held that commissioner did not have to consider facility that was being planned but was not in operation).

agencies¹²⁹ and any other facilities in proximity to the site selected which provide residential services to a significant number of persons who formerly have received in-patient services in facilities operated by the Office of Mental Health or the Office of Mental Retardation and Developmental Disabilities.¹³⁰ Several courts have decided which "similar residences" must be considered by the commissioner.¹³¹ The Appellate Division of the New York State Supreme Court, Fourth Department, has held that only residences for four to fourteen persons must be considered.¹³² The second department, however, has held that a family care home for three persons must be considered by the commissioner since such home was a "community residence" as defined by the Social Services Law.¹³³ Recently, the second department has held that a nursing home and a health-related facility housing over 100 persons were not "similar facilities" and did not have to be considered by the commissioner.¹³⁴ The approach of the second department appears to be more logical, and the fourth department probably now would concur with the approach of its sister court, since the 1982 amendments to the Padavan Law apply the statutory procedures to residences housing one to three persons.

The commissioner can sustain a municipality's objection only if he determines that the nature and character of the area in which the facility is to be located would be substantially altered as a result of the establishment of the residence.¹³⁵ While the statute states that "the commissioner shall make a determination within thirty days of the hearing," courts have held that determinations made more than

129. N.Y. MENTAL HYG. LAW § 41.34(c)(5) (McKinney Supp. 1984-1985).

130. *Id.*

131. *Town of Hempstead v. Comm'r*, 97 A.D.2d 826, 468 N.Y.S.2d 710 (2d Dep't 1983); *Spielman v. Introne*, 88 A.D.2d 958, 451 N.Y.S.2d 194 (2d Dep't 1982); *Village of Newark v. Introne*, 84 A.D.2d 936, 446 N.Y.S.2d 689 (4th Dep't 1981); *Town of Onondaga v. Introne*, 81 A.D.2d 750, 438 N.Y.S.2d 407 (4th Dep't 1981).

132. *Village of Newark v. Introne*, 84 A.D.2d 936, 937, 446 N.Y.S.2d 689, 690 (4th Dep't 1981). In *Town of Onondaga v. Introne*, 81 A.D.2d 750, 438 N.Y.S.2d 407 (4th Dep't 1981), the appellate division held that a hospital and a juvenile detention center did not have to be considered by the commissioner in determining overconcentration. *Id.*

133. *Spielman v. Introne*, 88 A.D.2d 958, 451 N.Y.S.2d 194 (2d Dep't 1982); N.Y. SOC. SERV. LAW § 463 (McKinney 1983).

134. *Town of Hempstead v. Comm'r*, 97 A.D.2d 826, 468 N.Y.S.2d 710 (2d Dep't 1983).

135. N.Y. MENTAL HYG. LAW § 41.34(c)(5) (McKinney Supp. 1984-1985); *see, e.g., Town of Hempstead v. Comm'r*, 78 A.D.2d 677, 432 N.Y.S.2d 399 (2d Dep't 1980); *Town of Greenburgh v. Coughlin*, 73 A.D.2d 672, 423 N.Y.S.2d 209 (2d Dep't 1979), *lv. to appeal denied*, 49 N.Y.2d 704, 404 N.E.2d 1341, 427 N.Y.S.2d 1025 (1980).

thirty days after the hearing are valid.¹³⁶ Municipalities objecting to community residence sites are not prejudiced by a tardy determination since a community residence cannot be established until the commissioner has rendered a determination in favor of the residence.¹³⁷

6. Review

The Padavan Law states that "[r]eview of a decision rendered by a commissioner pursuant to this section may be had in a proceeding pursuant to article seventy-eight of the [C]ivil [P]ractice [L]aw and [R]ules [CPLR] commenced within thirty days of the determination of the commissioner."¹³⁸ Since the statute of limitations for challenging other governmental determinations pursuant to article seventy-eight is four months,¹³⁹ the shortened statute of limitations appears to be aimed at expediting litigation challenging community residences. However, since proceedings challenging decisions rendered by a commissioner as not based upon substantial evidence must be transferred to the appellate division¹⁴⁰ and a petitioner has up to

136. *Town of Pleasant Valley v. Wassaic Developmental Disabilities Servs. Offices*, 92 A.D.2d 543, 544, 459 N.Y.S.2d 109, 112 (2d Dep't 1983) (determination was one day late); *Incorporated Village of Old Field v. Introne*, No. 80-1830 (Sup. Ct. Suffolk County 1980) (determination rendered after statutory period had expired).

137. See N.Y. MENTAL HYG. LAW § 41.34(e) (McKinney Supp. 1984-1985) (residences cannot be established until compliance with Padavan Law procedures).

138. N.Y. MENTAL HYG. LAW § 41.34(d) (McKinney Supp. 1984-1985); see *Kayser v. Introne*, No. 27611/79 (Sup. Ct. Kings County 1980), *aff'd*, 80 A.D.2d 751, 436 N.Y.S. 905 (2d Dep't 1981).

139. N.Y. C.P.L.R. § 217 (McKinney 1971); see *Community Board No. 3 v. New York Office of Mental Retardation and Developmental Disabilities*, 76 A.D.2d 851, 428 N.Y.S.2d 520 (2d Dep't 1980), *appeal dismissed*, 53 N.Y.2d 839 (1981); (determination challenged was actual operating license granted by Commissioner), *Town of Mount Pleasant v. State of New York Office of Mental Retardation and Developmental Disabilities*, No. 21747/82 (Sup. Ct. Westchester County 1983) (challenges to various procedural determinations made by commissioner during Padavan Law procedures subjected to four-month statute of limitations of CPLR § 217); *Romita v. New York State Office of Mental Retardation*, No. 4537/82, (Sup. Ct. N.Y. County 1982) (determination challenged was decision to open residence without hearing).

The doctrine of laches has also been applied against municipalities and homeowners who delay their objections about Padavan law procedures. See *Community Board No. 3 v. New York Office of Mental Retardation and Development Disabilities*, 76 A.D.2d 851, 853, 428 N.Y.S.2d 520, 522 (2d Dep't 1980), *appeal dismissed*, 53 N.Y.2d 839 (1981); *Zureck v. New York State Office of Mental Retardation and Developmental Disabilities*, No. 939/85 (Sup. Ct. Suffolk County 1985); *Town of Webster v. Slezak*, No. 1993/82, (Sup. Ct. Monroe County 1982); *Brennan v. Office of Mental Retardation and Developmental Disabilities of the State of New York*, No. 21697/81 (Sup. Ct. Warren County 1981).

140. See N.Y. C.P.L.R. §§ 7803(4), 7804(g) (McKinney 1981 & Supp. 1984-1985).

nine months in some appellate divisions to perfect a transferred proceeding,¹⁴¹ the shortened statute of limitations does not expedite proceedings against community residences. A more serious defect in the review section of the Padavan procedures is its failure to include the words "by the municipality" after "[r]eview of a decision rendered by a commissioner pursuant to this section may be had"¹⁴² This omission has opened the door to many neighbors and homeowner groups challenging the decisions of the commissioner even where the municipality has not challenged said decision.¹⁴³ To date, no commissioner's determination that a community residence site was appropriate has been challenged successfully in an article seventy-eight proceeding.¹⁴⁴

C. Zoning and Other Local Ordinances

One of the few benefits of the statute to sponsoring agencies is that a community residence established pursuant to the Padavan Law is deemed a family unit for the purpose of local laws and ordinances.¹⁴⁵ However, this benefit was bestowed upon community

141. 22 N.Y.C.R.R. § 600.11(a)(3) (nine months in First Department); 22 N.Y.C.R.R. § 670.13(c), 670.20(f) (nine months in Second Department).

