MAKING SPACE FOR A SPECTRUM OF COMMUNITY RESIDENCES: BUILDING SUSTAINABLE AND INCLUSIVE COMMUNITIES THROUGH NEW YORK'S PADAVAN LAW

INTRODUCTION

Regulating group homes for marginalized people, including the developmentally disabled, has social justice implications that extend beyond the traditional environmental, economic, and technical considerations generally underlying land use decisions. Group homes are community residential facilities: homes that are integrated in residential neighborhoods, but contain support professionals that do not ordinarily exist in the archetypical nuclear family that has historically dominated the American residential landscape.[1] Group homes are "non-traditional alternative[s] to 'single family' living. . . . [R]esidents are unrelated individuals, who, under [trained] supervision, share a single family home with a common kitchen, sanitary facilities and other common living facilities."[2] Under the care of counselors, some residents work outside the home during the day, while others undergo 'prevocational training' through workshops and activities within the home.[3] Group homes generally consist of four to sixteen residents and are sponsored by public agencies, private entities, or nonprofit organizations.[4]

Neighbors, often prejudiced against the people living in group homes, may oppose the siting of these residences, contending that these homes are not true residential uses.[5] Should the prejudiced public have the right to exclude group homes under the guise of promoting "public health . . . safety, and general welfare?"[6] Some states have enacted legislation to prevent discrimination against the siting of group homes.[7]

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1. Anna L. Georgiou, *NIMBY's Legacy—A Challenge to Local Autonomy: Regulating the Siting of Group Homes in New York*, 26 FORDHAM URB. L.J. 209, 210 (1999).

2. *Id.* at 210.

3. JACK LEVINSON, MAKING LIFE WORK: FREEDOM AND DISABILITY IN A COMMUNITY GROUP HOME 69 (2010).

4. Peter W. Salsich, *Group Homes, Shelters, and Congregate Housing: Deinstitutionalization Policies and the NIMBY Syndrome*, 21 REAL PROP. PROB. & TR. J. 413, 418 (1986).

5. Georgiou, *supra* note 1, at 212 (discussing how community members feared group homes as "dangerous" and likely to lead to a "decline in property value").

6. *Id.* at 213 (citing N.Y. CONST. art. 3, § 1).

7. Salisch, *supra* note 4, at 424 n.60 (listing the older versions of the following state statutes: ARIZ. REV. STAT. ANN. § 36.582.A (2014); CAL. WELF. & INST. CODE § 5116 (West 2014); COLO. REV. STAT. ANN. § 30–28–115(2)(a) (West 2014); CONN. GEN. STAT. ANN. § 8-3e (West 1985); DEL. CODE ANN. tit. 22, § 309(a) (West 2014); IDAHO CODE ANN. § 67–6531 (West 2014); IND. CODE ANN. § 12–28–4–8 (West 2007); IOWA CODE § 335.25 (West 2014); LA. REV. STAT. ANN. § 28:476 (West 1985); MD. CODE ANN, HEALTH—GEN. § 7–603(b) (West 2014); MICH. COMP. LAWS ANN. § 400.733 (West 2014); MO. ANN. STAT. § 89.020.2 (West 2014); MONT. CODE ANN. § 76–2–412(1) (West 2013); N.J. STAT. ANN. § 40:55D–66.1 (West 2014); N.M. STAT. ANN. § 3–21–1.C (West 2014); N.Y. MENTAL

New York, for example, adopted the Padavan Law, named after State Senator Frank Padavan (the Chairman of the New York State Senate Mental Hygiene and Addiction Control Committee), to prevent such discrimination.[8] The Padavan Law requires that a "[c]ommunity residential facility for the [developmentally] disabled be treated as a single family unit, for the purposes of local laws and ordinances."[9] Thus, the Padavan Law eases the process of establishing group homes in communities.[10]

In addition, the Padavan Law furthers the goals of New Urbanism that many planners are calling for to inform the next generation of sustainable land use regulations.[11] These smart growth principles include both designing walkable communities and setting aside space for affordable housing to overcome the ethnic divisions that *Euclidian* zoning fostered.[12] Chapter 13 of the Charter on New Urbanism specifies that neighborhoods should have "a broad range of housing types . . . [that] bring people of diverse ages, races, and incomes into daily interaction, strengthening the personal and civic bonds essential to an authentic community."[13] People living in group homes—whether living with developmental disabilities, substance abuse, or other social problems—come from diverse backgrounds and benefit from teaching others about their experiences. This kind of cross-cultural and social dialogue is what the charters of New Urbanism envisioned when they sketched their ideas for tomorrow's sustainable communities.[14]

Part I of this Note will provide background information on the Institutionalization Era, the movement towards deinstitutionalization that

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HYG. LAW § 41.34 (McKinney 2013); N.C. GEN. STAT. § 168-22 (West 2014); N.D. CENT. CODE § 25–16–14(2) (West 2013); OHIO REV. CODE ANN. § 5123.19(D) & (E) (West 2014) (declared invalid as a special, rather than a general law, in Garcia v. Siffrin Residential Ass'n, 407 N.E.2d 1369, 1378 (1980)); TENN. CODE ANN. § 13–24–102 (West 2014); UTAH CODE ANN. § 10–9A–520 (West 2013); W. VA. CODE ANN. § 27–17–2 (West 2014)).

8. Robert L. Schonfeld, *"Not In My Neighborhood:" Legal Challenges to the Establishment of Community Residences for the Mentally Disabled in New York State*, 13 FORDHAM URB. L.J. 281, 283 (1984).

9. N.Y. MENTAL HYG. LAW § 41.34(a), (f).

10. Georgiou, *supra* note 1, at 220, 223 (providing an overview of the Padavan Law).

11. *See Charter of the New Urbanism*, CONG. FOR THE NEW URBANISM, www.cnu.org/charter (last visited Apr. 22, 2015).

12. *See* James A. Kushner, *Smart Growth, New Urbanism and Diversity: Progressive Planning Movements in America and heir Impact on Poor and Minority Ethnic Populations*, 21 UCLA J. ENVTL. L. & POL'Y 45, 46–48 (2003) (explaining the negative impacts of Euclidian Zoning). Euclidean zoning involves "the separation of uses: commercial facilities, offices, single-family detached homes and apartments are all physically separate." *Id.* at 46 (citing Vill. of Euclid v. Amber Realty, 272 U.S. 365, 397 (1926)).

13. *Charter for New Urbanism*, *supra* note 11.

14. *See id*.

gave rise to the Padavan Law, and the benefits—both individual and societal—of group homes. Part II will provide the larger framework of group home regulation: the federal regime, including the Federal Fair Housing Amendments Act and the Americans with Disabilities Act; the Padavan Law and other New York statutes that govern various kinds of group homes; and the themes of local judicial challenges to group home laws.

Part III will assert procedural recommendations to streamline the site selection process for group homes and substantive recommendations for how to make the law more inclusive. Specifically, the Padavan Law should be broadened to afford the same amount of protection to other kinds of community residential facilities including substance abuse recovery homes, homes for troubled youth, homes for homeless LGBTQ youth, and alternative elderly care homes. Finally, Part IV will discuss potential legal challenges to the expanded Padavan Law by analyzing how the revised law would fare under the U.S. Supreme Court's equal protection cases, federal case law under the Federal Fair Housing Amendments Act, and New York State case law relating to the reasonableness of the state's police powers. Ultimately, this Note argues that a broadened Padavan Law is a first step in creating integrated, sustainable communities in which historically marginalized populations are supported and regarded as playing vital roles in their communities.

I. EARLY GROUP HOME REGULATION: HISTORY OF INSTITUTIONALIZATION, DEINSTITUTIONALIZATION POLICIES, AND THE BENEFITS OF GROUP HOMES

A. The Institutionalization of Developmentally Disabled People

Institutionalization is the antithesis of group homes that are integrated into residential communities. Institutions became popular after World War II because they were seen as castaway solutions for families that were unequipped or unwilling to raise their developmentally disabled children.[15] In institutions, children were regarded as "patients," and families had little to no interaction with them out of a misplaced fear of undermining treatment and frustrating "adjustment" to confinement.[16] In the 1950s, the

15. LEVINSON, *supra* note 3, at 19. There are many names that refer to this population, including developmentally disabled, developmentally delayed, mentally challenged, and (historically) mentally retarded. I choose to use "developmentally disabled," but the reader should be aware that I include all individuals with intellectual disabilities—regardless of medical terminologies—in this population.