142. See N.Y. MENTAL HYG. LAW § 41.34(d) (McKinney Supp. 1984-1985).

143. See *infra* notes 195-216 and accompanying text.

144. See *Town of Hempstead v. Comm'r*, 97 A.D.2d 826, 468 N.Y.S.2d 710 (2d Dep't 1983); *Incorporated Village of Westbury v. Prevost*, 96 A.D.2d 1100, 467 N.Y.S.2d 70 (2d Dep't 1983); *Town of Pleasant Valley v. Wassaic Developmental Disabilities Servs. Office*, 92 A.D.2d 543, 459 N.Y.S.2d 109 (2d Dep't 1983); *Town of Hempstead v. Comm'r*, 89 A.D.2d 850, 453 N.Y.S.2d 32 (2d Dep't 1982); *Village of Newark v. Introne*, 84 A.D.2d 936, 446 N.Y.S.2d 689 (4th Dep't 1981); *Grasmere Homeowners Ass'n v. Introne*, 84 A.D.2d 778, 443 N.Y.S.2d 956 (2d Dep't 1981); *Community Planning Bd. No. 18 v. Introne*, 84 A.D.2d 564, 443 N.Y.S.2d 262 (2d Dep't 1981); *Incorporated Village of Old Field v. Introne*, 81 A.D.2d 906, 441 N.Y.S.2d 418 (2d Dep't 1981); *Town of Onondaga v. Introne*, 81 A.D.2d 750, 438 N.Y.S.2d 407 (4th Dep't 1981); *Town of Pound Ridge v. Introne*, 81 A.D.2d 890, 439 N.Y.S.2d 54 (2d Dep't 1981); *Town of Cortlandt v. New York Office of Mental Retardation and Developmental Disabilities*, 80 A.D.2d 648, 436 N.Y.S.2d 1013 (2d Dep't 1981); *Town of Hempstead v. Commissioner*, 78 A.D.2d 677, 432 N.Y.S.2d 399 (2d Dep't 1980); *Lake Hawthorne Homeowners Ass'n, Inc. v. Coughlin*, 75 A.D.2d 855, 432 N.Y.S.2d 154 (2d Dep't 1980), *lv. to appeal denied*, 52 N.Y.2d 703, 437 N.Y.S.2d 1026 (1981); *City of Schenectady v. Coughlin*, 74 A.D.2d 985, 426 N.Y.S.2d 328 (3d Dep't 1980); *Town of Greenburgh v. Coughlin*, 73 A.D.2d 672, 423 N.Y.S.2d 209 (2d Dep't 1979), *lv. to appeal denied*, 49 N.Y.2d 704, 404 N.E.2d 1341, 427 N.Y.S.2d 1025 (1980); *Birch Lane Ad Hoc Committee v. Slezak*, No. 3159/82 (Sup. Ct. Monroe County 1982), *aff'd*, 97 A.D.2d 985, 469 N.Y.S.2d 829 (4th Dep't 1983).

145. N.Y. MENTAL HYG. LAW § 41.34(f) (McKinney Supp. 1984-1985). This

statute is consistent with statutes in other states. See *supra* note 60.

Several law review articles have been written on this topic. See Boyd, *Strategies in Zoning and Community Living Arrangements for Retarded Citizens: Parens Patriae Meets Police Powers*, 25 VILL. L. REV. 273 (1980); Hopperton, *State Legislative Strategy for Ending Exclusionary Zoning of Community Homes*, 19 URB. L. ANN. 47 (1980); Kressel, *The Community Residence Movement: Land Use Conflicts & Planning Imperatives*, 5 N.Y.U. REV. L. & SOC. CHANGE 137 (1975); Lippincott, "A Sanctuary for People": *Strategies for Overcoming Zoning Restrictions on Community Houses for Retarded Persons*, 31 STAN. L. REV. 767 (1979); Tuoni, *Deinstitutionalization and Community Resistance by Zoning Restrictions*, 66 MASS. L. REV. 125 (1981); Note, *Zoning the Mentally Retarded into Single-Family Residential Areas: A Grape of Wrath or the Fermentation of Wisdom*, 1979 ARIZ. ST. L.J. 385; Note, *Zoning for the Mentally Ill: A Legislative Mandate*, 16 HARV. J. LEGIS. 853 (1979); Note, *Exclusionary Zoning of Community Facilities*, 12 N.C. CENTRAL L.J. 167 (1980); Note, *Zoning and Community Group Homes for the Mentally Retarded—Boon or Bust?*, 7 OHIO N.U.L. REV. 64 (1980); NOTE, *A Review of the Conflict Between Community-Based Group Homes for the Mentally Retarded and Restrictive Zoning*, 82 W. VA. L. REV. 669 (1980). Decisions of other state courts have held that local zoning ordinances could not be used to block the establishment of community residences. See *Glennon Heights, Inc. v. Central Bank & Trust*, 658 P.2d 872 (Colo. 1983); *Hessling v. City of Broomfield*, 193 Colo. 124, 563 P.2d 12 (1977); *Oliver v. Zoning Comm'n*, 31 Conn. Supp. 197, 326 A.2d 841 (1974); *Linn County v. City of Hiawatha*, 311 N.W.2d 95 (Iowa 1981); *Tucker v. Special Children's Found., Inc.*, 449 So. 2d 45 (La. Ct. App. 1984); *City of West Monroe v. Ouachita Ass'n for Retarded Children, Inc.*, 402 So. 2d 259 (La. Ct. App. 1981); *Fitchburg Housing Auth. v. Bd. of Zoning Appeals of Fitchburg*, 380 Mass. 869, 406 N.E.2d 1006 (1980); *Northwest Residence, Inc. v. City of Brooklyn Center*, 352 N.W.2d 764 (Minn. 1984); *Costley v. Caromin House*, 313 N.W.2d 21 (Minn. 1981); *Northern N.H. Mental Health Housing, Inc. v. Town of Conway*, 121 N.H. 811, 435 A.2d 136 (1981); *Region 10 Client Management, Inc. v. Town of Hampstead*, 120 N.H. 885, 424 A.2d 207 (1980); *Bénger v. State*, 71 N.J. 206, 364 A.2d 993 (1976); *Mental Health Ass'n of Union County, Inc. v. City of Elizabeth*, 180 N.J. Super. 304, 434 A.2d 688 (N.J. 1981); *Mongony v. Bevilacqua*, 432 A.2d 661 (R.I. 1981); *Nichols v. Tullahoma Open Door, Inc.*, 640 S.W.2d 13 (Tenn. Ct. App. 1982); *cf. Civitans Care, Inc. v. Board of Adjustment of Huntsville*, 437 So. 2d 540 (Ala. Civ. App. 1983) (court held community residence was "boarding house" and not permissible in neighborhood zoned for family-only occupancy); *Roundup Found., Inc. v. Bd. of Adjustment of Denver*, 626 P.2d 1154 (Colo. App. 1981) (operation of group home for mentally retarded children not permitted use in R-2 zoned district); *Macon Ass'n for Retarded Citizens v. Macon-Bibb County Planning and Zoning Comm'n*, 252 Ga. 484, 314 S.E.2d 218 (1984) (refusal to permit group home in single-family zoning district held not to constitute unconstitutional discrimination against mentally retarded); *Metropolitan Dev. Comm'n of Marion County v. The Villages, Inc.*, 464 N.E.2d 367 (Ind. App. 1984) (proposed group home did not qualify as single-family dwelling or accessory use under zoning ordinance); *Penobscot Area Housing Dev. Corp. v. City of Brewer*, 434 A.2d 14 (Me. 1981) (group home did not constitute single-family use under zoning ordinance); *Garcia v. Siffrin Residential Ass'n*, 63 Ohio St. 2d 259, 407 N.E.2d 1369 (1980) (state statute purporting to override local zoning ordinances and allow community residential facilities in residential districts held invalid).

In *Cleburne Living Center, Inc. v. City of Cleburne, Texas*, 726 F.2d 191 (5th Cir. 1984), the Fifth Circuit Court of Appeals held that a zoning ordinance excluding community residences from use in an "apartment house district" was unconsti-

residences by the courts prior to the enactment of the statute.¹⁴⁶ Despite the clarity of the statute, some municipalities have attempted unsuccessfully to apply institutional codes to community residences.¹⁴⁷ Similarly, attempts to declare this section of the statute unconstitutional have been unsuccessful.¹⁴⁸

Non-governmental private sponsoring agencies still must follow the single-family ordinances of the local municipality before establishing community residences.¹⁴⁹ However, where the state or a state

tutional. *Cleburne*, 726 F.2d at 201. The Supreme Court of the United States affirmed the fifth circuit's order on July 1, 1985.

146. See *supra* note 38. However, those community residence cases involved a family model of houseparents and residents. It is not as clear that community residences without houseparents would have been deemed single family units for the purpose of local zoning laws prior to the Padavan Law. See *Crane Neck Ass'n v. NYC/Long Island County Servs. Group*, 61 N.Y.2d 154, 159-60, 460 N.E.2d 1336, 1338-39, 472 N.Y.S.2d 901, 904, *cert. denied*, 105 S. Ct. 60 (1984).

147. *Talercio v. Letchworth Village Developmental Disabilities Servs. Office*, No. 738/83 (Sup. Ct. Orange County 1984); *Town of Greenburgh v. Introne*, No. 11996/81 (Sup. Ct. Westchester County 1982); *New Vistas of Rockland v. Greenblatt*, No. 4957/81, (Sup. Ct. Rockland County 1982); *Dunleavy v. Introne*, N.Y.L.J., Aug. 5, 1981, at 13, col. 1 (Sup. Ct. Bronx County 1981).

In a similar vein, courts have rejected challenges by objectants to community residences claiming that community residence sponsors should be forced to file environmental impact statements or comply with Environmental Conservation Law §§ 8-0101 to -0117 and the environmental regulations of the State of New York. See N.Y. ENVTL. CONSERV. L. §§ 8-0101 to -0117 (McKinney 1984 & Supp. 1984-1985), N.Y. ADMIN. CODE tit. 6, §§ 617-617.19 (1978-1984). Pursuant to the regulations, specifically N.Y. ADMIN. CODE tit. 14, § 52.14 (Type II)(h), the Commissioner has determined that such residences are "Type II" actions requiring no environmental review and the courts have upheld this determination. *Brennan v. Office of Mental Retardation and Developmental Disabilities of New York*, No. 21697/81 (Sup. Ct. Warren County 1981), *Town of Pleasant Valley v. Wassaic Developmental Disabilities Servs. Office*, No. 2983-82 (Sup. Ct. Dutchess County 1983). Since other single family dwellings need not engage in environmental review before settling into a community, the commissioner's determination and the court decisions upholding it are logical. It should be noted that projects on a much grander scale than community residences have required little environmental review more than a commissioner's determination that the project is not of environmental significance. See *Town of Yorktown v. New York State Dep't of Mental Hygiene*, 92 A.D.2d 897, 898, 459 N.Y.S.2d 891, 892 (2d Dep't), *aff'd*, 59 N.Y.2d 999, 453 N.E.2d 1254, 466 N.Y.S.2d 965 (1983) (drug rehabilitation facility for 300 persons); *Cohalan v. Carey*, 88 A.D.2d 77, 452 N.Y.S.2d 639 (2d Dep't), *lv. to appeal denied*, 57 N.Y.2d 672, 439 N.E.2d 886, 454 N.Y.S.2d 77 (1982) (establishment of prison); *Harlem Valley United Coalition v. Hall*, 80 A.D.2d 851, 436 N.Y.S.2d 764 (2d Dept), *aff'd*, 54 N.Y.2d 977, 430 N.E.2d 909, 446 N.Y.S.2d 33 (1981) (center for delinquents).

148. See *infra* notes 153-82 and accompanying text.

149. N.Y. MENTAL HYG. LAW § 41.34(f) (McKinney Supp. 1984-1985); N.Y. ADMIN. CODE tit. 14, §§ 586, 686; 1979 Attorney General's Opinion 138-40.

agency is the sponsoring agency, it is exempt from application of the local ordinances.¹⁵⁰

D. Constitutionality

As stated in the Declaration¹⁵¹ and the Governor's Memorandum,¹⁵² the Padavan Law was intended to facilitate development of community residences and deinstitutionalization and to recognize the community concerns regarding such residences.¹⁵³ However, municipalities, neighbors of prospective residences, and sponsoring agencies all have expressed dissatisfaction with the statute and have urged the courts to declare the statute unconstitutional.¹⁵⁴ On every occasion, the courts have upheld the constitutionality of the statute.

In *Incorporated Village of Old Field v. Introne*,¹⁵⁵ a municipality tried to have the statute declared invalid as an unconstitutional delegation of power by the legislature, as void for vagueness, as violative of the village's "right to due process and equal protection of the laws" and as disregarding the village's zoning ordinance.¹⁵⁶ The New York State Supreme Court, Suffolk County, rejected the village's challenge to the statute on all grounds. The court first held that the village did not have standing to challenge the statute, citing cases which held that certain types of managerial and discretionary government decisions cannot be reviewed by a court.¹⁵⁷ However, the cases relied on by the court were mandamus proceedings and not challenges to the constitutionality of statutes.¹⁵⁸ In actuality, the municipality had no standing to challenge the constitutionality

150. *Town of Pleasant Valley v. Wassaic Developmental Disabilities Servs. Office*, No. 2983-82 (Sup. Ct. Dutchess County 1983); *Town of Greenburgh v. Introne*, No. 11996/81, slip op. at 3 (Sup. Ct. Westchester County 1982); *Gedney Ass'n v. New York State Dep't of Mental Hygiene*, 112 Misc. 2d 209, 213, 446 N.Y.S.2d 876 (Sup. Ct. Westchester County 1982); see also *County of Westchester v. Village of Mamaroneck*, 22 A.D.2d 143, 255 N.Y.S.2d 290 (2d Dep't 1964), *aff'd*, 16 N.Y.2d 940, 212 N.E.2d 442, 264 N.Y.S.2d 925 (1965) (county sewage project exempt from zoning restrictions of village in which project located); *Incorporated Village of Old Field v. Introne*, 104 Misc. 2d 122, 127, 430 N.Y.S.2d 192, 196 (Sup. Ct. Suffolk County 1980) (local zoning ordinance which conflicts with and hinders state policy is void).

151. See *supra* notes 53-57.

152. See *supra* notes 58-60.

153. 1978 N.Y. Laws ch. 468, § 1; 1978 McKinney's Sess. Laws at 1821-22.

154. See *infra* notes 155-95 and accompanying text.

155. 104 Misc. 2d 122, 430 N.Y.S.2d 192 (Sup. Ct. Suffolk County 1980).

156. *Id.* at 123-24, 430 N.Y.S.2d at 194.

157. *Id.*

158. *Id.* More specifically, the court cited *Abrams v. New York City Transit Auth.*, 39 N.Y.2d 990, 355 N.E.2d 289, 387 N.Y.S.2d 235 (1976), and *Jones v. v.*

of the statute except the zoning provisions which the municipality could claim impinged upon its rights under the "home rule" provisions of the New York State Constitution.¹⁵⁹ Thus, the court reached the right conclusion with regard to the municipality's lack of standing for the wrong reasons.

In discarding the village's claim that the statute was an unconstitutional delegation of power because it lacked standards and criteria for determining what constitutes "substantial alteration," the court noted that the legislature was not required to furnish a "precise or specific formula"¹⁶⁰ but only had to "[lay] down 'an intelligible principle,' specifying the standards or guides in as detailed a fashion as is reasonably practicable in the light of the complexities of the particular area to be regulated."¹⁶¹ The court held that the standards to be applied by the commissioner in reviewing a municipality's objections to a community residence site were sufficiently specific in light of the standards imposed by other statutes that withstood vagueness challenges.¹⁶² The court also rejected the village's allegation that it was denied due process and equal protection,¹⁶³ properly questioning whether these concepts applied to municipal corporations and noting that a municipality had no right to object to a community residence site proposed prior to enactment of the statute.¹⁶⁴

Finally, the court correctly held that the Padavan Law superseded the local village ordinances, noting that the state's police power can be invoked to override local ordinances where a subject of substantial state concern,¹⁶⁵ such as the care of mentally disabled persons in the state, is involved.¹⁶⁶ The court also noted that the state, as

Beame, 45 N.Y.2d 402, 408, 380 N.E.2d 277, 408 N.Y.S.2d 449 (1978), two cases that involved challenges to policies of municipalities and not the constitutionality of any statute.

159. See *Williams v. Mayor*, 289 U.S. 36, 40 (1933); *City of New York v. Richardson*, 473 F.2d 923, 929 (2d Cir.), *cert. denied*, 412 U.S. 950 (1973); *Town of Black Brook v. State*, 41 N.Y.2d 486, 362 N.E.2d 576, 393 N.Y.S.2d 946 (1977); *Jeter v. Ellenville Cent. School Dist.*, 41 N.Y.2d 283, 360 N.E.2d 1086, 392 N.Y.S.2d 403 (1977); *Wambat Realty Corp. v. State*, 41 N.Y.2d 490, 362 N.E.2d 581, 393 N.Y.S.2d 949 (1977).

160. *Incorporated Village of Old Field v. Introne*, 104 Misc. 2d 122, 125, 430 N.Y.S.2d 192, 195 (Sup. Ct. Suffolk County 1980).

161. *Id.*

162. *Id.* The court noted that statutory standards such as "public interest, convenience or necessity," "public peace, safety and good order" and "public health, safety and general welfare" have been upheld against vagueness challenges. *Id.*

163. *Id.* at 126-27, 430 N.Y.S.2d at 195-96.

164. *Id.* at 126, 430 N.Y.S.2d at 195.

165. *Id.* at 127, 430 N.Y.S.2d at 196.

166. See 104 Misc. 2d at 127, 430 N.Y.S.2d at 196.

sponsoring agent of the residence in question, was free from local control under the doctrine of sovereign immunity.¹⁶⁷ Several other challenges to the statute by municipalities also have been summarily dismissed.¹⁶⁸

In *Zubli v. Community Mainstreaming Associates, Inc.*,¹⁶⁹ the next-door neighbor of a proposed community residence in Kings Point brought an action to enjoin the establishment of the community residence and to declare the Padavan Law unconstitutional.¹⁷⁰ The neighbor alleged that the enactment of the Padavan Law was an unconstitutional zoning change since affected owners did not receive notice and a public hearing.¹⁷¹ Additionally, the neighbor alleged that the Padavan Law was an unreasonable exercise of the state's police power.¹⁷²

The decision of the New York State Supreme Court, Nassau County, that the Padavan Law was constitutional¹⁷³ was upheld by both the appellate division, second department¹⁷⁴ and the New York State Court of Appeals.¹⁷⁵ The supreme court held that the statute was properly enacted since, as an act of general legislation, it required neither notice nor a public hearing to effect the change.¹⁷⁶ More importantly, however, the court held that the Padavan Law was not "an unconstitutional exercise of local zoning authority by the State" but rather an "exercise of the State's fundamental police power for the public good and welfare."¹⁷⁷ The court found that the statute served a legitimate state interest and was not an unreasonable exercise of police power.¹⁷⁸

The most intriguing constitutional challenge to the Padavan Law was raised in *DiBiase v. Piscitelli*.¹⁷⁹ What began as a simple pro-

167. *Id.*

168. *Incorporated Village of Westbury v. Prevost*, 96 A.D.2d 1100, 467 N.Y.S.2d 70 (2d Dep't 1983), *appeal denied*, 62 N.Y.2d 602, 465 N.E.2d 375, 496 N.Y.S.2d 1026 (1984); *Cosgrove v. Introne*, No. 1025/1980 (Sup. Ct. Orange County 1982); *Town of Greenburgh v. Introne*, No. 11996/81 (Sup. Ct. Westchester County 1982).