16. *Id.*

medical community and families began recognizing the interests of institutionalized children.[17] For example, "some parent groups focused on creating a larger role for families . . . . Others pressed for expanded special education in schools and social and vocational programs in communities that would enable certain children to grow up at home."[18]

Despite these efforts, the catalyzing event that propelled the Deinstitutionalization Movement across state borders was the release of the Willowbrook Findings.[19] The Willowbrook State School was opened on Staten Island in 1938 to house "developmentally disabled" residents.[20] Over the next several decades, the facility began to accumulate more patients than it could provide services for: "Willowbrook was originally intended to house fewer than 3,000 residents, but by 1955 it housed over 3,500 residents. By 1963, 6,000 residents lived in buildings intended to hold only 4,275."[21] Senator Robert Kennedy visited Willowbrook in 1965 and was so horrified by the facility's conditions that he described it as a "'snake pit.'"[22] New York State legislators also visited Willowbrook during this time but kept all their gruesome findings secret.[23]

Though those findings were outside the public eye, the media slowly began to learn of the horrors at Willowbrook.[24] For example, reporter Geraldo Rivera sensed an opportunity to create a video exposé of the institution after meeting with one activist who bluntly described the "conditions" in one of the institution's buildings to Rivera: "'[T]here are sixty retarded kids, with only one attendant to take care of them. Most are naked and they lie in their own shit.'"[25] Rivera likened his footage to the "newsreels of American soldiers freeing the inmates of Dachau: the bulging, vacant eyes in emaciated faces, the giant heads and wasted bodies. Was Willowbrook America's concentration camp?"[26]

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17. *Id.*

18. *Id.*

19. *See* Schonfeld, *supra* note 8, at 287 n.28 (listing several newspaper articles that highlighted the atrocities at Willowbrook).

20. M.E. Grenander Department of Special Collections and Archives, *Finding Aid for the Willowbrook Review Panel Records, 1968–1981*, UNIV. AT ALBANY—SUNY, https://library.albany.edu/speccoll/findaids/apap127.htm (last visited Apr. 22, 2015) [hereinafter *Willowbrook Review*].

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.* ("In 1972, Geraldo Rivera, then a local reporter for TV station WABC in New York, drew national attention to Willowbrook's deplorable conditions through a televised expose.").

25. DAVID J. ROTHMAN & SHEILA M. ROTHMAN, THE WILLOWBROOK WARS: BRINGING THE MENTALLY DISABLED INTO THE COMMUNITY 16 (Transaction Publishers 2005) (1984).

26. *Id.* at 17.

As public outcry escalated, so did the momentum behind public interest groups seeking to challenge the constitutionality of these horrific conditions in federal courts.[27] In 1972, the Mental Health Law Project and the New York Civil Liberties Union filed a class action lawsuit on behalf of Willowbrook's residents demanding that the state provide better services and a stronger quality of care to residents.[28] During this trial, and subsequent litigation to compel the state to meet its requirements under the Willowbrook Consent Decree, the courts began to record the deplorable conditions at Willowbrook.[29] With the trials came the cross-examinations of Willowbrook doctors, nurses, psychologists, and other staff members.[30] One nurse's testimony, in particular, resonates with scholars; the nurse, who worked at a hospital where Willowbrook sent patients for further treatment, recalled seeing a patient come in with a cast:

> [The cast] was rotted and broken in several places. . . . There was an extremely foul odor from his cast, the odor of urine and feces. [T]here were maggots crawling out from underneath it. . . . [W]e picked off 35 or 40 [maggots]. There were numerous maggots in the wound itself. And there was a large black bug embedded in the wound.[31]

Like fiction out of a horror movie, these gruesome accounts of the conditions at the Willowbrook School are forever preserved in these early lawsuits. These records provided much-needed visibility to the inhumane conditions that developmentally disabled youth endured and spurred a public dialogue about the way that developmentally disabled people were treated—and should be treated—in our communities.[32]

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27. *See* Schonfeld, *supra* note 8, at 287 n.31 (mentioning New York State Ass'n for Retarded Children v. Rockefeller, 357 F. Supp. 752 (E.D.N.Y. 1973), as an example of a federal lawsuit intended to "improve the conditions at Willowbrook" and "establish[] . . . smaller community facilities").

28. ROTHMAN & ROTHMAN, *supra* note 25, at 108.

29. *Id.* at 108; *See also* Schonfeld, *supra* note 8, at 282 n.3 (citing New York State Ass'n for Retarded Children v. Carey as one of the cases in which the federal courts in New York upheld the Willowbrook Consent Decree "which required a reduction in the population at Willowbrook and the placement of Willlowbrook residents into smaller community residences."); New York State Ass'n for Retarded Children, Inc. v. Carey, 393 F. Supp. 715, 717 (E.D.N.Y. 1975) (citing, in relevant part, from the Consent Decree: "[Developmentally disabled people], regardless of the degree of handicapping conditions, are capable of physical, intellectual, emotional and social growth, and . . . that a certain level of affirmative intervention and programming is necessary if that capacity for growth is to be preserved.").

30. ROTHMAN & ROTHMAN, *supra* note 25, at 108.

31. *Id.*, *see also* Schonfeld, *supra* note 8, at 288 n.34.

32. *See Willowbrook Review*, supra note 20 (the "shocking images of children lying on floors naked and drinking out of toilet bowls" led to an "almost immediate[]" "[p]ublic outcry").

B. Policies Giving Rise to the Padavan Law and The Benefits of Group Homes

After the Willowbrook Findings awoke the public to the atrocities lurking within the confines of institutions for developmentally disabled people, the New York State Assembly could no longer ignore this prominent problem.[33] As Schonfeld describes, the legislature was motivated by two policies in enacting the Padavan Law: (1) the "establishment of community residences and deinstitutionalization;" and (2) quelling "the concerns of municipalities regarding the siting of residences." [34] The governor's stated purpose for the law embodied these policies.[35] The state legislature, in its "Legislative Findings and Intent" section, found that developmentally disabled people "have the right to attain the benefits of normal residential surroundings," and "that the opportunities for mentally disabled individuals will be enhanced . . . by providing these individuals with the least restrictive environment that is consistent with their needs . . . [and] foster[s] the development of [their] maximum capabilities."[36] The Padavan Law,[37] consistent with these goals, eases the siting of group homes.[38]

The Padavan Law also implicitly recognized that residents personally benefit when group homes are integrated into communities.[39] Group homes are often located in "stable and safe" neighborhoods and are situated with "easy access to public transportation and a variety of community services.[40] These "[n]eighborhood services" include "educational, religious, athletic and social clubs."[41] Within the homes themselves, trained staff provides a "structured therapeutic program" by "creat[ing] a social milieu whereby community involvement, group work, nondirective counseling and peer relationships are encouraged." [42] "[B]y virtue of the group setting, interpersonal dynamics, trust and social skills may well be developed."[43]

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33. Schonfeld, *supra* note 8, at 287.
34. *Id.* at 291.
35. *Id.* at 291 n.40.
36. *Id.*
37. *Id.* at 283 n.8 (explaining that the Padavan Law is "named for State Senator Frank Padavan, Chairman of the New York State Senate Mental Hygiene and Addiction Control Committee").
38. *Id.* at 292.
39. *See* Jill E. Thomsen, *Residential Group Homes for Nebraska's Troubled Youth: An Attractive Alternative to Institutionalization*, 77 NEB. L. REV. 835, 838 (1998) (citing "benefits" to residents).
40. Salsich, *supra* note 4, at 419.
41. Thomsen, *supra* note 39.
42. *Id.*
43. *Id.*

II. REGULATING GROUP HOMES: FEDERAL REGIME, STATE STATUTES, AND LOCAL CHALLENGES

A. Federal Regime Governing Group Home Regulation

1. The Federal Fair Housing Amendments Act

The Federal Fair Housing Amendments Act (FFHA) of 1988 amended the Fair Housing Act (FHA) to broaden the categories of people protected from discrimination in housing.[44] "The FHA prohibit[ed] discrimination based on gender, race, color, religion or national origin."[45] The FFHA adds to these categories by outlawing discrimination "on the basis of handicap or family status."[46] The two central purposes for including handicap and family status as protected groups in the FFHA are: "(1) to protect these populations against erroneous misconceptions and societal stereotypes and (2) to effectively integrate these populations into mainstream society."[47] The definition of "'[h]andicap'" includes "a person [with] (1) a physical or mental impairment which substantially limits one or more of such person's major life activities, (2) a record of having such impairment, or (3) being regarded as having such an impairment."[48] The provision explicitly excludes people who suffer from addiction of a controlled substance.[49] Similarly broad, the definition of "'[f]amilial status'" includes "one or more individuals (who . . . [are not yet] 18 years [old]) being domiciled with—(1) a parent or another person having legal custody of such individual or individuals; or (2) the designee of such parent or other person having such custody, with the written permission of such parent or other person."[50]

Although substance abuse recovery homes could not raise a discriminatory claim under the FFHA, group homes for developmentally disabled people and group homes for youth both could raise discrimination claims under the FFHA's definition of "handicap" and "familial status," respectively. Thus, if "a restrictive covenant or municipal zoning ordinance" obstructed the establishment of a group home for developmentally disabled people or youth, the group home could challenge

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44. *Id.* at 845.
45. *Id.*
46. *Id.*
47. *Id.* (paraphrasing H.R. Rep. No. 100-711, at 18 (1988)).
48. 42 U.S.C. § 3602(h) (2014).
49. *Id.*
50. *Id.* § 3602(k).