169. 102 Misc. 2d 320, 423 N.Y.S.2d 982 (Sup. Ct. Nassau County 1979), *aff'd on opinion below*, 74 A.D.2d 624, 425 N.Y.S.2d 263 (2d Dep't), *aff'd as modified*, 50 N.Y.2d 1024, 410 N.E.2d 746, 431 N.Y.S.2d 813 (1980).

170. 102 Misc. 2d at 322, 423 N.Y.S.2d at 985.

171. *Id.* at 331-33, 423 N.Y.S.2d at 991-92.

172. *Id.* at 337, 423 N.Y.S.2d at 994.

173. *Id.* at 335, 423 N.Y.S.2d at 993.

174. 74 A.D.2d 624, 425 N.Y.S.2d 263 (2d Dep't 1980).

175. 50 N.Y.2d 1024, 410 N.E.2d 746, 431 N.Y.S.2d 813 (1980).

176. 102 Misc. 2d at 333, 423 N.Y.S.2d at 992.

177. *Id.* at 335, 339, 423 N.Y.S.2d at 993.

178. *Id.*

179. N.Y.L.J., July 14, 1980, at 14, col. 4 (Sup. Ct. Nassau County 1980), *aff'd*, 87 A.D.2d 611, 448 N.Y.S.2d 35 (2d Dep't 1982), *appeal dismissed*, 57 N.Y.2d 672, 439 N.E.2d 1248, 454 N.Y.S.2d 1034 (1982).

ceeding by a group of neighbors in Westbury, to challenge the decision of a sponsoring agency to establish a community residence and the decision of the village approving the selection of the proposed residence, became an attack on the constitutionality of the statute by both the neighbors and the sponsoring agency.¹⁸⁰ The New York State Supreme Court, Nassau County, dismissed the neighbors' attack on the Padavan Law on the ground that they did not have standing to challenge the statute.¹⁸¹ This result seems inconsistent with *Zubli's* implicit holding that neighbors do have standing to challenge the statute. However, since the constitutional challenges raised by the neighbors in *DiBiase* were the same as those raised in *Zubli*, the *DiBiase* court also rejected the neighbors' claims based on the *Zubli* precedent.¹⁸²

The *DiBiase* court also rejected the sponsoring agency's claim that the statute violated the equal protection clause¹⁸³ and discriminated against mentally retarded persons.¹⁸⁴ The court held that the Padavan Law was reasonably related to the policy sought to be implemented, the facilitation of the establishment of community residences.¹⁸⁵ The court ruled that:

The Padavan Law is not a regulatory statute that exercises restraint or control over a person or his or her property. It merely provides a procedure for establishing and licensing community residential facilities for the mentally retarded. The statute does not abridge any of the fundamental rights of the mentally retarded. They are entitled to those same rights of travel, ownership of property, and pursuit of life, liberty and happiness as other people enjoy. The Padavan Law, through the exercise of the state's police power, only seeks to open new doors to the mentally retarded to free them from the chains of institutionalization.¹⁸⁶

The court, noting that mentally retarded persons do not constitute a suspect class,¹⁸⁷ applied the rational basis test to the statute and

180. N.Y.L.J., July 14, 1980, at 14, col. 4.

181. *Id.* The court found, though, that the neighbors had standing to challenge the determination of the village approving the sponsoring agency's proposed site. *Id.*

182. *Id.*

183. U.S. CONST. amend XIV.

184. N.Y.L.J., July 14, 1980, at 15, col. 2.

185. *Id.*

186. *Id.*

187. *Id.*, see *Matter of Levy v. City of New York*, 38 N.Y.2d 653, 658, 345 N.E.2d 556, 558, 382 N.Y.S.2d 13, 15 (1976), *appeal dismissed*, 429 U.S. 805 (1976). In *Frontiero v. Richardson*, 411 U.S. 677 (1973), Justice Brennan, in his plurality opinion, said:

decided that it did not violate the equal protection clause.¹⁸⁸ The second department affirmed the holding of the supreme court, Nassau County,¹⁸⁹ finding that

[O]n its face, . . . the challenged statute is patently designed to encourage the establishment and licensing of community residential facilities for persons formerly served in State institutions and to insure that providers of care establish such facilities with the participation of local communities in site selection By amending the Mental Hygiene Law, the Legislature expressed a public policy that the needs of the mentally disabled should be met through the concept of group homes in community settings chosen through a process of joint discussion and accommodation between the providers of care and services to the mentally disabled and representatives of the community. Section 41.34 of the Mental Hygiene Law [Padavan Law] is rationally related to the public policy sought to be implemented by the Legislature, and to that extent, is constitutional¹⁹⁰

The result reached by the *DiBiase* court was correct since, with respect to the community residence at issue, the statute worked as anticipated. In *DiBiase*, the sponsoring agency gave the municipality notice of the establishment of the residence, the municipality held public hearings and eventually approved the selection of the home, and the sponsoring agency acquired the home.¹⁹¹ Additionally, the sponsoring agency argued in favor of the constitutionality of the statute when it was initially attacked by the neighbors' group.¹⁹²

what differentiates sex from such nonsuspect statuses as *intelligence* or *physical disability*, and aligns it with the recognized suspect criteria, is that *the sex characteristic frequently bears no relation to ability to perform or contribute to society.*"

Id. at 686 (emphasis added).

The Fifth Circuit Court of Appeals recently found a local ordinance banning community residences in a particular area to be unconstitutional, and in the process, held that the mentally retarded were a "quasi-suspect" class. *Cleburne Living Center, Inc. v. City of Cleburne, Texas*, 726 F.2d 191 (5th Cir. 1984). However, the Supreme Court of the United States on July 1, 1985 vacated the lower court's "quasi-suspect" classification of the mentally retarded in light of its previous decision in *Frontiero*. The Court did affirm the circuit court's order using the rational basis test.

188. N.Y.L.J., July 14, 1980, at 15, col. 2.

189. *DiBiase v. Piscitelli*, 87 A.D.2d 611, 448 N.Y.S.2d 35 (2d Dep't 1982), *appeal dismissed*, 57 N.Y.2d 672, 439 N.E.2d 1248, 454 N.Y.S.2d 1034 (1982).

190. *Id.* at 611-12, 448 N.Y.S.2d at 36.

191. *Id.* A party not aggrieved by a statute cannot attack its constitutionality. *Ulster County Court v. Allen*, 442 U.S. 140, 154-55 (1979); *Oriental Blvd. Co. v. Heller*, 27 N.Y.2d 212, 220, 265 N.E.2d 72, 75, 316 N.Y.S.2d 226, 231 (1970), *appeal dismissed*, 401 U.S. 986 (1971).

192. N.Y.L.J., July 14, 1980, at 15, col. 2.

However, the courts' findings that the statute served the purposes enunciated by the legislature and the governor are somewhat strained since state officials have testified that the statute has, in some instances, impeded the development of new community residences.¹⁹³ Indeed, the state cited the statute's procedural requirements as a reason for requesting an additional four years to comply with the Willowbrook Consent Decree with respect to the number of persons to be moved from Willowbrook to community residences.¹⁹⁴ Perhaps the question of whether a particular application of the statute is rationally related to the public policy sought to be implemented by the legislature would be a triable issue of fact in a case with circumstances different from those in *DiBiase*.

E. Standing

During the 1970's, the New York State Court of Appeals developed the "zone of interests"¹⁹⁵ test of standing to increase the accessibility of courts to aggrieved persons.¹⁹⁶ Under that test, a complainant need only show that an administrative action would have a harmful effect on him and that the interest asserted is arguably within the zone of interests to be protected by the statute.¹⁹⁷ The court of appeals also has held that standing will be denied where a clear legislative intent negates review or where there is no demonstration of injury in fact.¹⁹⁸ Using this liberalized standing test, lower courts have wrongfully permitted neighbors and homeowner associations to challenge decisions on community residence sites where the municipalities in question have acquiesced in or supported the site selected by the sponsoring agency.

In *Grasmere Homeowners' Association v. Introne*,¹⁹⁹ two homeowner associations challenged a commissioner's determination that the establishment of community residences at two contested locations in Staten Island would be appropriate since their presence would

193. See *supra* note 71.

194. *Id.*

195. *Fritz v. Huntington Hosp.*, 39 N.Y.2d 339, 346, 348 N.E.2d 547, 553, 384 N.Y.S.2d 92, 97 (1976); *Dairylea Coop., Inc. v. Walkley*, 38 N.Y.2d 6, 9-10, 339 N.E.2d 865, 867, 377 N.Y.S.2d 451 (1975); *Douglaston Civic Ass'n v. Galvin*, 36 N.Y.2d 1, 7, 324 N.E.2d 317, 321, 364 N.Y.S.2d 830, 835 (1974).

196. *Id.*

197. *Id.*

198. *Fritz*, 39 N.Y.2d at 339, 348 N.E.2d at 547, 384 N.Y.S.2d at 92 (doctors had right to challenge hospital determination denying them staff membership); *Dairylea Coop., Inc.*, 38 N.Y.2d 6, 339 N.E.2d 865, 377 N.Y.S.2d 451 (1975) (milk company had standing to challenge grant of license to competitor).

199. 84 A.D.2d 778, 443 N.Y.S.2d 956 (2d Dep't 1981).

not create an overconcentration of residences resulting in the substantial alteration of their areas.²⁰⁰ The municipality, Community Board #2, did not challenge the commissioner's determination. However, the appellate division, second department held that the association's interests were within the "zone of interests" to be protected by the statute and that the associations had standing to challenge the determination.²⁰¹

In *Karas v. New York State Office of Mental Retardation and Developmental Disabilities*,²⁰² a group of residents in the vicinity of a proposed residence and a homeowner association attempted to enjoin establishment of the facility despite the municipality's approval of the site.²⁰³ The court held that although the municipality would not be able to challenge the site, the neighbors had standing to engage in litigation.²⁰⁴

While acknowledging the liberalized standing test,²⁰⁵ both the *Grasmere Homeowners' Association* and *Karas* courts ignored the court of appeals' holding that standing should be denied where there was "a clear legislative intent negating review"²⁰⁶ as in the case of the Padavan Law. Language pervading the Governor's memorandum clearly demonstrates an intent to reduce the amount of litigation over community residence sites and to limit site selection discussions to municipalities and sponsoring agencies.²⁰⁷ In his memorandum, the Governor said:

These bills . . . implement a far-reaching program to place the dynamic relationship between State and local governments and voluntary providers of care to the mentally ill, mentally retarded and developmentally disabled upon a new footing Senate Bill 8213-B implements my program objective, announced in my

200. *Id.* at 779, 443 N.Y.S.2d at 956.

201. *Id.*

202. No. 15601/82, (Sup. Ct. N.Y. County), *aff'd*, 95 A.D.2d 984, 464 N.Y.S.2d 613 (1st Dep't 1983), *lv. to appeal denied*, 60 N.Y.2d 560, 459 N.E.2d 863, 471 N.Y.S.2d 1028 (1980).

203. *Id.*, slip op. at 2.

204. *Id.*; see also *Birch Lane Ad Hoc Comm. v. Slezak*, No. 3159/82, (Sup. Ct. Monroe County 1982), *aff'd*, 97 A.D.2d 985, 469 N.Y.S.2d 829 (4th Dep't 1983); *DiBiase v. Piscitelli*, N.Y.L.J., July 14, 1980, at 14, col. 6, *aff'd on other grounds*, 87 A.D.2d 611, 448 N.Y.S.2d 35 (2d Dep't 1981), *appeal dismissed*, 57 N.Y.2d 672, 439 N.E.2d 1248, 454 N.Y.S.2d 1034 (1982). In *Grasmere*, *Karas*, *Birch Lane* and *DiBiase*, no appeal was ever taken on the standing issue since the sponsoring agency won on the merits in each case.

205. *Grasmere*, 84 A.D.2d at 778, 443 N.Y.S.2d at 957; *Karas*, No. 15601/82, slip. op. at 3.

206. See *supra* note 198 and accompanying text.

207. 1978 McKinney's Sess. Laws at 1821-22.

State of the State Message, of assuring the involvement of local governments in the process of determining where new community residential facilities will be located [T]he bill aims to facilitate the establishment of community residences by discouraging frivolous legal challenges that have needlessly delayed proper establishment of such facilities in the past, at great cost to the litigants. This legislation attempts to encourage a process of joint discussion and accommodation between the providers of care and services to the mentally disabled and representatives of the community, rather than legal antagonism²⁰⁸

The Governor's program bill also emphasized that the statute was aimed at requiring "municipal involvement in a process of selecting and approving sites selected for such facilities by sponsoring agencies,"²⁰⁹ and "substituting municipal involvement for litigation as the means [for] expression of community opposition to [the] establishment of a facility."²¹⁰ These statements by the Governor clearly demonstrate that only the municipality is to have input into the location of community residence sites and that the statute is intended to discourage litigation.²¹¹ While the language of the Declaration²¹² is less clear on this issue, it points out that the statute was aimed at facilitating development of residences and achieving cooperation between communities and sponsoring agencies²¹³ and those aims are not furthered by the granting of standing to neighbors to challenge community residences. Thus, by permitting neighbors and homeowners associations to challenge community residence sites, the courts have interpreted the Padavan Law contrary to the intentions of its drafters. Without the Padavan Law, neighbors and homeowner groups would not have any basis to challenge most sites.²¹⁴

208. *Id.*

209. Governor's Program Bill No. 303 for 1978, at 1.

210. *Id.*

211. *Id.*; 1978 McKinney's Sess. Laws at 1821-22.

212. 1978 N.Y. Laws ch. 468, § 1.

213. *Id.*

214. *See supra* notes 38, 146 & 150. In summary, homeowners prior to the Padavan Law would have had no basis to challenge a state-operated residence or a privately-run residence with a family-like structure, as in the cases *Little Neck Community Ass'n* and *Incorporated Village of Freeport*. However, homeowners would have had the right to challenge privately-run residences that did not have a family-like structure from being based in a single family zone. *See Douglaston Civic Ass'n v. Galvin*, 36 N.Y.2d 1, 324 N.E.2d 317, 364 N.Y.S.2d 830 (1974). Aside from zoning challenges, though, homeowners do not have the legal or moral right to determine which of their countrymen qualify to be their neighbors, nor the right to exercise dominion and control over property which they do not own. Further, they have no right to maintain the status quo in their neighborhood and their control over property use is only coextensive with the metes and bounds of

Since all of the courts that have granted neighbors and homeowner associations standing have rejected the merits of such groups' claims, the issue of standing has not reached the New York State Court of Appeals. However, in its recent decision in *Crane Neck Association Inc. v. NYC/Long Island County Services Group*,²¹⁵ the court of appeals stated that a "major purpose of section 41.34 [Padavan Law] . . . was to eliminate the legal challenges that were impeding the implementation of the State policy."²¹⁶ Perhaps, this is an indication that the court of appeals would rule differently from the lower courts on the standing issue if a proper case came before it.

IV. Restrictive Covenants

Recognizing their inability to prevent the development of community residences through Padavan Law challenges, homeowners in areas covered by restrictive covenants have attempted to enforce such covenants against community residences on the ground that they are not single-family dwellings.²¹⁷ As a result of a recent New York State Court of Appeals decision,²¹⁸ that avenue is now closed.

The first challenge to the establishment of a community residence on the grounds that it would violate a restrictive covenant was successful. In *Tytell v. Kaen*,²¹⁹ homeowners covered by a 1919

their own lots. See, e.g., *Fieldston Garden Apts. v. City of New York*, 7 Misc. 2d 147, 157, 145 N.Y.S.2d 907, 918 (Sup. Ct. Bronx County 1955), *aff'd*, 3 A.D.2d 903, 163 N.Y.S.2d 402 (1st Dep't 1957).

215. 61 N.Y.2d 154, 460 N.E.2d 1336, 472 N.Y.S.2d 901, *cert. denied*, 105 S. Ct. 60 (1984).

216. *Id.* at 164, 460 N.E.2d at 1341, 472 N.Y.S.2d at 906.

217. Such attempts can only be contemplated in cases where the purchaser of a home is a private sponsoring agency or the state is a lessee rather than a condemnor. If the state acquires the property through the eminent domain procedure, the restrictive covenant would be extinguished. *Ossining Urban Renewal Agency v. Lord*, 39 N.Y.2d 628, 350 N.E.2d 405, 385 N.Y.S.2d 28 (1976); *Dan Gernatt Farms v. Jorza*, No. H20125 (Sup. Ct. Erie County 1983); *Salmon v. Bogdanoff*, No. 12169/81 (Sup. Ct. Nassau County 1982); *Newcomb v. Office of Mental Retardation and Developmental Disabilities*, No. 17454/80 (Sup. Ct. Bronx County 1981). If the state is the sponsoring agency and it establishes a community residence pursuant to the Padavan Law, it is exempt from having to follow the procedures of the Eminent Domain Procedure Law. N.Y. EMINENT DOMAIN PROCEDURE LAW § 206(E). If the State acquires property by condemnation, an affected homeowner may apply for damages in the New York Court of Claims, N.Y. COURT OF CLAIMS ACT § 9 (McKinney 1963 & Supp. 1984-1985). However, it is unlikely that a homeowner would succeed in collecting any damages. See *supra* note 7 for studies finding that community residences do not increase crime or lower property values in neighborhoods.