the allegedly discriminatory covenant or ordinance by showing both "disparate treatment and disparate impact."[51]

To show disparate treatment, the plaintiff "must show that the defendant treats members of a protected group differently than others who are similarly situated because of the protected group's family status."[52] "[A]dditional evidence of discriminatory animus is not required."[53] To show disparate impact, the plaintiff must "demonstrate that although a particular covenant or ordinance is [facially neutral], its application has a discriminatory effect."[54] Should the plaintiff establish a "prima facie case" for disparate "impact, then the burden shifts to the defendant to show that the covenant or ordinance is rationally related to a legitimate purpose and that no alternative action would be less discriminatory."[55]

2. The Americans with Disabilities Act

The Americans with Disabilities Act (ADA) was enacted to remedy past discrimination against disabled people.[56] The statute encompasses people living with "physical and mental disabilities, as well as persons with health related disabilities."[57] The ADA employs the same definition for "disability" as the FFHA does for "handicap."[58] Title II of the ADA prohibits discrimination against the disabled in public entities (any state or local government) and transportation.[59] To bring a Title II claim under the ADA, Georgiou writes,

> (1) a plaintiff must be a qualified individual with a disability; (2) the individual must have been discriminated against by the public entity, or excluded from participation in or denied the services, programs, or activities of a public entity specifically because of

51. Thomsen, *supra* note 39, at 845−46.
52. *Id.* at 846.
53. *Id.*
54. *Id.*
55. *Id.*
56. Georgiou, *supra* note 1, at 231.
57. *Id.* at 232.
58. *Compare* 42 U.S.C. § 12102(1) (2012) (defining disability as "a physical or mental impairment that substantially limits one or more major life activities of such individual"), *with* 42 U.S.C. § 3602(h) (defining handicap as "a physical or mental impairment which substantially limits one or more of such person's major life activities").
59. Georgiou, *supra* note 1, at 232.

> the disability; and (3) the entity providing the activity, service, or program must be a public entity.[60]

The Second Circuit held that the ADA's prohibition on discrimination applied to local zoning decisions.[61] In *Innovative Health Systems v. City of White Plains*, the City's Zoning Board of Appeals (ZBA) rejected Innovative Health Systems' application for a permit to open an outpatient drug and alcohol treatment center for clients.[62] The Second Circuit held that the ZBA's permit rejection was not justified by substantial evidence that the facility was a "clinic," and therefore it conflicted with the mixed commercial- and office-use zone.[63] Significantly, the Second Circuit held that the ADA's prohibition against discrimination of disabled people in a service, program, or activity includes a municipality's zoning regime.[64] Though *Innovative Health Systems* involved the siting of a large commercial substance abuse outpatient center, and not a small substance abuse recovery group home, the decision extends the reach of the ADA's ban on discrimination of disabled people to zoning regulations.[65] This decision undoubtedly affirms the power of group homes for disabled people to bring challenges in federal court under the ADA.

B. State Statutes: Case Study of New York's Padavan Law

1. The Padavan Law: Regulating Group Homes for Developmentally Disabled People

The Padavan Law's[66] core feature is its requirement that "community residence[s]" be treated as "[single] family unit[s], for . . . purposes of local laws and ordinances."[67] This requirement preempts discrimination against developmentally disabled people by requiring that municipalities treat group homes for developmentally disabled people in residential neighborhoods as single "family units."[68] As Peter Salsich writes, "more than half the states have enacted statutes that attempt to resolve local

60. *Id.* at 234.

61. Georgiou, *supra* note 1, at 236; Innovative Health Systems v. City of White Plains, 117 F.3d 37, 40 (2d Cir. 1997).

62. *Id.*

63. *Id.* at 49.

64. *Id.*

65. Georgiou, *supra* note 1, at 236.

66. I choose to focus on the Padavan Law because New York's preemptive group home law has substantial case law that followed its enactment.

67. N.Y. MENTAL HYG. LAW § 41.34(f).

68. *See* Salsich, *supra* note 4, at 424.

conflicts over group homes. [Like the Padavan Law,] [m]any statutes preempt all or portions of local zoning controls over group homes for the developmentally disabled."[69] The Padavan Law also features a narrow inclusion of only community residences "for the disabled,"[70] a limit on the number of inhabitants in each community residence ("four to fourteen" individuals),[71] and a broad reach of group home operators (both of public agencies and private organizations).[72]

"The procedural requirements imposed on sponsoring agencies" seeking operating licenses are relatively straightforward.[73] "[S]ponsoring agencies" receive operating licenses from "either the New York State Office of Mental Health or the New York State Office of Mental Retardation and Developmental Disabilities."[74] The sponsoring agency must provide notice to the municipality of where it intends to establish a community residence.[75] If the agency has not yet selected a specific site, the agency must provide a general "description of the nature, size, and community support requirements" of the proposed residence.[76] When the sponsoring agency selects a "specific site," the agency must provide the proposed residence's address and "a listing of all community residences and institutions in the proximity of the proposed community residence."[77]

The purpose of providing this data is to allow the municipalities to determine whether the residence would affect "the nature and character of the area wherein such proposed facility is to be located."[78] The municipality then has forty days after receiving this notice[79] to approve the proposed site,[80] suggest one or more alternative suitable sites,[81] or object to the establishment of the residence because it would cause an overconcentration of "community residential facilities" that would "substantially alter[]" the

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69. *Id.*

70. N.Y. MENTAL HYG. LAW § 41.34(a)(1).

71. *Id.*; *see also* Schonfeld, supra note 8, at 298.

72. *Id.* § 41.34(a)(2).

73. Schonfeld, *supra* note 8, at 296 (footnote omitted).

74. *Id.*; The Office of Mental Retardation and Developmental Disabilities was renamed the Office for People With Developmental Disabilities in 2010 to reflect the modern view that "retardation" is a pejorative term to describe developmentally disabled people. *Agency Overview*, OFFICE FOR PEOPLE WITH DEVELOPMENTAL DISABILITIES, http://www.opwdd.ny.gov/opwdd_about/overview_of_agency (last visited Apr. 22, 2015).

75. N.Y. MENTAL HYG. LAW § 41.34(b).

76. *Id.*

77. Schonfeld, *supra* note 8, at 301 (citing N.Y. SOC. SERVS. LAW § 463-a).

78. N.Y. MENTAL HYG. LAW § 41.34(c)(1).

79. *Id.*

80. *Id.* § 41.34(c)(1)(A).

81. *Id.* § 41.34(c)(1)(B).

"nature and character of the areas within the municipality."[82] Thus, the burden placed on the municipality is twofold: The "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."[83] After responding to the sponsoring agency, the municipality may hold a public hearing.[84] If the municipality does not respond, the sponsoring agency may establish the residence at its proposed site.[85]

2. New York's Social Services Law: Regulating Other Group Homes

All other group homes are regulated under New York's Social Services Law. Section 460-b of the Social Services Law sets forth the policies for providing "the highest quality" of "[r]esidential care programs for adults and children."[86] The law specifies that the Department of Social Services will work with other departments (e.g., Department of Mental Health, Office of Alcoholism and Substance Abuse Services, etc.) in "develop[ing] and admin[istering] . . . programs, standards and methods of operation . . . with respect to residential care programs for children and adults."[87] Unlike the Padavan Law, § 460-b does not contain any explicit procedural requirements for municipalities siting the residence. Rather, § 460-b(2) provides that, in order to receive an operating certificate by the state, the facility must submit an application to the relevant department with information "contain[ing] the name of the facility . . . the kinds of care and services to be provided, [and] the location and physical description of the facility."[88]

Section 374-c provides additional requirements for "authorized agenc[ies] seeking to operate group homes" only for children under the Department of Social Services.[89] "Authorized agenc[ies]" include "[a]ny agency, association, corporation, institution, society or other organization which is . . . empowered by law to care for, to place out or to board out children . . . ."[90] Group homes created under this provision are "subject to supervision, visitation and inspection by the department" of social

82. *Id.* § 41.34(c)(1)(C).
83. Schonfeld, *supra* note 8, at 303 (citing N.Y. MENTAL HYG. LAW § 41.34(c)(1)(C), (c)(5)).
84. N.Y. MENTAL HYG. LAW § 41.34(c)(2).
85. *Id; see also* Schonfeld, *supra* note 8, at 303.
86. N.Y. SOC. SERV. LAW § 460.
87. *Id.*
88. *Id.* § 460-b(2).
89. *Id.* § 374-c(1).
90. *Id.* § 371(10)(a).

services.[91] Like the Padavan Law, authorized agencies must "notify the chief executive officer of the municipality" of the "agenc[ies] plans to establish one or more group homes within a municipality."[92] However, unlike § 41.34(c)(1)(C) of the Padavan Law, the legislature did not explicitly empower municipalities to object to the siting of group homes within their borders.[93]

C. New York Case Law: Interpreting the Padavan Law and Themes of Local Challenges

1. Pre-Padavan Case Law

Before the Padavan Law, New York courts had already issued rulings supporting group homes and invalidating "restrictive" zoning ordinances.[94] New York's highest court, in *City of White Plains v. Ferraioli*, invalidated a zoning ordinance that restrictively defined "family" as a group of blood-related individuals that "[live] together as a single housekeeping unit with kitchen facilities."[95] The Court of Appeals held that a privately run foster home housing ten children in a single-family zone, was a group home because its use was consistent with "the character of the neighborhood to promote the family environment."[96] The court emphasized that:

> Zoning is intended to control types of housing and living and not the genetic or intimate internal family relations of human beings. . . . So long as the group home bears the generic character of a family unit as a relatively permanent household, and is not a framework for transients or transient living, it conforms to the purpose of the ordinance.[97]

Later, New York courts invalidated similar ordinances that narrowly defined "family" based on blood relation.[98]

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91. *Id.* § 374-c(1).