218. *Crane Neck Ass'n v. NYC/Long Island County Servs. Group*, 61 N.Y.2d 154, 460 N.E.2d 1336, 472 N.Y.S.2d 901, *cert. denied*, 105 S. Ct. 60 (1984).

219. N.Y.L.J., June 11, 1979, at 12, col. 3 (Sup. Ct. Bronx County 1979), *aff'd*, 77 A.D.2d 519, 429 N.Y.S.2d 1018 (1st Dep't 1980).

covenant²²⁰ that previously had been enforced against developers seeking to construct an apartment building²²¹ sought to enforce the covenant to block the establishment of a community residence.²²² The covenant limited use to "one private dwelling house for the use of a single family"²²³ and prohibited the use of premises as

any public or private hospital, sanitorium, or asylum or place where any person . . . may be treated for any illness, disease or sickness of any nature or kind whatsoever [or] for any public or private home retreat, . . . asylum, refuge, convent or school where any person may be treated, sheltered, cared for, instructed or taught or any apartment house, tenement house, [or] hotel²²⁴

The state supreme court, Bronx County, enforced the covenant to enjoin the establishment of a proposed community residence.²²⁵ The court rejected the arguments of the sponsoring agency of the proposed residence that the statutes and cases finding that community residences were single-family dwellings for the purposes of local zoning ordinances were also applicable to restrictive covenants.²²⁶ In enforcing the covenant, the court noted that:

[i]nsofar as the framers of these restrictive covenants appear to have had in mind the traditional concept of "family" at the time they created the restrictions, the new definition would not appear to apply to these restrictive covenants. To decide otherwise would undermine the thoughts, words and concepts of our predecessors, by policies [that] though desirable and laudatory, nevertheless, are of such recent vintage that the proverbial ink has not yet had time to dry.²²⁷

The supreme court decision in *Tytell* was thereafter affirmed by the appellate division, first department.²²⁸

The vitality of *Tytell v. Kaen* was destroyed by the New York State Court of Appeals' recent decision in *Crane Neck Association, Inc. v. NYC/Long Island County Services Group*.²²⁹ In *Crane Neck*, a homeowner association and a group of individual homeowners at-

220. N.Y.L.J., June 11, 1979, at 12, col. 5.

221. *Id.*

222. *Id.*

223. *Id.* at col. 6.

224. *Id.*

225. *Id.* at 13, col. 2.

226. *Id.* at cols. 1-2.

227. *Id.* at col. 2.

228. 77 A.D.2d 519, 429 N.Y.S.2d 1018 (1st Dep't 1980).

229. 61 N.Y.2d 154, 159, 460 N.E.2d 1336, 1338, 472 N.Y.S.2d 901, 903 (1984), *cert. denied*, 105 S. Ct. 60 (1984).

tempted to enforce a 1945 covenant against a community residence being leased by the state. The covenant stated:

There shall not be constructed nor maintained upon the said premises any buildings other than single family dwellings and outbuildings . . . [any] house or dwelling costing less than \$3500 on the basis of 1944 material and labor costs, . . . [any] building other than Cape Cod or Colonial design and architecture (and additional buildings shall conform in architecture to the main dwelling) and shall be erected on said premises unless plans and specifications therefor have first been submitted to and approved in writing by the parties of the first part, or their duly authorized agent²³⁰

The New York State Supreme Court, Suffolk County, granted partial summary judgment to the Crane Neck Association and the homeowners,²³¹ declaring that the covenant had to be construed to apply to both the construction and the use of the residential buildings.²³² The court also decided that the occupancy of the premises as a community residence was violative of the "single family dwelling" clause of the restrictive covenant.²³³

The appellate division, second department reversed the order and refused to enforce the covenant on the grounds that the residence was not violative of the restrictive covenant, and the public policy of the State of New York prohibited the enforcement of the restrictive covenant against the use of the premises as a community residence.²³⁴ The court correctly noted that under New York law restrictions on the use of land are contrary to the general policy in favor of free

230. 61 N.Y.2d at 158-59, 460 N.E.2d at 1338, 472 N.Y.S.2d at 903. Obviously, the covenant here is less restricting than the one in *Tytell*.

231. N.Y.L.J., May 18, 1981, at 15, col. 6 (Sup. Ct. Suffolk County 1981), *rev'd*, 92 A.D.2d 119, 460 N.Y.S.2d 69 (2d Dep't 1983), *aff'd*, 61 N.Y.2d 154, 460 N.E.2d 1336, 472 N.Y.S.2d 901, *cert. denied*, 105 S. Ct. 60 (1984).

232. N.Y.L.J., May 18, 1981, at 16, col. 1. The decision that a restrictive covenant clause regarding construction also applies to use is reflective of New York law. *Baumert v. Malkin*, 235 N.Y. 115, 139 N.E. 210 (1923). However, since the clause relied upon by the Crane Neck Association discusses the type of architecture and building materials and there is another clause in the covenant that lists prohibited uses (but does not include community residences), 92 A.D.2d at 121, 460 N.Y.S.2d at 71, it is not clear that the drafters of the covenant intended the clause relied upon by the Crane Neck Association to affect use as well as construction. The better law in other jurisdictions is that restrictive covenant clauses regarding construction do not necessarily apply to use. *See, e.g., Berger v. State*, 71 N.J. 206, 364 A.2d 993 (1976); *Jones v. Park Lane for Convalescents, Inc.*, 384 Pa. 268, 120 A.2d 535 (1956).

233. N.Y.L.J., May 18, 1981, at 16, col. 2.

234. 92 A.D.2d 119, 460 N.Y.S.2d 69 (2d Dep't 1983).

and unobstructed use of real property and are to be construed strictly against those seeking enforcement of covenants.²³⁵ Noting that New York law provides that if a covenant is susceptible to two constructions, the less restrictive construction will be adopted,²³⁶ the court held that the community residence could be considered a "single family dwelling" for the purpose of the covenant.²³⁷ The court stated that:

[t]he goal is to establish a relatively permanent, stable environment, operating as a single household unit under a set of houseparents, which as much as possible bears the generic characteristics of the traditional family. . . . [I]t is the emulation of the traditional family unit which, in our opinion, satisfies the terms of the restrictive covenant, notwithstanding the lack of a biological or legal relationship among residents. The primary purpose of that covenant, preservation of the quality of life and character of the neighborhood, will not be contravened by the presence of this group residence It will represent another "family" in the

235. *Id.* at 126, 460 N.Y.S.2d at 74; see *Huggins v. Castle Estates*, 36 N.Y.2d 427, 430, 330 N.E.2d 48, 51, 369 N.Y.S.2d 80, 84 (1975); *Premium Point Park Ass'n v. Polar Bar Inc.*, 306 N.Y. 507, 512, 119 N.E.2d 360, 362 (1954).

236. 92 A.D.2d at 126, 460 N.Y.S.2d at 74; see *Aronson v. Riley*, 87 A.D.2d 879, 881, 449 N.Y.S.2d 544, 546 (2d Dep't 1982); *Lewis v. Spies*, 43 A.D.2d 714, 716, 350 N.Y.S.2d 14, 17 (2d Dep't 1973).

237. 92 A.D.2d at 126-27, 460 N.Y.S.2d at 74-75. This view is consistent with that of other states that have held that community residences are single family dwellings for the purposes of restrictive covenants. See *Cain v. Delaware Sec. Invs.*, 7 Mental Disab. Law Rptr. 384 (Del. Chancery Ct. 1983); *Craig v. Bossenberry*, 351 N.W.2d 596 (Mich. App. 1984); *Leland Acres Homeowners Ass'n v. R.T. Partnership*, 106 Mich. App. 790, 308 N.W.2d 648 (1981); *Malcolm v. Shamie*, 95 Mich. App. 132, 290 N.W.2d 101 (1980); *Bellarmino Hills Ass'n v. Residential Systems Co.*, 84 Mich. App. 554, 269 N.W.2d 673 (1978); *Costley v. Caromin House, Inc.*, 313 N.W.2d 21 (Minn. 1981); *State v. District Court*, 609 P.2d 245 (Mont. 1980); *Knudtson v. Trainor*, 216 Neb. 653, 345 N.W.2d 4 (1984); *Berger v. State*, 71 N.J. 206, 364 A.2d 993 (1976); *J.T. Hobby & Sons v. Family Homes*, 302 N.C. 64, 274 S.E.2d 174 (1980); *Crowley v. Knapp*, 94 Wis. 2d 42, 288 N.W.2d 815 (1980); *cf. Seaton v. Clifford*, 24 Cal. App. 3d 46, 100 Cal. Rptr. 779 (1972) (group home possessed characteristics of business enterprise and thus violated restrictive covenant); *Shaver v. Hunter*, 626 S.W.2d 574 (Tex. App. 1981), *cert. denied*, 459 U.S. 1016 (1982) (sheltered living facility for handicapped did not constitute "single-family residency" use and thus violated restrictive covenant); *Omega Corp. of Chesterfield v. Malloy*, 319 S.E.2d 728 (Va. 1984) (same). However, the vitality of *Seaton* is in doubt considering the more recent decision in *Welsch v. Goswick*, 130 Cal. App. 3d 398, 181 Cal. Rptr. 703 (1982), which noted that the issues involved related to "changed circumstances in a rapidly developing area of social concern subject to continuing legislative scrutiny" and that "a 10-year old case is of limited persuasive value." 130 Cal. App. 3d at 407 n.7, 181 Cal. Rptr. at 708, 709 n. 7; see also *Guernsey, The Mentally Retarded and Private Restrictive Covenants*, 25 WM. & MARY L. REV. 421, 442 (1984) (provides framework for analyzing constitutional validity of restrictive covenants).

community. . . . [t]he purpose of [this] group home is to be quite the contrary of an institution and to be a home like other homes.²³⁸

The appellate division, second department further held that even if the residence violated the covenant the state's public policy precluded enforcement of the covenant.²³⁹ The court cited the Padavan Law, the Declaration, the Governor's memorandum and the Willowbrook Consent Decree as evidence of the state's public policy in favor of establishing community residences.²⁴⁰ According to the court, this expressed policy was

broad enough to overcome not only challenges to group residences which are based upon local zoning ordinances, but also those based upon private restrictive covenants. . . . The provisions of the Padavan Law, which establish guidelines for community participation in the site selection process, provide a sufficient check on the possibility of any one community or neighborhood becoming saturated with such residences or of a residence being placed in an entirely inappropriate locale. . . . Beyond that, however, communities and residents should not be permitted to decide unilaterally by means of restrictive covenants, possibly employing language more specific than that at bar, that they will not permit the establishment of group residences in their area.²⁴¹

The decision of the second department in *Crane Neck* was more consistent with established real property law and principles of statutory construction than that of the court of appeals which affirmed it.²⁴² The court of appeals criticized the appellate division's reliance on case law holding that community residences were single family dwellings for the purposes of local laws and ordinances²⁴³ and decided that the community residence was not a single family dwelling. It supported its finding by reasoning that the residents were "twice outnumbered by a changing, nonresident staff of nurses, physical and recreational therapists, dieticians and others"²⁴⁴ and that no houseparents would reside there.²⁴⁵ The reasoning of the appellate

238. 92 A.D.2d at 127, 460 N.Y.S.2d at 74-75 (citing *City of White Plains v. Ferraioli*, 34 N.Y.2d 300, 313 N.E.2d 756, 357 N.Y.S.2d 449 (1974)).

239. 92 A.D.2d at 127, 460 N.Y.S.2d at 75.

240. *Id.* at 127-29, 460 N.Y.S.2d at 75-76.

241. *Id.* at 129, 460 N.Y.S.2d at 76.

242. 61 N.Y.2d 154, 460 N.E.2d 1336, 472 N.Y.S.2d 901.

243. *Id.* at 159-60, 460 N.E.2d at 1338-39, 472 N.Y.S.2d at 904.

244. *Id.* at 160, 460 N.E.2d at 1339, 472 N.Y.S.2d at 904.

245. *Id.* The court seemed to be confused as to whether the residence had houseparents as the court initially noted that "it is not clear from the record that there have in fact been houseparents." *Id.* at 157, 460 N.E.2d at 1337, 472 N.Y.S.2d at 903.

division that the covenant should not be enforced because its language was ambiguous and open to two interpretations and that the less restrictive interpretation should be applied is more logical and more in accord with past New York law. The reading of the covenant by the court of appeals, if applied in other cases, would force prospective buyers and sellers in covenanted areas to "read the minds" of the covenant's authors. Actually, the parties should be bound only to the least restrictive interpretation of what is recorded in the county clerk's office.

However, the court of appeals refused to enforce the covenant on the ground that to do so would contravene a long-standing public policy favoring the establishment of such residences.²⁴⁶ In support of this view, the court correctly cited statutes and executive pronouncements favoring development of community residences.²⁴⁷ However, the court of appeals went further and held that the section of the Padavan Law declaring that community residences were single family units for the purpose of local laws and ordinances precluded the enforcement of the covenant on public policy grounds.²⁴⁸ The court stated that:

[t]he fact that subdivision (f) speaks of "local laws and ordinances" thus reflects only the particular grounds that historically had been invoked to block placement of community residences, and not a deliberate substantive limitation by the Legislature. Private covenants restricting the use of property to single-family dwellings pose the same deterrent to the effective implementation of the State policy as the local laws and ordinances that had actually been the subject of the legal challenges. Given the avowed purpose of this law, we conclude that the Legislature did not enact subdivision (f) to erase the impediment resulting from single-family requirements found in laws and ordinances while leaving it intact in private covenants, and that the subdivision applies to such deed restrictions as well.²⁴⁹

246. *Id.*

247. *Id.* at 160-63, 460 N.E.2d at 1339-40, 472 N.Y.S.2d at 904-06.

248. *Id.* at 163-66, 460 N.E.2d at 1341-43, 472 N.Y.S.2d at 906-08; *cf.* Ginsberg v. Yeshiva of Far Rockaway, 45 A.D.2d 334, 358 N.Y.S.2d 477 (2d Dep't 1974), *aff'd*, 36 N.Y.2d 706, 325 N.E.2d 876, 366 N.Y.S.2d 418 (1975).

249. 61 N.Y.2d at 164, 460 N.E.2d at 1341, 472 N.Y.S.2d 906-07. The only advantage of this approach is that it could be used in an argument to deny standing to homeowners and homeowner groups to bring litigation against community residence sites. *See supra* notes 195-216 and accompanying text. A stronger case can be made from the documents cited by the court against granting standing to homeowners than that made by the court with regard to covenants. Other states have specific statutes stating that community residences are single family dwellings for the purpose of both zoning and restrictive covenants. *See ARIZ. REV. STAT.*

This interpretation of the Padavan Law is strained and overbroad, especially considering that there were sufficient policy statements from other sources to determine the public policy of New York State regarding community residences.²⁵⁰ Moreover, its interpretation is inconsistent with earlier portions of its decision which rejected the application of cases declaring community residences to be single family dwellings for the purposes of local zoning laws and ordinances to this case²⁵¹ and which conceded that the section of the Padavan Law declaring community residences to be single family dwellings for local laws and ordinances had codified those zoning cases.²⁵²

The court also held that its application of the Padavan Law did not violate the contract clause of the Constitution²⁵³ because the law was reasonable and appropriate to effectuate the state's program of deinstitutionalization.²⁵⁴ However, since the court decided not to enforce the covenant on public policy rather than on pure statutory grounds,²⁵⁵ it did not have to reach the issue of whether its application of the Padavan Law violated the contract clause.²⁵⁶

V. Preliminary Injunctions and Temporary Restraining Orders

A favorite tactic of municipalities and homeowner groups attempting to block the development of community residences is to seek a temporary restraining order²⁵⁷ or a preliminary injunc-

ANN. § 36.582 (Supp. 1983-1984); CAL. HEALTH & SAFETY CODE § 1566.3 (West Supp. 1985); N.C. GEN. STAT. § 168-22 (1982); WIS. STAT. ANN. § 46.03(22)(d) (West Supp. 1984-1985).

250. 61 N.Y.2d at 160-63, 460 N.E.2d at 1339-40, 472 N.Y.S.2d at 904-06.

251. *Id.* at 159-60, 460 N.E.2d at 1338-39, 472 N.Y.S.2d at 903-04.

252. *Id.*

253. Article I, Section 10 of the U.S. Constitution states, in relevant part, that "[N]o state shall . . . pass any . . . law impairing the obligation of contracts." U.S. CONST. art. I, § 10.

254. 61 N.Y.2d at 167, 460 N.E.2d at 1343, 472 N.Y.S.2d at 908.

255. *Id.* at 160, 460 N.E.2d at 1339, 472 N.Y.S.2d at 904.

256. Having ruled that the covenant could not be enforced because it would contravene a long-standing public policy, 61 N.Y.2d 160, 460 N.E.2d 1339, 472 N.Y.S.2d 904, the court should have ignored the contract clause arguments made by the Crane Neck Association and held that mere impairment of a court order declaring public policy could not invoke a contract clause challenge. *Barrows v. Jackson*, 346 U.S. 249 (1953). Footnote 5 of the decision of the New York Court of Appeals in *Crane Neck*, explaining the reasons why the court chose to consider the contract clause arguments of the Crane Neck Association, appears to conflict totally with its previous position that public policy precluded it from enforcing the covenant. Compare portions of the court's opinion at 61 N.Y.2d at 166-67, 460 N.E.2d at 1343, 472 N.Y.S.2d at 908 with earlier portions at 61 N.Y.2d at 160, 460 N.E.2d at 1339, 472 N.Y.S.2d at 904.