92. *Id.* § 374-c(2)(a).

93. *Cf.* § 41.34(c)(1)(C) *with* § 374-c(1)(a) (containing a notification requirement but lacking a provision that empowers municipalities to object to siting plans).

94. *See* Georgiou, *supra* note 1, at 218 (discussing City of White Plains v. Ferraioli, 313 N.E.2d 756 (N.Y. 1974), McMinn v. Town of Oyster Bay, 482 N.Y.S.2d 773 (N.Y. App. Div. 1984), among other cases).

95. *City of White Plains*, 313 N.E.2d at 758.

96. *Id.*

97. *Id.*

98. *See* Georgiou, *supra* note 1, at 218–19 (describing *McMinn* as the New York case that prohibited zoning ordinances from "effectively limit[ing] the number of unrelated persons living together in a single family zone, [while] not similarly restrict[ing] the number of related persons"

Similarly, the New York Court of Appeals adhered to this reasoning against ordinances that sought to regulate the composition of families instead of regulating the character of neighborhoods in *Group Home of Port Washington v. Board of Zoning & Appeals of the Town of North Hempstead*.[99] The court held that a foster home that included two permanent surrogate parents and seven children was the "functional equivalent of a family."[100] Even though the court acknowledged that the nature of foster homes is that "some of the resident children will be replaced by others as time passes, the family unit itself will continue."[101] The goal of a foster home is to promote stability and a "family-like existence" in order to "support and nurture [the resident-children's] need[s] if they are to grow into mature individuals."[102] The "functional equivalent" standard is a "factual question."[103]

Rather than decide that only foster homes meet the functional equivalent standard, the *Port Washington* Court established a factual test for whether an exclusionary ordinance would survive: if the group home is the functional equivalent of a family, then the group home must be permitted.[104] Additionally, the *White Plains* Court set the precedent that zoning ordinances that regulated the genetic composition of family members could not be used as an exclusionary device for prohibiting group homes in residential neighborhoods.[105] Even prior to the enactment of the Padavan Law, these two cases recognized that group homes in New York can be the functional equivalent of families and that zoning ordinances cannot unfairly define families based on genetic similarities.

2. Upholding the Constitutionality of the Padavan Law

Shortly after the Padavan Law was passed, neighbors—clinging to notions of deprived due process rights—led constitutional challenges in

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(footnote omitted)); *McMinn*, 482 N.Y.S.2d at 783 (finding that, although numerical restrictions on the number of people in a family may be constitutional, ordinances that require "families" to be related by blood is "arbitrary").

99. *See* Georgiou, *supra* note 1, at 222 (citing *Group House of Port Washington* as an example of a case where the New York courts have been "reluctant to preempt local zoning regulations pertaining to the siting of group homes for foster care"); Group House of Port Wash., Inc. v. Bd. of Zoning & Appeals, 380 N.E.2d 207, 208 (N.Y. 1978).

100. *Group House of Port Washington*, 380 N.E.2d at 211 (finding children in a foster home could not be expelled, even though the foster parents and foster children were not blood-related).

101. *Id.*

102. *Id.* at 210.

103. *Id.* at 211.

104. *Id.*

105. City of White Plains v. Ferraioli, 313 N.E.2d 756, 758 (1974).

courts.[106] In *Zubli v. Community Mainstreaming Associates, Inc.*, a New York trial court rejected plaintiffs' arguments that the Padavan Law was unconstitutional on due process grounds.[107] The plaintiffs in *Zubli* opposed the siting of a community residence facility for up to twelve developmentally disabled adults.[108] Specifically, the neighbors argued that the Padavan Law "encroach[ed] upon plaintiffs' property without substantial relation to a legitimate governmental purpose" and failed to include a notice and public hearing for individual neighbors.[109]

First, the *Zubli* court held that the Padavan Law is one of general applicability, and thus does not violate the Due Process Clause because such laws do not need to afford individual notices and hearings to anyone potentially affected by the siting of a group home.[110] Second, the court rejected the neighbors' arguments that the Padavan Law amounted to an unconstitutional taking without just compensation under the Fifth Amendment.[111] As a law with "state-wide effect," the court refused to hold that the Padavan Law amounted to an unconstitutional taking both because no property had been taken and because there was no threat of "direct legal restraint" on the plaintiffs' use of the land.[112] Finally, the court held that the Padavan Law furthers a legitimate state interest and is therefore not an "unreasonable exercise of the police power."[113] Later New York decisions confirmed that the Padavan Law withstands equal protection and due process challenges.[114]

3. Invalidating Discriminatory Restrictive Covenants

The New York Court of Appeals refused to find that group homes for developmentally disabled people were the equivalent of single-family dwellings in the context of private restrictive covenants;[115] however, "long-

106. Schonfeld, *supra* note 8, at 313–14 (describing how municipalities and neighbors were unhappy with the Padavan Law and expressed their "dissatisfaction with the statute" through constitutional challenges in courts).

107. Zubli v. Cmty. Mainstreaming Assocs., 423 N.Y.S.2d 982, 992 (N.Y. Sup. Ct. 1979).

108. *Id.* at 986–87.

109. *Id.* at 990.

110. *Id.* at 992.

111. *Id.* at 993.

112. *Id.*

113. *Id.*

114. *See, e.g.*, Schonfeld, *supra* note 8, at 313 (discussing Inc. Vill. of Old Field v. Introne, 430 N.Y.S.2d 192, 196 (N.Y. Sup. Ct. 1980), which held that the Padavan Law "provides for a hearing and a judicial review" and that the statute does have a rational basis).

115. *See id.* at 321 n.218 (providing Crane Neck Ass'n. v. NYC/Long Island Cnty. Servs. Grp., 460 N.E.2d 1336 (N.Y. 1984), as the case that prevented all future challenges to group homes through restrictive covenants).

standing public policy favoring establishment of such residences for the mentally disabled" rendered such covenants unenforceable.[116] In *Crane Neck Association v. NYC/Long Island County Services Group* the court held that a restrictive covenant that prohibited all other dwellings besides "single family dwellings" could not prohibit the establishment of a community residence for eight developmentally disabled adults. Although the court found that the restrictive covenant was intended "to preserve . . . a neighborhood of single-family dwellings, not only architecturally but also functionally," the court emphasized that the legislative intent behind the Padavan Law's single-family mandate in § 41.34(f) was to "eliminate litigation 'regardless of the source' by simply declaring a community residence to be a single-family unit."[117]

One decade later, New York courts continued this trend of refusing to allow restrictive covenants to block community residences established in a larger condominium complex. The courts found that the "multiple condominium units" occupied by developmentally disabled people could not be distinguished from "separately owned private houses" that the Padavan Law originally envisioned protecting.[118]

4. Limited Scope of the Padavan Law: Inapplicable to Other Group Homes

The preemptive force underlying § 41.34(f) has not been transferred to regulating other kinds of group homes. The New York Court of Appeals refused to recognize that "aspirational" policies for promoting substance abuse treatment embedded within Article 19 of the Mental Hygiene Law invalidated a village's zoning ordinances regulating substance abuse recovery homes.[119] Nothing in Article 19 contained an explicit "withdraw[al of] zoning authority of local governments," akin to § 41.34(f) of the Padavan Law.[120] Thus, no conflict existed between the local laws regulating substance abuse recovery homes and the statewide policies to treat substance abusers embedded within the Mental Hygiene Law. The *Daytop Village* Court ultimately found that the village had a "legitimate, legally grounded interest in regulating development within its borders," and unlike the Padavan Law, any state laws regulating substance abuse recovery homes did not trump local laws.[121]

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116. *Crane Neck Ass'n*, 460 N.E.2d at 1339.

117. *Id.* at 1338, 1342.

118. Bd. of Managers, Artist Lake Condo. v. Rios, 630 N.Y.S.2d 875, 879–80 (N.Y. Sup. Ct. 1995).

119. Vill. of Nyack v. Daytop Vill., Inc., 583 N.E.2d 928, 931 (N.Y. 1991).

120. *Id.*

121. *Id.* at 932.