257. N.Y. C.P.L.R. § 6313 (McKinney 1980). A temporary restraining order may not be issued against the state in performing a governmental duty. *Id.* § 6313(a); *DiFate v. Scher*, 45 A.D.2d 1002, 1003, 358 N.Y.S.2d 215, 217 (2d Dep't

tion²⁵⁸ against the development of the residence. However, appellate courts generally have declined to uphold preliminary injunctions against community residences.²⁵⁹ In order for a New York State court to grant a preliminary injunction, there must be a showing of both a clear likelihood of ultimate success on the merits and the existence of irreparable injury if the injunction is not granted.²⁶⁰ However, it would be impossible to show irreparable harm since, as the second department correctly noted, if the objections to a residence were upheld, the residence would have to be used for any other legitimate purpose authorized by local zoning laws.²⁶¹ The second department also has held that "the mere assertion that petitioner [municipality] will be unable to prevent the operation of the residence at a later date unless it is halted immediately cannot suffice to carry its burden in this regard [showing of irreparable injury]."²⁶² For temporary restraining orders and orders to show cause, the appellate courts have been willing to strike down such orders pursuant to section 5704(a) of the Civil Practice Law and Rules²⁶³ if such

1974). Establishing facilities for the mentally disabled is certainly a governmental function. See N.Y. MENTAL HYG. LAW § 13.01, 13.07, 13.15(a) (McKinney 1978).

258. N.Y. C.P.L.R. § 6301 (McKinney 1980).

259. *Roberts v. Selzak*, 89 A.D.2d 559, 452 N.Y.S.2d 113 (2d Dep't 1982); *Town of Stony Point v. New York State Office of Mental Retardation and Developmental Disabilities*, 78 A.D.2d 858, 432 N.Y.S.2d 633 (2d Dep't 1980); cf. *Town of Pound Ridge v. Introne*, 81 A.D.2d 885, 439 N.Y.S.2d 55 (2d Dep't 1981) (court ruling based on finding that sponsoring agency had misled municipality about its intentions; decision appears to be an aberration—a situation in which "bad cases make bad law").

It should be noted that where the state and a private agency are joint sponsors of a community residence and a lower court issues a preliminary injunction against the private agency, the state's automatic stay power during an appeal, pursuant to CPLR Section 5519 (a)(1), covers the private agency as well. N.Y. C.P.L.R. § 5519(a)(1) (McKinney 1980). Therefore, the private agency can continue to develop the residence during the appeal. See *Lake Hawthorne Homeowners Ass'n v. Carey*, 103 Misc. 2d 329, 423 N.Y.S.2d 769 (Sup. Ct. Westchester County 1980). Of course, if the state is the sponsoring agency, it would have an automatic stay during an appeal from a preliminary injunction issued by a lower court, pursuant to CPLR Section 5519(a)(1). N.Y. C.P.L.R. § 5519(a)(1) (McKinney 1978).

260. *Roberts v. Selzak*, 89 A.D.2d 559, 452 N.Y.S.2d 113 (2d Dep't 1982); *Town of Stony Point v. New York State Office of Mental Retardation and Developmental Disabilities*, 78 A.D.2d 858, 432 N.Y.S.2d 633 (2d Dep't 1980); see *Picotte Realty, Inc. v. Gallery of Homes, Inc.*, 66 A.D.2d 978, 412 N.Y.S.2d 47 (3d Dep't 1978); *Shelborne Beach Club, Inc. v. Hellman*, 49 A.D.2d 933, 372 N.Y.S.2d 277 (2d Dep't 1975).

261. *Roberts v. Selzak*, 89 A.D.2d at 559, 452 N.Y.S.2d at 114.

262. *Stony Point*, 78 A.D.2d at 859, 432 N.Y.S.2d at 635.

263. *Hunt-Comm. Ass'n v. Office of Mental Retardation and Developmental Disabilities*, No. 84/12774 (2d Dep't 1984); *Town of Pleasant Valley v. Wassaic Developmental Disabilities Servs. Office*, 92 A.D.2d 543, 459 N.Y.S.2d 109 (2d Dep't 1983); *Lincoln Assoc. v. Introne*, No. 24653/80 (2d Dep't 1980).

application is made prior to the return date of the order to show cause.²⁶⁴

VI. Recommendations

While in some instances, the Padavan Law has slowed and impeded the development of community residences,²⁶⁵ it has facilitated the development of some privately-run residences whose structures would not have been considered single family dwellings for purposes of local laws and ordinances by the courts prior to the statute.²⁶⁶ According to one commentator, the statute has been useful because it "frame[d] the conflict between the retarded and the community in very specific terms,"²⁶⁷ and the number of residences opened has increased at a faster rate since the enactment of the statute.²⁶⁸ Thus, it is not recommended that the statute be repealed entirely, but rather that it be fine-tuned so that it fully reflects the meritorious intentions of its drafters.²⁶⁹

It is recommended that the 1981 amendment applying the statute to residences for one or two persons²⁷⁰ be repealed since it discourages residence development, and it is difficult to comprehend how a concentration of those residences would result in the substantial alteration of an area. Moreover, the 1981 amendment requiring the inclusion of a specific site in the sponsoring agency's notification letter²⁷¹ should be repealed. This provision places too great a burden on the sponsoring agency to commit money to a site that it may not be able to use and coalesces neighborhood opposition to a site. Therefore, the statute should be amended back to its original form.

264. *Town of Cortlandt v. Office of Mental Retardation and Developmental Disabilities*, N.Y.L.J., Nov. 12, 1980, at 7, col. 1 (2d Dep't 1980).

265. See *supra* note 71.

266. *Id.*

267. ROTHMAN, *supra* note 1, at 195-96; see also JANICKI, *supra* note 20, at 9 (statute has been beneficial to community residences).

268. In 1976, there were only 130 community residences in New York. By 1982, there were over 1000. JANICKI, *supra* note 20, at 13. Of the planned residences which have opened in New York City, 47% of those planned opened after the statute was enacted, while only 23% opened prior to the statute's enactment. R.A. LUBIN, A.A. SCHWARTZ, W.B. ZIGMAN & M.P. JANICKI, COMMUNITY ACCEPTANCE OF RESIDENTIAL PROGRAMS FOR DEVELOPMENTALLY DISABLED PERSONS 10 (1981).

269. See *supra* notes 40-60 and accompanying text for statements by the legislature and Governor Carey strongly stating that it was New York's public policy to take mentally disabled persons out of institutions and place them in community residences.

270. 1981 N.Y. Laws ch. 1024, § 3.

271. *Id.*

Under the original statute, a municipality still could suggest that a sponsoring agency establish a community residence in certain areas of its jurisdiction and avoid other areas due to overconcentration.

It is also recommended that the statute's provision requiring the sponsoring agency to take the municipality's site if it is satisfactory²⁷² be amended to require the sponsoring agency to take the site only if it is proved, at a commissioner's fact-finding hearing, to be superior to the sponsoring agency's site and affordable to the sponsoring agency. While the municipality's suggested alternative site should not be disregarded, the proposed provision would assure a sponsoring agency that it could develop its site if it were superior to that suggested by the municipality. Certainly, the selection of the superior site would benefit the facility's residents. Furthermore, the statute's provision that an article seventy-eight proceeding can be brought to challenge a commissioner's determination after a fact-finding hearing²⁷³ should be amended to exclude parties other than municipalities from bringing such challenges. This amendment would clarify standing considerations although there is adequate legislative history and precedent available to enable courts to deny neighborhood groups standing to challenge commissioners' determinations.²⁷⁴ Finally, it is recommended that the statute *not* be changed to include a definition of the term "substantial alteration" since any definition would be inadequate to encompass the myriad neighborhood situations in New York State, and the courts have had little difficulty deciding cases under the present definition.

VII. Conclusion

While the drafters of the Padavan Law envisioned that the statute would facilitate the development of community residences for the mentally disabled, it is difficult to comprehend how the intricate statutory procedures to be followed by a sponsoring agency before establishing a residence have facilitated that development.²⁷⁵ On the other hand, the statute has limited challenges by narrowing the

272. N.Y. MENTAL HYG. LAW § 41.34(c)(4) (McKinney's Supp. 1984). However, the appellate division, second department recently held that a municipality must prove that its proposed alternative site was superior to that proposed by the sponsoring agency. *Town of Oyster Bay v. Webb*, N.Y.L.J., June 5, 1985, at 12, col. 3 (2d Dep't 1985).

273. *Id.* § 41.34(d).

274. *Id.* § 41.34(c)(1)(C), (c)(5).

275. *See supra* notes 71, 145-50 & 267-68 and accompanying text.

objections that can be raised to a residence, has disciplined slow-moving sponsoring agencies by setting down a procedural timetable, and has assisted the development of some residences by declaring community residences established pursuant to the statute to be single family dwellings for the purposes of local laws and ordinances.²⁷⁶ Moreover, if a sponsoring agency perseveres through the procedures and subsequent litigation, it should be able to establish its residence. No court has ever found that a community residence would substantially alter an area, and it is unlikely that any community residence in combination with other community residences or similar facilities would substantially alter an area. Whether the procedure actually results in greater cooperation and understanding between communities and sponsoring agencies is unclear. However, one thing is clear—the statute has not eliminated litigation regarding community residence sites.

276. *Id.*