A New York appellate court likewise refused to find that the Mental Hygiene Law's provisions pertaining to establishing drug rehabilitation centers "show[ed] [any] clearly defined intent to preempt reasonable local regulation of the location and construction of these [drug rehabilitation] centers."[122] In the absence of any explicit preemptive language in the state laws that govern other kinds of group homes, the New York courts have refused to invalidate local laws in the way commanded by the courts in § 41.34(f) of the Padavan Law.

III. RECOMMENDATIONS

A. Procedural Recommendations: Fixing the Padavan Law

On its face, the Padavan Law contains procedural language that hampers the process of establishing group homes in communities in three ways. First, the Padavan Law should not impose the same procedural requirements on supportive residences that the law requires for community residential facilities. The 1981 amendments to the Padavan Law altered the statutory definition of "community residential facility for the disabled" to include all "community residential facilit[ies] . . . for up to fourteen individuals with mental disabilities."[123] This revision replaced the Padavan Law's former mandate to include only group homes for between four and fourteen individuals.[124] The effect of this revision is that sponsoring agencies seeking to establish group homes of one to three individuals—often called "supportive residences" due to their lack of a substantial number of residents—are subject to the same procedural requirements (e.g., filing a notice of intent to establish such a facility with the municipality, securing the residence before receiving the municipality's approval, etc.) as larger group homes. The state legislature sought to create the "'least restrictive environment'" for developmentally disabled people in these larger group homes by emulating "'the benefits of normal residential surroundings.'"[125]

Second, the requirement that sponsoring agencies must have a site selected before the municipality gives approval should be lifted because it delays the process of establishing group homes. Section 41.34(c)(1) requires that sponsoring agencies provide the municipality with notice

122. Ibero-American Action League, Inc. v. Palma, 366 N.Y.S.2d 747, 748 (N.Y. App. Div. 1975).

123. N.Y. MENTAL HYG. LAW § 41.34(a)(1).

124. Schonfeld, *supra* note 8, at 298.

125. *Id.* at 291 n.40 (quoting Act of July 6, 1978, 1978 N.Y. Laws ch. 468, §1).

about the site's location and other details pertaining to the "nature and character" of the residence.[126] This pre-approval requirement creates several risks. First, sponsoring agencies will likely purchase residences before receiving municipal approval, thereby risking that the property will become "unusable" if the municipality succeeds on an overconcentration challenge.[127] Second, this requirement discourages sellers from offering houses to sponsoring agencies because the seller may not want to endure the Padavan Law's administrative procedures.[128] Finally, by requiring sponsoring agencies to reveal the location of their proposed sites early in the process, neighbors are bound to hear about the location. If the location is selected and revealed to the public, neighbors may seek to take "extra-legal" means of blocking the group home, such as pooling funds to purchase the property.[129]

Third, § 41.34(5) should provide a dispersion requirement to qualify what is meant by "substantially altered."[130] A dispersion requirement imposes a minimum distance that must separate group homes (i.e., no group home shall be sited within 1,000 feet of a similar group home).[131] Generally, New York courts have ruled in favor of establishing group homes in disputes over whether a proposed group home would result in a "substantial alteration" of the "nature and character of the neighborhood" and thus constitute an overconcentration.[132] The rationale behind a dispersion requirement is that it prevents overconcentration of group homes to ensure that neighborhoods are truly integrated and do not become group home "ghettos."[133] However, should the legislature expand the Padavan Law to protect other kinds of group homes (as Part III.B of this Note proposes), perhaps an even greater risk of "ghettoization" of all kinds of group homes exists, thus conflicting with the Padavan Law's deinstitutionalization policy. Adding a dispersion requirement to the Padavan Law could also trigger litigation over whether the FFHA has been violated, a topic explored in Part IV of this Note.

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126. N.Y. MENTAL HYG. LAW § 41.34(c)(1).

127. Schonfeld, *supra* note 8, at 300.

128. *Id.*

129. *Id.* at 300–01; *see also* People v. Cornwell Co., 695 F.2d 34 (2d. Cir. 1982) (neighbors pooled together funds to purchase a home that a group home originally intended to purchase).

130. N.Y. MENTAL HYG. LAW § 41.34(5).

131. *Id.*

132. Kevin J. Zanner, *Dispersion Requirements for the Siting of Group Homes: Reconciling New York's Padavan Law with the Fair Housing Amendments Act of 1988*, 44 BUFF. L. REV. 249, 279 (1996).

133. *Id.* at 271.

Finally, a provision should be added to the Padavan Law that explicitly prohibits granting standing to neighbors. In *Grasmere Homeowners' Association v. Introne*, a New York appellate court held that homeowners' associations or neighbors had standing because they fell within the "zone of interest" of the case since siting group homes for developmentally disabled people affected their interests as property owners.[134] This "liberalized standing test" not only empowers neighbors to sue based on a general and potentially prejudicial interest, it is also contrary to legislative intent to "reduce the amount of litigation over community residence sites and to limit site selection discussions to municipalities and sponsoring agencies."[135] Without a provision blocking neighbor standing, the risk remains that neighbors blinded by their own NIMBY ("Not In My Backyard") interests will trample the establishment of group homes.[136]

B. Substantive Recommendations: Expanding the Scope of the Padavan Law

After amending the Padavan Law for the above procedural defects, the legislature should consider substantive changes to include additional categories of group homes qualifying as "community residential facilities" under § 41.34(a)(1). Other kinds of group homes could similarly benefit from the preemptive "single-family" designation found in § 41.34(f).[137] This designation could protect such group homes from discriminatory local laws that seek to exclude their establishment in communities.

The definition of "community residential facility" found in § 41.31(a)(1) should be broadened to include the homes for: substance abuse recovery, troubled youth, LGBTQ youth, and alternative elderly care. The section's designation of homes for up to fourteen individuals should be maintained, however, in order to preserve the legislature's intent of ensuring these community residences mimic their residential surroundings. The following is not an exhaustive list, and undoubtedly other kinds of group homes would benefit from the protection of § 41.34(f). However, the additional categories that I have selected are similar to group homes for

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134. Grasmere Homeowners' Ass'n v. Introne, 443 N.Y.S.2d 956, 957 (N.Y. App. Div. 1981)

135. Schonfeld, *supra* note 8, at 319.

136. *Id.* at 290 n.39 (citing ROTHMAN & ROTHMAN, *supra* note 25, at 187–88 and describing how neighbors, motivated by a desire to exclude group homes from their neighborhoods, engage in "community harassment"—including purchasing the residence, protests, selling property to different buyers, abrasive telephone calls, political influence, among others non-legal means—to thwart the establishment of group homes in their communities).

137. *See* Salsich, *supra* note 4, at 424 (discussing state statutes that preempt local zoning authority).

developmentally disabled people because they focus on bolstering personal development. Thus, the addition of these kinds of group homes is consistent with the Padavan Law's legislative intent and deinstitutionalization policies. Furthermore, as follows, studies demonstrate a rational basis for a state to provide additional protection for these other kinds of group homes.

1. Substance Abuse Recovery Homes

Adult group homes for recovering drug addicts and alcoholics provide a supportive, sober living arrangement for people who have come out of an institutional treatment facility. "The most common . . . [type of substance abuse recovery] home[] is the Oxford House. Oxford Houses are self-governing, unsupervised group homes" for people choosing to lead sober lives after attending a treatment facility.[138] In addition to "abstain[ing] from drinking and using drugs . . . members must pay their share of the rent."[139]

The main benefit of substance abuse recovery homes is that they develop "resident self-determination" because the living arrangements are self-motivated and voluntary.[140] These arrangements are "considerably less expensive" compared to hospitalization, and thus residents have both personal and financial incentives for staying sober.[141] Substance abuse recovery homes help residents transition back into mainstream society through living in an integrated community residence away from the dependency and self-identification as a "patient" that comes from "prolonged hospitalization."[142]

2. Homes for Troubled Youth

Troubled youth include "teens who have been either orphaned, abused or neglected."[143] There are two core public policy rationales for removing troubled youth from institutions and supporting residential care facilities for them instead. First, "separating [troubled youth] from their more troublesome and delinquent peers who *do* require some form of institutionalized detention" allows professionals to provide support based

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138. Michael J. Davis & Karen L. Gaus, *Protecting Group Homes For the Non-Handicapped: Zoning in the Post-Edmonds Era*, 46 U. KAN. L. REV. 777, 805−06 (1998) (footnote omitted).

139. *Id.* at 806 (footnote omitted).

140. *Id.* at 805 (footnote omitted).

141. *Id.* (footnote omitted).

142. *Id.* (quoting JOHN M. MCCOIN, ADULT FOSTER HOMES: THEIR MANAGERS AND RESIDENTS 25 (1983)).

143. Thomsen, *supra* note 39, at 835−36.

on the unique needs of each group.[144] Second, there is a "lack of available foster homes, adoptive families and long-term care" facilities ideal as permanent housing placements for troubled youths.[145] However, given this lack of availability, group homes for troubled youth provide a realistic solution. Additionally, such homes employ a "structured therapeutic program . . . whereby community involvement, group work, nondirective counseling and peer relationships are encouraged." [146] This "non authoritarian" social structure differs markedly from institutions, and "fosters interpersonal relations and character growth." [147]

3. Homes for LGBTQ Homeless Youth

Lesbian, gay, bisexual, transgender, and queer[148] (LGBTQ) youth are "over-represented in foster care, juvenile justice systems and homeless settings."[149] Despite making up 5% to 7% of the general population of youth in the United States, studies show that between 9% and 45% of all homeless youth are LGBTQ.[150] Additional "[s]tudies indicate that between 25% and 50% of homeless youth are LGBT and on the streets *because of* their sexual orientation or gender identity."[151] Even fewer studies address the racial composition of LGBTQ homeless youth, "but those that [do] . . . suggest that LGBT homeless youth are disproportionately people of color."[152]

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144. *Id.* at 836 (footnote omitted).

145. *Id.* (footnote omitted).

146. *Id.* at 838 (footnote omitted).

147. *Id.* (footnote omitted).

148. Queer is an umbrella term that can refer to an individual who chooses to identify as non-heterosexual or non-cisgendered. (Cisgender refers to individuals whose gender matches their biological sex, or the sex that one is born into.) Individuals may, but not always, identify as queer or genderqueer as a way to identify their sexual orientation or gender identity; however, others may simply identify as lesbian, gay, bisexual, or transgender. Language is fluid in the queer community. *See* Gender Equity Resource Center, *Definition of Terms*, UNIV. CAL. BERKELEY, http://geneq.berkeley.edu/lgbt_resources_definiton_of_terms (last visited Apr. 30, 2015).

149. *Youth In Out-of-Home Care*, LAMBDA LEGAL, http://www.lambdalegal.org/issues/youth-in-out-of-home-care (last visited Apr. 30, 2015).

150. ANDREW CRAY, KATIE MILLER & LAURA E. DURSO, SEEKING SHELTER: THE EXPERIENCES AND UNMET NEEDS OF LGBT HOMELESS YOUTH 4 (Ctr. for Am. Progress 2013) [hereinafter SEEKING SHELTER], *available at* http://cdn.americanprogress.org/wp-content/uploads/2013/09/LGBTHomelessYouth.pdf.

151. *Statistics You Should Know About Gay & Transgender Students*, PFLAG NYC, [hereinafter *Gay & Transgender Statistics*], http://www.pflagnyc.org/safeschools/statistics (last visited Apr. 30, 2015) (emphasis added).

152. SEEKING SHELTER, *supra* note 150, at 6 ("[A] 2007 survey of homeless youth in New York City found that approximately 28 percent of surveyed black youth and 31 percent of Hispanic youth identified as lesbian, gay, or bisexual.").

Furthermore, "LGBT youth who reported higher levels of family rejection during adolescence are three times more likely to use illegal drugs."[153] In addition to the increased risk for substance abuse, "[g]ay teens are 8.4 times more likely to report having attempted suicide and 5.9 times more likely to report high levels of depression compared with peers from families that reported no or low levels of family rejection."[154] When compared to their non-LGBTQ peers, "26% of LGBT youth say their biggest problems are not feeling accepted by their famil[ies], trouble at school/bullying, and a fear to be out/open."[155] In contrast, "22% of non-LGBT[Q] youth say their biggest problems are trouble with class, exams, and grades."[156] There is a clear and present need for stable intervention in the lives of LGBTQ youth, especially those who are forced onto the streets after coming out.

Group homes for LGBTQ youth are one solution in providing stability. The Ali Forney Center ("AFC") in New York City is an organization that provides day services, emergency housing, and transitional housing for LGBTQ homeless youth.[157] The AFC Day Center provides "street outreach, case management, primary medical care, HIV testing, mental health assessment and treatment, food and showers, an employment assistance program, and referral to [its] housing programs as well as psychiatry and workshops on issues facing homeless LGBTQ youth to providers."[158] AFC's Emergency Housing Program and Transitional Housing Program are more akin to group homes, as they operate "safe, staff-supervised homelike apartments" for LGBTQ youth and allow them to live at those sites for up to six months and up to two years, respectively, before referring them to more permanent housing (in the Emergency Housing Program) and giving them the skills to live independently (in the Transitional Housing Program).[159] Staff-supported group homes for LGBTQ homeless youth help residents live on their own and find and maintain employment and educational opportunities.[160]

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153. *Gay & Transgender Statistics*, *supra* note 151.

154. *Id.*

155. *Growing Up LGBT in America: View Statistics,* HUMAN RIGHTS CAMPAIGN, http://www.hrc.org/youth/view-statistics/ (last visited Apr. 30, 2015).

156. *Id.*

157. *The Ali Forney Center Services*, THE ALI FORNEY CENTER, http://aliforneycenter.donordrive.com/?fuseaction=cms.page&id=1007 (last visited Apr. 30, 2015).

158. *Id.*

159. *Id.*

160. *Id.*

4. Alternative Elderly Care Homes

The elderly have unique issues, especially with regard to housing, that are often obscured by other societal issues. These problems include "financial problems, poor housing conditions, declining health, unavailability of services, family conflicts, loneliness, bereavement, and the desire for companionship."[161] Group homes for the elderly are alternatives to nursing homes and family placements, and offer a number of advantages.

First, group homes for the elderly are "more cost effective than institutionalization" because they generally "employ staff to help with meal preparation and housekeeping," while emphasizing resident independence for meeting other daily needs.[162] Second, group homes for the elderly provide residents with "psychological benefits."[163] Rather than feeling like they are burdening their families or society, group living arrangements for the elderly strike a balance between providing personalized attention and maintaining "'independence through interdependence.'"[164] Third, group homes for the elderly benefit the surrounding neighborhood by permitting a "continued connection with" this segment of the population.[165] We always have, and always will have, much to learn from our elders.

IV. POTENTIAL LEGAL CHALLENGES TO THE EXPANDED PADAVAN LAW

The expanded Padavan Law would likely be subject to litigation. This Part explores potential legal challenges and examines how the revised law might fare based on existing state and federal common law. The following provides a non-exhaustive list of the types of legal challenges that the expanded Padavan Law faces: (1) a federal challenge based on the Equal Protection Clause of the U.S. Constitution for including certain classes and (as opponents would say) arbitrarily excluding others; (2) a federal challenge based on the Supremacy Clause of the U.S. Constitution for including a dispersion requirement despite the FFHA's anti-discrimination policies; and (3) a state challenge based on a charge that the substantive additions are not sufficiently based on findings that there is a rational need for preemptive protection for other kinds of group homes.

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161. Davis & Gaus, *supra* note 138, at 803 (footnote omitted).

162. *Id.* at 804 (footnote omitted).

163. *Id.* (footnote omitted).

164. *Id.* (quoting SHEILA M. PEACE & CHARLOTTE NUSBERG, INT'L FED'N ON AGEING, SHARED LIVING: A VIABLE ALTERNATIVE FOR THE ELDERLY? 1 (1984)).

165. *Id.* (footnote omitted).

A. Federal Equal Protection Challenge: Will the Expanded Padavan Law's Substantive Revisions Survive Constitutional Scrutiny?

Although the U.S. Supreme Court has recognized that developmentally disabled people deserve constitutional scrutiny—what some scholars have referred to as "rational basis with bite"[166]—under the Equal Protection Clause, the Court has refused to extend such coverage to other kinds of vulnerable groups that would ordinarily live in group homes. In *City of Cleburne v. Cleburne Living Center, Inc.*, the Court invalidated a Texas ordinance that required a special use permit for group homes for developmentally disabled people only but did not require such a permit for other kinds of residential dwellings like "apartment houses, multiple dwellings, boarding and lodging houses, fraternity or sorority houses, dormitories, apartment hotels, hospitals, sanitariums, nursing homes for convalescents or the aged," among other uses.[167]

The *Cleburne* Court rejected the city's paternalistic arguments that the discriminatory law was intended to protect developmentally disabled people from private prejudice and instead found the developmentally disabled a protected class warranting legislative flexibility.[168] Thereby, legislation that treated the developmentally disabled as a class would be entitled to rational basis review subject to a showing of "important governmental purposes" (where the intermediate scrutiny "bite" of "rational basis with bite" comes in).[169] However, the Texas ordinance failed to pass constitutional muster because the city could not demonstrate an "important governmental purpose" for requiring that only group homes for the developmentally disabled first acquire a special use permit.[170]

On the contrary, the Court did not delve into the merits of whether the groups at issue in *City of Edmonds v. Oxford House, Inc.,* which involved substance abuse recovery homes, were deserving of constitutional

166. *See* Gayle Lynn Pettinga, *Rational Basis With Bite: Intermediate Scrutiny By Any Other Name*, 62 IND. L.J. 779, 793 (1987) ("The Court, however, chose to bypass this opportunity to recognize another quasi-suspect classification or quasi-fundamental right deserving the protection of intermediate scrutiny. Instead the Court protected this group and its rights through rational basis with bite.").

167. Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 447 (1985); *see also* Davis & Gaus, *supra* note 138, at 780 (pointing out that *Cleburne* "hold[s] that if some types of homes for unrelated persons are permitted, a municipality must have at least a rational basis for excluding others" (citing Cleburne, 473 U.S. at 449–50)).

168. *Cleburne*, 473 U.S. at 442–43, 449.

169. *Id.* at 435.

170. *Id.*

scrutiny.[171] In *Edmonds*, a substance abuse recovery group home could not be sited in a single family zone because the city's ordinance mandated that a "family . . . means an individual or two or more persons related by genetics, adoption, or marriage, or a group of five or fewer persons who are not related by genetics, adoption, or marriage."[172] The Oxford House was blocked from establishing in that neighborhood because it contained more than five unrelated persons.[173] The core issue before the Court was whether Congress intended for the FFHA's maximum occupancy exemption to be applied to ordinances that excluded substance abuse recovery group homes from single-family zones because their members are not blood-related.[174]

The *Edmonds* Court held that the City of Edmonds' blood-related ordinance was not a "'restriction regarding the maximum number of occupants permitted to occupy a dwelling' . . . . and thus did not fall within the exemption." [175] Thus, the blood-related "family" ordinance was independently legitimate because it was a land use restriction that intended to "preserve the family character of a neighborhood . . . rather than on the total number of occupants living quarters can contain." [176] The Court focused on the characterization of maximum occupancy restrictions as legitimate state uses of police powers because of their clear purposes in "preventing overcrowding of . . . dwelling[s]," and concluded that the blood-related ordinance was not included in the maximum occupancy exemption because the ordinance did not include a cap on the number of related persons that could cohabitate.[177] Consequently, the ordinance did not violate the FFHA.

Significantly, the *Edmonds* Court neither entertained the Oxford House's anti-discrimination claims nor held that the city failed to provide "reasonable accommodations" that would violate the FFHA's prohibitions on discrimination. Thus, the Court did not have the opportunity to decide the merits of whether blood relation ordinances were unconstitutional as applied to alcoholics and drug addicts. However, the Court would have likely found no constitutional problem in denying protection to alcoholics

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171. *See* Davis & Gaus, *supra* note 138, at 784–85 (emphasizing the *Edmonds* holding as the case that erected a wall between impermissible definitions of family as blood-related and legitimate housing and land use codes).

172. Edmonds v. Oxford House, Inc., 514 U.S. 725, 729 (1995) (quoting EDMONDS COMMUNITY DEVELOPMENT CODE § 21.30.010(A)).

173. *Id.*

174. Davis & Gaus, *supra* note 138, at 784.

175. *Id.* (citing *Edmonds*, 514 U.S. at 731, 738 (quoting 42 U.S.C. § 3607(b)(1) (1994))).

176. *Edmonds,* 514 U.S. at 735.

177. *Id.*

and drug addicts because the FFHA does not consider those groups as "handicap" under the law itself.[178]

Though the expanded Padavan Law would not likely survive under *Edmonds* and *Village Belle Terre v. Boraas*,[179] there are compelling arguments to overturn the logic underlying those decisions that confine the definition of families to blood relation in single family zones. These arguments derive from Justice Thurgood Marshall's dissent in *Village of Belle Terre*.[180] In that case, the Court upheld a zoning ordinance that prohibited groups of more than two unrelated individuals from living together on the grounds that the ordinance was a proper enactment under the locality's zoning authority.[181]

In his dissent, Justice Marshall emphasized that a restrictive zoning ordinance requiring that people who live together be genetically related infringes on individuals' fundamental rights to association and privacy protected by the First Amendment and the Due Process Clause of the Fourteenth Amendment, respectively.[182] In a nutshell, Justice Marshall argued that the ordinance surpasses accepted zoning purposes and

> imposes upon those who deviate from the community norm in their choice of living companions significantly greater restrictions than are applied to residential groups who are related by blood or marriage, and compose the established order within the community. The village has, in effect, acted to fence out those individuals whose choice of lifestyle differs from that of its current residents.[183]

According to Justice Marshall, the ordinance must be analyzed under strict scrutiny because it infringes on fundamental rights; thus, the legitimate local government zoning purposes of "restricting uncontrolled growth, solving traffic problems, keeping rental costs at a reasonable level,

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178. *See* 42 U.S.C. § 3602(h) (2012) ("Handicap means . . . (3) being regarded as having such an impairment, but such term does not include current, illegal use of or addiction to a controlled substance.").

179. *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974), was the first Supreme Court case to uphold ordinances that define family based on genetics and blood relations. David & Gaus, *supra* note 138, at 779.

180. *See* Davis & Gaus, *supra* note 138, at 779 (regarding the *Belle Terre* decision as the landmark case that empowered state and local governments with "broad discretion to differentiate between residences housing families and residences housing unrelated persons" under "federal constitutional law").

181. *Village of Belle Terre*, 416 U.S. at 9.

182. *Id.* at 13 (Marshall, J., dissenting).

183. *Id.* at 16–17 (Marshall, J. dissenting) (footnotes omitted).

and making the community attractive to families" would not likely be compelling enough to warrant infringement of fundamental rights, and thus, would not likely survive strict scrutiny.[184]

Although both *Edmonds* and *Village of Belle Terre* remain good law, times have changed and state legislatures have already begun recognizing nontraditional families—at least partially—for the same privacy interest that Justice Marshall wrote about.[185] Group homes, regardless of whether their purpose is to rehabilitate substance abusers, improve the social skills of troubled youth, provide social and economic support to LGBTQ youth, or improve the life skills of developmentally disabled people, are akin to families that are related by blood or marriage because they, too, are comprised of people who support each other. The time is ripe to make such an argument should the expanded Padavan Law be challenged on equal protection or due process grounds for arbitrarily including certain groups and excluding others.

B. Federal Preemption Challenge Over Dispersion Requirements: Will the Expanded Padavan Law's Procedural Changes Survive?

The circuit courts are presently split over whether the FFHA preempts state and local group home siting laws that contain dispersion requirements.[186] In *Familystyle of St. Paul, Inc. v. City of St. Paul*, Familystyle sought special use permits for the addition of three residential group homes for the mentally ill.[187] Although the provider was granted the permits, it failed to meet the permit's conditions to disperse its facilities, and thus the permits expired.[188] The City of St. Paul denied the permit renewals, holding that the city's ordinance requires that community residential facilities be separated by at least a quarter of a mile.[189] Familystyle argued that the FFHA preempted the dispersion requirement in

184. *Id.* at 13–14 (Marshall, J. dissenting).

185. *See, e.g.*, *Marriage Equality and Other Relationship Recognition Laws,* HUMAN RIGHTS CAMPAIGN, http://hrc-assets.s3-website-us-east-1.amazonaws.com//files/assets/resources/marriage-equality_10-2014.pdf (last updated Oct. 17, 2014) (showing that as of October 17, 2014, thirty-one states and the District of Columbia recognize same-sex marriage, with another two states that provide the equivalent of state-level spousal rights to same-sex couples within the state).

186. *See* Zanner, *supra* note 132, at 252 (highlighting the *Familystyle* and *Horizon House* decisions as two circuit court cases that illustrate "contrasting views regarding the legality of dispersion requirements under the FHAA").

187. Familystyle of St. Paul, Inc. v. City of St. Paul, 923 F.2d 91, 92 (8th Cir. 1991).

188. *Id.*

189. *Id.* at 93.

the ordinance, citing the prohibition on discriminatory housing practices in § 3615.[190]

The Eighth Circuit disagreed with Familystyle's argument.[191] As Zanner notes, the St. Paul ordinance regulated the location of institutions, whereas the FFHA regulates the buying and renting of housing.[192] Thus, the court did not find any preemption problem because Familystyle failed to allege that any handicapped individuals were being discriminated from buying and renting housing due to the ordinance. Furthermore, the dispersion requirement survived both discriminatory intent and discriminatory effect claims. First, the *Familystyle* court did not find disparate intent because "the purpose of the legislation was to deinstitutionalize individuals with handicaps."[193] Second, the *Familystyle* court refused to find disparate impact because: (1) "the dispersion requirement did not limit the housing choices of any individuals other than those with handicaps;" and (2) the "prevent[ion] [of] clustering of facilities which could result in segregation from the mainstream community" is a compelling governmental interest.[194] Thus, the Eighth Circuit held that the dispersion requirement "guarantees that residential treatment facilities will, in fact, be 'in the community,' rather than in neighborhoods completely made up of group homes that re-create an institutional environment."[195]

On the contrary, as Zanner further notes, the District Court for the Eastern District of Pennsylvania invalidated an ordinance that contained a dispersion requirement in *Horizon House Developmental Services, Inc. v. Township of Upper Southhampton*.[196] In *Horizon House*, the town had enacted several different ordinances—all containing various dispersion requirements—after a group home provider "announced its intention to open two group homes in Upper Southhampton," a town that "had no dispersion requirement at the time [of Horizon House's announcement]."[197] The district court found that the ordinance with the dispersion requirement had a discriminatory effect on handicap residents and was motivated by discriminatory intent. First, as Zanner writes, the ordinance had a

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190. *Id.* (quoting 42 U.S.C. § 3615 (2012) ("the Fair Housing Act invalidates 'any law of a State, a political subdivision, or other such jurisdiction that purports to require or permit any action that would be a discriminatory housing practice under this subchapter shall to that extent to be invalid.'")).

191. *Id.*

192. Zanner, *supra* note 132, at 263.

193. *Id.* at 264 (citing Familystyle of St. Paul, Inc. v. St. Paul, Minn., 728 F. Supp. 1396, 1402 (D. Minn. 1990)).

194. *Id.* at 264, 265 (citing *Familystyle*, 728 F. Supp. at 1403, 1404).

195. *Familystyle*, 923 F.2d at 94.

196. Horizon House Developmental Servs., Inc. v. Twp. of Upper Southhampton, 804 F. Supp. 683, 694 (E.D. Pa. 1992).

197. Zanner, *supra* note 132, at 266 (citing *Horizon House*, 804 F. Supp. at 687).

discriminatory effect because it facially "require[d] . . . group homes for handicap individuals be located at least 1000 feet apart."[198] Second, there was ample evidence to support the town's discriminatory animus in drafting the dispersion requirements for group homes for developmentally disabled people.[199]

The *Horizon House* court came to the opposite conclusion of the *Familystyle* court when dealing with dispersion requirements; however, there are notable factual differences between the two cases. First, as stated above, there was clear evidence of the community's discriminatory animus in drafting the dispersion requirements in the ordinance at issue in *Horizon House*, and there was no such evidence of discriminatory intent when including the dispersion requirement in the *Familystyle* case. Second, the major difference between the two cases is that the St. Paul ordinance was created as an outgrowth of state deinstitutionalization policies in Minnesota, whereas the government presented no evidence in *Horizon House* that the Southhampton ordinance was passed to promote state deinstitutionalization policies.[200]

Significantly, these two cases seem to indicate that dispersion requirements "may be given more weight [by courts] when a state law, which is enacted to circumvent the normal politics of zoning, places certain conditions on the group protected under the statute."[201] Likewise, the state legislature would empower the expanded Padavan Law with a dispersion requirement to prevent "ghettoization" of group homes. The expanded Padavan Law would protect more types of group homes than just those for developmentally disabled people, and thus the need to spread out these different kinds of group homes across different residential communities may be even more pressing. Adding a dispersion requirement to the Padavan Law's "substantial alteration" language will help facilitate the siting of more group homes by enabling courts to know exactly when municipalities have met their burden of showing overconcentration. The expanded Padavan Law would likely survive judicial challenges to such a requirement based on the wealth of state findings supporting

198. *Id.* at 268 (citing *Horizon House,* 804 F. Supp. at 694).

199. *See, e.g.*, *Horizon House*, 804 F. Supp. at 696 ("Supervisor Held testified that he voted for the spacing requirement in the original ordinance out of concern that a group of persons with mental retardation might act unpredictably and erratically.").

200. Zanner, *supra* note 132, at 271 ("the [*Horizon House*] court held that there [was] no evidence 'that people with handicaps living close to one another is per se detrimental,' and that 'meaningful integration' can only be accomplished if the handicapped persons are included physically in the community and are not restricted in deciding where to live." (citing *Horizon House*, 804 F. Supp. at 698)).

201. *Id.* at 273.

deinstitutionalization and other policies supporting the need for additional types of community residences (assuming the state makes such findings).

C. State Challenge Over Rationality of the Expanded Padavan Law: The Need for Rational Findings to Support Preemptive State Legislation

Of course, a judicial outcome in line with *Familystyle*—one in favor of the expanded Padavan Law on the dispersion requirement issue—would need to be based on state deinstitutionalization policies. Furthermore, any equal protection or due process challenge of the expanded Padavan Law on the basis of its inclusion of certain additional groups but not others would need to be supported by a set of rational findings for each type of group home that the expanded Padavan Law would include. After all, rationality is at the core of state police power use.[202]

As stated above, New York courts have upheld the Padavan Law's constitutionality, in part, because it was a reasonable exercise of the state's police power.[203] Noting the state legislature's change in public policy, the *Zubli* court referred to the state legislature's rational findings:

> Here, the Legislature has recognized the need to encourage a more enlightened and humane approach to the care and treatment of mentally disabled people. . . . [I]nstitutions such as the infamous Willowbrook State School . . . are now seen as destructive warehouses, little better than concentration camps which must be closed in favor of appropriate community facilities.[204]

Likewise, the court in *DiBiase v. Piscatelli* found the Padavan Law was an expression of the state legislature's police powers that shifted the state's policy away from institutionalization and toward mainstream community residences.[205]

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202. *See* Amsel v. Brooks, 106 A.2d 152, 156 (Conn. 1954) ("All police legislation is subject, in the courts, to the test whether it serves the public health, safety and moral at all and whether it does so in a reasonable manner. It cannot parade under the banner of service to the commonweal and restrict or destroy private rights in furtherance of some special interest. The regulation and prohibition it imposes must have a rational relationship to the preservation and promotion of the public welfare.").

203. *See* Schonfeld, *supra* note 8, at 315–16 (discussing Zubli v. Cmty. Mainstreaming Assocs., 423 N.Y.S.2d 982, 994–95 (N.Y. Sup. Ct. 1979) and DiBiase v. Piscitelli, 448 N.Y.S.2d 35 (N.Y. App. Div. 1982) as two cases that show that courts upheld the Padavan Law based on the legislature's rational findings).

204. *Zubli*, 423 N.Y.S.2d at 994 (internal quotation marks omitted).

205. *DiBiase*, 448 N.Y.S.2d at 36.

These rational findings were embodied in the governor's pronouncement of the policy in the Governor's Program Bill No. 303 and the Padavan Law's Legislative Findings and Intent section, both of which were directly informed by the Willowbrook findings.[206] The expanded Padavan Law could survive a challenge that the state legislature has acted beyond its police powers so long as it can demonstrate rational findings that there is a need for substance abuse recovery homes, troubled youth homes, LGBTQ homeless youth homes, and alternative elderly care homes. The Padavan Law's history shows that the New York courts have deferred to reasonable enactments of the state legislature in light of such rational findings.

CONCLUSION: ONWARD TO INTEGRATED, INCLUSIVE COMMUNITIES

Sustainable communities are inclusive communities. In order to truly be sustainable, tomorrow's communities must not only be powered by renewable energy and fueled by organic gardens, they must also be integrated with diverse groups of people and empower the voices of those who have not traditionally been part of the conversation. Recognizing the dilemma that *Euclidian* zoning caused for group home siting, Salsich posits:

> To a certain extent, the fear of change manifested by NIMBYs may be traceable to the 'parasite' mentality articulated by Justice Sutherland in his *Euclid* dicta. Are the mentally [challenged], homeless, elderly, disabled and incarcerated today's 'parasites,' or are they our children, brothers and sisters, aunts and uncles, parents and grandparents?[207]

By emphasizing inclusion over exclusion, New Urbanism contains a social justice component that seeks to remedy the NIMBY-ism created by *Euclidian* zoning. The expanded Padavan Law would make it easier to site group homes in communities by saving space in "single family" zones for these populations. By living and working in ordinary community surroundings, developmentally disabled people, recovering alcoholics and drug addicts, troubled youth, LGBTQ youth, and the elderly stand to gain considerably through their own personal development. Likewise, everyday suburbanites and urbanites can learn from people that live differently from them. Such mutual understanding is the cornerstone of tomorrow's

206. *Willowbrook Review*, *supra* note 20; *see also* N.Y. MENTAL HYG. LAW § 41.34.
207. Salsich, *supra* note 4, at 417.

sustainable communities. Learning from one another is the first step in changing the attitudes that gave rise to NIMBY arguments that neighbors traditionally spouted when opposing group homes within their communities. If land use planners want to build tomorrow's sustainable communities, they need to recognize that today's laws regulating group homes must be revised to facilitate the siting of community residences that empower marginalized groups.

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† Adam dedicates this Note to his best friend, teacher, and younger brother, Seth, for inspiring him to advocate on behalf of people with differing abilities in our communities. He would also like to acknowledge Professor L. Kinvin Wroth, Ariel Solaski, Lizzie Tisher, Ashlee Stetser, Ryan Richards, Ivy Garlow, Ian Hedges, Irene Schwieger, and Melissa Shapiro for their hard work reviewing and improving this Note. All errors are mine alone.